GLOBAL ISSUE: *Dateline.....*

*Arizona, Hong Kong, Petersburg, Moscow, Texas, W. Virginia, Juneau, Italy, Fairbanks, France, Anchorage, Ketchikan, Hawaii, Iraq, California, Nome, Australia, Vietnam.....*Inside

Send in your best lawyer jokes. They don't need to be obscene. The search continues.....

See page 23 for details

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The Alaska BAR RAG

VOLUME 15, NO. 1

Dignitas, semper dignitas

JANUARY-FEBRUARY, 1991

New A.G. has long Alaska history

By Ralph R. Beistline

If you had asked Charlie Cole 60 days ago what he would be doing today, the last thing that might have come to mind would have been, "Alaska's Attorney General." If you had asked this reporter at the same time what the chances were of Cole accepting such an offer, the answer would have been "zero."

Thanks, though, to some unexpected political developments, a persuasive Governor, and a little soul-searching, Attorney General Charlie Cole most certainly is.

Not long after the recent election, Gov. Walter J. Hickel approached Charlie with an offer the Fairbanks attorney could not refuse. "I can't pay you much, but I can give you the biggest client in the United States." Included in this offer was the opportunity to serve the State of Alaska and its people and to help chart a course for Alaska that will be felt well into the future.

Thirty-eight years earlier, Charlie Cole first arrived in Alaska, fresh from Stanford Law School and a brief, but distinguished, professional baseball career. (When asked why he did not go on to a career in the major leagues with contemporaries like Mickey Mantle, Cole explained that it was the long bus rides that deterred him).

As Alaska waited patiently for the final step to Statehood in 1958, two young attorneys paused at Cleary Summit outside Fairbanks after a day of skiing together. Who would have thought that 32 years later one (Charles Cole, right) would be appointed attorney general, serving with the chief justice of the Alaska Supreme Court (Jay Rabinowitz, left)? *Photo courtesy Jay Rabinowitz.*

Interestingly, Charlie was not the only Stanford graduate that year who went on to prominence. He sat next to Bill Rehnquist, currently Chief Justice of the United States Supreme Court, and was friends with Sandra Day, later Sandra Day O'Connor, today also a Supreme Court Justice.

Charlie's first job in Alaska was in Juneau as an attorney for the Commission of Veteran Affairs. After about six months, he transferred to the Juneau Attorney General's office where he met a young Ed Merdes, who also later distinguished himself as an Alaska attorney, politician, and community leader.

Soon thereafter, Charlie learned of a law clerk position in Fairbanks for Territorial Judge Vernon Forbes. Cole applied for the position, was hired, and thereafter relocated to Fairbanks where he has resided ever since.

The clerkship lasted approximately 1 year . From there Charlie went into private practice with the firm of Collins, Clasby, and Sczudlow. Shortly thereafter, a prominent local attorney, Julian A. Hurley, became ill and Charlie took over his practice in room 218 of the Lavery Building. Charlie has been in private practice in the Fairbanks area ever since.

In 1956, Charlie made what was to be his only venture into politics when he ran for Fairbanks City Magistrate. His opponents were Larry Dworkin and George Sullivan. Sullivan later became Mayor of Anchorage. Charlie ran a full-fledge campaign and was elected. Interestingly, this is the only election that George Sullivan is known to have lost in his 68 years in Alaska.

For the next several years, in addition to maintaining his private

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Lawyer tackles the Iditarod race to Nome

By Kevin G. Clarkson

This winter, while most Alaska attorneys will be inside warm offices (hopefully), performing their usual routines, researching cases, drafting legal documents, briefs and countless discovery requests, one Anchorage attorney, Jim Cantor of Perkins Coie, will be out in the cold, performing a much different routine: feeding and tending sled dogs, shoveling dog manure, and loading, unloading and driving a dog sled.

Is Jim out to prove to our Lower 48 counterparts that their perceptions of Alaska lawyers are right? NO. Is he answering "the call of the wild?" Well, maybe.

This March, Jim will try his hand (or dogs) at the Iditarod, Alaska's 1,162 mile dog sled race from Anchorage to Nome.

Although Jim was raised in Michigan and graduated from the University of Michigan and the Cornell University Law School, he is a long-time Alaskan. He first came to Alaska in 1977 when he took a year off from his undergraduate studies and "came up here for adventure." During that year, Jim definitely had a lot of adventure — crabbing, substitute teaching in Bethel and driving a truck — and developed an enduring love for Alaska's wilderness.

After completing his undergraduate studies in Michigan, Jim returned to Alaska in 1981 and canoed the Yukon River, "showed Alaska to Susan" (his future wife) and lived in Bethel for a year. Jim received his law degree from Cornell in May, 1986, passed the Alaska Bar the following July and has been working as a litigator in the Perkins Coie Anchorage office ever since.

Jim's mushing experience began in Alaska during his year off from school.

"Susan and I had spent Thanksgiving with friends in Russian Mission near the Yukon River. Being in Russian Mission in November, we really didn't have much to do except play Scrabble and talk, and we mostly talked about mushing. After two days, our friends convinced Susan and me to borrow a sled (a 1930's freight sled) and three dogs (one that had never run in a team before, one that hadn't run for a year and no lead dog) and take a one-month mushing trip to Bethel." This was an experience neither Jim (nor Susan) would repeat — but it was enough to get them hooked and did not diminish their interest in mushing.

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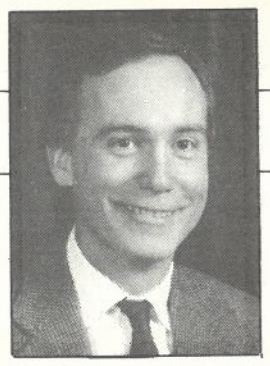

President's Column

By Daniel Cooper

At the October Board meeting, the Board of Governors adopted the Association's operating budget for 1991. As a result of increasing costs, and relatively level income streams, the Board felt constrained to adopt a budget that attempted to attack both ends of the problem: some fees were increased, and costs were contained or eliminated where possible.

To weed out the casual readers of this column, I'll offer the following numerical comparisons:

	1990 Budget	1990 Actual	1991 Budget
Revenues:	$1,194,324	$1,293,194	$1,288.579
Expenses:	$1,317,235	$1,393,059	$1,372.564
Net Loss:	$122,911	$99,865	$83,985

As is readily apparent, there is a deficit projected for 1991, as there was for 1990. And in fact, the deficit in 1991 is projected to be smaller than the 1990 deficit, a fact which is somewhat misleading. The 1990 deficit had an unusual bulge resulting from the Northern Justice Conference. the Conference generated a loss of approximately $34,000, a number which, while not wholly satisfactory, is acceptable. Nonetheless, the deficit projected for 1991 is larger than anyone on the Board wants it to be.

At a Tanana Valley Bar Association meeting where I discussed some of these numbers, I was subjected to scandalous accusations, with the threat of serious legal harm thrown in. Ducking and dodging these verbal arrows, I tried to point out a few simple facts:

The number of staff at the Bar has not increased until recently. In 1984, there were 13 staff members caring for the needs of 1,840 active and 280 inactive members. In 1991, there are 14 staff caring for the needs of 2,405 active and 471 inactive members. After 1984, the staff actually decreased for a time to 12 members. Both staff positions added since then have been in the discipline section: a lawyer and a paralegal investigator. Both of these staff members are needed to address a continuing and pressing problem: the prompt investigation and resolution of complaints against lawyers. Without these people, the investigation and resolution of complaints against lawyers would lag farther and farther behind acceptable standards.

In 1981, the last time dues were raised, the average cost of running the Association per lawyer (active and inactive) was about $340. The dues increase at that time to $300 per year was not enough to cover all costs of running the Association. By 1990, the cost has risen to over $475 per lawyer, and dues remain the same. In spite of attempts to keep those costs down, the increased demands of the membership, and of the public, cause them to creep up.

Aha! The TVBA cries, *why* do they creep up? Why can't you guys keep 'em down? We don't pay you folks that high salary and send you to far away places with strange sounding names just to charge us more! Well, I explained, it's like this . . .

First, everyone wanted more CLE in more places. We got it, and it cost a little more. CLE brings in more money than it ever did before, but it costs more too. People wanted more video replays. They got'em, but they didn't like the quality of the tapes. So we improved the quality of the tapes . . . to an extent, and now we are trying to do better. Better costs more, not less.

Second, lawyers, and the public, started to view the delay in investigating and resolving complaints concerning lawyer misconduct as being unacceptable. Lawyers, and the public they serve, are entitled to, and should receive, prompt investigation of alleged lawyer misconduct. There has been an increase of the absolute number of such complaints, but that is to be expected as the number of lawyers increase and the public becomes more aware of their rights with respect to lawyers and the services they provide. As the number of complaints increase, the capability of the system to address those complaints likewise must increase. The capability of the system can only be increased in increments of people. People mean salary, and the minimum "increment" for a lawyer's salary is a significant expense. By adding a paralegal and increasing a lawyer from half time to full time, the budget increase was in the range of $67,000, plus payroll taxes and benefits. These are costs which must be incurred if lawyer discipline is to be handled effectively and efficiently.

Let me digress for a moment and talk about lawyer discipline. Discipline continues to be a concern not only of the Board of Governors, but of the Supreme Court and the public. The Association is under continuous and increasing scrutiny to

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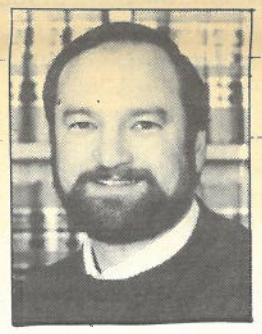


Editor's Column

By Ralph Beistline

As we begin 1991, I have a lot of profound things on my mind to write about. In fact, I already have several provocative commentaries in draft form. I thought, though, that for the first column of the year, I would tackle a rather mysterious and mind-boggling subject, that of socks.

I address this subject because of a recent personal experience. My wife was concerned about our budget and noted that I spent what she felt was an inordinate sum of money on socks.

"You have tons of socks," she complained, "you don't need any more."

"Yes," I explained, "but none of them match!"

"That's impossible," she said, "they matched when you bought them, didn't they?"

I then explained an experience I had three weeks earlier. I was out with potential clients, discussing a possible new case. For some reason, I glanced at my feet and noted what to me was a glaring difference in the socks I was wearing. True, they were both gray, but different shades and with different coloring. I spent the rest of the meeting straining to ensure that both of my feet were not visible at the same time. This obviously affected my concentration on the subject at hand.

The Mystery

My wife was sympathetic and, as a result, we spent New Year's Day sorting socks on the living room floor. It actually became a family project — some of that "quality time" we read so much about.

Four shopping bags of socks from 12 feet were poured onto the floor and the sorting began. Slowly the pile of pairs built, but when finished we found that the pile of unpaired socks was far larger. We had dozens of shades of blue, gray, and brown. We had stripes, dots, and diagonals. Matches, though, we had relatively few.

I think we all sensed it at once: The realization that we had discovered an unexplainable and unrefutable phenomena. Somehow socks in our house were disappearing, not by pairs, but individually; not temporarily, but permanently; and not only mine, but everyone's!

Were they being stolen? Were they being transformed? Or were they merely evaporating? Until this day, these haunting questions remain.

Since this discovery, I have conferred privately with both scientists and law enforcement officers, and have learned that they, too, have experienced this phenomena. Furthermore, it is not peculiar to Alaska, but is national in scope. Like me, they were baffled. But unlike me, they were resigned to live with the problem and annually dispose of large bags of unmatched socks.

The Solution

After considerable thought, I have come to realize that there is a solution to this problem. One that will save untold cost and unnecessary stress. It is rather simple. No longer should society require us to wear matched socks. In fact, socks should not match each other. The only requirement is that they be clean.

True, this would require a fundamental change of societal mores, but it could be accomplished if only a few brave soles would commit themselves to that effort and begin the trend. Where better for this movement to start but with the Alaska Bar Association? And what better time than now?

Post Script

I did hear back from the clients I spoke of earlier. They sent me a note explaining that they had retained other counsel, but did enclose a matched pair of socks.

The Alaska BAR RAG

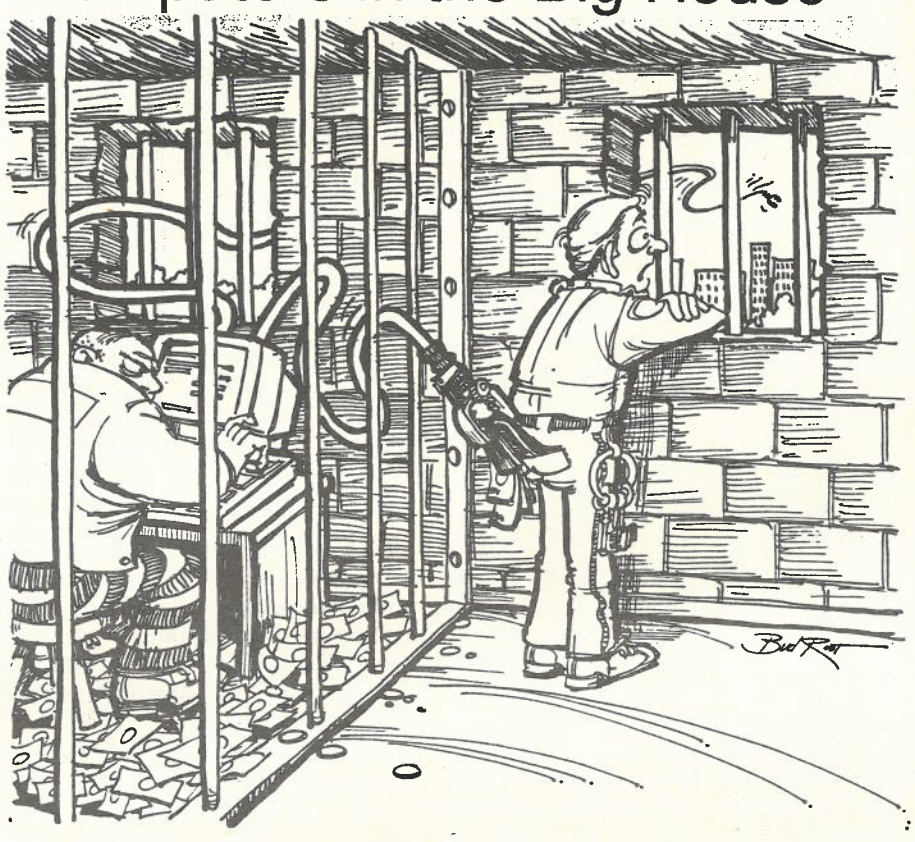
President Cooper has established the following schedule of board meetings during his term as president. If you wish to include an item on the agenda of any board meeting, you should contact the Bar office at 310 K Street, Suite 602, Anchorage, Alaska 99501 (272-7469) or your Board representatives at least three weeks before the Board meeting.

Jan. 18 & 19, 1991
March 22 & 23, 1991
June 3-5, 1991, Fairbanks
June 6-8, 1991, Fairbanks

The *Alaska Bar Rag* is published in January, March, May, July, September, and November.

Software keeps prisoners busy, productive

Computers in the Big House



"WOW, HOW WIERD...THERE IT GOES AGAIN...."

By J.B. Dell

Recently the Alaska Court System has taken steps to remove personal computers from the state's prisons. Prisoner use of computers is by no means a new phenomenon, and this article is designed to inform attorneys as to the existing state of prison software.

One of the first programs to hit the prison market was '*prisonperfect*' (Micrasoft, $375), which was first issued in 1986. This program serves both as a general word processing tool as well as a source of form complaint letters regarding cell temperature, clogged toilets, and guard misconduct, etc. *Prisonperfect* is currently available in version 4.2 with upgrades costing only $35 for previous users.

Death row inmates may be interested in *Lotus 123 'Yurdead'* (Intel, $250). This program provides a handy tickling system to calculate the precise amount of years, months, days, hours, and seconds until execution. Form letters to the Governor for clemency are automatically printed out every third week. Similar form letters to leading world humanitarian and religious figures are automatically printed. Following execution, death announcements are automatically sent to relatives and friends up to 75 persons.

No prisoner's hard disc would be complete without the recently released '*AppealWrite*' (Appel, $150). This program contains briefs covering all standard grounds for appeal at state and federal levels. General facts are alleged by all programmed briefs so that it is not necessary to read before signing. *In forma pouperis* affidavits are standard with each brief.

Recently Micrasoft has introduced '*Prisonplanner*' ($300) which provides a complete 365-day calendar and tickler system to cover the birthdays, anniversaries, execution dates, and discharge dates for fellow prisoners. *Prisonplanner* automatically sends out congratulation cards, birthday best wishes, or condolences for failed jailbreaks.

Prisoners who have access to a modem and who have not been rehabilitated may be able to take advantage of '*WhiteCollarCaller*' (Infosystem $400). This program utilizes telephone modem systems to make unauthorized bank withdrawals, steal electronic bank deposits, engage in fraudulent stock transactions, and otherwise engage in nonviolent property crimes from the safety and convenience of a prisoner's own cell. Upgrades are available for $40 and this program is currently issued in version 5.1. For those prisoners wanting to avoid telephone and long distance charges, a $50 supplement disc is available which charges all phone calls to the prison chaplain's home phone.

Psychopathic prisoners and those with no financial goals, may be interested in '*dBIII Virus*' (IBN, $200) This software requires a modem, and can be programmed to engage in hours of mischief even while the prisoner is sleeping. The program sends destructive data-erasing programs to thousands of educational, religious, financial, and government institutions and facilities around the United States. The latest version (4.2) contains a handy windows feature with a user-friendly format that does not require the prisoner to be able to read or write. This feature enables the prisoner to utilize a specific intent defense in the event that he is charged with a crime for using this software.

Prisoners irritated by pesky guards or those wishing to facilitate an escape, may be interested in '*Guardman*' (Appel $250) This program is kept on the permanent resident memory portion of the computer and has a programmed set of responses to nosey questions posed by guards. The responses include "Shutup", "I was sleeping", "None of your damned business", "Talk to my lawyer", "I puked where you're standing", "Will you do it for 20 bucks?", "Say hi to your old lady".

Finally, Alaska prisoners can benefit from the newly developed '*ClearyScan*' (Computerville, $450), which is a data base program capable of storing 10,000 bytes of information concerning unsatisfactory prison conditions. *ClearyScan* can be networked to fellow prisoners throughout the state, with weekly printouts of overcrowding, unsanitary facilities, inappropriate medical care, etc.

Finally, it's important to remember that prison software is not "all work and no play". Recently released is Micrasoft's simulation game '*Attica*' ($300), which recreates the legendary New York prison riot of the 1960's. It's all teary eyed nostalgia as each player advances from rookie guard to Nelson Rockefeller.

(Ed. Note: Any resemblance to actual software manufacturers, living or dead, is entirely coincidental).

• M.L. Cooper

Continued from page 2

assure that the lawyers who deserve discipline receive it. Pressure seems to mount on a daily basis to resolve complaints against lawyers ever more quickly. The problems with attorney discipline, be they real, perceived, or otherwise, continue to receive attention from the Board with the goal of reducing the delay from the day the complaint is received to the day of its ultimate disposition as much as is reasonably possible.

But back to money. 1990 (actual) and 1991 (projected) deficits follow a deficit of $37,346 in 1989. That all adds up to a real dollar drain on the reserves of the Association. The unappropriated capital (reserves) of the Association at December 31, 1990 are about $320,000. Whack out another $84,000 for projected losses in 1991 and it becomes clear that the dreaded dues increase is not too far in the future.

That is the message that I am supposed to deliver to you in this column. Active members can expect a dues increase in 1992 or 1993. The Board of Governors has determined that it is in the best interests of the Association, its members, and those that the Association serves, to buy down the reserves of the Association slowly, and before instituting a dues increase, to contain costs to the extent possible. There have been no dues increases for active or inactive members since 1981. Inactive members had their dues raised this year. Active members must expect their dues to rise soon.

Having said that, I have to go to the next TVBA meeting and face the music. Thankfully, we hold our meetings in a windowless ground floor, so death by defenestration is not very feasible. But as you know, at the TVBA, just about anything is possible.

Prepare *your* practice for secession today

By Mark Andrews

When Alaska secedes from the union, will your commercial law practice be ready? The November victory of the Alaska Independence Party calls all bar members good and true to prepare themselves for a glamorous foreign law practice.

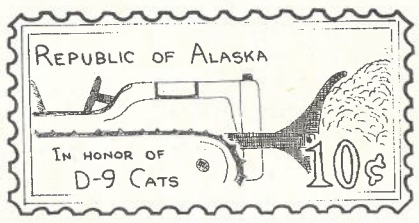
Suppose, for example, that foreigners from Seattle or San Francisco are foreclosing on your client's property in the Republic of Alaska? Worse, what if we are at war with the United States at the time? What might happen? The United States Supreme Court has considered just such an eventuality. *Dean v. Nelson*, 77 U.S. (10 Wall.) 158, 19 L.Ed. 926 (1870).

The story begins in May 1861. Thompson Dean was a Yankee from, Cincinnati, and owned the Memphis Gas Light Company. The first shots of the Civil War had just been fired in April, and Dean wanted to sell his utility stock before things got further out of control. So Dean transferred his stock to an agent, one "Pepper." That's all we know about his name — Pepper. But Dean was probably sorry he ever heard the name at all.

On June 11, 1861, Pepper sold most of Dean's utility stock to Thomas Nelson. By this point, 12 states had seceded, including Tennessee itself, where a popular vote had approved secession only three days earlier. But the first serious battles of the war still lay in the future. Dean seemed to have gotten most of his investment out of the South just in time.

But did Pepper sell Dean's stock for Yankee dollars, gold, lumber, nails, or anything that he could send North? Nope. Pepper sold the stock on terms. Generous terms. Nelson promised to pay Pepper $5,000 in quarterly installments out of the net (not gross) earnings of the stock, at 6 percent interest. Nelson signed a note and deed of trust.

On July 20, Pepper sold more of Dean's stock to Nelson. By this time the war was truly joined; the First Battle of Bull Run was fought the next day. Said the supreme court about this second sale: "It appears from the evidence in the



case, that Pepper sold this stock to Nelson, and the remainder of Dean's stock to other persons, when he did under the apprehension that it would be confiscated by the Confederate authorities, as was threatened to be done, and from a desire to leave Memphis for his own personal safety."

With this farewell, Pepper leaves our story. Presumably he did not go to Cincinnati and explain all this to Dean.

On August 16, 1861, President Lincoln banned all commerce between the Union and the Confederacy. Nelson, who lived in Memphis, received dividends on the utility stock, but could not pay anything to Dean.

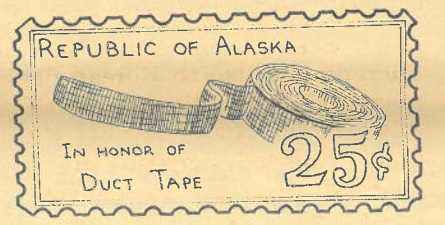
Memphis fell to Union forces in June 1862, with Dean not far behind. Dean confronted Nelson that summer and fall. Dean testified later that Nelson refused to pay anything because of the risk of having to pay it all over again to the Confederate government. Nelson said Dean refused to accept any payment because the stock had already been forfeited because of Nelson's failure to pay.

Then the tale took a curious turn. On April 5, 1863, Union authorities ordered Nelson and his family to leave Memphis. There had been "outrages committed by guerillas in the vicinity." The Union Army expelled Nelson in retaliation, although the opinion mentions no guerrilla activity by Nelson himself. However, as we will see, the removal of Nelson was timely and convenient for Dean, and perhaps the supreme court's collective eyebrow raised upon encountering this part of the fact pattern.

Later in April 1863, the military district of Memphis set up a "Court of Civil Commission" to hear lawsuits "instituted by loyal citizens for the collection of debts."

Dean filed a complaint in September 1863 to foreclose on the utility stock. He attempted personal service, but Nelson, of course, was not to be found. Dean served the complaint by publication.

Now wait. Freeze the frame right there, because you are looking at The Stuff That Plaintiffs' Dreams Are Made Of. Dean, a Yankee, files suit in a Yankee-controlled court. His defendant cannot lawfully cross Union lines to receive service of process, and the process server cannot cross the lines to serve the complaint; but Dean may serve by publication The local newspaper cannot lawfully circulate outside Union-held territory, because of Lincoln's proclamation. Even if Nelson saw the notice, he could not legally go to Memphis to defend, because of the expulsion order against him. Even if Nelson could go to Memphis, he probably would have had no access to the Civil Commission, because of doubts about his loyalty. And the property that Dean wants lies entirely within the Union court's jurisdiction.



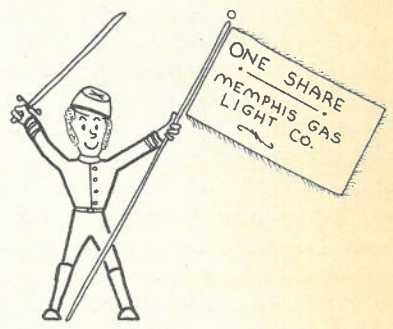
If you plaintiff's lawyers are not salivating by now, read that paragraph again.

It will surprise no one that Nelson did not appear in court to defend against the foreclosure. In October 1863, the utility stock was sold to a third party (not Pepper), who duly transferred it back to Dean.

But the South, or at least Nelson, was determined to rise again. Nelson sued Dean in June 1865.

Nelson was one gutsy guy. Only weeks after the end of the war, and probably still under a cloud for suspected rebel sympathies, he sued on every theory he could find, including an allegation that the Union army's Civil Commission was "illegal and without any authority."

The federal circuit court in Tennessee "hometowned" Dean, just like we do in Fairbanks, and declared Nelson the winner. The court ordered the stock retransferred.



Dean would have none of it. He took the whole thing to the U.S. Supreme Court. Understandably, one of Dean's arguments was that Pepper's original transactions were "unconscionable."

The legal question was whether Nelson's redemption rights had expired after the 1863 foreclosure. The court said no. I will spare the reader the details of the court's reasoning. While these are critical to an understanding of legal relationships, as well as the effective practice of law, they are no fun. I will say only that Nelson won on the due process question. What with Nelson stuck in Confederate territory, service of process was worthless. No foreclosure, therefore the redemption period never began to run. Nelson finally emerged holding the utility stock, but was required to pay the purchase price.

The decision was a solid win for American jurisprudence. The 1870 opinion was written by Associate Justice Joseph Bradley, from New Jersey, who had been appointed by President Ulysses S. Grant earlier the same year. Thus, a Grant appointee examined the law, and not the politics, and found in favor of the Confederate. It would have been easy for the court to duck behind the war, for when Dean filed his complaint in the Civil Commission, the Union was only recently in full control of the Mississippi, but not yet of Tennessee itself. Way to go, Bradley!

Dean v. Nelson speaks to us today. The advice for Alaskan lawyers:

1) Be sure your client does **not** wait until American forces **are** advancing on Spenard before **sell**ing the utility stock.

2) Avoid hiring agents or brokers with only one name, or who have the name of common household spices.

3) If you have to serve a court complaint on the other side of enemy lines, hire The Rhett Butler Courier service. Check "Blockade Runners" in the Yellow Pages.

In Alaska, the rebellion is yet forming. But it is none too late to gear up your practice to entertain foreign clients from Tokyo, London, and Walla Walla.

A.G. goes to the Bolshoi, sees Gorby

By Douglas B. Baily

I knew when I accepted Gov. Steve Cowper's invitation to serve as Alaska's attorney general that the job would entail innumerable meetings, frequently with groups of lawyers.

But I did not have to wait for the rousing rendition of the Star Spangled Banner by the Red Army Band in the balcony of the Chambers of the Supreme Soviet at the Kremlin Palace to recognize that this meeting would be very very different.

An invitation to be a member of the faculty of The Moscow Conference on Bilateral Legal and Economic Relations (sponsored jointly by the American Bar Association and the Soviet Ministry of Justice) arrived early last spring. I enthusiastically accepted the invitation to participate as a member of a panel discussing legal responses to major environmental disasters. Involvement in Alaska's response to the *Exxon Valdez* incident led to my being extended this exciting opportunity.

My arrival after an SAS flight over the pole from Anchorage/Copenhagen included a special greeting by a guide/interpreter who provided diplomatic clearance at the Moscow Airport. A waiting limousine then raced us through wet and crowded Moscow streets to the Hotel Ukraine. I was particularly pleased that my greeters handled customs and immigration clearance as I had two shotguns in my luggage in preparation for a post-conference hunting trip in the Kalmyk Republic. But that is another story.

The opening plenary session included remarks by the leader of the U.S. Delegation, former Secretary of State William Rogers, and a brief but moving lesson in civics from former U.S. Sen. Edmond Muskie outlining the constitutional and historical basis of the rule of law in the United States. One could feel the interest and enthusiasm of the approximately 800 U. S. and 2,000 Soviet attorney delegates to the conference who listened via simultaneous translation.

My conference-related activities began the day before the opening plenary session. I had attended a fine Chinese luncheon for all American and Soviet faculty, which proved to be a moving and heartwarming experience. Many of the Soviet faculty spoke English and some had been acquainted with their American counterparts for years. Seating assignments were arranged based on our conference subject matter, providing an opportunity to exchange ideas prior to our scheduled panels.

The steady flow of excellent Moldavian wine that arrived with the serving of the noon lunch led to a most interesting afternoon. I soon came to take for granted that there were bottles of vodka on every table at many meals.

Contacts that I made during my tenure as attorney general led to my inclusion as one of 12 from the U.S. delegation invited to participate in a lengthy, private discussion with the Soviet Minister of Justice.

The minister responded in depth to questions touching on diverse subjects. The subjects included lack of codification of many Soviet laws and decrees — leading to their remaining today almost "secret" in nature; the Soviet government's policy toward Soviet Jews; and the willingness of the Communist Party to accept anything remotely resembling an independent judiciary.

While the minister's responses were somewhat guarded, they were certainly much more open than I would have expected a year or two ago.

I inquired on behalf of Alaska as to why the Soviet government did not act more aggressively in dealing with Japanese nationals who had been apprehended masquerading as North Korean fishermen, while intruding in prohibited areas of the North Pacific. My inquiry received perhaps the most guarded response of the session. Nevertheless, it was a stimulating and exciting experience for me to participate in a session to which the Minister of Justice committed a substantial period of time even though the Supreme Soviet, of which he is a member, was about to convene in the Kremlin for its ongoing debate on issues of world-changing scope.

The business sessions of the Moscow Conference proved to be stimulating and in-depth explorations of their subject matters. Topics included joint venture trade agreements, legal provisions for labor management relations, and the creation of an independent judiciary in the Soviet Union, to name a few. The latter really provided some sparks. But they flew not between the old adversaries, the United States and the Soviet Union, but between old-line Soviets and those interested in substantial reforms.

A former judge complained in great detail that the Communist Party had interfered with his judicial decisions. His impassioned comments were electrifying. A woman justice of the Supreme Court of one of the Soviet Republics responded from the floor, saying that nobody had ever told her what to do, and nobody ever would. In her case this was most likely true. I spoke with her after the session, and determined that her independent character was not to be subdued by the mere Communist Party of the Soviet Union.

The conference included numerous social events, and I had several opportunities for comparing notes with Alaskan colleagues George Bennish and Ron Benkert. Joyce Rivers was in attendance but I was unable to catch up with her during the sessions. This was due certainly to the presence of some 900 Americans housed in hotels across town from one another. I was able to attend "Swan Lake" at the Bolshoi and tour the art gallery quality metro stations on free evenings.

The final banquet was held in a great hall of the Kremlin Palace. Our distinguished host for the evening was President Mikhail Gorbachev.

Given the truly staggering burdens and obligations confronting this world leader in September of 1990, we took it as a measure of the significance of the Moscow Conference to Soviet leadership that he would elect to attend this function and to remain for most of the evening's entertainment. The banquet was an event that I truly treasure throughout my allotted years, as I will the entire experience.

• Cole knows the law

Continued from page 1

practice, Charlie worked as City Magistrate and recalls that the City Attorney at the time was "Bulldog" Ed Merdes who, like Charlie, had moved inland from Juneau.

About the same time, Charlie's younger brother, Richard, also an athlete in his own right, graduated from law school and moved to Alaska. Dick worked for Charlie for about one year before going to work for the District Attorney's office in Fairbanks. A year after that, Dick went into private practice himself and, like his brother Charlie, has been in private practice in Fairbanks ever since.

Charlie Cole reflects back over his 38 years of practice in Alaska with fondness. "Alaska has been good to me and so has the practice of law," he comments. "It was partly in appreciation for this and a growing sense of civic duty that led me to accept the Governor's offer."

It seems that to some extent, and maybe to a substantial extent, Cole's new job has humbled him. He appreciates the support of his lovely wife, Christine, who tells him that she would be happy living in Juneau or anywhere that he might go, and he is overwhelmed at both the community and statewide support his appointment has received.

Charlie relates that he is happy to be working with Governor Hickel and describes the experience as a "pleasure." He views the Governor as a "big-picture person" who is very supportive of those in his administration. Cole relates that he would almost label the Governor an environmentalist who is very sensitive to the beauties of Alaska and who is looking for a reasonable balance between conservation and development.

Now, six weeks into the job, Charlie has no regrets but relates that the work to do is overwhelming. He has already become involved in the Exxon oil spill litigation and the Amerade Hess rate case. He is also becoming familiar with the mental health litigation and the State's position with regard to subsistence and Native sovereignty. Charlie relates that the pull tab issue was "just an aside and really just straightforward." Charlie describes what he is doing now as not dramatic, but what lawyers do every day, just on a somewhat larger scale.

As attorney General, Charlie is also responsible for a large staff — over 100 attorneys working on the civil side and over 70 on the criminal side. When asked about the rumors of significant changes within the legal department, Charlie was cautious. "We have a lot of work to do and we need good attorneys," Cole commented. He does not currently anticipate any major changes, but noted that any changes that are made within the law department will be made carefully and with deliberation.

Then, of course, there is the big question: How long will Charlie Cole be Attorney General? Charlie noted that several days after arriving in Juneau, he received a call from an Anchorage reporter who informed him that he was going to be fired later in the day. In response to this, Charlie called the Governor, who categorically denied that Charlie would be fired that day.

Fortunately, Charlie is still on the job, but is uncertain as to the length of his tenure in Juneau. He notes, on the one hand, that the work is endless, but, on the other hand, his Juneau apartment lease is short-term.

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January 1991

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FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.

U.S. Supreme Court No. 89-1063
Argued October 10, 1990: Opinion Imminent

FACTS: Most attorneys worry from time to time about that single case in which everything seems to go wrong. However, few must ever experience the double whammy of the unnamed Oklahoma attorney who first filed an appeal too early, then tried to correct his error by filing another appeal too late. To make matters even worse, this unique procedural coup then ended up before the U.S. Supreme Court. Here is the sequence of events:

January 29, 1989. Oral argument was scheduled in federal court on a Motion for Summary Judgment in this dispute between two mortgage companies, FirsTier and Investors. The trial judge announced his decision from the bench. Since it was favorable to Investors, and concluded the case, the court asked Investors' counsel to prepare findings and conclusions.

February 8, 1989. In a refreshing display of abhorrence of filing at the last minute, and already knowing full well how the trial judge felt about his or her case, FirsTier's counsel filed a Notice of Appeal. However, the trial judge had not as yet approved any findings or conclusions or entered a final judgment.

March 3, 1989. The trial judge issued its final order and judgment, which was, as expected, adverse to FirsTier.

Over 30 days later. Perhaps realizing an appeal from the court's actual order and judgment would be more appropriate, FirsTier filed a second Notice of Appeal sometime in April, but more than 30 days after entry of the order and judgment. Leave of court to do so was granted, but Investors appealed the trial judge's indulgence in granting leave.

PROCEEDINGS BELOW: *September 26, 1989.* To FirsTier's shock, the Tenth Circuit, on its own motion, requested briefing on the validity of the early appeal, then dismissed it on the basis of lack of appellate jurisdiction.

The propriety of allowing the late-filed appeal remains with the Tenth Circuit awaiting an opinion. But the propriety of dismissing the early-filed appeal will any day be decided by the U.S. Supreme Court.

ANALYSIS: Alas, all in one case, FirsTier's counsel managed to file once too early and once too late, completely missing the only clearly identifiable window for timely appeal.

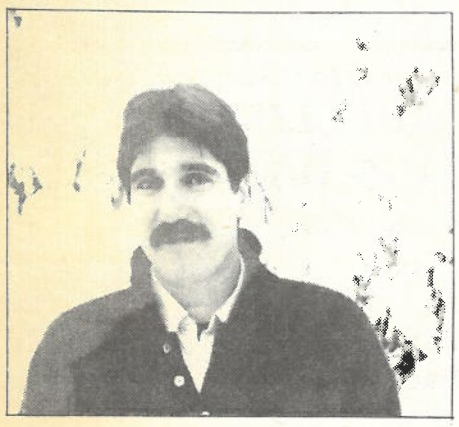
Perhaps there will be some benefit from the Court's analysis of what is a final judgment from which an appeal may be taken. This issue seems to arise occasionally in Alaska state court proceedings. But the potential for any other precedental value appears to be somewhat nebulous. Alaska remains one of the few jurisdictions in which filing deadlines are not treated in a highly technical and unforgiving fashion as straight-forward matters of jurisdiction. The problem is, whatever the Court does with this appeal will provide no help for those practitioners who need to plead excusable neglect for filing too late. It will benefit only those rare souls who find themselves required to plead excusable zest for filing too early.

--Ed Husted

Lawyer tackles the Iditarod Race

Continued from page 1

When Jim and Susan returned to the Lower 48 so Jim could attend law school, he took his dogs with him. "I was the only person in my law school with a dog team. We actually did a lot of mushing in upstate New York."



Jim Cantor

After returning to Alaska in 1986 to work for Perkins Coie, Jim devoted his attention to the law and "Susan kind of took over the dogs."

But last fall, Jim faced "that problem which every litigation associate fears." All of his cases suddenly settled. Faced with this dilemma, Jim decided he could either seek out more work from "the partners" or "run the Iditarod."

"When I asked the partners for time off to run the Iditarod, I was a little apprehensive, but they really thought it was a great idea. Everyone at Perkins got into helping me out and they even threw me a doggie bootie-making party," he said

Jim is currently training for the big race. This training involves getting out of bed, shovelling the dog yard (about five garbage cans of dog droppings per week), loading dogs on his truck, driving to the track and unloading, hooking up his team, running the sled for 20 miles, loading his truck back up, driving home to unload, eating lunch about 4 p.m., feeding the dogs (about 45 pounds of dog food per day), and then repeating the whole process (finishing about midnight).

Jim recently qualified for the Iditarod by finishing the Knik 200, a race From the Knik Bar in Wasilla to Skwentna and back.

"It was a real experience," he said, "especially when it was 3 a.m. and 30 below. I fell asleep on my sled once." Jim got about 1 hour and 10 minutes sleep during the whole 36-hour race, some of it while hanging on the back of his sled.

Why run the Iditarod? "I've always been intrigued by the hardship of the Alaska wilderness and the excitement that the hardship can provide. I thought it would add a different perspective to my life. So far it has."

Jim Cantor's dogteam will face a long trail from Anchorage to Nome in March, and when they cross the finish line on Front Street--win, lose or draw--they'll be among an elite group that has survived the Last Great Race. Can Cantor overcome the tactics of Susan Butcher and Rick Swenson, who are each going for their record fifth victories? Can the young lawyer hold his own against the best of the Bush? Stay tuned.

Bar Rag Iditarod-watcher's tip: Mushers always welcome sponsors, contributions of dead fish, money, and gear, like the deal Dee Dee Jonrowe struck with Eddie Bauer.

TVBA is 'Santa' to local kids

In Fairbanks, attorney Paul Barrett is Father Christmas to needy children and members of the TVBA are his elves. Each year for the last four years, 100 kids who otherwise would not have had much of a Christmas have been given gift certificates and treated to a "Christmas Shopping Spree" at the Fred Meyer store in Fairbanks. In the first two years, the children each received $35 certificates, and for the last two years, they have received $50 certificates.

Paul came up with the idea of helping these kids four years ago when economic times were kind of tough in Fairbanks. Reflecting on how he was relatively well off and had been spared a severe downturn, he approached a local CPA, Norm MacPhee, and broached the idea of trying to raise money to give to disadvantaged youth. Between them, they raised over $3,500 in just a few days from doctors and lawyers in Fairbanks. The money was turned over to the College Rotary Club, which has acted as coordinator ever since.

College Rotary Club members organize the event, and assist the kids as they shop. The children who participate each year are selected by the Salvation Army, the Fairbanks Native Association, Women in Crisis Counseling and Assistance Center, and LOVE, Inc. These organizations work with the kids prior to the "Shopping Spree," and teach them about the joy of giving and gift selection. The kids are encouraged to buy gifts for family members, and there is much discussion about what gifts might be appropriate. The kids aren't told that they are actually going to receive the money and go shopping until just before the actual day of the event.

The morning of the "Shopping spree," the kids are collected by their sponsors and brought to Fred Meyer . This year, a high point for the kids was when they were collected on a bus which was provided by Princess Tours. When they arrive, Fred Meyer employees, who have volunteered not only their time, but to come in an hour or so early, provide the kids with hot apple cider and donuts. The kids are then handed their certificates and off they go with helpers to find and purchase just the right gift for Mom and Dad, and their brothers, sisters and others. They are also encouraged to spend some of the money on themselves. If they don't spend quite all the $50, the change goes in the Salvation Army kettle to help others. As the helpers are armed with calculators, there isn't usually much change.

For the last three years, all the funding has come from the College Rotary Club and lawyers in the Tanana Valley. The lawyers provide the bulk of the funding, and in 1990, 57 lawyers contributed almost $4,000 dollars to the program. The Tanana Valley Bar Association, that bastion of do-gooders and bleeding hearts, contributed the balance.

Although many, many people help out, the program would never have been launched but for one person. Because Paul Barrett thought himself fortunate one year, 400 kids have had their lives touched in a positive way.

Submitted by Dan Cooper

MINUTES
TANANA VALLEY BAR

November 9, 1990
PRE-MEETING DISCUSSIONS:

Before the meeting commenced, Dick Madson provided those seated at my table with a brief symposium on the merits of machine guns. Madson indicated that he had recently represented a gentleman in Federal Court who was charged with possession of a machine gun and who received, in Madson's view, a fair sentence. Madson indicated that the Federal sentencing guidelines had a provision which would reduce the guideline sentence if the weapon in question was used for sporting purposes. Someone inquired why anyone would desire to have a fully automatic weapon for sporting purposes. Madson indicated that you couldn't understand it until you had fired one and went on with some stories about what fun it was to be able to burn up massive amounts of ammunition in no time flat. Madson further indicated that he would like to be able to mount one of them on the boat at his moose camp so that when he and other hunters came around a bend in the river they could simply spray the willows and then go in and see if anything had fallen. This is kind of the reconnaissance-by-fire method of moose hunting.

Dan Cooper asked Art Robson why he was present. Robson had Left a memo on all the tables indicating that he was going to be out of town between November 9 and the Friday after Thanksgiving. Robson's memo went on to say that he was going to be in the Hawaiian Islands. Someone indicated that this seemed to fall within the category of bragging and that we should have fines for those who participate in this sort of abuse of the rest of us who are remaining in town.

Al Schon, seated at our table, is playing Judd in the FLOT production of Oklahoma. It was noted that Mr. Schon, as Judd, is still dead. Fortunately, it's not summer and we're not running out of ice.

Someone at the table discussed the fact that at some major colleges and universities one can now receive a degree in bagpiping. After some discussion it was questioned why anyone would desire to have such a degree. It was also noted that this degree was not offered in Universities where the school of music was close to the school of veterinary medicine as the sound of the pipes upset the small animals there for surgery and experimentation and might be construed as abuse by animal rights activists.

The meeting was called to order at approximately 12:30 p.m. by Maximum Leader Dan Cooper. Guests included Phil Graves, Judge Kleinfeld's law clerk who is currently assigned in Fairbanks. Treasurer Smith was asked to bill Phil for his dues. Also present was Jim Wilkens of Bradbury, Bliss & Riordan's Anchorage office.

It was indicated that Ken Covell was working on the problem of the Supreme Court briefs being removed from the Fairbanks law library. apparently he had been in touch with Cynthia Petumenos but, since Mr. Covell was not present, no report could be given on his success or lack thereof in convincing the state law librarian to keep a set of the Supreme Court briefs at the Fairbanks law library.

On a different subject, it was announced that Dallas Phillips is still not coming back.

On this note, the meeting adjourned.

Christopher E. Zimmerman
Secretary
Tanana Valley Bar Association

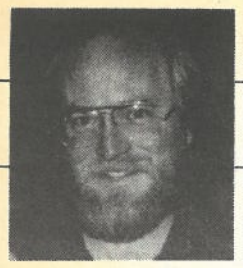
November 16, 1990

The Bar assembled for its usual luncheon at the Regency Fairbanks. On the menu were the standard fish and salads together with a Mexican dish which, I believe, was named Montezuma's Revenge. While others were complaining about this "killinary" delight, Dick Madson indicated that he had eaten it all.

Guests in attendance included Wayne Wolf, the Clerk of the U.S. Bankruptcy Court, Merril Weiner, one of Justice Rabinowitz's law clerks and Colonel Marchand of the Fort Wainwright Judge Advocate's Office. Wayne Wolf indicated that he refused to say anything about a certain bankruptcy judge from Anchorage. Merril Weiner indicated that she would endeavor to keep the opinions coming at their usual rate of one a month and Colonel Marchand indicated that he believed that everything was okay in Saudi Arabia.

Judge Savell indicated that he had spoken to Art Robson who was vacationing in Hong Kong. He said it was interesting to note that when it is 11:30 a.m. here it is 4:30 a.m. in Hong Kong. Apparently Robson left town with a stipulation for a continuance of a criminal case wherein Rule 45 expires on Monday, November 28. Robson's client apparently refused to waive Rule 45 and Judge Savell indicated that he intended to have the client on

Continued on page 23



TORTS

By Michael Schneider

I. WHAT IS THE "DUTTON RULE?"

In a case called *National Savings Life Ins. Co. v. Dutton*, 419 So.2d 1357 (Alabama 1982), the Alabama Supreme Court came up with the bright idea that, in an insurance coverage and bad-faith case where there were both contract claims and bad-faith claims, the bad-faith claims would fail *as a matter of law*, unless the trial court was in a position to grant a directed verdict on the breach of contract claims at the close of the evidence. *Id.* at 1362. If reasonable people could differ about whether or not the carrier was in breach of contract, so the reasoning goes, then how could the carrier be held to have unreasonably failed to honor a timely claim? Because there are about a zillion good answers to this superficial question, the *Dutton* Rule has been roundly criticized by both courts and commentators. *See* for example Shernoff, Insurance Bad-Faith Litigation, § 5.03[3], pp. 5-10.7. *Dutton* is such bad law that Alabama has consistently found exception to its own rule, leaving *Dutton* of questionable vitality, even in that jurisdiction. *See* for example *Jones v. Alabama Farm Bureau of Mutual Casualty Co.*, 507 So.2d 396, 400 (Ala. 1987); *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1053 (Ala. 1987), and *United Services Automobile Ass'n v. Wade*, 544 So.2d 906, 914 (Alabama 1989).

Carriers have a legal duty implied in the insurance policy to act in good faith in dealing with their insureds on a claim. Their violation to do so is a tort. *See Noble v. National American Life Ins. Co.*, 624 P.2d 866, 867-68 (Ariz. 1981), *State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152, 1155 (Alaska 1989). The rule in *Dutton* has allowed carriers to argue that if a justification exists in fact or law for a carrier's conduct that then, as a matter of law, a carrier cannot be held responsible for conduct that is ill-motivated, improper, fraudulent, or malicious. This reasoning ignores the fact that questions of motive, intent, and reasonableness are virtually always jury questions. *See* for example *Gudenau & Co. v. Sweeney Ins. Inc.*, 736 P.2d 763, 765 (Alaska 1987); *Turnbull v. LaRose*, 702 P.2d 1331, 1335 (Alaska 1985); *Wilcox Associates v. Fairbanks North Star Borough*, 603 P.2d 903, 906 (Alaska 1979), and *McGee Steel Co. v. State*, 723 P.2d 611, 614, 615 (Alaska 1986). Despite its legal and intellectual bankruptcy, the *Dutton* Rule continues to receive a lot of play in both state and federal courts in this state. Two cases from our supreme court make it obvious that *Dutton* is not the law in Alaska. They will be discussed below.

II. DEATH OF THE DUTTON RULE.

A. *Hagans, Brown & Gibbs v. First Nat'l Bank of Anchorage, 783 P.2d 1164 (Alaska 1989).*

This Opinion, No. 3533, was issued December 8, 1989. The Hagans firm had a contingency fee agreement with Seair. The Hagans firm obtained a judgment for $220,000.00, that would, if affirmed on appeal, insure to the benefit of Seair's assignee, First National. *Id.* at 1165. Settlement offers of $150,000 and $175,000, respectively, were made to First National. Both offers were recommended by the Hagans firm. First National rejected both offers but, following the larger offer, suggested that it would accept same, but only if the law firm was willing to significantly compromise the fee to which it would otherwise be entitled. *Id.* at 1165-66. First National was sued by the Hagans firm, contending that the covenant of good faith and fair dealing implied in the contract had been breached by First National. The supreme court recognized that, as a matter of professional ethics, the client had ultimate control of whether or not a settlement would be accepted (*id.* at 1167), but was clear to point out that the client's discretion, *admittedly providing First National with an objectively reasonable basis for refusing the settlement offer*, could not be exercised in bad faith to unreasonably deprive the law firm of its entitlement under the contingency fee contract:

> "The question which forms our consideration is this: If the client had not hoped to renegotiate the attorney fee would he or she have accepted the settlement offer? We believe this question is a proper standard for good faith and fair dealing. Thus, if there is some genuine dispute as to the answer to this question, summary judgment must be denied."

Id. at 1168. If the result in *Hagans* leaves you unconvinced, read on.

B. *Loyal Order of Moose v. Int'l Fidelity, 797 P.2d 622 (Alaska 1990).*

This Opinion was issued August 17, 1990. The superior court in this case fell prey to the *Dutton* rule. *IFI* argued that it had an arbitration provision in its policy through which it could compel the lodge to arbitrate "all disputed questions of fact" relative to either the contractor's or the lodge's compliance with the terms of the relevant construction contract. Id. at 629. The superior court reasoned that:

> "[tlhere is a legitimate dispute as to whether Darling was or was not in default and as to whether Moose Lodge was required to pay Darling for the claimed extras. Until such time as that dispute is resolved by arbitration *as required in the contract,* the failure of IFI to either complete the project or respond in damages is not required. [sic] *If an act is not required, failure to do so or properly investigate is not bad faith*. Therefore, the court concludes that there is no factual dispute and IFI is entitled to summary judgment on Moose Lodge's claim for bad faith. The cross-motion of Moose Lodge is therefore denied." (Emphasis added)

Id. at 626, quoting the superior court's decision.

While the supreme court clearly acknowledged the surety's right to rely upon its arbitration clause and acknowledged the significance of the outcome of any arbitration so demanded (*id.* at 629), the court went on to state:

> "The surety's demand for arbitration may not itself be made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim."

Id. at 629.

Loyal Order of Moose makes it clear that the mere fact that a party had a contractual right to do something does not, in and of itself, dissolve the *jury questions* of whether or not a contract right was exercised, not for the purposes originally agreed to by the parties, but for some bad-faith motive or reason. *Loyal Order of Moose* makes it clear that the *Dutton* Rule has no place in Alaska law. Where the record supports plaintiff's contention that acts or omissions by the carrier were for a bad-faith purpose or motive, the matter should be submitted to a jury for its determination.

III. CONCLUSION.

No matter how they do it in Alabama, questions of motive, intent, reasonableness, and credibility of witnesses have always been matters for the jury's consideration in Alaska. Any doubt that this is the case in insurance bad-faith litigation should, by now, be put to rest by *Hagans* and *Loyal Order of Moose*.

Letters

More on military spouses

A recent issue of the Rag contained my article, "Benefits of Former Spouses of Military Personnel." It stated that Congress was considering legislation that would expand the rights of so called "20/20/15" former spouses. Congress did not pass that legislation, although it did pass amendments to the Uniformed Services Former Spouses' Protection Act. The President signed the bill on November 5, 1990.

Interested readers may request a copy of the November/December issue of my "Military Divorce Newsletter" that contains a discussion of the changes and a "redlined" version of 10 U.S.C. $1408. Please enclose $5 and address your request to: 2773 South Parker Road, #230, Aurora, CO 80014.

Edwin Schilling III

Unfair dues

I write in opposition to the proposed change in Article III of the bylaws (dues increase for inactive members). Those of us who are not currently engaged in the active practice of law wonder what lies behind the proposal, if not a simple desire to increase revenues without offending a vocal constituency. From my memory of past Association operating budgets, I can recall few expenses attributable to inactive members. If we are not practicing there should be no allegations of misconduct for Mr. Van Goor and his co-workers to investigate. I'm certain that most of us would be willing to forego the announcements for Continuing Legal Education programs and the like. As for the *Bar Rag,* I do enjoy it, but I can buy a subscription for quite a bit less than $75.00

The other jurisdiction in which I am admitted, Pennsylvania, has the good grace not to charge inactive members at all. Give us a break!

Doug Miller
Assistant Professor and Director,
Legal Research and Writing Program
South Texas College of Law
Houston, Texas

It's The Big Bang

First you publish Harry Branson's poem and then you ask what it means, proving, once again, that two wrongs do not make a right. (Rite?)

To clearly understand the poem, you must first understand Harry Branson. Since most of those who know him don't and those who don't know him can't, the majority of attempts to interpret meaning are doomed to fail. The undersigned, however, understands Harry Branson at least as well as he understands Georgie Gaurou which leads to the rather obvious conclusion that the poem is "about" — The Big Bang. This, in turn, leads to the question — if there was no one there to hear The Big Bang, did it make any noise?

I hope this makes everything crystal clear.

James R. Blair

The Rag in Italy

Thank you for all your service over the past year. I enjoy reading the *Bar Rag,* which is my only regular source of news from Alaska here in Rome. I hope the new year is a good one for you and your families.

Pat Traves
Collegio San Norberto
Viale Giotto 27
00153 Roma, Italia

Frolic with the cops

The Alaska State Troopers and its preceding organizations, Alaska Highway Patrol, Alaska Territorial Police, and the Alaska State Police, are celebrating our 50th anniversary in 1991. Many activities will be taking place including a special dinner/dance in May, featuring the Royal Canadian Mounted Police Band from Ottawa, Canada. The main event will take place on August 16, 17, 18, 1991 in Anchorage, and will include many social functions, golf tournament, picnic, and an "oldtimers" pistol match, in conjunction with the RCMP/AST Annual Shoot.

The most important element of the celebration will be bringing together as many past members of the organization as possible. The Anniversary Committee has located approximately 400 active as well as retired members, who have joined the Golden Anniversary Committee (GAC). Many of these members will be attending our activities.

Over these many years, the legal profession and law enforcement have worked together through thick and thin to get the job done. Many friendships and associations were made, and all of us have recollections of past events and occurrences that enriched our personal lives.

The purpose of this letter is to alert old friends of the Highway Patrol, Territorial Police, State Police, and State Troopers, of the anniversary activities and encourage membership in the organization. This will give you an ongoing report of our activities.

More importantly is that you mark August 16, 17, 18, 1991 on your calendar and plan on attending some of the activities. It will be a chance to meet law enforcement types going back to the '40s and give some of us a chance to meet and greet old acquaintances of the past.

Applications for membership in GAC and further information on the overall anniversary activities can be obtained at the GAC Store located at 245 West Fifth Avenue #24, Anchorage, AK 99501, open on Tuesday, Thursday and Saturday, or feel free to contact me personally at (907) 279-0618 in Anchorage. Written correspondence can be directed to myself at the above address.

Look forward to seeing you in 1991.

Tom Anderson

Vasiliy writes

The times of perestroika seem too turbulent for all of us in the Soviet Union/Russia. You all hear reports from our country and know how it is over there: freedoms start to bloom, groceries disappeared from state-run stores, ruble shrinks (Q: "What's the correlation between a dollar, a pound, and a ruble?" A: "One dollar can buy a pound of rubles."), no drinks, no cigarettes (a carton of Marlboro 100s is as much as an average monthly salary), crime is going up rapidly, black market dealers gain, Gorbie loses. But I still stand for him (perhaps, because I want to see him as slim as I am).

Our little son Nikita, now 4, is good, sweet and healthy. His asthma condition is gone (& hopefully will never return.) He enjoyed summertime at our countryhouse place, and especially liked it when it was piggie-back walks with his dad. He goes to kindergarten, loves cars, buses, trucks, metro, peanuts (sold only in dollar shops), ice-cream (once I took him to a newly opened capitalist establishment "Pinguin": "Papa, I did not know in my whole life there could be so many colors for ice-cream!"), mom, dad, sister, and the rest of this whole wide world.

Our little (now 18) daughter Anya upon her graduation from high school last year worked for a few months as a cook in Nikita's kindergarten. Last July she successfully passed her entrance exams ("A" for English) and now is a first year student of Moscow University School of Philology (department of Russian and Russian literature). We are proud of her. She seems to be heading towards early marriage. We have nothing against: he is a nice young man, his family is wonderful (his

Continued on page 23

Movie Mouthpiece

By Ed Reasor

I don't know any more about raising children than anyone else, but some things seem to work.

Every Sunday, for example, at 2:30 p.m. after Mass and lunch, the entire Reasor family sits down, turns on Channel 13 to watch and comment on Siskel & Ebert, the two best television film critics in the business. When my two older boys were at home, this was also a family tradition, only the show then was called "At The Movies" and was seen on Channel 7, Anchorage public television station.

Today, none of us always agrees with Siskel or Ebert, but we come away a bit more enlightened and more experienced in voicing our own opinion on the basis of some growing empirical coherence, not just gut reaction. The total result is that all of my kids know a tremendous amount about film, the art medium of their generation. And more — they love the craft.

Roger Ebert, who is the stouter of the Siskel-Ebert team and generally sits on the right as you face the tube, spends some of his time on the movie beat at the Hawaii Film Festival. Until this year, the Festival was hosted by the East-West Center of the University of Hawaii and now, in its tenth year, it's sponsored by an independent nonprofit corporation.

The Hawaii Legislature appropriated $250,000 for the festival, so the result is 130 films free of charge to anyone who wants to come and view them for one whole week. In addition to Mr. Ebert's lecture on "Asian Images in Hollywood Cinema," the festival also featured panel discussions on screenwriting, film financing, and how to break into the entertainment industry.

I spent a few pleasant hours listening to the wisdom of Roger Ebert and here is my report:

Ebert is stocky, seems shorter than his television image, but comes across as a real down home boy who would get along extremely well with independent Alaskans. He put on no airs; he walked into the lecture room on time, dressed in a Sears Roebuck light striped coat, a blue shirt, khaki pants and tennis shoes. This is a man who loves films and wants to immediately view them, not waste time looking around to see who, if anyone, is dressed in the latest fashion.

Ebert first introduces his toy, a disc-laser videoplayer with a remote control gadget. His films are packaged like long-playing records, which he places on the machine, and adjusts the picture, clarity, and sound with his remote control.

The advantage of this contraption is that one can fast-forward the film without losing any of the image (try that on your own VHS); stop-freeze a frame (to look for wires or covered trampolines); reverse back; or fast-forward from place to place in seconds so that certain sequences or dialogue exchanges can be viewed independently for comment and criticism. It's a lovely toy and he's proud of it.

As a professional movie critic, Ebert sees almost every film released. Always he asks himself two questions: What do I see on the screen and what can I learn from what I have just seen?

Roger Ebert (the more portly of the two on the right) dresses up with his sidekick Gene Siskel in this publicity photo from Buena Vista Television.

When Ebert watches a film at home with his video disc, he constantly adjusts the color and contrast with his remote control. He keeps trying to see what the cinematographer saw through the camera's lens, before the film went to lab (although if you asked him that, he might deny it, not being conscious that's what he's doing. He says he just likes to find the right color combination).

When Ebert first attended the Hawaii Film Festival, he gave a lecture on "Citizen Kane," the Orson Welles classic. That's about a two hour film, but it took him six full hours, remote control and all, to review. Clearly, it is best to watch an unviewed film in a theatre or at home for the first time before trying the Ebert technique. Then fast-forward, reverse-wind, freeze-frame and analyze as you go along shortly after you have seen the complete film.

The Hawaii Film Festival offered a cornucopia of Vietnamese films, some about the war, some not. Those about the war, however, were filmed by the Viet Cong from their viewpoint. In the discussion of the American movie "Deer Hunter," however, (starring Robert De Niro, Christopher Walken, Meryl Streep, directed by Michael Cimino), the Vietnamese filmmakers could not understand the prisoner of war sequences, where guards forced the three, young Pennsylvania friends to play a game of Russian roulette. What Cimino intended was a metaphor of war's waste, but the Vietnamese were confused; before this film, they were completely unaware of the term and they knew absolutely no one who had ever played this deadly game.

"A civilized man is a person whose curiosity outweighs his prejudices," Ebert intones during his "Asians in Film" lectures, and no one in Hawaii, this rainbow culture state, disagrees.

When it comes to American movies of Asians, however, filmmakers seem to utilize their prejudices — all of the attractive, dark mysterious Asian women are prostitutes, thus fulfilling the male filmmaker's fantasies. The hero is never an Asian male but a handsome Caucasian who saves the woman from herself, thus making her worthy of the love of an American or European.

The film we watch to illustrate this and other points is "The World of Susie Wong" (a 1960 release, almost two full hours) starring Nancy Kwan and William Holden, directed by Richard Quinne. This is a story of an American artist who falls in love with a Hong Kong prostitute, rejecting his middle class heritage, while at the same time elevating her to the position of a knowledgeable, acceptable lady.

By now Ebert has his coat off and is getting with the program. We have stopped the film a full dozen times to comment on how actors seen on the right side of the screen have a stronger axis than actors seen on the left side of the screen, so the right side personality is a more positive one. He notes that Asian music during the establishing shots of Hong Kong help set the scene and the atmosphere. Ebert comments that people of different backgrounds almost always "meet-cute" in the movies (knocking packages from each others' arms outside Macy's, for example).

In "Susie Wong," Holden is sketching Kwan on the ferry from Kowloon to Hong Kong when she accuses him of stealing her purse (which she negligently left behind, herself) a classic meet-cute.

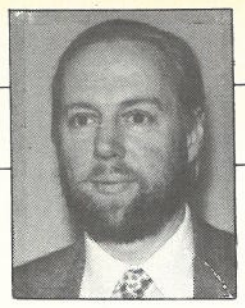
We go on like this, critic and viewer volunteers, for a full two hours and we're still on the first film, although Roger has brought 14 different Asian-in-film movies. When the whistle blows to announce another screening of a newly released film next door, I wonder where the time has gone. I've been to half-hour depositions that seemed much, much longer than this pleasant two hour critique.

Ebert left us with many thought-provoking observations as we closed our discussions of "Susie Wong." Among them:

- "Prostitution is based on a dependent economic need but in "The World of Susie Wong," the occupation is sentimentalized, as it is also in "Risky Business," and "Pretty Woman." The truth of the matter is that prostitution is not a sentimental occupation at all."
- "Violence is the most popular subject matter in Hollywood in the 90s. Most plots involve several people being killed. Murder often is the end of the film."
- "Regional films generally don't have box office luck. People now go to the movies to have their expectations confirmed. That's why sequels are so popular today."
- "A good film generally opens on 1,800 screens. It has to have instant success, which often is a product of good marketing; 85 percent of the box office gross in North America is in 9 cities and one of them (Toronto) is in Canada."
- "A good film critic never makes a value judgment of a film based on his own personal philosophy. Film review is relative — it has to be compared to something else out there."

Near Thanksgiving day 1991, the Hawaii Film Festival will sponsor once again another week of free, new, exciting movies and critic Roger Ebert will be there again. Plan on coming, if you can.

And please, guys, don't schedule any trials for me that week, because I'm definitely going — sun, sea, and cinema with Ebert — all for free. How can it get and better.



Family Matters

By Drew Peterson

Do we as attorneys have an ethical duty to advise our clients of alternate dispute resolution options? Can we be sued for malpractice if we fail to do so? These and similar questions are increasingly coming to the forefront of the alternate dispute resolution movement. They merit consideration by all lawyers.

As a family mediator and practitioner of other alternative dispute resolution methods, I am frequently reminded of the ignorance of much of the practicing bar about my chosen field. Most attorneys with whom I speak do not understand the difference between mediation and arbitration, to say nothing of more sophisticated ADR distinctions like those between mini-trials, summary jury trials, and early neutral evaluation. Like many other mediators, I find that my marketing efforts (including those directed at my legal peers) consist more of education than promoting my own expertise in the field.

The situation is comparable to family law 15 years ago governing marital property aspects of pension rights. As those of you as old as me may recall, 20 years ago there was only a slowly dawning recognition that pensions accrued during a marriage could be considered marital property. This was in the days before ERISA.

Many pensions took 20 or more years to vest, and even then the programs might not be actuarially sound. Moreover, some pensions had been held definitively to be non-marital in nature, notably military retirement per the U.S. Supreme Court.

Gradually, over a period of time in the 1960s and early 70s, decisions recognizing the marital property nature of pensions rights increased. They received relatively little attention among the practicing bar, however. Only the more sophisticated and well informed attorneys seemed to be aware of their existence.

And then it came! In 1975 a California case hit the popular press. It was a legal malpractice case in which a wife won a substantial judgment from her attorney who failed to obtain for her a share of the husband's pension. I remember being amazed at the impact. Within a few weeks, or so it seemed, marital pension rights went from being a subject seldom discussed in divorce case negotiations to a subject raised early and often. The practicing bar went from ignorance of the subject to sophisticated concern about it.

Such a malpractice judgment has not yet occurred based upon a failure to advise a client of alternative dispute resolution options. I noted with some satisfaction, however, the debate in the November, 1990 issue of the *American Bar Association Journal* (page 50-51), as to whether or not there is a professional duty to advise clients of such ADR options.

The speaker in favor of the proposition that there is such an ethical duty was Frank E. A. Sander, professor at Harvard Law School. Sander asserts that such a duty already exists, under Rule 1.4(b) of the Model Rules of Professional Conduct ("A lawyer shall explain a matter to the extent reasonable necessary to permit the client to make informed decisions . . ."). He further compares the situation to a doctor suggesting surgery without exploring the other possible alternatives.

Speaking against the imposition of such a mandatory ADR discussion rule, New Jersey lawyer Michael L. Prigoff argues primarily that such a requirement is inadvisable because it would form a further basis for legal malpractice liability. Such a rule would be expensive, he argues, especially in smaller cases. Nevertheless, Prigoff asserts that in his own practice he discusses ADR options in depth with every litigation client. The implication is that all attorneys should do likewise.

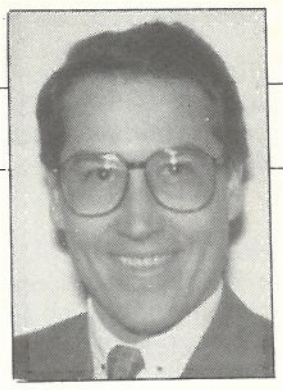
My own view is that all practicing attorneys need to have a basic understanding of alternative dispute resolution options as a part of their bag of legal tricks. All of us engaged in the dispute resolution business, in one capacity or another. Without an understanding of the so-called alternate methods of dispute resolution we cannot fully advise clients of the alternatives for resolving their particular dispute, which is the exact advice which they are paying us to provide.

I recently attended the 1990 Conference of the Society of Professionals in Dispute Resolution (SPIDR), in Dearborn, Michigan. I was particularly struck by the comments of retired Justice David A. Nichols of the Maine Supreme Court, who I met unobtrusively as one of the conference participants. Justice Nichols said that in his opinion the challenge in educating lawyers about ADR is to get them to understand that they play an integral role in the process, and that they can derive a real sense of personal satisfaction from its successes.

Justice Nichols was exactly right! All too often there is a perception that ADR options are a threat to the traditional functions of the bar, as well as a threat to the economic interests of attorneys. In fact, however, ADR options are nothing more than further creative options which we can offer to our clients. In appropriate cases, ADR procedures can help clients resolve their particular dispute in a manner which is best suited to its nature, the clients' interests, and their pocketbook.

Attorneys involved with the ADR process can get a tremendous satisfactions from it, whether serving in a neutral or an advocacy role. People involved with ADR procedures, moreover, need attorney advisers and advocates just as much as do those in litigation. It is only the forum and method of dispute resolution that is different, not the necessity for quality legal counsel and advice.

In any event, the challenge is already here. If Harvard's Professor Sanders in correct, the duty to understand and advise clients of ADR options already exists. The day does not seem far away when attorneys can and will be sued for failure to advise clients of such options. It only makes sense to educate ourselves about such matters now, before it is too late.



Estate Planning Corner

By Steven T. O'Hara

We all learned the term *"per stirpes"* in law school, but its meaning is not always clear. Consider the following typical clause: "I give my residuary estate to my descendants who survive me, *per stirpes*."

Suppose the testatrix had two children when she signed her will containing this clause. But suppose her children predecease her and she then dies, leaving three grandchildren.

Suppose two of the grandchildren are sons of child 1 and that the other grandchild is the son of child 2. Suppose the testatrix' residuary estate is $100,000.

Under these circumstances, the sons of child 1 might argue that the $100,000 is divided equally among the grandchildren, so each receives $33,333.33.

On the other hand, the son of child 2 might argue that he gets $50,000, while the other grandchildren get $25,000 apiece.

Accordingly, directions concerning the term "*per stirpes*" should be contained in any instrument in which the term is
used. For example, if the she intended her grandchildren to take their parents' shares, the testatrix could have provided:

> Assets that are left to, distributable to, or allocated for an individual's descendants who are living on a designated date "*per stirpes*" shall be divided in the following manner. One equal share shall be created for each then living child of that individual and one equal share shall be created for each child who is not then living of whom any descendant is then living. Each share for a child who is not then living shall be redivided in the same manner into subshares for that child's then living descendants. It is intended that even if no child of that individual is then living, the division shall still be made *per capita* for that individual's children of whom any descendant is then living.

By contrast, if she intended the grandchildren to take equal shares, the testatrix could have provided:

> Assets that are left to, distributable to, or allocated for an individual's descendants who are living on a designated date "*per stirpes*" shall be divided in the following manner. One equal share shall be created for each then living descendant in the nearest degree of consanguinity to that individual and one equal share shall be created for each descendant in that same degree of consanguinity who is not then living of whom any descendant is then living. Each share for a descendant in that same degree of consanguinity who is not then living shall be redivided in the same manner into subshares for that descendant's then living descendants.

These clauses are based on Schlesenger, *"Per Stirpes:" What Do You Mean?* 4 The Audio Estate Planner (May 1987), which is a good initial source to consult on this issue.

Pondering the ways of private practice

By Art Robson

The following is a summarization of the December 4th meeting of the Law Practice Management Session. (The author's assigned article was to cover the idiosyncrasies of practice in the Fourth Judicial District, often called the "Fairbanks Local Rules." With the beginning of a new year and the appointment of a new presiding judge (Dick Savell) the Rules were all changing and hence it was decided to postpone such an article until its prognosticatory value was self evident).

The Law Practice Management Session was conducted by Ken Kirk who has always been a sole practitioner, with John Lohff (who has been by himself in practice since getting out of the army), Mark Ertischek (who has had every kind of experience) and Ron Melvin (a former corporate man who has become a dyed-in-the-wool solo barrister).

The meeting convened with a question from this author concerning the obsolescence of a general law practice for a private practitioner because of (a) unpredictable court scheduling, (b) continuous rule and law changes and (c) the Bar's guideline requiring the prompt return of telephone calls.

Ken Kirk began by pointing out that he had originally considered practicing in Fairbanks but unfortunately found out he could only argue effectively in prose.

General practitioner by the wayside

The panel felt that it was *partially* true that general practitioners were going by the wayside but felt equally strongly that there would always be certain areas for general practitioners. Number one of these being smaller communities.

It seems self evident that specialized practice occur in urban areas. When there are only a handful of attorneys in town they almost have to generalize in order to provide all the needed services and in order to have enough work to stay alive. A second situation is where the practitioner has a source of clients who have general needs. For instance, one practitioner in Anchorage occasionally represents a large church. When he is not representing that church he gets a lot of work from the parishoners who tend to bring in all their various legal problems, and so he must be a generalist. There will always be situations where people have a steady source of clients (for whatever reason) and that person will have to remain a generalist because the clients aren't weeded out before they come to his or her office.

In discussing generalist's problems, our panelists speculated at how the generalist was to cope with the 40 rule changes found in the last packet (all of which a general practitioner should know). One panelist indicated he was getting ready to respond to a particularly odious proposed rule change and found that there was already a statute which had made his point for him. The embarrassing part of this (and the reason for anonymity) is that this was in the area of specialty of that panelist.

Generally speaking, the panel found it no more difficult to keep up with the mass of rule changes than the mass of changes in all broad areas of the law.

Some areas of the law are so esoteric that it is not possible for the generalist to have the depth of knowledge necessary. For instance, in a "discrimination in hiring practices" case, it often is material to know the exact date of the discrimination because both *rules of law* and *policies of bodies such as the Human Rights Commission* have changed over periods of time. And, as with a worker's Compensation case, a different date of injury may give rise to a different set of rights.

Is there a core area?

Addressing the question of a core area for generalists surrounded by peripheral specialties, the panel searched for a "natural pattern of practice." They seemed to find this relationship where a sole practitioner was concerned.

For instance, in a rural community you have to know wills, probate estates, even contests of probate, trusts, basic contracts, real estate law, some business arrangements, some bankruptcy, and even consumer law. A material reason to limit the number of these areas was found to be that you cannot charge a client for a bunch of research to bring yourself up to speed in areas that are traditionally considered "general." Once you get into an area where the public realizes that a problem is a bit esoteric, then you have the dilemma of whether to charge a client for the extra research to become familiar with the area, or simply to refer them to a specialist in the nearest urban center.

One member of the panel indicated that he no longer chose to handle divorce, child custody, or support, and that it required a very important client to lure him into the arena of an adoption. The court's apparent scattergun approach to what is in the "best interest" of a child makes for a lengthy bit of "free" research to get up to speed. Fellow panelists seemed to think that even if you took the extra time, the "best interest" of the child varies greatly from judge to judge. It may become a question of knowing which judge, and then researching that judge's individual attitude.

This brought forth suggestions of other areas such as children in need of aid cases where everything is sealed and you can't simply look for a parallel case and follow what the attorney in your situation did in that case.

Probate courts and bankruptcy court produce near paranoia because of their being somewhat close-mouthed and having a lot of unwritten rules. All agreed that it is particularly frustrating to have your pleadings returned by a clerk who coyly lets you know that "for several months now *everybody* has known that you don't do it this way anymore."

The gospel according to the clerks

When that pleading comes back with no explanation on it, you then have to get a clerk to give you a clue where you should search to find out what rule you have transgressed!

A member of the panel developed a system for getting rapport with the probate clerks but it did cost one hell of a lot of $40 per hour *guardian ad litem* work. This volunteer approach may never grow to be terribly popular.

The same panel member had an easier system for dealing with bankruptcy court. The system is a two-step one. (1) Call the bankruptcy court clerk's office and advise them that you haven't been into bankruptcy court for two years, and see if they will answer the question. If you get the answer, great. (2) If you don't get the answer you then take the second step which is to call somebody who goes to bankruptcy court regularly and plead with them to take the case.

Sale — ten percent off

The group discussed a recent ABA journal perspective on law practice. the *ratio descedendi* of the article was that we will be merchandising legal services in the same way as products are currently merchandises. Further, this doesn't seem to be very far down the road.

We don't have to deal with much of this in Alaska but there are nationwide firms such as the Hyatt firm, or even chain stores such as Sears, that directly advertise legal services.

This obviously will make inroads in the practice of those barristers without P.R. agents. In addition, it will probably change the approach which we must all take.

Since most national firms haven't discovered Alaska, we may not have branch offices of the legal giants opening up here, to further cloud the decisions of our loyal clients, as to whether to return to our more individualized approach.

At this point we do have the Bogle & Gates and Perkins Coie examples. These firms are regional and do have offices in Alaska. Whether they have actually changed the practice of law in Alaska with their approach is not yet apparent. Most panelists agreed that they had not felt any real impact as of this time, but all agreed that those firms had taken their full share of the meat and potatoes.

Fight the chains

For the sole practitioner and for the generalist, the competition is with the chain operations. The sole practitioner must now figure out a way to tie himself in with available expertise in one way or another. One of these ways is to use a computer for legal research. This does make a lot of expertise available that a sole practitioner could not otherwise afford to use. For the time being at least, this will make it possible for a sole practitioner to leverage his expertise, at a lesser price than dividing the fee with a genuine expert.

Available statistics indicate that you should spend one-fiftieth of your time on a computer, and all of the panel felt that this was a very reasonable estimate. This is certainly a lot less expensive than the large firm approach of throwing huge amounts of manpower at a project. It is probably the best that can be done at this state.

Human computers?

The panel felt however that the "computer advantage" was on the wane and they spent some time discussing whether paralegals would be the answer. On the subject of paralegals, several panel members felt that the *effect* of all of this was to compete with the big law firms by using the same means that the big law firms use, and that we would certainly lose at that game.

The subject matter discussed by the panel was sufficiently extensive that this report will be carried in three parts. Just imagine that the heroine is strapped to the cutting table in the sawmill and the great big saw is coming nearer and nearer and *nearer!*

Discipline imposed

Attorney X received a written private admonition for tape recording a telephone conversation with another lawyer with whom Attorney X was engaged in a personal dispute. This conduct violated Alaska Ethics Op. 78-1, which provides that a lawyer may not record any conversation without the consent and prior knowledge of all parties to the conversation. There is no exception that allows a lawyer to make such tapes in a "private" quarrel, nor is it a defense that taping was the only way to catch the other party in a lie. Clandestine taping is inherently deceitful under DR 1-102(A) (4). Counsel are reminded that violation of an ethics opinion may be grounds for discipline. See Bar Rule 15(a).

Attorney Y was concerned about Client's ability to pay the attorney's bill. Client agreed to set up a payment schedule and began making payments. Meanwhile Attorney Y commenced garnishment proceedings to recover a judgment entered for Client. When garnishment proceeds arrived, Attorney Y applied them in full to reduction of Client's account balance. Client protested this treatment but Attorney Y continued it until the account was entirely paid. Attorney Y received a written private admonition for violating DR 9-102(B)(4) (failure to deliver client funds on request) and DR 9-102(A)(2) (failure to retain client funds in trust pending resolution of a fee dispute).

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Disciplinary Matter Involving: DAVID M. CLOWER, Respondent.	)	Supreme Court No. S-2463
	)	ORDER

ABA File Nos. 86.66/76/209

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

Mr. Clower petitioned the court on August 22, 1990, to formally terminate his probation. The Alaska Bar Association filed a response to the petition on September 4 and supplemental responses on September 12 and November 6, 1990.

IT IS ORDERED:

The petition to formally terminate the probation imposed on Mr. Clower by the order of this court of March 18, 1988, is granted. Mr. Clower is hereby reinstated to active membership in the Bar Association.

Entered by direction of the court at Anchorage, Alaska on Dember 3, 1990.

DAVID A. LAMPEN, SR.
Clerk of the Supreme Court

DON'T FORGET TO RENEW YOUR SECTION MEMBERSHIP!

Your section membership renewal was sent to you this year on the same form as your Bar Dues Notice. *The deadline for Bar Dues and for Section Renewal is FEBRUARY 1.*

Section membership is *NOT AUTOMATICALLY RENEWED;* you must fill out the renewal form with your Dues Notice or send in a separate letter indicating the section membership(s) you are renewing. If you have any questions concerning your section membership, please call Barbara Armstrong, Assistant Director, or Virginia Ulmer, Executive Secretary, at the Bar Office at 272-7469.

CLE LIBRARY

EFFECTIVE JANUARY 1, 1991

VIDEOTAPES AND COURSE MATERIALS

(Unless otherwise noted)

Individual Video Rental	$20.00 per person
Course Materials Purchase	$25.00 per set
Total Cost	$45.00 per program

INDIVIDUALS WHO DO NOT RETURN VIDEOTAPES BY THE DUE DATE WILL BE INVOICED A $40.00 DUPLICATION AND RESTOCKING FEE FOR THE VIDEOTAPE.

The Alaska Bar Association makes every attempt to provide quality videotapes. However, in some instances, technical difficulties have resulted in tapes of less than desired quality. We regret the inconvenience and appreciate your patience and understanding.

Archived videotapes and materials from 1982 through 1986 are available upon request. A list of archived programs may be obtained from the Bar Office. Because archived programs are stored off-site, please allow 7-10 days for your request to be filled.

PURCHASE OF VIDEOTAPES

(Unless otherwise noted)

Bar member PURCHASE of videotape	$50.00 per program
Course Materials Purchase	$25.00 per set
Total Purchase Cost for Bar Member	$75.00 per program
Non-member PURCHASE of videotape (This fee includes course materials)	Cost of live registration for the program.

PLEASE REFER REQUESTS FOR VIDEOTAPE RENTAL/PURCHASE AND MATERIALS PURCHASE TO MARY LOU BURRIS OR BARBARA ARMSTRONG. ITEM AVAILABILITY MUST BE CHECKED AND INVENTORIED. THANK YOU.

CLE Video Replays

REPLAY LOCATIONS:

FAIRBANKS LOCATION: Please note there are now TWO locations: Attorney General's Office, Conference Room, 100 Cushman, Ste. 400 -- CLE Video Replay Coordinators, Ray Funk and Mason Damrau, 452-1568 AND Guess & Rudd Conference Room, 100 Cushman St., Ste. 500 -- CLE Video Coordinator, Jim DeWitt, 452-8986. Be sure to check location listed below.

JUNEAU LOCATION: Attorney General's Office, Conference Room, Assembly Building -- CLE Video Replay Coordinator, Leon Vance, 586-2210.

KETCHIKAN LOCATION: Law Offices of Ziegler, Cloudy, King & Peterson, 307 Bawden St. -- CLE Video Replay Coordinator, John Peterson, 225-9401

KODIAK LOCATION: Law Offices of Jamin, Ebell, Bolger & Gentry, 323 Carolyn Street -- CLE Video Replay Coordinator, Matt Jamin, 486-6024

REPLAY DATES:

***Real Estate Issues** (Anch. 11/8/90)
Kodiak: 1/19/91 Beginning at 10AM

***Effective Depositions** (Anch. 11/9/90)
Fairbanks: 1/18/91, 9AM-5PM, ATTORNEY GENERAL'S OFFICE
Juneau: 11/17/90, 9AM-5PM
Kodiak: 1/12/91, Beginning at 10AM

***FDIC & Resolution Trust Corp.** (Anch. 1/24/91)
Fairbanks: 2/1/91 9AM-1PM, GUESS & RUDD
Juneau: 2/2/91 9AM-1PM
Kodiak: No replay scheduled

***Employment Law: Wrongful Discharge** (Anch. 4/26/91)
Fairbanks: 5/10, 9AM-5PM, GUESS & RUDD
Juneau: 5/4, 9AM-5PM
Kodiak: 5/11, Beginning at 10AM

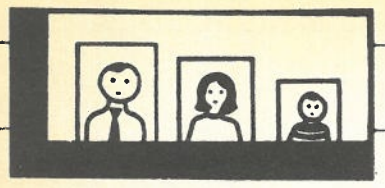
***Bankruptcy & Divorce** (Anch. 5/10/91)
Fairbanks: TBA
Juneau: 5/18, 9AM-1PM
Kodiak: 5/25, Beginning at 10AM

***Professional Responsibility** (Anch. 9/20/91)
Fairbanks: 10/11, 9AM-5PM, A.G.'s OFFICE
Juneau: 9/28, 9AM-5PM
Kodiak: 10/5, Beginning at 10AM

***4th Annual Alaska Native Law Conference** (Anch. 10/14/91)
Fairbanks: 11/15, 9AM-5PM, A.G.'s OFFICE
Juneau: 10/26, 9AM-5PM
Kodiak: 11/2, Beginning at 10AM

***Bridge the Gap** (Anch. 11/1 &2/91)
Fairbanks: 12/12 & 13, 9AM-5PM, A.G.'s OFFICE
Juneau: 11/9 & 11/16, 9AM-5PM
Kodiak: No replay scheduled

Please pre-register for all video replays. Registration cost is $35 per person and includes course materials. To register and for further information, contact MaryLou Burris, Alaska Bar Association, PO Box 100279, Anchorage, Alaska, 99510 – phone 272-7469/fax 272-2932.



People

Donna Burton, formerly with the USAF, is now with Delaney, Hayes, et.al.....**Allen Bailey**, formerly with Ross, Gingras, Bailey & Miner, has opened his own law office in Anchorage.....**Bruce Brown** has joined the firm of Winner & Associates .....**Norman Banfield** writes from Sun City, AZ: "After 55 years of active practice of law in Alaska, I will no longer practice and wish to change my membership to inactive" .....**Allen Dayan** and **Frederick Hahn** have formed the partnership of Dayan & Hahn.

Monte Engel has moved from Homer to Billings, MT....**Jeff Feldman** has relocated to the new law firm of Young, Sanders & Feldman.....**Peter Gamache** is the District Attorney in Kodiak.....**Dan Hickey** and **Victor Krumm** have formed the firm of Hickey & Krumm.....**James Hanley** has relocated from Kenai and is an assistant D.A. in Juneau .....**Bernadette Janet** has moved from Anchorage to Everett, WA.....**Eric Johnson**, formerly with Gilmore & Feldman, is now with OSPA.....**William Kantola** has relocated from Nome to Bakersfield, CA.

Allison Mendel and **Karla Huntington** have formed the firm of Mendel & Huntington.....**Philip (Jay) McCarthy** is now living in Flagstaff, AZ ..... **Kathleen McGuire** is now living in Seattle.....**Thomas Nave**, formerly of Gullufsen & Nave, has opened his own law office in Juneau.....**James Shine**, formerly with Hughes, Thorsness, has opened his own law office in Juneau.....**Ann Stokes** has moved from Fairbanks to Anchorage.

Paul Tony has relocated from Juneau to Anchorage.....**Marcia Vandercook** is now with the Alaska Sentencing Commission.....**Donna Willard** and **Richard Willoughby**, formerly of Willoughby & Willard, have each opened their own law offices in Anchorage.....**Lynn Allingham** has been appointed by the Board of Governors as the Alaska Bar Association representative to the American Bar Association House of Delegates. She is currently an assistant U.S. Attorney in Anchorage.

Former Superior Court Judge **Gerald Van Hoomissen**, formerly of Welches, OR, lists his new address as back in Fairbanks.....**Alex Swiderski**, formerly with the P.D.'s office in Palmer, is now with the with the A.G.'s office in Anchorage.....**Jordan Jacobsen**, formerly with Hughes, Thorsness, is now with Alyeska Pipeline Service Co.

Ann Waller-Reach has been appointed deputy municipal attorney for the Municipality of Anchorage, following the appointment of **Dick McVeigh,** as municipal attorney

Cowper appoints judges

Gov. Steve Cowper Nov. 30 announced the appointment of two new judges, Don Hopwood of Anchorage for Kodiak Superior Court and M. Francis Neville of Anchorage for Homer District Court.

"Both of these candidates are extremely able, energetic and will serve these communities well," Cowper said.

Hopwood, 39, was one of three candidates for the job, in private practice with the firm of Kay, Saville, Coffey, Hopwood & Schmid where he handled criminal defense and commercial cases. A 10-year Alaska resident, he also has worked as a judge advocate for the U.S. Air Force and as a private attorney in Nebraska.

Hopwood's law degree is from the University of Nebraska, he is a member of the American, Alaska, Anchorage, Iowa and Nebraska bar associations and has served on numerous bar association arbitration panels. He also is active in Big Brothers/Big Sisters, is a pilot and is single.

Neville, 41 , one of five candidates for the post, since 1982 had been an assistant state attorney general specializing in natural resources. She is a former attorney/advisor for the U.S. Department of Interior and earned her law degree from Arizona State University.

New attorneys take oath

Five new Fairbanks attorneys were admitted to the Alaska Bar Association in November. Pictured from left as they take their oaths are Neil Slotnick (clerk for Justice Jay Rabinowitz); Gina Tabachki (clerk for Judge Niesje Steinkruger); Barney Kollenborn (clerk for Judge Dick Savell); Sheri Donaldson (of the District Attorneys Office); and Cynthia Klepaski (Hughes, Thorsness, Gantz, Powell and Brundin). Also pictured is keynote speaker Roger Brunner, Esq., presenting admittee Klepaski with a Tootsie Roll Pop (not to be confused with a Wallypop). In a strange Fairbanks ritual, the 409 cleaner was used by the admittees to clean the court restrooms after the ceremony.

JUNE 6, 7 & 8, 1991

Circle these dates!

Come to Fairbanks for the 1991 ALASKA BAR ASSOCIATION ANNUAL CONVENTION! Portions of the Convention will be held in conjunction with the Alaska Court System. Brochure with details will be mailed shortly. For more information, call Barbara Armstrong at the Bar Office, 272-7469.

Dates: Thursday, Friday, Saturday — June 6, 7, & 8

Location: Westmark Hotel, Fairbanks

See you in Fairbanks — Extremely Alaska!

Bar Dues Payable February 1

Alaska Bar Association membership dues are payable February 1, 1991. Dues unpaid after that time accrue a penalty of $5.00 a week, per Alaska Bar Rule 61.

On April 1, the Bar Association will petition the supreme court to suspend those members who have not paid their dues or penalties.

If a member is suspended for nonpayment of dues, member dues continue to accrue throughout the period of suspension. In order to be reinstated to membership in good standing, a member must pay all the dues and penalties which have accrued. In addition, the member is subject to a determination that he meets the standard of character and fitness as set out in the Bar Rules.

For further information on bar dues, contact Deborah O'Regan at the Bar Office at 272-7469.

Federal judge leaves the court

Chief Judge Alfred T. Goodwin of the United States Court of Appeals for the Ninth Circuit announced in Pasadena on December 26, 1990 that he would step down as chief judge of the United States Courts for the Ninth Circuit, effective January 31, 1991. He will assume senior status on February 1, 1991. Circuit Judge J. Clifford Wallace of San Diego will succeed him on the basis of seniority.

In his announcement, Chief Judge Goodwin said, "I became eligible for senior status two and a half years ago, but deferred that action because of the honor and the professional challenge of presiding over this great court. . . I have been happy with that choice and have enjoyed the honor and privilege of being Chief Judge of the Ninth Circuit as it rounds out its first century as the federal appellate court for the Far West."

Judge Goodwin ascended to the position of chief judge on the basis of seniority on June 15, 1988, when Chief Judge Emeritus James R. Browning of San Francisco stepped down. During Chief Judge Goodwin's term, the federal courts in the West saw significant expansion, including an increase of almost a dozen new district court judges and over two dozen new bankruptcy court judges -- for a total of more than 325 federal judicial officers and 4,000 judicial employees in nine western states.

In addition to growth in personnel, Ninth Circuit courts over the past two and one-half years have been involved in a wide array of projects and programs to improve the administration of justice. Two new death penalty resource centers — in California and Arizona have been established to improve the quality of legal representation for prisoners on deathrow. Ninth Circuit lawyers and judges were actively involved in the successful congressional efforts to improve salaries for federal judicial officers across the country. Others worked closely with Senator Joseph Biden to draft a law to help the courts adopt methods and procedures to reduce costs and delays in civil litigation. Chief Judge Goodwin was a central figure in diverting recent

Continued on page 22

Cole taps Blankenship

Alaska Attorney General Charles E. Cole announced Dec. 6 the appointment of Fairbanks lawyer Douglas L. Blankenship as his deputy attorney general. He will work in Juneau.

Blankenship, 38, was in private practice in Fairbanks with the law firm of Birch, Horton, Bittner & Cherot dealing in commercial law and litigation. In naming Blankenship, Cole said, "I was looking for a disciplined administrator with extensive private practice in law."

Blankenship replaces Ron Lorensen who was appointed assistant attorney general for legislation and regulations. Lorensen has served as deputy attorney general for more than 10 years and has been with the Department of Law for 15 years. In his new position, he replaces Art Peterson who retired last October.

A 1980 graduate of Gonzaga University School of Law, Blankenship first moved to Fairbanks in 1975 but left in 1980 to attend law school. He has made Fairbanks his permanent home since 1985. Blankenship and Cole, also from Fairbanks, have known each other for more than 10 years. "I'm honored to take the position of deputy attorney general, and I will work faithfully to advance Governor Hickel's agenda for the state," said Blankenship.

Randy Clapp relaxes over the holidays with his mother, Marion, who confesses that the Alaska Bar Rag is a favorite at her residence in Arizona.

CLE Calendar

1991 PROGRAMS

#12 Jan 18 4.2 cles	Estate Freezes - ALI-ABA Video Replay - 4 hrs.	Hotel Captain Cook-Anchorage
#02 Jan 24 4.4 cles Half Day	FDIC and Resolution Trust Corp.	Hotel Captain Cook-Anchorage
#08 Mar 1 1:30pm-4pm cles tba	Off the Record - FAIRBANKS	Regency Hotel- FAIRBANKS
#11 Mar 7 Half Day cles tba	Debt Forgiveness Income	Hotel Captain Cook-Anchorage
#01 Mar 12 & 13 2 Half Days 7.2 cles	HAWAII CLE: Making and Meeting Objections -- Faculty: Barbara Caulfield, NITA Trainer	Turtle Bay Hilton-Oahu
(These dates fall during the spring school vacation for the Anchorage and Fairbanks School Districts.)		
#13 Apr 12 cles tba	How to Win With the Evidence You've Got	Hotel Captain Cook-Anchorage
#07 Apr 18 cles tba	Environmental Law	Hotel Captain Cook-Anchorage
#04 April 26 cles tba	Employment Law: Wrongful Discharge	Sheraton Anchorage Hotel
#09 May 10 Half Day cles tba	Bankruptcy & Divorce	Anchorage Hilton Hotel
June 6, 7, 8 cles tba	ANNUAL CONVENTION	Westmark Hotel- FAIRBANKS
#05a Sep 19 9am-2pm cles tba	Professional Responsibility- KETCHIKAN	Cape Fox Hotel- KETCHIKAN
#05b Sep 20 9am-4pm cles tba	Professional Responsibility- ANCHORAGE	ANCHORAGE Hilton Hotel
#03 Oct 3 & 4 cles tba	Child in Need of Aid & Juvenile Delinquency Issues	Hotel Captain Cook-Anchorage
#10 Oct 14 cles tba	4th Annual Alaska Native Law Conference	Hotel Captain Cook-Anchorage
#06 Nov 1 & 2 2 full days cles tba	Bridge The Gap	Anchorage Hilton Hotel

For further information on any of the above programs, contact the Alaska Bar Association, PO Box 100279, Anchorage, AK 99510, phone 907-272-7469, fax 907-272-2932.

Solid Foundations

By Mary Hughes

In the first Interest on Lawyers' Trust Accounts litigation in several years, a petition seeking declaratory relief has been filed with the Indiana, Supreme Court. The issue arises from a conflict between the courts February 21, 1990 decision entitled *In the Matter of Indiana State Bar Association's Petition to Authorize a program Governing Interest on Lawyers' Trust Accounts,* 550 N.E,2d 311 (Indiana 1990) and the IOLTA Act promulgated by the Indiana legislature. The court's February decision denied the State Bar Association's petition and determined that IOLTA violated the rules for the discipline of attorneys and the rules of professional conduct. In particular, the court could not endorse a program that allowed "interest" on client funds to be paid to a bar foundation charged with the responsibility of dispensing the funds for the provisioning of legal services to the disadvantaged. As was evident by the dissent, the majority's bottom line was that the banks should remain the recipients of "interest" earned on "non-interest-bearing" Indiana lawyers' trust accounts:

> Let there be no mistake: interest is being earned on "non-interest-bearing" Indiana lawyer trust accounts. This Court can choose to continue directing that interest to the financial institutions holding the accounts or it can choose to direct it to help people too poor to hire counsel or to under-privileged or minority students seeking legal education. The Indiana Bankers Association has informed this Court that its members do not object in principle to the legal profession's proposal that the interest benefit the disadvantaged. This Court should not object, either.

Id. at 316.

The Indiana IOLTA Act which permits attorneys to participate with immunity from discipline contravenes the Supreme Court's opinion. The declaratory lawsuit asks for a clarification of the constitutionality of the legislative program based upon the separation of powers. The opt-out legislative program is currently on hold until the court makes its ruling. Hearings were expected last fall and a decision should be forthcoming.

Indiana is the only state in which an IOLTA program has been challenged recently. The programs in Alaska as well as the other 48 states are functioning extremely well and as reported by the Alaska Bar Foundation, over $200,000 has been disbursed since Alaska's IOLTA program inception in 1986. Nationwide, IOLTA grant awards now total in excess of $200,000,000.

Additional information may be obtained on Alaska's opt-out IOLTA program from any of the Alaska Bar Foundation Trustees or Deborah O'Regan. Updates on IOLTA cases will be continually provided.

For champagne, it's all in the cuvee

By Stephan A. Collins

"Like sipping stars" or something to that effect is what Dom Pérignon of Hautvillers France purportedly exclaimed when he was asked to describe the sensation of drinking Champagne.

Dom Pérignon, or a contemporary of his, was a Benedictine monk who has been given credit for developing the sparkling wine most associated with luxury and celebration. The likely reason that Champagne is most associated with celebration is that those stars of tiny carbon dioxide bubbles enhance the body's absorption of the alcohol in the wine.

It could be said that if there had been no Dom there would not have been Don (Ho, that is) and his tiny bubbles.

The cuveé

When Dom Pérignon created his sparkling wine 200 years ago, it became history's first designer wine. The Dom designed a blend of different grape varieties from different vineyards to create a unique composition of flavors and character. This composition is known as the cuveé. Each Champagne maker creates its own cuveé and the cuveé distinguishes one maker from another. The maker maintains this cuveé as near as possible from year to year and it is the standard product the consumer becomes familiar with.

Some of the best cuveé are the result of the blending of up to 40 different wines from different origins and different years. Whenever the bottle does not designate the year of harvest (this is known as NV or non-vintage champagne), the bottle contains only the cuveé. Vintage champagne (the bottle will designate the vintage year) contains primarily wine resulting from that year's harvest with a blend of the cuveé.

Vintage harvests portend qualities that the maker believes will be exceptional extensions of the maker's cuveé. While vintage Champagnes often are extremely enjoyable for the subtle differences in the accustomed quality of wine, NV Champagnes are often more enjoyable than vintage Champagne because the consumer is at least familiar with product that has proven enjoyable in the past. However, because a cuveé depends on so many different variables, cuveés, like lawyers, should never be thought of as fungible.

If the consumer is already familiar with a make of Champagne and is unsure of a vintage's quality, the consumer should stick with an NV Champagne. The purchase will not likely result in disappointment. (This is especially true when purchasing Champagne at a restaurant, since vintage Champagne always is more expensive than NV).

The grapes

The black Pinot Noir grape is the predominant variety used in making Champagne, with the White Chardonnay grape coming in second. Only perfect unbroken grapes are pressed separately. The blending of the juices occurs afterwards. If the cuveé is made entirely of Pinot Noir, the resulting Champagne is called Blanc de Noir (white wine made with black grapes). If the cuveé is made entirely from Chardonnay grapes, the resulting Champagne is called (you guessed it) a Blanc de Blancs.

Virtually all Champagne is white but some makers produce rosé Champagne, ie Pierrier Jouet. Rosé Champagne is made by adding a small amount of red still wine to white champagne. Rosés are often more expensive and slightly more fruity than their white counterparts. However, rosé Champagne should not be confused with that infamous pink stuff served by my friend Andre at his famous dinners.

The method

If Dom Pérignon had stopped after blending his cuveé, he probably would not have become as famous as he did. Blending wines is quite common; many Bordeaux and Burgundy wines are the result of blending, as are Ports and Sherrys. As already mentioned, what made the Dom famous was his tiny bubbles. Natural carbonation occurs in some wine varieties, but the carbonation is not as strong as in Champagne. What the Dom did to produce a wine with as much sparkle as his was develop the process of using a second fermentation in a tightly sealed bottle. The process that the Dom developed is known as the "méthode champenoise" (quite appropriately, the Champagne method.)

The méthode champenoise is a fairly simple but long process. The maker first places a dose of cuveé in a heavy glass bottle. Heavier glass is used to avoid having the bottle shatter because of the ventual increase in pressure. (Now there is something for a products liability attorney to salivate over). The maker then adds a precisely measured mixture of sugar and yeast to promote the second fermentation that produces the carbon dioxide. This mixture of sugar and yeast is known as the Liquer de Tirage. Because the bottle is then tightly sealed with a flared cork and wire cap, the resulting carbon dioxide is forced into the body of the wine itself and is released as the tiny bubbles when the bottle is opened. The sealed bottles are then placed in a cool subterranean cellar until the wine matures.

During the maturation period, the sediment produced from the addition of the Liquer de Tirage is forced to the top of the bottle by a slow and elaborate process of rotating and tilting the bottle end-up. Once all of the sediment has collected at the top of the bottle and the wine is clear, the neck of the bottle is then immersed in a solution of freezing brine. This immersion causes the sediment to freeze into a plug that is ejected from the bottle once it is uncorked; this step is known as the "Dégorgement."

The alchemy

Because some of the wine is lost through the dégorgement, the maker replaces the lost volume with a dose of more wine and another sugar solution known as the "Liqueur D'Expedition." The addition of this liqueur is known as the "Dosage" and is the reason for the differences between grades of the wine, but not quality. Pre-dosage Champagne is quite dry. Beginning with the driest and progressing to the sweetest, the grades of Champagne are as follows: Brut 0-1 percent dosage; Extra Dry 1-2 percent; Dry (Sec in French) 2-4 percent; Demi-Sec 4-6%; and Doux 8-10 percent. These last two grades are quite sweet and for most American tastes are best suited for dessert. After this final step, the bottles are washed and prepared for shipment to the consumer.

California sparkle

Although only sparkling wines made in the Champagne region of France can call themselves Champagne, a number of other parts of France and other countries of the world make quite enjoyable sparkling wines.

Some sparkling wine makers would have the consumer believe that the méthode champenoise is the only thing that matters in making a sparkling wine. This is only half the truth; the quality of the wine will depend on the quality of the grapes used in making the cuveé. If a vineyard has developed a reputation of producing could Pinot Noir or Chardonnay grapes, then there is the possibility that the sparkling wine will be interesting and enjoyable. The consumer should not avoid a sparkling wine merely because it is not Champagne. The consumer should let the palate lead where a snobby nose fears to tread.

A number of years ago, many of the more famous Champagne makers began buying California vineyards or going into joint ventures with existing California vineyards to produce high quality sparkling wines. The Champagne makers provided the experience and prestige and the Californians provided the quality grapes. In the last few years, the California counterparts have literally given their French older brothers a run for the money.

Some of these Franco-American (no pun intended) products have been extremely satisfying. Some of the Champagne makers and their California products are Mumm—Domaine Mumm; Moét & Chandon—Domaine Chandon; Piper Heidsieck—Piper Soncoma. Tattinger also recently produced a California sparkling wine.

The Champagne Region of France

In this day of increasing costs of importing wines from France, the consumer would be very wise to try these. A prices running between $15 and $25, the consumer cannot seem to go wrong. If the wine does not turn out to be as satisfying as anticipated, the cost and possible intoxication can be written off to experience.

Continued on page 18

More techniques to avoid bankruptcy tax

By Thomas J. Yerbich

Although debt forgiveness income must always be determined in the manner set forth as discussed in previous Bar Rag articles, IRC § 108(a) excludes (or, rather, provides for its non-recognition) debt forgiveness income from gross income under certain circumstances.

In our context, the two with which we will be concerned are indebtedness discharged when the debtor is either insolvent or in a Title 11 (bankruptcy) case. As a general rule, debt forgiveness income is not recognized (not included in gross income) in either instance — bankruptcy or insolvency.

Insolvency

In the insolvency situation the amount of non-recognized (excluded) debt forgiveness income excluded cannot exceed the amount by which the debtor is insolvent [IRC § 108 (a)(3)]. That is, if the debtor is insolvent by $20,000, that is the maximum debt forgiveness income excluded from gross income; any amount in excess of that amount would be recognized and included. A taxpayer is insolvent when the aggregate of liabilities exceed the aggregate FMV of assets [IRC § 108(d)(3)]. There is, however, no limitation as to amount on debt forgiveness income excluded from gross income in a bankruptcy proceeding.

Oh boy, you may think, a taxpayer's problems are resolved if he can just become insolvent or file bankruptcy before debt forgiveness occurs!

Not quite so because, as with many tax benefits, there are "hooks" or conditions which accompany the exclusion rule of IRC § 108(a). IRC § 108(b) requires that the amount of debt forgiveness income not recognized (excluded) under IRC § 108(a) be applied to reduce certain tax attributes. This reduction is applied in a hierarchical order:

(1) NOL;
(2) general business credit;
(3) capital loss carryovers; and
(4) basis of property. The reduction is on a dollar-for-dollar basis (except for the general tax credit which is 33 1/3 cents for each dollar). Thus, if a taxpayer has $30,000 excluded debt forgiveness income: first NOL will be reduced by $30,000; second, if no NOL, general tax credits will be reduced by $10,000; third, any unapplied, unrecognized debt forgiveness income is applied to capital loss carryover; and fourth, if not applied to any of the first three, a taxpayer's basis in property is reduced by $30,000. Note that the amount of the excluded debt forgiveness income is reduced by the amount that is applied to each succeeding layer in the hierarchy. For example, if $10,000 is applied to reduce NOL to zero; $6,000 is applied to reduce $2,000 of general tax credit to zero; $4,000 is applied to reduce capital loss carryover to zero; the adjusted basis in property is reduced by the remaining $10,000.

Also remember that Treas. Reg. § 1.1001-2(a)(2) includes the amount that could, or would, if not excluded under IRC § 108, be debt forgiveness income.

Bankruptcy

In a bankruptcy proceeding, the impact or effect on the debtor is more subtle and may even be nonexistent. In a chapter 7 or 11, the reduction in tax attributes required by IRC 108(b) are applied to the bankruptcy estate, which is treated as the taxpayer, rather than to the individual debtor [IRC § 108(d)(8)]. Thus, any reduction in the tax attributes will generally directly affect only the bankruptcy estate not the debtor. However, a reduction in tax attributes in the bankruptcy estate may affect the debtor.

As you may recall from the first article in this series, all tax attributes possessed by the debtor at the time the petition is filed became part of the bankruptcy estate. In addition, to the extent the trustee does not use those pre-petition tax attributes, they pass back to the debtor for future use [BC § 346(i)]. Thus, to the extent those tax attributes are reduced by IRC § 108(b), they will not be available for use by the debtor post-bankruptcy. Furthermore, the rule does not apply for the purposes of applying IRC 1017 (reduction in basis rules) to property transferred from the estate to the debtor.

So far so good. If we get down to adjusting the basis of property, matters get even more complex. The basis in what property gets reduced? [IRC § 108(b)(2)(D)(i) only refers to "the property."] The amount excluded from income under IRC § 108(a) is applied to reduce the basis in property held by the taxpayer as of the beginning of the taxable year next immediately following the taxable year in which the discharge occurs [IRC § 1017(a)]. The Precise Property to which the reduction is applied is determined and prescribed in Treasury Regulations. Existing Treasury Regulations were issued in 1956 and although those regulations have not been updated to reflect the 1980 changes in the IRC, they continue to provide authoritative guidance [See S. Rep. 96-589, 96th Cong. 2d Sess. p 14] in determining the order of reduction.

Once again the order for reduction in basis is hierarchical in nature [Reg. §§ 1.1016-7(a), 1.1017-l(a)]:

(1) If the indebtedness was incurred to purchase specific property (other than inventory or receivables), whether or not a lien has been placed against that property, the basis of the debt-financed acquired property is reduced by the amount of the unrecognized debt forgiveness income.

(2) If the indebtedness was secured by a lien against specific property (other than inventory or receivables), the basis in such property is reduced by the unrecognized debt forgiveness income.

(3) Any excess of unrecognized debt forgiveness income, after application as specified in (1) and (2) is then applied, pro rata relative to the adjusted basis in each asset, to all other property (other than inventory or receivables) of the taxpayer.

(4) Finally, if the unrecognized debt forgiveness income is not exhausted by application to the first three categories, any remainder is applied to inventory and receivables pro rata (relative to adjusted basis in each asset).

For individuals, the application rules in the preceding paragraph apply only to property held in a trade or business. If the unrecognized debt forgiveness income is not exhausted by application to trade or business property, two other hierarchical rules are applied to individuals:

(1) Basis in property held for the production of income is reduced pro rata (relative to adjusted basis in each asset); and

(2), if not exhausted by application to such production of income property, the balance is applied to reduce pro rata (relative to adjusted basis in each asset) the bases in all other property (not used in trade or business or for the production of income).

There are some special limitations which apply.

- First, basis reduction may not exceed the amount by which the aggregate bases in debtor's assets exceeds the aggregate of the debt remaining, measured immediately after the debt is discharged [IRC § 1017(b)(2)].
- Second, unrecognized debt forgiveness income is not applied to reduce the basis in any property which the debtor treats as exempt under BC § 522 [IRC § 1017(c)(1)]. Please note that the debtor must have actually claimed the property to be exempt. Also, note that although there is no authority on the subject, it should be presumed that the Service will take the position that the § 1017(c)(1) limitation will only apply to the extent that the asset was, in fact, exempt. Thus, if the debtor claims a residence as exempt, the amount excluded from the computation will be the lesser of the amount actually claimed as exempt (the "equity") or the maximum amount exempted by the otherwise applicable exemption statute.

• Champagne primer

Continued from page 17

The service

Champagne is predominantly served chilled. In achieving a chilled bottle, never forget that Champagne is first of all a white or rosé wine. Any good bottle of sparkling wine should never be kept at any temperature below 45 degrees Fahrenheit for any extended period, like in a refrigerator. Most refrigerators are kept at a temperature of 38 to 40 degrees Fahrenheit. Not only does a cooler temperature damage the wine, it removes some of the pleasure of the wine.

A reason that poor quality sparkling wine, like low quality beer, is served ice-cold is because the cold masks the terrible taste. Keep the bottle in a cool environment until just before serving; the sage advice is to keep the bottle with the potatoes and not the cucumbers. This applies to white still wines as well.

When a bottle is needed, chill it to about 45 to 50 degrees Fahrenheit by placing it in the refrigerator two hours before the opening.

If some bubbly is needed before the fire dies, place the bottle in a bucket filled with ice and cold water. According to some principle of physics that I do not seem to readily recall from high school, anything immersed in such a contraption will chill faster than in a bucket of ice. Because some elevated concept of physics is involved, I like to call this contraption a super coolader. By immersing the bottle in such a contraption the wine should chill out in about 20 minutes, (during which the fire can be well stoked in anticipation of the coming stars).

By the way, the Champagne maker Moet & Chandon owns the Abbey de Hautvillers where Dom Pérignon contemplated God and the stars. This is how Dom Perignon's name continues to be heard to this day, they named their top of the line Champagne after him.

Bar Rag letters welcome

YOUNG LAWYERS MAKE THE GRADE

By Dale Perrigo
and Max Huffman

Anchorage Youth Court recently finished its third year of operation. During 1990 it successfully completed 15 actual criminal cases. sent an Anchorage Youth Court team to the National Mock Trial Competition in Portland, Oregon, received an IOLTA grant and its 501(c)3 non-profit status. Anchorage Youth Court thanks all those student attorneys, senior attorneys and supporters who have helped to make 1990 a successful year for Anchorage Youth Courts.

Anchorage Youth Court is planning an exciting 1991. It will continue to receive two to three new cases per month. Student attorneys are prepared to handle these cases but will continue to need help from senior attorneys with expertise in criminal law. If you can donate three to five hours to help high school students trying real cases please contact the Anchorage Youth Court office. The Youth Court would certainly appreciate your assistance.

The Youth Court's next major event will be the swearing-in ceremony for new members. Nearly 250 candidates took the ten work training course this fall and sat for their bar exam on December 8, 1990. The successful new members' swearing-in will be held February 3, 1991 at the Alaska Supreme Court Room with a reception afterwards at the Hotel Captain Cook.

Planned for March 1 and 2, 1991, is the second Alaska State Mock Trial Competition. Teams from around the state will be competing in trying a mock case. Adult attorneys who would like to help student teams prepare for this event or to act as judges in the State Mock Trial Competition should contact Mike Whits of Hartig, Rhodes, Norman, Mahoney and Edwards at 276-1692 or the Anchorage Youth Court office at 274-5986,

Finally, Anchorage Youth Court's dreams for 1991 include being able to sponsor a NITA (National Institute of Trial Advocacy) type seminar for Anchorage Youth Court members as well as preparing a case that will be broadcast nationwide. Anchorage Youth Court will continue to hold its monthly business meetings, law related career tours, CLE seminars and skill building video presentations.

The Youth Court is pleased to be able to continue to operate this year with funds raised by the Anchorage Youth Court Bar Association, grants from the Anchorage Bar Association and IOLTA, and numerous charitable donations from individuals. The Anchorage Youth Court is especially appreciative of the dedicated adult and student volunteers who make Anchorage Youth Court Possible, The Youth Court can always use more help and if you would like to donate your time, expertise, goods or money please call the Anchorage Youth Court office and ask for Sharon Leon at 274-5986, Blythe Marston at Bogle & Gates (276-4557), or John Ealy at Heller, Ehrman, White and McAuliffe (277-1900).

Young Lawyers sponsoring statewide trial competition

The Young Lawyer's section of the Anchorage Bar Association is sponsoring the Second Annual Alaska State High School Mock Trial Competition. The competition will be held in Anchorage on March 1 and 2, 1991. The competition will consist of 32 teams from High Schools around the state who will either defend or prosecute a hypothetical criminal case. The winner of the competition qualifies for the National High School Mock Trial Competition in New Orleans.

Attorneys are needed to act as competition judges. Competition judges may serve as the "trial judge" as well as scoring the competitors. Judges are needed for two rounds on the evening of Friday, March 1, and for two rounds on the morning of Saturday, March 2.

Donations are also needed to help subsidize the State champions trip to the national competition.

Anyone interested in serving as a competition judge or providing a donation should contact:

Michael D. White
Hartig, Rhodes, Norman,
Mahoney & Edwards,
717 "K" Street
Anchorage, Alaska 99501-3397
276-1592.

In Southeast, the planes shun the clouds

It was Wednesday afternoon at four o'clock - the late November cutoff time for landing jets at the Petersburg airstrip. Everyone in the airport was looking out over Scow Bay for the landing lights of the Alaska 737 that might take us south to Ketchikan. Somewhere in the sky the plane was circling around while a little snow shower moved up Frederick Sound.

At 4:15 p.m. ground personnel told us that the jet had overflown Petersburg. There would not be another flight out for 23 hours. It looked like I would be trapped in paradise for another day.

Petersburg is a pleasant little town. I hope this was made clear in the article I wrote for the November-December volume of the Alaska Bar Rag. Unfortunately, the same mountains, trees, and waters that provide its beautiful scenery also makes it one of the toughest places to land in Southeast Alaska.

I had flown up to Petersburg the previous Monday morning with plans to be back home in Ketchikan the next day. The flight left Ketchikan on time and flew North to Wrangell. We sat on the ground in that town for a couple of hours while the flight crew waited for a snow squall to pass through Petersburg. I passed the time sipping free orange juice and thumbing through a copy of *Field and Stream*. There are always many copies of this magazine on the jets that service Southeast Alaska for Alaska Airlines.

The little storm must have taken a shine to Petersburg because it settled in over the Wrangell Narrows. The flight crew crossed Petersburg off Flight 65's itinerary and flew directly from Wrangell to Sitka. They kicked us off the plane there to wait for the Juneau weather to clear.

For some reason Flight 65 was out of peanuts so we were all pretty hungry when the plane reached Sitka. Most of the passengers squeezed into the airport cafe for lunch.

As we entered we passed passengers off a flight from Anchorage to Sitka as they left the restaurant. They had also been killing a few hours in Sitka waiting for Juneau weather to improve. This produced a pleasant surprise. Among the marooned passengers was a Juneau psychiatrist who I was having a tough time contacting over the phone.

After button-holing the doctor and having lunch, I reboarded our aircraft. Flight 65 was officially over for the day and we were now on Flight 64 heading for Petersburg and points south.

The plane landed in Petersburg on the first try about 3 p.m. Twenty-four hours later, with my work done, I was back at the airport waiting for a flight back home to Ketchikan. It was a fruitless exercise. Another snowstorm had settled in over Petersburg. Thick, heavy flakes obscured the runway and forced Flight 64 to overfly the town.

"Ok," I thought, "I can catch the early morning prop flight to Ketchikan and be there in time for the normal start of business." A southbound ferry was scheduled to leave at 3:45 a.m. the next day but it wouldn't arrive in Ketchikan until 7 o'clock the next evening. I opted for the plane.

The plane never came. I spent a large portion of the next morning pouring over ancient copies of the National Geographic so thoughtfully provided by Ketchikan Air for their stranded passengers. Every once in awhile, the airline's Wrangell office would call with weather updates. Our plane was stuck in Wrangell and snow would soon close the runway.

Petersburg weather was above landing minimums but I knew that could change at anytime. Wrangell Air finally threw in the towel, leaving that day's Alaska Airlines' Flight 64 as my only hope to make it home. After spending time in downtown Petersburg with my clients I returned to the airport to wait, with the rest of the oft denied passengers for Flight 64. As I stated before, at 4:15 p.m. the ground crew told us that the plane had overflown Petersburg. I picked up my ticket, secured reservations for tomorrow's flight and kicked myself for not taking the 3:45 a.m. ferry. At this rate I would have to work all weekend to catch up.

On my way out the door someone grabbed me and said the jet would try again. Minutes later it touched down on the wet tarmac with reverse thrusters screaming its arrival in Petersburg. I joined the other shell-shocked passengers for a flight back to Ketchikan and home.

The story does not end there.

While I was in Petersburg the Ketchikan roads had turned to icy chutes. After a harrowing ride down South Tongass Avenue I made it to base of our driveway. The old Toyota couldn't make a purchase on its slippery surface so I had to park it on the road and walk to the house.

I was heavily loaded for the trip. Besides luggage and files there was a brown bag of bakery goods from the Petersburg bakery to carry up the hill. This bag of goodies was a bribe to gain entry into my house after the prolonged absence. By much effort I crabbed my way up the driveway and into the house without major incident.

After dinner that night I cracked open the atlas and discovered that Petersburg is less than 100 miles from Ketchikan.

Never has one flown so far and waited so long to travel such a short distance. (Sorry Winston, where ever you are.)

CLE Honor Roll, 1990

We want to acknowledge the contribution of and participation by the following Bar members as faculty, program coordinators, planning committee members and/or video replay coordinators for our 1990 CLE programs. Without their hours of volunteer assistance, the Bar CLE programs would not be possible.

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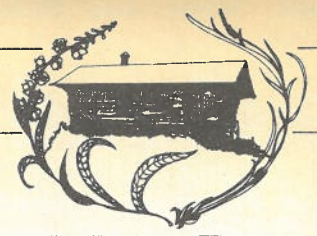
We regret any omissions or errors.



Historical Bar

By Robert Hughes

Only one man escaped from Macquarie Harbor twice. His name was Alexander Pearce (1790-1824), a little, pockmarked, blue-eyed Irishman from County Monaghan who had been transported for seven years at the Armagh Assizes in 1819, for stealing six pairs of shoes. He had arrived in Van Diemen's Land in 1820, and as an assigned servant he gave continuous trouble to his masters by running away, stealing and getting drunk. He soon learned enough bush skills to "stay out" for three months at a stretch with some other absconders. Flogging did not impress him. Eventually, in 1822, he was sent to Macquarie Harbor for forging a two-pound money order and absconding from service. On September 20, 1822, Pearce seized an open boat from Kelly's Basin on Macquarie Harbor, where he had been working in a sawpit gang. Seven other convicts piled into the craft with him. Two of them had already tried to escape from Van Diemen's Land by stealing a schooner moored in the Derwent estuary: Matthew Travers, an Irishman under life sentence of transportation, and Robert Greenhill, a sailor from Middlesex. For that failed escape, they had been sent to Macquarie Harbor. The others were an ex-soldier, William Dalton (perjury in Gibraltar, fourteen years); a highway robber, Thomas Bodenham; William Kennelly, alias Bill Cornelius, transported for seven years and re-sentenced to Macquarie Harbor for an escape attempt; John Mather, a young Scottish baker, working a seven-year-sentence and then sent to Macquarie Harbor for forging a £15 money order; and a man called "Little Brown," whose Christian name is unknown and who cannot, due to the commonness of his surname, be identified.

Flogged with the adrenaline of escape, the eight men rowed across the harbor, ran the boat ashore, smashed its bottom with a stolen axe, and set out on foot. At first they made good time through the dank maze of the shore forest, lugging their axes and their meager rations. They spent the night on the slopes of Mount Sorrell, not daring to light a fire, and struck east the next morning toward the Derwent River, where they planned to steal a schooner, sail it downstream past Hobart and out into Storm Bay and so "proceed home," 14,000 miles to England. The first leg of their route lay across the Darwin Plateau, keeping to the north of the Gordon River.

Before them, although they did not know it, lay some of the worst country in Australia. Even today, bushwalkers rarely venture into the mountains between Macquarie Harbor and the inland plains: fold after fold, scarp on scarp, with giant trees growing to a hundred feet from clefts in the steep rock where, clambering along rotted limbs or floundering through the entangling ferns and creepers, one cannot possibly move in a straight line. The convicts struggled along in a gray, dripping twilight from dawn to dusk, with one man beating the scrub in front "to make the road." At night, like exhausted troglodytes, afraid of winds and shadows, they lit a fire in the cleft of a rock and huddled around it to sleep as best they could. Within a week, the weather turned to gales and sleet and their little store of tinder was soaked. Then they finished the last of their rations. Hungry, cold and failing, the band struggled for another two days through "a very rough country . . . in a very weak state for want of provisions."

But now the fugitives were straggling. "Little Brown . . . was the worst walker of any; he always fell behind, and then kept cooing (sic) so that we said we would leave him behind if he could not keep up better." No man felt able to gather all the wood for a fire. In the feeble hysteria of exhaustion, they began to squabble about who should do it; in the end, each convict scraped together enough twigs for himself and eight little fires were lit. Kennelly made what might or might not have been meant as a joke. "I am so weak," he said to Pearce and Greenhill, "that I could eat a piece of a man."

They thought about that all night, and "in the morning,

"Pearce's narrative goes on,

> there were four of us for a feast. Bob Greenhill was the first who introduced it, and said he had seen the like done before, and that it eat much like a little pork.

John Mather protested. It would be murder, he said; and useless, too, since they might not be able to choke the flesh down. Greenhill overrode him:

> "I will warrant you," said Greenhill, "I will well do it first myself and eat the first of it; but you must all lend a hand, so that you may all be equal in the crime." We then consulted who should fall. Greenhill said, "Dalton; as he volunteered to be a flogger, we will kill him."

In these flat declarative outlines, the scene might come from an Elizabethan revenge-tragedy: the conclave, the ritual to overcome the great taboo, the literary diction, the avenging choice of the flogger as victim. Indeed, it may be too pat; Dalton was never a flogger at Macquarie Harbor, and other "literary" touches in the narrative may come from the amanuensis to whom Pearce eventually dictated his story. But in any case, Dalton was killed. He fell sound asleep at about three in the morning, and Greenhill's axe

> struck him on the head, and he never spoke a word after . . . Matthew Travers with a knife also came and cut his throat, and bled him; we then dragged him to a distance, and cut off his clothes, and tore out his inside, and cut off his head; then Matthew Travers and Greenhill put his heart and liver on the fire and eat it before it was right warm; they asked the

Continued on page 21

In the West, the fees are robust

In the middle of 1988, a lawyer in Laramie, Wyoming, found herself with a client — let's say the client's name is Mary Smith — who needed to get a $4,000 judgment collected in California. In June the lawyer tried to refer the matter to an attorney in Southern California. The following correspondence ensued. Besides Ms. "Smith's" name, the only things changed are the name of the California lawyer, the town where he practiced, and the name of the judgment debtor. —Ed.

STANLEY L. HARDING
ATTORNEY AT LAW
NEWPORT BEACH, CALIFORNIA

August 8, 1988

Ms. Becky N. Klemt
Pence and MacMillan
Attorneys at Law
Laramie, Wyoming

Dear Ms. Klemt:

I apologize for not getting back to you sooner, but I have been in and out of the office for the past six weeks. Seems that there's never enough time.

I want to thank you for offering me the opportunity to collect the judgment on behalf of Ms. Smith, but must decline.

Without sounding pretentious, my current retainer for a case is a flat $100,000, with an additional charge of $1,000 per hour. Since I specialize in international trade and geopolitical relations between the Middle East and Europe, my clientele is very unique and limited, and I am afraid I am unable to accept other work at this time.

I am enclosing the copy you sent of the judgment and again Ms. Klemt, I thank you for your thoughts. It was very nice of you.

Very sincerely,
Stanley L. Harding

PENCE AND MACMILLAN
ATTORNEYS AT LAW
LARAMIE, WYOMING

August 17, 1988

Stanley L. Harding, Esquire
Attorney at Law
Newport Beach, California

Dear Stan:

I am in receipt of your letter to me dated August 8, 1988, regarding collection of a judgment against Mr. Jones.

Stan, I've got news — you can't say you charge a $100,000.00 retainer fee and an additional $1,000.00 an hour without sounding pretentious. It just can't be done. Especially when you're writing to someone in Laramie, Wyoming, where you're considered pretentious if you wear socks to Court or drive anything fancier than a Ford Bronco. Hell, Stan, all the lawyers in Laramie, put together, don't charge $1,000.00 an hour.

Anyway, we were sitting around the office discussing your letter and decided that you had a good thing going. We doubt we could get away with charging $1,000.00 an hour in Laramie (where people are more inclined to barter with livestock than pay in cash), but we do believe we could join you in California, where evidently people can get away with just about anything. Therefore, the four lawyers in our firm intend to join you in the practice of international trade and geopolitical relations between the Middle East and Europe.

Now, Stan, you're probably thinking that we don't know anything about the Middle East and Europe, but I think you'll be pleasantly surprised to find that this is not the case. Paul Schierer is actually from the Middle East — he was raised outside of Chicago, Illinois, and although those national newsmen insist on calling Illinois the Midwest, it's the Middle East.

Additionally, although I have never personally been to Europe myself, my sister just returned from a vacation there and told me lots about it, so I believe I would be of some help to you on that end of the negotiations. Hoke MacMillan has actually been there, although it was 15 years ago, so you might have to update him on recent geopolitical developments. Also, Hoke has applied to the rotary Foreign Exchange Student Program for a 16-year-old Swedish girl and believes she will be helpful in preparing him for trips abroad.

Another thing you should know, Stan, is that the firm has an extensive foreign language background, which I believe would be useful to you. Hoke took Latin in high school, although he hasn't used it much inasmuch as he did not become a pharmacist or a priest. Vonnie Nagel took high school German, while Paul has mastered Spanish by ordering food at numerous local Mexican restaurants. I, myself, majored in French in college, until I realized that probably wasn't the smartest career move in the world. I've forgotten such words as "international" and "geopolitical" (which I'm not *too* familiar with in English), but I can still hail a taxi or find a restroom, which might come in handy.

Stan, let us know when we should join you in California so that we can begin doing whatever it is you do. In anticipation of our move, we've all been practicing trying to say we charge $1,000.00 an hour with a straight face, but so far, we haven't been able to do it. I suspect it'll be easier once we actually reach California, where I understand they charge $500,000 for one-bedroom condos and everyone (even poor people) drives a Mercedes. Anyway, because I'll be new to the area of international trade and geopolitical relations, I'm thinking of only charging $500-$600 an hour to begin with. Will that be enough to meet our overhead?

I look forward to hearing from you before you go away again for six weeks.

Sincerely,
Becky N. Klemt

P.S.: Incidentally, we have advised our client of your hourly rate. She is willing to pay you $1,000.00 per hour to collect this judgment provided it doesn't take you more than four seconds.

Submitted by Leonard Thom Kelly, who received the article from his brother, who practices law in West Virginia. From Litigation Magazine, Summer, 1990.

Poor-taste cannibal excerpt

Continued from page 20

rest would they have any, but they would not have any that night.

But the next morning, hunger won. They had been without food for four days. Dalton's flesh was carved and doled out into seven roughly equal portions, and the band got moving again.

Brown was walking slower and slower; he must have reflected as he limped along that he, the weakest, would be next. Kennelly, too, was afraid for his life. And so the two of them fell back, and silently disappeared in the forest mazes of the Engineer Range, hoping to get back to Macquarie Harbor. Realizing that their story "would hang us all," the others tried to catch them but failed. On October 12, Brown and Kennelly were found half-dead from exposure on the shore of Macquarie Harbor, still with pieces of human flesh in their pockets. Brown died in the prison hospital on October 15, and Kennelly four days later.

Now five convicts were left. They reached the Franklin River, swollen with rain, and spent two days trying to cross it; Pearce, Greenhill and Mather went across first and dragged the other two over with the help of a long pole. Mather was crippled with dysentery and the others "were scarcely able to move, for we were so cold and wet." But they struggled on across the Deception Range and then the Surveyor Range after that, and on October 15 they saw below them a fine open valley, probably the Loddon Plains, Here, in the long grass by a creek, thoughts of fresh food rose again. it was Bodenham's turn to die. As he slept, Greenhill split his skull. Ten years later, the first official explorer to reach the Loddon Plains, a surveyor, would find human bones in this valley.

Four men were left, and they kept marching. By about October 22, they had apparently reached the first line of the Western Tiers and before them lay "a very fine country," full of "many kangaroos and emus, and game of all kinds"; but they had no hunting weapons, and the frustration of starving while watching the mobs of shy gray marsupials bounding invulnerably past must have been overpowering. "We then said to ourselves," Pearce declared, "that we would all die together before anything should happen."

But Greenhill had no intention of dying together with anyone, and Mather was very apprehensive. He and Pearce "went to one side, and Mather said, Pearce, let us go on by ourselves; you see what kind of a cove Greenhill is; he would kill his father before he would fast one day." But on that open button-grass moor, which may have been the King William Plains, they could not have lost Greenhill. Since he carried the only axe they had left, he could not be killed; and none of the famished men could hobble faster than the rest. Thus bound together, they went on; and around the last week in October (from here, the chronology of Pearce's accounts grows hazier), they stopped by a little creek and lit a fire to boil the last of Bodenham, "which scarcely kept the Faculties in Motion."

Mather could not eat his share. He had gathered some fern roots, which he boiled and wolfed down, but

he found it would not rest on his stomach (no wonder) for such a Mess It could not be expected would ever digest in any Mortal whatever, which occasioned him to vomit to ease his Stomach & while in the act of discharging it from his Chest, Greenhill still showing his spontaneous habit of bloodshed seized the Axe & crept behind him gave him a blow on the head.

It did not kill Mather. He jumped up and grappled with Greenhill, wresting the axe from him. Pearce and Travers managed, for a time, to calm the two men down. But Mather was doomed, and that night the four men made camp around a fire "in a very pensive and melancholy mood." Greenhill and Travers, bosom friends, were determined to eat Mather next; Pearce, without telling Mather, was secretly on their side. He walked a little way from the fire and looked back: "I saw Travers and Greenhill collaring him." The team was at work again, and Pearce made no effort to save poor John Mather, who now made ready to die a Christian death, very far from England.

They told him they would give him half an hour to pray for himself, which was agreed to; he then gave the Prayer-book to me, and laid down his head, and Greenhill took the axe and killed him. We then stopped two days in this place.

The three men kept heading east, but Travers was sinking. He had been bitten on the foot by a snake and could no longer walk. Terrified that his two companions would eat him, he begged them to leave him to die and go on with what remained of Mather, which might be rations enough to carry them to a settlement. Greenhill refused to abandon him. He and Pearce

Continued on page 22

• Goodwin retires from 9th

Continued from page 15

legislative efforts to dilute the decentralized power and authority of circuit judicial councils.

A broad series of other issues was raised, studied, and generally resolved during Chief Judge Goodwin's term, including:

- the creation of a model manual for improved jury management
- a survey of how Rule 11 sanctions were being applied in the circuit.
- proposals for allowing the media access to courts.
- development of recommendations for better management of court reporting and the effective use of magistrate judges
- the widespread institution of local district conferences to foster more effective communication between the bench and the bar
- extensive installation of computers and automation technology in clerks' offices and judges' chambers.

Two significant issues that occupied much of the chief judge's time over the past two years — leading the court's opposition to attempts by congressmen and senators from the Pacific Northwest to divide the Ninth Circuit, and spearheading the court of appeals' relocation efforts after the October 1989 San Francisco earthquake substantially damaged and closed its historic courthouse headquarters — remain on the agenda for the next chief judge.

"Because of the generous support of the judges and the gallantry and dedication of staff, the circuit remains strong, united, and efficient in the administration of justice. I feel confident in turning the gavel over to Judge Wallace that the Ninth Circuit will go into its second century in excellent condition under new, strong, and energetic leadership," Judge Goodwin said.

His term as chief judge of the United States Courts for the Ninth Circuit capped a 35-year career as a judicial officer in both the state and federal court systems. Born June 29, 1923 in Bellingham, Wash., Judge Goodwin graduated from Crook County High School in Prineville, Ore., and served in the U.S. Army during World War II, rising in rank from private to captain.

Judge Goodwin worked for the Eugene, Oregon *Register-Guard* as a reporter while attending the University of Oregon. He received his B.A. in 1947 in journalism, and graduated from the University of Oregon Law School in 1951, after serving as editor-in-chief of the Oregon Law Review. After his admission to the Oregon bar in 1951, he practiced law in Eugene and later formed his own law firm. In 1955, Governor Patterson appointed him judge of the Oregon Circuit Court (Lane County) where he served until Governor Mark 0. Hatfield appointed him Associate Justice of the Oregon Supreme Court in 1960. In December 1969 President Nixon appointed him to a lifetime position on the United States District Court for the District of Oregon. On December 17, 1971, President Nixon elevated him to the United States Court of Appeals for the Ninth Circuit.

Chief Judge Goodwin is married to the former Mary Ellin Handelin; they have four children. He resides in Pasadena, California and maintains a rustic cabin on the Deschutes River in central Oregon.

He will continue to maintain his chambers in Pasadena, where, he happily reports, "I will go back to doing what I find personally most rewarding after 35 years as a state and federal judge -- hearing and deciding cases. . . "

A tale of cannibalism

Continued from page 21

stayed with the delirious Travers for five days, tending him. Travers lapsed in and out of his fever, "in great agitation for fear that they would dispose of him. . .(t)he unfortunate Man all this time had but little or no sleep."

They half-dragged, half-carried Travers for several days more. But it was no use:

> (Greenhill and Pearce) began to Comment on the impossibility of ever being able to keep *Traviss* up with them for their strength was so nearly exhausted it was impossible for them to think of making any Settlement unless they left him . . . It would be folly for them to leave him, for his flesh would answer as well for Subsistence as the others.

Travers awoke and, through his haze of pain, heard them talking.

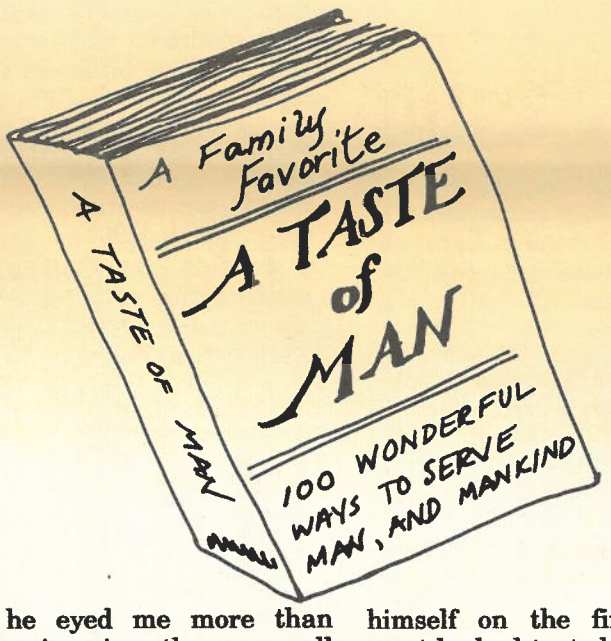
> In the greatest agony (he) requested them in the most affecting manner not to delay themselves any longer, for it was morally impossible for him to attempt Travelling and more & therefore it would be useless for them to attempt to take him with them . . . The Remonstrances of *Traviss* strengthened the designs of his companions.

They killed Travers with the axe. The victim "only stretched himself in his agony, and then expired."

Now they were two. But for the kangaroos, the terrain through which Pearce and Greenhill were now walking was not unlike England: undulating fields of grass sprinkled with little copses, a mild and fruitful landscape ringed with hills, all golden in the early summer light.

> Greenhill began to fret, and said he would never get to any port with his life. I kept up my spirits all along, and though we must shortly come to some inhabited parts of the country, from the very great length we had travelled.

But there could be no doubt that one would sooner or later eat the other. Greenhill had the axe, and the two men walked at a fixed distance apart. When Pearce stopped, so did Greenhill. When one squatted, so did the other. There was no question of sleep. "I watched Greenhill for two nights, for I



thought he eyed me more than usual." One imagines them: a small fire of eucalyptus branches in the immense cave of the southern night, beneath the drift and icy prickle of unfamiliar stars; the secret bush noises beyond the outer ring of firelight — rustle of grass, flutter and croaking of nocturnal birds — all sharpened and magnified by fear, with the two men fixedly watching one another across the fire. One night Pearce became convinced of Greenhill's "bad disposition as to me." He waited, and near dawn his adversary fell asleep. "I run up, and took the axe from under his head, and struck him with it, and killed him. I then took part of his arm and thigh, and went on for several days."

Pearce was now utterly alone. "I then took a piece of a leather belt," he notes laconically, "and was going to hang myself; but I took another notion not to do it." He walked on a little further and blundered into his first stroke of good luck since Macquarie Harbor: a deserted aboriginal campsite. The blacks had seen him coming and had fled, leaving pieces of game scattered around their still-lit cooking-fires.

Pearce settled down and gorged himself on the first non-human meat he had tasted in nearly seven weeks. It gave him strength to keep going for several days until, from a hilltop, he glimpsed the landmark that signalled his arrival in the farmed country of the Derwent Valley: Table Mountain, a hill just south of Lake Crescent. Below him lay the Ouse, a large tributary stream of the Derwent.

Two days later, following the river down, Pearce came on a flock of sheep. He managed to grab and dismember a lamb. As he was devouring its raw flesh, a convict shepherd emerged from the bush "and said he would shoot me if I did not stop immediately."

The shepherd's name was McGuire, and he soon realized that he knew the blood-boltered little goblin he had at gunpoint. Before his banishment to Macquarie Harbor, Pearce had worked on a sheep run nearby. McGuire "carried the remains of the lamb, and took me with him into his hut, and made meat ready for me, where I stopped for three days, and he gave me all attendance." He would not turn a fellow Irishman in to the authorities, and for several weeks more Pearce hid in the huts of McGuire and other Irish convict shepherds. Then he fell in with a pair of bushrangers, Davis and Ghurton, who armed him; and they skulked about in the bush together for two more months. But his new companions had a £10 reward on their heads, and convict solidarity — never a dependable bond — could not hold up forever against that. On January 11, 1823, near the town of Jericho, the three of them were arrested by soldiers of the 48th regiment acting on the word of informers and were brought down to Hobart in chains.

Churton and Davis were tried and hanged, an automatic punishment for bushrangers. While in jail, Pearce confessed the whole story of his escape — cannibalism and all — to the acting magistrate, the Reverend Robert Knopwood. It was transcribed and sealed, and not a word of it was believed. The authorities assumed — in the manner of the Cretan paradox — that since all convicts were liars, this one could only be covering for his "mates," who must still be alive and at large. This grotesque tall story could only be the invention of a felon's debased mind. There were no living witnesses to that nightmare trek from Macquarie Harbor to the Derwent, and no *corpus delicti*. And so Pearce was not executed; instead, they sent him back to Macquarie Harbor, where he arrived in February 1823.

Excerpt from "The Fatal Shore".

Letters . . .

Continued from page 10

parents also have a much younger child - 5 year old girl).

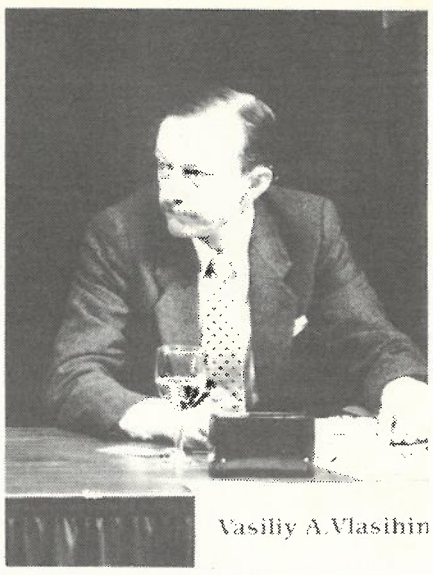
Tanya continues to work with TV as an editor, but she also does her own series on family issues, being on the screen. This made her a popular figure (no discounts at market places though yet). She enjoys her work, admires Nikita, loves Anya, and wonders how she managed to keep the marriage bond with me for more than twenty years.

I am a loyal institutchick, still with my Institute being Head of Legal Studies there. During last two years was busy mostly not with U.S. legal studies, but with some projects and papers which had to do with the legal and governmental reforms in the Soviet Union/Russia. Now I am again with the American Bar Foundation, this time for 3 months fellowship (expires January 1, 1991). This fellowship became possible because of the American Bar Foundation and the American Bar Association kind willingness to have me here. And I am deeply grateful to all those who made this visit possible. I am commited to complete my book on judicial review in the U.S. with the strategic goal to try to persuade our society to adopt the model of constitutional review as it exists in this country.

Please, note: mail goes very slowly from the U.S. to Moscow. Some people were advising me on the visits of their friends or relatives in Moscow. I was getting the letters with such information long after a visitor had been gone, and I was unable to get in touch with such a visitor and extend hospitality.

Vasiliy A. Vlasihin

(Editor's Note: Contact Bar Office for addresses.)



Vasiliy A. Vlasihin was among panelists at the 1990 Northern Justice Conference.

DO YOU HAVE JOKES?
The Bar Rag wants to collect and print the best (and most) lawyer jokes we can find. (Cartoons are OK). Send them to:

The Alaska Bar Rag
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310 K St., Ste. 602
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AAA left out

I write in response to an article which appears in the November-December 1990 issue of the *Alaska Bar Rag*. That article, by Anchorage attorney Daniel Patrick O'Tierney, concerned recent developments involving alternative dispute resolution here in Alaska. While I thoroughly enjoyed the article and found it to be highly informative, I did feel that it contained a significant omission.

Mr. O'Tierney mentioned a number of different entities currently involved in various branches of alternative dispute resolution. Notable by its absence was the American Arbitration Association ("AAA"). As chairman of the Alaska Advisory Council for the AAA, I felt that I had no choice but to write to summarize the significant contributions made by the AAA in this area.

The AAA was established in 1926. It is not only the oldest but one of the largest and most active alternative dispute resolution bodies in the country. The AAA has an international membership of approximately 54,000 and is viewed by most as having pioneered the concept of arbitration as an alternative to litigation. It has recently been a pacesetter in conjunction with the emerging dispute litigation technique known as mediation. The AAA operates through 38 regional centers located throughout the United States and administered more than 58,000 cases during the calendar year 1990.

The AAA has been active in the state of Alaska since the 1950's. The organization has approximately 220 members within the state, many of whom routinely serve as arbitrators or mediators. The AAA has also been quite active in conjunction with arbitration and mediation training within the state of Alaska. Neal Blacker, the executive director of the Seattle regional office, visits Alaska on a frequent basis in order to conduct seminars and training sessions and is quite familiar with Alaskan practice.

I do not, by this letter, mean to criticize Mr. O'Tierney or demean the article which he wrote. Quite to the contrary, it was excellent. Rather, I simply wished to point out that there are other "players" involved in arbitration beyond those mentioned in his article.

I believe very strongly in alternative dispute resolution, given the expense and delay associated with the litigation of civil disputes. I look forward to the growth and evolution of arbitration and mediation practices here in Alaska, and have little doubt that the AAA will continue to play a prominent role in this area for many years to come. Thank you.

Peter C. Ginder
Kemppel, Huffman and Ginder, P.C.

• TVBA minutes (continued)

Continued from page 8

the phone this afternoon. Apparently Robson may get the opportunity to return from Hong Kong ahead of schedule. There will, hopefully, be further information on this at the November 23 meeting.

Ken Covell reported on the status of the removal of Cynthia Petumenos's briefs. He indicated that he had spoken with Cynthia and that the briefs were on microfiche here and that new briefs would continue coming in, theoretically.

Judge Savell suggested, based upon the quality of food today, that we move our Friday luncheons to the Peking Garden for one week to try it out. His comment was "try it, you'll like it." He indicated that it was a better buffet at a lower price and that if we didn't like it we could always come back to the Regency. After discussion it was agreed that Judge Savell was the new Food Committee and that the November 30th meeting would be held at the Peking Garden.

The members assembled indicated that perhaps an appropriate for the departing Judge Zervos would be a rubber robe suitable for Sitka wear. Mark Andrews indicated on the latest case of mistaken identity wherein he was congratulated by Steve Cooper, Mark Boyer and Ed Merdes on his appointment to the Superior Court judgeship.

Wayne Wolf indicated that he was still wearing the same permanent that he had when he left Fairbanks some years ago.

Dan Callahan reported for the judicial council that the applicants were in for Kotzebue and Anchorage judgeships and that there were a whole slug of applicants. Will Schendell indicated that there was going to be an employment law seminar, brown bag luncheon, but I didn't get the date.

Chief Justice Rabinowitz indicated that all was quiet on the Supreme Court front and there had been no Fairbanks calendar that month because of a lack of cases.

Dick Madson was asked why he was not on the cover of the ABA Journal holding a model of the Exxon Valdez. He indicated that his press agent had apparently failed.

Entertainment for the forthcoming bar convention was discussed. Fleur was instructed to get "bigger balloons" by Maximum Leader Cooper.

There being no further business to transact, the meeting was adjourned.

Christopher E. Zimmerman
Secretary
Tanana Valley Bar Association

November 30, 1990

The meeting was called to order at 12:25 p.m. by Maximum Leader Dan Cooper. The meeting this week was held at the Peking Garden. Lunch was priced at $7.95.

Mark Andrews gave the most recent mistaken identity report. He indicated that Barb Hampesch had congratulated him on his appointment to the Superior Court Judgeship in Sitka. Mr. Andrews indicated that he is about to commence wearing a badge which says I'm here and he's gone." Mark also indicated that he was glad that Larry had a good reputation in town. Some took exception to this characterization.

R. Dryden Burke reported for the Foreign Policy Committee that he had been instrumental in assuring that the Chinese abstained rather than vetoing the recent United Nations resolution authorizing the use of force in Iraq if the Iraque troops were not withdrawn from Kuate by January 15, 1991. R. Dryden indicated that we should all stay tuned for further developments.

Judge Dick Savell asked how everyone was enjoying the luncheon since it was his idea to have it at the Peking Garden. Savell indicated that his taste had been questioned in the past. John Franich or someone indicated that it was not Dick's taste that had been questioned, but rather his judgment.

Judge Savell indicated that he was happy to see all the Assistant District Attorneys in attendance. There was some speculation that they were all there looking for jobs since everyone knows they all make more than $29,000 and are in the category of state employees requested to submit their resignations by the new Hickel administration. Savell indicated that he was happy to see sensible crime charging being done by the District Attornev's office.

There was some discussion of the forthcoming Fourth of July picnic. Fleur Roberts semi-volunteered to handle arrangements for that gathering. Some in attendance indicated that Mr. Reeves at Gold Dredge #8 had a good facility for holding such an event. Some others were concerned as to whether that facility was insulated for winter weather. Someone indicated that the dredge had a good dance floor. Someone else indicated that we didn't really want a dance floor because the Public Defenders would get drunk and fall down and the District Attorneys would stand around and point and laugh at them. Jackie Paris indicated that she would assist Fleur in the arrangements and that they would both get bigger balloons. Bob Noreen asked that money be appropriated for four round-trip tickets to Hawaii as the door prizes. the motion was seconded and then Judge Kleinfeld moved to amend the destination to Tok. Ed Niewohner moved to amend the motion to give the money that it would cost to purchase four round-trip tickets to Hawaii to the Rescue Mission. At that point Mr. Noreen withdrew the motion. Bob had earlier asked State Law Librarian Cynthia Petumenos if she was really Cynthia Petumenos and it seemed that his thinking was somewhat disorganized.

Ron Smith again raised the question of a dues decrease which he has posed earlier. the Maximum Leader indicated that the question of decreasing the dues would be taken up at the December 7, 1990 meeting. As an aside, your undersigned pointed out that said former City Employees forget quickly the unpleasant effects which tax, or dues, decreases can bring about. It was also suggested that perhaps we could invest the money into some sort of a permanent fund whereby all members of the TVBA could receive a dividend.

There being no further business to transact, the meeting was adjourned. The meetings from henceforth will be held at the Peking Garden and notice will be sent to all members and friends of the Association.

Christopher E. Zimmerman
Secretary
Tanana Valley Bar Association