TVBA Rebellion

Page 21

New Model Rules Proposed

—Insert

Classroom in the Wrangells

—Page 15

$2.00

The Alaska BAR RAG

Volume 13, Number 4 — *Dignitas, semper dignitas* — July/August, 1989

Tanana Valley rebels against Bar

...But coerced to co-sponsor survey

BY HAROLD M. BROWN

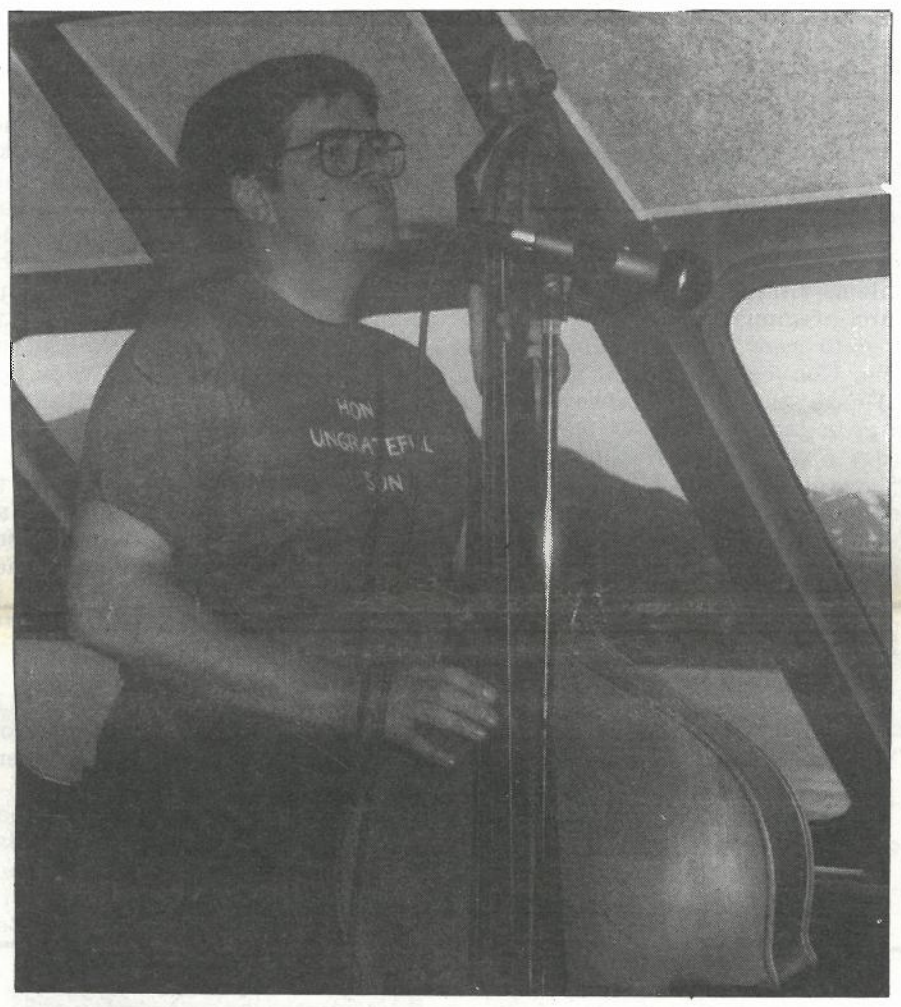
Earlier this year, the Alaska, Juneau and Tanana Valley Bar Associations, the Alaska Judicial Council and the Alaska Court System jointly sponsored a comprehensive economic survey of the Alaska Bar, receiving a hefty 55 percent return on the more than 1,900 questionairres distributed to members of the Bar.

The survey is the first of its kind in Alaska, and the data have provided a fascinating picture of the practicing attorneys throughout the state.

Among the findings: The average attorney practices civil law full-time in a large lawfirm (by Alaska standards) in Anchorage. He is 40 years old, has 11 years of experience, bills a little over six hours a day, works a 45-hour week and has an adjusted gross income from the practice of law of $78,300.

We have not yet reported on the comments received from respondents to the survey. Some, of course, said things that cause even me, an experienced older member of the Bar, to blush. Most comments concerned the perceived failure of the Bar to

Continued on page 12



Hal Brown, "Honorary Ungrateful Son," also played with "Grateful Dads" in Juneau. See convention coverage, pages 4 and 6.

Secession talk is rampant

In a move guaranteed to send shock waves throughout the State, the Tanana Valley Bar Association has thrown down the gauntlet to the Alaska Bar Association and has directly challenged its authority and wisdom.

Related Story Page 16

June 23, 1989, began as any other Fairbanks summer day; warm, beautiful, pristine. No one could have guessed what lay ahead.

Bar Rag reporters are now faced with the task of reconstructing the June 23, 1988 meeting of the Tanana Valley Bar Association and the carnage that followed. This can best be done by a review of the minutes taken of that meeting and sifting through the memories, now fading, of those in attendance on that fateful day. A picture does now emerge.

Mary Hughes, President of the Alaska Bar Foundation, traveled to

Continued on page 21

Bankruptcy filings climb by individuals

"People don't file bankruptcy when things start going bad, but when things are about to go better."

Michael Schneider to the contributing writers committee of the Bar Rag

BY JAMILIA A. GEORGE

According to at least one local attorney, whose recollection of law school is certainly fresher than this writer's, we might be able to make some sense out of the significant rise in bankruptcy filings in recent months.

Or can we?

A statistical base has been monitored for this district since 1984. Reflected in that base is the startling conclusion that in fact "things are not about to go better." 1987 saw a 49 percent increase over 1986, the record to this point. In 1988, filings dropped by more than 10 percent over the previous year.

Now, we all know that things did NOT suddenly get better in 1988, rather, property foreclosures hit a record high for this state and oil revenues declined dramatically. Suddenly bankruptcy filings for January 1989 through May have increased more than 17 percent over this same period in 1988.

What does all this really mean?

It means that we are now one full month ahead of filings for this same period last year. It means that nearly 90 percent of the bankruptcy filings are chapter 7 liquidations compared to 63 percent in 1984.

In just two years, chapter 7 filings have risen 8 percent. Chapter 11 reorganizations have gone from 26 percent in 1984 to less than 6 percent through May, 1989. Chapter 13 wage earner plan filings have likewise dropped. None of these figures is representative of the massive number of conversions which occur annually due to many factors, from the nonviability of plans for reorganization to the debtor's non-compliance with the Federal Rules and Bankruptcy Code.

Anchorage, of course, leads the pack, with 491 total filings through May of this year compared to 86 for Fairbanks, same period.

If indeed, "smart people file bankruptcy when things start to go better," then a growing number of the state's population would seem to know more than what can be gleaned from sinking property values and the sharp tightening of credit.

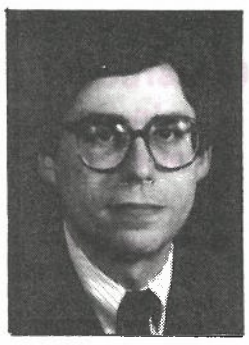
When asked what factors might be responsible for the rather heady incline in recent filings, Bankruptcy Judge Herb Ross said, "we have a number of bankruptcy cases involving intelligent and financially talented people, who thoughtfully (or thought that they were thoughtfully) invested their wealth, and nonetheless got caught up in gears of negative leverage, declining rental markets, and a shrinking and poorer population. It shows how fragile things are and how we can be whipped around by events completely out of our control."

Where fortunes have been made and lost in the market place, they are now being made and lost in the bank-

Continued on page 19

Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510

Non-Profit Organization
U.S. Postage Paid
Permit No. 401
Anchorage, Alaska



FROM THE PRESIDENT

Jeffrey Feldman

There are several issues currently brewing that are of importance to the Bar.

Mandatory CLE

The Juneau Bar Association submitted a resolution at the annual convention in June to establish a program of mandatory continuing legal education for all members of the Alaska Bar Association. The survey of the Bar recently completed by the Alaska Judicial Council concluded that slightly more than one half of the members of the Alaska Bar Association favored a program of mandatory CLE. This survey result was surprising. In years past, mandatory CLE proposals generally have been met with disfavor by the Bar.

The mandatory CLE proposal was the subject of vigorous debate at the annual business meeting at the convention. Those favoring the proposal pointed to the salutary effect it would have on the level of training, competence and the public's perception of the Bar. Proponents also contended that mandatory CLE would increase CLE attendance and, thereby, provide a basis for a stronger CLE program. Opponents of the proposal contended that a mandatory CLE program would work a hardship on non-urban practitioners (who are less accessible to CLE programs), that it was not productive to force any individual to become educated if he or she was not independently motivated to do so, and that a mandatory program was contrary to an Alaskan spirit of independent choice. Ultimately, those attending the business meeting voted to refer the matter to the Statutes, Rules and Bylaws committee of the Bar Association with directions that the committee prepare a proposed mandatory CLE rule for submissison to the membership for consideration and comment. After the period for comment has passed, the Board of Governors will determine whether the rule should be proposed to the Supreme Court for adoption. The final decision, as is always the case with Bar rules, will rest with the Supreme Court.

Northern Justice Conference

For the past year, the Board of Governors has been working with representatives of the state court judges, the federal court judges, the Ninth Circuit Court of Appeals and lawyers and judges in the western provinces of Canada to plan a conference of American, Soviet and Canadian lawyers and judges in Anchorage in June of 1990 to be called the Northern Justice Conference. The conference is intended to enable attorneys and judges in the geographical regions adjacent to Alaska to meet and discuss legal issues of mutual interest including issues relating to international trade, the adminisitration of justice in northern regions, problems associated with the legal treatment of native populations and criminal justice problems unique to the arctic and subarctic regions. The conference is planned to occur during the 1990 Alaska Bar Convention and the meeting of Alaska state court judges in Anchorage in June of 1990.

A planning meeting was held in Juneau in June and was attended by American, Soviet and Canadian representatives. The planning conference was productive and enabled the representatives of the three countries to begin the process of identifying and focusing both the topics and format of the discussions of programs that will occur. Chief Judge Alfred Goodwin of the Ninth Circuit Court of Appeals has shown considerable interest in the conference and has pledged his support. Chief Judge Goodwin has also extended an invitation to the conference to Chief Justice William Rehnquist and we are hopeful that the chief justice or another member of the United States Supreme Court will attend and participate.

The Board of Governors has not yet made a final decision on whether to go forward with the conference. The matter will be discussed at the Board of Governor's meeting on August 15. If you have questions about the 1990 conference please contact any of the members of the Board of Governors or Bob Wagstaff, who is the chairman of the 1990 planning committee. If you have opinions or thoughts about the conference please make them known so that they may be considered by the Board.

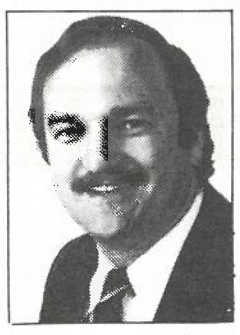
Sunset

Like other boards and commissions, the Alaska Bar Association is brought up for periodic sunset consideration and review by the Alaska legislature. Last year, a bill was submitted to extend the Bar Association for another three year period of time. The bill was held in committee by the chairman of the senate judiciary committee, Senator Jan Faiks, and the bill did not pass. As a result, the Bar Association is in the "wind up" phase and is scheduled to expire as a creature of legislative enactment as of July 1, 1990.

The failure of the legislature to pass legislation extending the Bar Association has trigigered a number of questions. For example it is not clear that legislative enactment is required. The Alaska state constitution refers in several places to the "organized bar" and some have argued that the Bar Association is actually a creature of a constitution and does not require legislative endorsement.

The Alaska Supreme Court has communicated its desire that the Bar Association continue in existence and has indicated that it will adopt a rule re-establishing the Alaska Bar Association in the event that the legislature fails to act during the upcoming session to extend the Bar Association by legislative enactment. The continuation of the Bar Association is a matter of importance to all lawyers. If the association were to be abandoned, matters relating to admissions and discipline could be assumed by the Divisions of Occupational Licensing of the Department of Commerce and the self-governance that is critical to an independent bar would be jeopardized. It does not appear that there is unanimity among Bar members on the issue of whether the association would be better off operating under a rule created by the supreme court or under legislative enactment. In discussing this issue with Bar members, I have received a range of thoughts and opinions about the perceived benefits of each course. Older attorneys, in particular, who recall the dispute between the Bar and the Supreme Court in 1964 disfavor the extension of the association by adoption of a supreme court rule. Members of the Board of Governors will be meeting with both the supreme court and members of the legislature to discuss the issue and chart an appropriate course. Your thoughts and opinions are solicited.

We look forward to a busy and productive year and encourage and solicit your help, support and criticism. Please send us your thoughts and comments on these issues, or on any other matter concerning the Association's activities.



THE EDITOR'S DESK

Ralph Beistline

With this issue I begin my second year as Editor of this esteemed publication. We were able to publish six times last year and are hoping to do the same this year. We still are experimenting with colors and may, at some time in the future, arrive at one that we all agree on. Until then, we will keep you guessing as to what color the next edition will be.

We have also brought some new blood to the paper and are receiving growing support from the Bar. This may well be our greatest accomplishment, for the more input we receive from you, the better the paper will be.

Samantha Slanders has received mixed reviews this year. We do appreciate her wisdom, but are debating now whether or not our budget can afford her services.

We definitely want to keep our investigative staff in place and were particularly pleased with several "scoops" that they obtained this year. If you recall, it was Rag reporters that broke the story on Elvis Presley in Barrow; who first detected oil spill rumors in Valdez; and who revealed extraterrestrial activities in statewide courthouses. We rely heavily on these intrepid souls.

All in all, we view last year as a successful one for the Bar Rag and look forward to continued successes in the future.

In closing, we express our thanks and gratitude to Larry Weeks whos has recently stepped down as President of the Bar Association, and our congratulations to Jeff Feldman who has recently assumed these duties. We do appreciate the support received from the Board of Governors for this publication and certainly look foroward to working closely with them in the future.

As far back as 1986, the Bar Rag knew a scoop when it saw one.

Years, even months before even they knew of their impending investiture in 1988-89, Dick Savell and Niesje Steinkruger were toasting their appointment.

Meanwhile, Rag founder Harry Branson (seated) was daydreaming of judicial fame. (Appropriately, Branson was appointed a U.S. Magistrate on April 1, 1989).

Just three months later, Branson attained even more acclaim as his poem "World War II," (published in the Bar Rag this year), was performed by the renowned Miss Millie in the Palace Saloon, during the Fairbanks Golden Days Festival at Alaskaland.

(The Bar Rag's candid camera never sleeps).

The Alaska Bar Rag

Board of Governors
Alaska Bar Association
1989-1990

President: Jeffrey M. Feldman
President-elect: Daniel R. Cooper, Jr.
Vice President: Alex Young
Secretary: Sandra Stringer
(Non-Attorney Member)
Treasurer: Lew M. Williams
(Non-Attorney Member)
Members:
Bruce A. Bookman
Andonia Harrison
Elizabeth "Pat" Kennedy
Ardith Lynch
John M. Murtagh
Michael A. Thompson
Larry R. Weeks

President Feldman 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, Alas a 99501 (272-7469) or your Board representative at least three weeks before the Board meeting.

September 8 and 9, 1989
October 27 and 28, 1989
January 19 and 20, 1990
March 23 and 24, 1990
June 4-6, 1990
June 7-9, 1990, Annual Convention
Hotel Captain Cook, Anchorage

Editor in Chief: Ralph R. Beistline
Editor Emeritus: Harry Branson
Contributing Writers:
Mickale Carter
Mary K. Hughes
Edward Reasor
Michael J. Schneider
Donna C. Willard
James T. Stanley
Julie Clark
Gail Ballou
James M. Bendell
Dan Branch
Drew Peterson

Design and Production: The Alaska Group
Advertising Agent:
Computer Composition
(907) 279-0752

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

IN THE MAIL

Elect judges

This is in reply to the letter from my friend Bob Bacon published in the May/June issue of the *Rag*. Bob argues that we should consider a method of selecting and retaining judges which does not involve a popular vote. He points out, that, at times, part of the business of the courts is to thwart the will of the majority, and that subjecting the judges to election attentuates their ability to fearlessly do so.

I disagree, although his point appeals to me greatly. I highly prize the ability of the courts to spit in the eye of the legislature. I recall a legislator I knew a few years ago telling me of voting for legislation even though she knew it was unconstitutional. However, I think that retention elections are a good idea, and serve the public interest.

Decisions on issues of law are of two sorts. One is simply to interpret existing law. If this were the sole function of the courts, a good argument could perhaps be made that pure merit should be the only criterion for retention.

However, courts must also make policy decisions and create new law. A recent example against which I bumped my nose is the Fireman's Rule, which precludes a public safety official from recovering in tort for negligently caused injury suffered in the line of duty. The rationale for the rule is one of public policy. If a judge is to announce and enforce such a rule, he or she is a policy maker, and in a democratic society policy makers should be responsible directly to the public.

That means that to some extent judges *should* be subject to public displeasure with their decisions. On the other hand, of course, it would be grim indeed in a constitutional system were judges to be selected and competitively elected on the basis of their appeal to the majority.

For example, let us suppose that two judges who are not corrupt, senile, lazy, intemporate or bigoted were to sincerely decide that as a matter of public policy and sound law, no terms of imprisonment should be imposed on criminals except in presumptive or unclassified crimes. Suppose that they wound up on the Court of Appeals. Is the public not entitled to disagree with them?

Bob says that there are jurisdictions which have no judicial elections. It seems as though Section 2 of the Fourteenth Amendment could be read to require judicial elections of some kind. I think, at any rate, that a middle course between Texas-style political judicial elections and federal-style life tenure is the best course in an imperfect world.

I whole-heartedly support Bob's proposal to put effort into public education, and to support sitting judges who are attacked for unpopular decisions.

—*Michael Jungreis*

Letter to Gail

Judge Gail Roy Fraties
390 Chestnut
San Carlos, CA. 94070
Dear Judge Fraties:

The Tanana Valley Bar Association is sorry to hear of your illness and wishes you a speedy recovery. The TVBA has a tradition of not sending flowers. We did have some plastic flowers we sent members who are hospitalized. They had a notation which required that they be returned for reuse by the next hospitalized member. However, Justice Jay Rabinowitz after a hospital stay threw them away. We have billed him for the cost of the flowers.

The membership thought that balloons delivered by a stripper would be more appropriate for the famous Gail Roy Fraties. Unfortunately the lady at the only balloon delivery business in San Carlos said she does not perform as a stripper. I explained the type of person she was delivering balloons to and asked her to do her best.

The membership also thought you might enjoy some of our minutes more than a card. Here they are with our wishes for a speedy recovery.

Ron Smith
Secretary

Any takers?

With the speed of Exxon, I am contacting you at the suggestion of Debra O'Regan in my nationwide talent search for funny people who dare to use humor in bar association publications.

Each year the Public Relations and Communications Section of the National Association of Bar Executives holds a workshop for bar communications professionals. I foolishly suggested that a good topic for one of this year's sessions might be humor in bar association communications, and was immediately drafted to find presenters. I am an avid reader of the Alaska Bar Rag and when I spoke to Debra in Denver last February she gave me your name and said you might be able to joint us. The workshop is scheduled for September 20-23, 1989, at the Royal Plaza Hotel in Walt Disney Village in Orlando, Florida. As if to prove that humor can really make a difference, my session has been fiendishly scheduled for Friday afternoon September 22, immediately after lunch at 1:30 p.m.

The details about the session remain to be worked out but I hope to organize a panel discussion with a working title of
"The Risks and Rewards of Humor."

Now here comes the funny part: We have no budget to pay for transportation and lodging of our speakers. However, I have sent along numerous colorful brochures about Walt Disney World Village in hopes of luring you from Alaska to sunny Florida in late September. In addition, you will also have the opportunity to meet with bar association communicators from across the country and exchange ideas. Ample time is also set aside for hospitality and "fellowship"

Sincerely yours,
Craig Gaare

Note: The Editor is too cheap to go to Florida. If anyone else wants to carry the Alaska standard, Mr. Gaare can be reached at:
Iowa Bar Association, 1101 Fleming Building, Des Moines, Iowa 50309.
(515) 243-3179.

Cut out and save this boilerplate 'Letter to the Editor'

BY J.B. DELL

About once or twice a month our urban newspapers feel the need to print a letter to the editor from some dolt upset about lawyers.

Probably much wasted time is spent by the editors of these papers weeding through dozens of these crank letters trying to find one containing something that resembles a cogent thought.

In order to avoid wasting this time in the future, I suggest that the papers run the following generic lawyer-bashing letter in some appropriate section of the paper (maybe next to the comic strip Bizarro):

Dear Editer:

Well I see that one of our local judges has just frustrated the will of the people and has conspired with lawyers (so called "officers of the court"). When are we going to get sick and tired of seeing our rights abused?

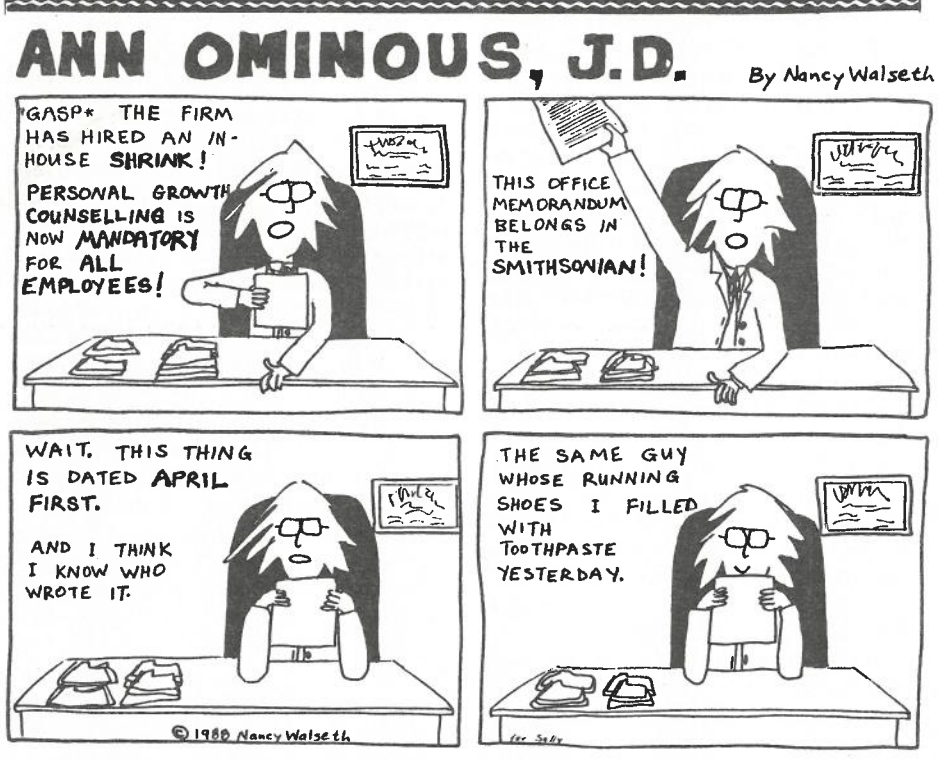
This travisty is allowed to occur because the public is kept out of closed door meetings which "disipline" lawyers. Why is there so much secrecy when even telivision game shows are required by law to be public? The constitution guarenties a trial by peers, but the public is denied peers when only lawyers are allowed. This also violates the Magna Carta, the Declaration of the Rights of Man, and the Vermont Reorganization Act of 1783.

Lawyers have created a monopoly in their business and have thereby guarentied wealth and profits for themselves and victimization for the public. Why is this monopaly allowed if for example I am a shoe cobbler and any other shoe cobbler is allowed to compete or even someone who thinks he can work with shoes or does cobble and wants to compete is not disallowed or prevented from competing even in the same street not withstanding city or state license or bonding? Can anybody give me on good reason?

Many years ago anybody could practice law (or "hang out their shingle") if they just read for the law. Abraham Lincoln crammed for the law in just three weeks and eventually went on to become President. he did not need a Bar Association.

Also have you noticed that the lawyers and the judges have teamed up to prevent the rest of us from using the Power of Attorney. This right to act as an attorney was given by our legislature but has been taken away. Also notice that the Alaska Supreme Court is all lawyers and you know what they will do!

There is only one answer. These judges should be impeached and the lawyers put on trial for fraud. The courts should be turned back to the people from whence they came.



THE REST OF THE STORY

Sealing Civil Court settlements

By Bill Kovach

In the minds of many people there are similarities between journalists and lawyers. Some are not flattering. There is a sense that lawyers and journalists alike can be too intrusive, that they sometimes have far too much freedom to go where others cannot. They find problems where none were suspected before. Generally they always seem to be needlessly stirring the pot.

But underneath it all, there are more positive aspects to many of the values which journalists and lawyers in a democratic society share. There is the sense of obligation to the fundamental promise and character of the society as organized under its constitution. We are both necessarily students of history and government. Our interpretations may differ but we are aware of the genius of our system which says such differences are to be encouraged and debated so the system can stretch itself into each new future.

Finally, I think, we both train ourselves to be alert to the next set of issues with which our society must deal — lawyers examine how they will integrate into or change the status quo; journalists alert the public to the next evolution and help illuminate the outlines of its dimensions and facets.

It is with this in mind that I raise a concern about the growing trend in secrecy in civil lawsuits where issues of public health and safety are raised and then withheld from public view by court-sanctioned covenants of silence. It is an issue journalists have begun to examine more aggressively. A pair of reporters at The Washington Post — Elsa Walsh and Ben Weiser — were finalists in the Pulitzer judging for just such work. It is an area of concern which promises to become an issue about which we will disagree and debate for sometime to come.

I would like to describe some examples of the practice from the perspective of a journalist.

The most celebrated example has been a series of General Motors cases over potentially lethal fuel tank design problems with their cars. Beginning in 1978 the company engaged in a strategy to use civil court procedures to prevent public disclosure of information about the relative safety of their automobiles — safety information which could affect hundreds of thousands of car buyers, some lethally.

Through an error by a clerk in one case which was heard in Washington, D.C., some of that material did become public. Among the documents were some which raisied questions of whether the company placed profit margin considerations above safety concerns in designing the fuel tanks used in most GM cars until the early 1980s. One document, called the Ivey Analysis after GM Engineer Edward C. Ivey, assigned a $200,000 value on human life in a classic cost/benefit analysis designed to determine the expenditure level which could competitively be justified. The document estimated the then current design could lead to as many as 500 deaths by fire a year in crashes involving GM cars.

These documents showed, by the way, that GM engineers designed a safer fuel tank but the company decided to cost — $8.59 to $11.59 per car — was competitively prohibitive.

In order to continue the veil of secrecy over the material which the civil discovery process produced, GM has paid millions of dollars to settle cases confidentially and to maintain court ordered seals on documents and lips. The information has until recently been successfully withheld from potential car buyers and the National Highway Transportation Safety Administration.

In another case, Johnson & Johnson Pharmaceutical Company ensured through secret settlements that neither the public nor the Federal Drug Administration learned that some of its own medical personnel felt that a prescription pain reliever was being marketed without adequate warnings. Eventually the drug was taken off the market but not before 14 people had died and more than 400 suffered life-threatening reactions requiring medical treatment.

Johnson & Johnson's court strategy, like that of GM, was to make sure that several company officials were never allowed to give pretrial depositions includling one — an associate medical director — who has been quoted as saying that some of the patient deaths were "avoidable deaths."

Another Johnson & Johnson official — head of the company's dealings with the FDA — wrote a memo to the president of the company saying: "we resisted too much and waited too long" to make proper warnings. He further suggested that the sales department had been given undue influence over the wording of the medical warnings issued to patients and doctors about the drug.

When the drug was withdrawn from the market in 1983 a congressional subcommittee held an investigation but had no access to any of these documents which were held under court ordered seal.

Finally, a sealed case in Rochester, New York, involved a payment of $5 million by Xerox to two families in return for a complete sealing of the court records and a gag order. As a result of the cases the families entered into a covenant of silence with Xerox and moved away from a neighborhood of 600 homes, never telling their neighbors that chemicals leaked into the groundwater table upon which their homes were built and dust emitted by the Xerox smokestacks onto their homes could cause nervous disorders and, perhaps, cancer.

These are only a few of the cases discussed in recent months in the press, cases in which potential life-threatening information has been withheld from the public through court sanctioned covenants of silence. The practice, as you all know, is standard procedure and widespread. According to The Washington Post, court officials in Washington, Maryland and Virginia werre able to identify at least 200 cases in which judges had sealed entire case files, including the normally public pleadings. These cases have been wiped off the books as if they never existed. Even the docket entry merely says: "Sealed vs. Sealed."

Carrying these techniques further upstream in the process, many corporate lawyers are using the same device outside the courtroom. Recently the Department of Labor discovered that an electrician of a nuclear power plant in Glenrose, Texas, withdrew a complaint of safety violations at the plant after contacts by lawyers of the company which operated the plant. Not only did he withdraw his complaint, but he entered into an agreement not to "voluntarily appear as a witness or a party in any proceeding against any company involved in the operation of the plant" and that he would take all reasonable steps, including such reasonable steps as may be suggested by representatives of the operating company, to resist. For this agreement he received $15,000. His lawyer received $20,000.

Now it is understandable that civil courts which do not have the long history and body of precedent of public access that have developed with criminal law, may function differently in this area, especially since rules of discovery require opposing parties in civil litigation to exchange proprietary information. Judges are particularly sympathetic to arguments that release of the material could provide valuable trade information to a competitor.

As Stanley Sporokin, federal district court judge in Washington says: "criminal law is the public business. Private lawsuits are usually private business. The courts don't have much say." D.C. Superior Court Judge Peter H. Wolf agrees and adds: "we are not knights riding white chargers righting wrongs whenever they come up. We wait until people come in to us."

But there are those who disagree and see a strong public interest in disclosure of these suits. They argue that the 1984 Supreme Court opinion upon which these agreements largely rely takes pains to limit them to cases in which "good cause" for such secrecy has been shown. They believe that such covenants of silence require a severe balancing test weighted heavily in favor of the public.

D.C. Superior Court Judge Gladys Kessler is one. "I believe," she says, "the court documents are public documents, and the world has a right to look at them."

And Thomas W. Henderson, Chairman of the American Bar Association's Toxic and Hazardous Substances and Environmental Law Committee, says an increasing number of plaintiffs' lawyers are expressing misgivings about confidential settlements in environmental suits. "I don't think anybody's pleased about doing it," he says. "I think there is a concern that the information ought to be public."

States like Maryland and Virginia have taken legislative action to provide greater public access to such court generated information. I was very pleased to learn since I came here that the Alaska Supreme Court has agreed with John McKay and ruled that a covenant of silence by a public agency is improper. If past history is any guide, the Exxon oil spill may offer a chance to extend that principle to private parties as well in the near future. Senators Arlen Specter of Pennsylvania and Daniel Moynihan of New York are considering legislating certain kinds of court sealing orders.

Clearly the debate has been joined. Questions are being raised. Questions which I would like to leave you include:

What is the public interest being served by closing such records? Or is Judge Wolf right: Judges are merely passive observers in these covenant of silence dramas?

In cases like the Xerox case has the judge become a party after the face of pollution? If so, could — or better yet, should — the judge become liable if there is injury because of the pollution, particularly, if that injury could have been avoided had a covenant of silence not been imposed?

What is the company's responsibility to the public? Does the court have any role in guiding that once the case has entered the courtroom?

If a company such as General Motors could mitigate damages by telling potential victims of the problem, does the judge's agreement to a covenant of silence make the judge a coconspirator against the public's interest?

Obviously the lens through which I view these issues is that of free speech. Is it a speech issue? I generally agree with the limit on free speech which says you cannot yell fire in a crowded theater if there is no fire. But: what if there is a fire and you don't tell people and they die? Are you responsible for their deaths? Should an official acting in an official capacity be immune if that official orders that no one discuss the fact that the theater is on fire?

What about the impact of such covenants of silence on other agencies of government charged with protecting public health?

Jo Ann Burg, of the Federal Toxic Substances and Disease Registry, which collects and assesses data on human illness resulting from exposure to toxic chemicals, says her office has encountered a number of instances in which alleged victims, on instructions from their attorneys, have declined to cooperate with the agency. The less information we can gather from these primary sources, she says, the less accurately we can assess the health effects. So the corrosive effects of these covenants of silence grow ever wider and reinforce the American public's distrust of government — of public officials — of public institutions. This distrust is reaching intolerable levels and it must be reversed if our system is to remain strong enough to function effectively in an ever more competitive world.

A society which cannot trust its leaders to tell the truth about public policy; cannot trust its leaders not to use public office to enrich themselves at the expense of public duty; cannot trust its institutions to protect the welfare of the people against the special interests; is a society which loses the ability to work together toward common goals.

The public rightly expects not just effective and efficient systems of governance but systems which bespeak wisdom and a humane perspective.

Our last line of defense in these questions lies in the courts. In a government owned by the people the law must be the final protector.

It must protect us from murderers. It must protect us from the arbitrary power of government. And it must sprotect us from the tyranny of a corporate world which respects nothing so much as the quarterly earnings reports.

This article is taken from the banquet address delivered at the annual Bar Convention in Juneau on June 10. Bill Kovach is former New York Times Bureau Chief in Washington, D.C. and Editor of the Atlanta Journal-Constitution. He is currently acting curator of the Nieman Center at Harvard University.

The deceptive deed-in-lieu of foreclosure

By Frank Nosek

Is the deed-in-lieu of foreclosure really a simple cure-all or is it just deceptively simple? Let's walk through a standard deed-in-lieu transaction. Test yourself to see if you can come up with more dangerous situations than the author lists under "Practice Tips."

First let's set the stage:

Act I: The Loan.

Scene I: The offices of Beluga Alaska National Corp. (BANCO).

Dick and Jane are euphoric over having qualified and closed on a new home loan. The BANCO officer is ecstatic over the prospect of a steady stream of interest payments. (Here you can substitute the "seller" for the bank if the seller is going to "carry the paper.")

Scene II: The kitchen of Dick and Jane's new home two years later.

Dick and Jane are discussing their finances over lukewarm linguini; Dick has just received a pink slip from AVVUM Corp. They finally decide to pay the little Billy's orthodontist bill and not to make the monthly house payment to BANCO.

Act II: The Default.

Scene I: BANCO Offices.

Dick and Jane sorrowfully tell BANCO that they cannot afford to keep up the loan payments on their new house and that moreover, they cannot afford any type of proposed modification to the loan. Since the property is "under water," (more owed on the mortgage than the dream home is worth on the market) it cannot be sold to cover the mortgage debt (of course, the mortgage is a deed of trust which is the security device of choice in Alaska). Dick and Jane propose to give the dream home to the bank in satisfaction of the mortgage debt. What is a lender to do?

Scene II: BANCO Board Room; loan committee meeting.

Much discussion of remedies. Should BANCO file suit on the note under the Moening case, 751 P.2d 5? BANCO's attorney advises that Dick and Jane's note does not contain the clear warning language required by A.S. 34.20.160 adopted in reaction to the Moening decision. Well then, how about a judicial foreclosure? The loan officer points out that Dick and Jane's financial statement shows no significant assets and of course Dick does not have a job any longer, so judicial foreclosure would be time consuming and expensive. Moreover, if a judicial foreclosure is done, BANCO will have to maintain the dream house for a period of one year after confirmation of sale, yet cannot sell it until after the one year statutory period of redemption has run. (A.S. 09.35.220)

OK, so BANCO can always do a nonjudicial foreclosure. (A.S. 34.20.070) But still, nonjudicial foreclosure takes about 100 days and even at the competitive foreclosure attorneys' rates which BANCO enjoys it still costs some money in legal fees, and probably Dick and Jane will move out or not maintain the house during the foreclosure period anyway.

Is there anything faster, better, and cheaper? The loan officer chimes up "How about just taking the house back? After all they are willing to give it to us?" All eyes focus on the bank's attorney. "How about it, counselor?"

Act III: The deceptive deed-in-lieu of foreclosure (DIL).

Scene I: The mechanics.

You won't find the DIL in our statutes, nor will you find much Alaska case law on it . . . yet. It is a common law creature.

In its simplest terms, the buyer (poor Dick and Jane above) reaches an agreement with BANCO under which Dick and Jane will convey title to the dream home to BANCO in lieu of foreclosure. In return BANCO will cancel the purchase obligation. There are plenty of variations to that theme. However, the end result is that the buyer is released from further obligatiton under the deed of trust and note and gives up possession and title to the dream home, and BANCO has the dream home now in satisfaction of its loan and must either rent or resell the dream home in order to recoup its loan. Dick and Jane divorce; Jane joins an oil clean-up crew in Prince William Sound and Dick moves in with his parents in Texas and enrolls in law school. BANCO then sells the dream home to Tom and Mary for no money down and an adjustable rate mortgage starting at 3% interest with a 30 year term. Everyone (except possibly Tom and Mary) lives happily ever after.

PRACTICE TIPS

1. Acceptance. Any deed requires that it be knowingly accepted by the grantee; same is true of a DIL. Thus, the ploy of the defaulting borrower simply recording a deed to the property back to the lender is not effective to cancel the purchase obligation, unless the lender agrees to accept the deed.

2. Deed Absolute Rule. Under the deed absolute rule the deed has all the appearances of an ordinary conveyance, but is really intended to be a security, and thus the debt can be paid off and there must be a mortgage foreclosure to clear title. A DIL is a special type of deed, although it can be either a warranty deed or a quit-claim deed depending upon the negotiations of the parties. However, it must clearly be a deed in lieu and not a deed absolte, i.e., not simply a deed given as additional security, which becomes really only another mortgage. This can happen if the recitals in the deed don't clearly recite the consideration, i.e., that the deed is given in exchange for a valuable consideration such as the cancellation of the mortgage debt.

3. Merger. The doctrine of merger in this situation might dictate that the lesser interest (the mortgage) is merged into the greater interest (the title) when the DIL is given by the buyer to the lender. This would be a disastrous result to the lender since it would mean that it's mortgage would become void and the lender would take the property subject to any of the buyers' junior encumbrances and liens.

4. Junior Encumbrances. If, subsequent to the bank's mortgage, the buyer has voluntarily or involuntarily created other liens, the DIL given to the bank will not operate to cut-off such intervening liens. In other words, when the buyer gives a DIL to the bank the DIL carries with it all junior encumbrances and the property continues to be encumbered. When there are junior encumbrances the DIL seldom is acceptable to the bank and foreclosure will still be necessary in order to eliminate the junior encumbrances.

5. Title Insurance. Buyer wants to treat the transaction as a type of voluntary repossession and simply give BANCO a quitclaim deed. BANCO sees the transaction as a purchase, therefore wants all of the trappings of an ordinary purchase of real property, including a warranty deed and a title insurance policy. It is extremely dangerous to take a DIL without knowing exactly what the status of existing liens of record is against the property.A purchaser's title insurance policy is the best protection here. However, the title company will not issue its insurance policy unless it is convinced the DIL is freely given, for an adequate consideration, and that the deed is not a deed absolute. Even then the title company will except from its insurance coverage all junior liens and probably attach a bankruptcy disclaimer to the policy as well.

5. Rents. The rents, issues and profits which the property produces belong to the title holdler under the common practice in Alaska. During the one year statutory redemption period after a judicial foreclosure, rents belong to the purchaser/redemptioner (A.S. 09.35.310). However, it is usual for the lender to take a written assignment of rents as additional collateral. Typically the assignment of rents cannot be activated until there is a default in the loan payments, and even then the lender must think carefully before it exercises its rights and gives notice to tenants or others to pay rents to the bank, since by exercising its assignment of rents rights the bank may become a mortgagee in possession and assume additional liabilities and obligations which would otherwise fall upon the title holder (such as maintenance, management, payment of underlying debts, tort liability to third parties).

6. Possession. Possession, like rents, belongs to the title holder absent a written agreement with the lender otherwise. However, after an execution sale the rents belong to the purchaser/redemptioner during the statutory redemption period (A.S. 09.35.310). While it is difficult to tell when the lender becomes a "mortgagee in possession" and therefore is burdened with most of the obligations which the title holder would normally have, it is likely that if the lender takes physical control of the premises it will be deemed to be a mortgagee in possession.

7. Mortgagee in Possession. Typically the mortgagee does not take possession until after the foreclosure sale. A receiver is sometimes appointed by the court to collect rents and manage the property pending foreclosure (A.S. 09.40.240). If the mortgagee is the successful bidder at a non-judicial foreclosure sale, it takes title and possession follows the title. If the mortgagee takes possession pursuant to judicial foreclosure sale, the mortgagee does not get title for one year after confirmation of the sale, during which time the former buyer can redeem and reclaim title. During the redemption period the mortgagee is a mortgagee in possession and must account for all of the rents received during the one year period and apply them in some fashion to

Continued on Page 10

News, Awards, from

Pettigrew Receives 1st Annual Pro Bono Award

Jane Pettigrew receives First Annual Pro Bono Award from Pro Bono Coordinator Seth Eames.

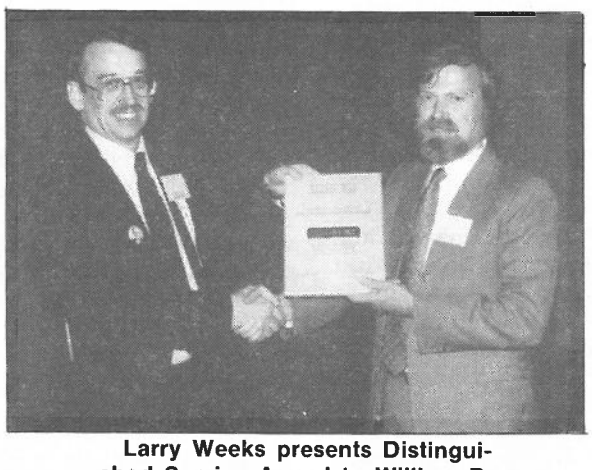
M. Jane Pettigrew, a partner with the Greg Ozckus Law Offices in Anchorage, was awarded the first annual Pro Bono Award.

This award was presesnted to Ms. Pettigrew for her outstanding contributions on behalf of low-income Alaskans through the Alaska Pro Bono Program. She has been volunteering her time through the Alaska Pro Bono Program for five years.

Ms. Pettigrew has represented more than eleven pro bono clients (at this writing she has four open cases for the Alaska Pro Bono Program), and was instrumental in creating and implementing the "Pro Se Chapter 7 Bankruptcy Clinic". Over the past year and a half, this pro se clinic has provided free legal assistance to more than 200 people in the Anchorage area. This attorney's contribution of more than 250 hours of her time clearly represents her dedication to the concept of equal access to justice.

The Alaska Pro Bono Program also presented a Recognition Plaque to the entire membership of the Alaska Bar Association for their combined efforts in providing free legal assistance to the poor. Sixteen identical plaques, each listing the total number of donated hours by year, will be hung in a public place in all the superior courthouses in Alaska. The Alaska Bar Foundation is to be thanked for their generous grant which paid for the plaques.

Distinguished Service Award Goes to Rozell



Larry Weeks presents Distinguished Service Award to William B. Rozell.

William B. "Bart" Rozell has been selected for the Alaska Bar Association Board of Governors Distinguished Service Award.

The award, presented at the 1989 Alaska Bar Association Convention in Juneau, annually honors an attorney for outstanding service to the membership of the Bar Association.

Mr. Rozell served on the Board of the Bar Association from 1976-1981 and as president of the Bar from 1980-1981. Since 1985, Mr. Rozell has served as a Trustee of the Alaska Bar Foundation. The Foundation provides scholarships for law students from Alaska, sponsors the Alaska Legalnet service, and is responsible for the promulgation of the IOLTA rule, which has recently been converted to an opt-out program.

For the last several years, Mr. Rozell has been the motivating force behind the activation of the Alaska Pro Bono panel in Juneau. He devised the Juneau "conflicts panel" and has served to inspire 80% of the Juneau Bar into participating in the APBP. He took the very first case under the pro bono program, and his firm has devoted hundreds of hours to the APBP.

For the last four years, Mr. Rozell has served as the supervising attorney for the first attorney placed on probation by the Alaska Supreme Court.

Mr. Rozell was born in New York and received his degree from Cornell Law School. He worked as a VISTA attorney and later for a Wall Street firm before moving to Juneau in 1972 to accept a position with Faullkner, Banfield, Doogan & Holmes, where he is now a partner.

Ketchikan Lawyer Wins Professionalism Award

Larry Weeks presents Professionalism Award to Charles L. Cloudy.

Charles L. Cloudy, a partner with Ziegler, Cloudy, King & Peterson in Ketchikan, has been awarded the Alaska Bar Association's Professionalism Award, which was presented at the 1989 Annual Convention in Juneau.

The annual award recognizes an attorney who exemplifies the attributes of the true professional; whose conduct is always consistent with the highest standards of practice and who displays appropriate courtesy and respect for clients and fellow attorneys.

Mr. Cloudy was born in Ketchikan and received his J.D. degree from Willamette Law School. He returned to Ketchikan to practice law and has practiced in Ketchikan with Robert H. Ziegler, Sr. for 37 years.

The Board of Governors, in announcing the Professionalism Award, recognized Mr. Cloudy's consistent and enormous commitment and loyalty to his clients; and his reputation for total respect and consideration for opposing attorneys, judges, court personnel, clients and witnesses.

CONVENTION HIGHLIGHTS

Over 130 Bar members attended the 1989 Annual Convention in Juneau, and the weather was kind to us! The CLE sessions on "Media and the Law" and "Legal Negotiations" were well attended, but the boat cruise was everybody's favorite.

In addition to witnessing the "Battle of the Bands" between "The Grateful Dads" and "The Ungrateful Sons," bar members caught great views of whales! The Hospitality Suite was another special venue, and our Soviet and Canadian visitors joined in the spirit, as well. Next year's convention will be held June 7-9, 1990 in Anchorage, and we are looking forward to participation by the Soviets and Canadians for this "Northern Justice Conference." See you in 1990!

TWO UPCOMING SENTENCING GUIDELINES SEMINARS

The U.S. District Court and Probation Office for the District of Alaska, in cooperation with the Alaska Bar Association, will be conducting a two-day seminar on U.S. Sentencing Guidelines. The seminar will be held at the U.S. Courthouse and Federal Building in Anchorage on Thursday and Friday, September 7-8, 1989. CLE credits will be awarded. For more information contact Norman E. Mugleston or Pat Brooks in the U.S. Probation Office, Anchorage 271-5492 or Joshua Wayne, U.S. Probation Office, Fairbanks 456-0266.

The Criminal Defense and Criminal Prosecution Sections of the Alaska Bar Association will conduct a program on Federal and State Sentencing Guidelines from 3:00 p.m. — 5:00 p.m. on Tuesday, October 31 and Thursday November 2 at the Anchorage Hilton. A brochure will be mailed to Bar members. For more information on this program, contact Barbara Armstrong, CLE Director, at 272-7469.

Mandatory CLE referred

The membership present at the Annual Business meeting in Juneau on June 6 voted to refer the issue of mandatory continuing legal education to the Statute, Bylaws & Rules committee to draft a proposed rule to present to the membership for a referendum.

A resolution had been submitted by the Juneau Bar Association which would have required each active member of the Bar Association to complete a minimum of 15 hours of continuing legal education annually. Following lengthy debate on the floor of the meeting the membership voted to refer this matter to the Statute, Bylaws & Rules committee to prepare a more comprehensive draft of the rule and accompanying regulations. The committee is to present their work product to the Board of Governors at the January Board meeting for its consideration before submitting the rule to the membership for a referendum.

President Jeff Feldman appointed a subcommittee of the Statute, Bylaws & Rules committee to work on this rule. The committee consists of Margie MacNeille, Chair, Richard Brown and Craig Stowers. Members of the Association who have comments are encouraged to contact the members of this committee.

Hawaii 1990 Circle these dates!

The Bar Association Mid-Winter CLE will be Tuesday and Wednesday, March 13 and 14, 1990 on the island of KONA.

Next year's speaker will be the ever popular James McElhaney lecturing on "Evidence for Advocates: The Law You Need to Know to Prove Your Case." Details will be mailed to Bar members.

Bar Association Elects New Officers

Jeffrey M. Feldman, an Anchorage attorney with the law firm of Gilmore & Feldman, was elected as the president of the Bar Association at the Annual Convention in Juneau. Other officers are:president-elect, Daniel R. Cooper, Jr., a Fairbanks attorney with Bradbury, Bliss & Riordan; vice president, Alex Young, with the Anchorage firms of Delaney, Wiles, Hayes, Reitman & Brubaker; secretary, Sandra Stringer, public member from Fairbanks; and treasurer, Lew M. Williams, Jr., public member from Ketchikan and publisher of the Ketchikan Daily News.

1989 ANNUAL SECTION UPDATES

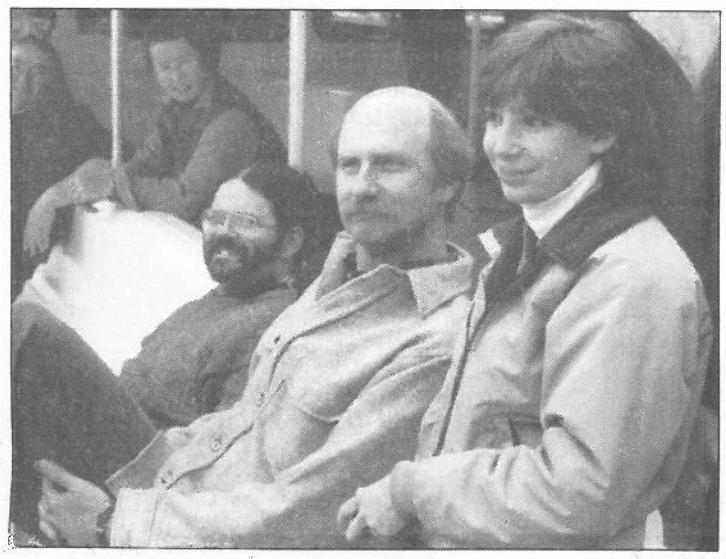
1989 Section Updates are available for the following sections:

Adminisitrative Law, Business Law, Criminal Defense Law, Criminal Prosecution Law, Employment Law, Family Law, Alaska Native Law, Natural Resources Law, Real Estate Law, Tax Law, and Torts Law. The Updates will be mailed to section members. Copies are available to non-section members for $10 per copy. Please call MaryLou Burris at the Bar Office at 272-7469 for more information.

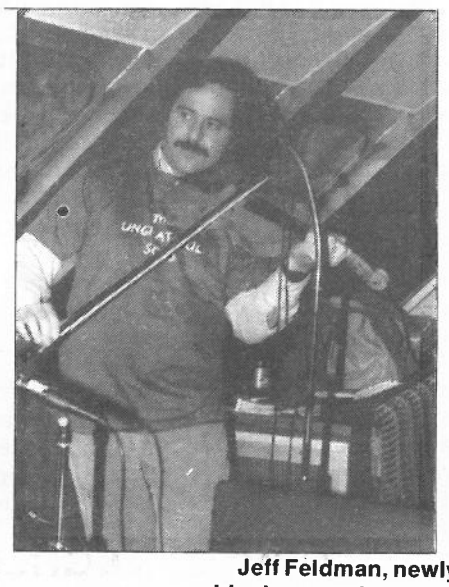
Convention '89

Jeff Feldman, Bruce Bookman & David Mannheimer, "The Ungrateful Sons" challenge "The Grateful Dads."

Donna Willard with Soviet attorneys Vladimir Krutskijh & Vasiliy Vlasihin.

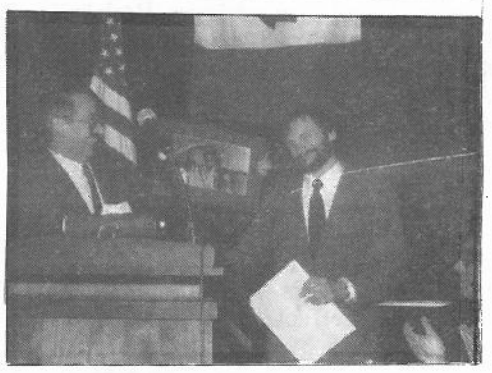


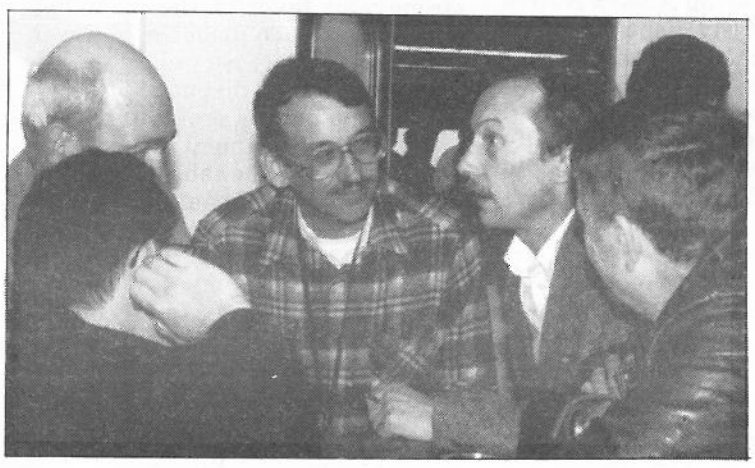
John Murtagh, John Reese, C.J. Allen on cruise. (Above left). And David Mannheimer performs with "The Ungrateful Sons" (Right).

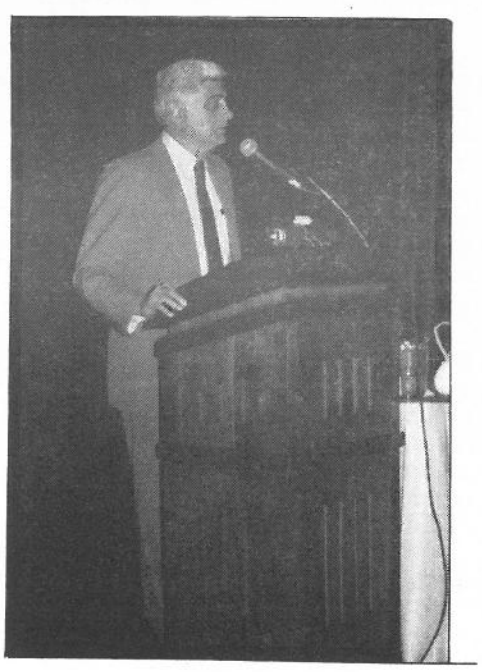


Jeff Feldman, newly elected President presents outgoing president Larry Weeks with framed print of convention brochure cover at banquet.

Larry Weeks presents outgoing Board member Ken Eggers with photo from Fairbanks convention.







(Above left) Soviet attorney Vasiliy Vlasihin, Larry Weeks & others: "In this country you can do **what**? (On the right) Larry Weeks. John Murtagh, Dan Cooper at reception at the Governor's Mansion.

Bill Kovach, acting curator at the Nieman Foundation, Harvard University is banquet speaker.

Photos by Steve Van Goor

Frank Wins

The following is a listing of the order of finish in the fun run that was held on June 9, 1989 at the Bar Convention. Times were unavailable.

Jay Frank	Bruce Davison
Art Peterson	Robert Hickerson
John Gissberg	Vance Sanders
Mike Lessmeier	Jim Shine
Bill Mellow	Linda Grover
Dave Jones	Mark Reagan
Vic Pappalardo	Steve White
Michael Parise	Beth Kerttula
Parry Grover	Nina Sneider
Tony Sholty	Shelly Owens
Jonathan Pollard	Terry Fakes

While the times were unavailable, it was the general consensus that everyone ran "very fast". The race started up in the Last Chance Basin behind Juneau and wound its way through downtown, finishing at the old ferry terminal. The total distance was 2.7 miles. A good time was had by all.

If you need any additional information, I will be glad to either supply it or fabricate it. *--John G. Frank*

The Alaska Bar Association wishes to thank The Alaska Shorthand Reporters Association and Taku Stenographic Reporters for providing court reporting and transcription services for the 1990 Northern Justice Conference Planning Meeting held June 7, 1989 in Juneau, Alaska.

THANKS TO THE FOLLOWING 1989 CONVENTION SPONSORS

Birch, Horton, Bittner, Cherot & Anderson
Robertson, Monagle & Eastaugh
Bayly, Martin & Fay
Carr-Gottstein Properties
Dean Moburg & Associates, Court Reporters, Seattle
Fred S. James & Co.
MarkAir
The Michie Co.
Midnight Sun Court Reporters
R & R Court Reporters

FAMILY MEDIATION

Drew Peterson

Disputes about the management of family owned businesses — disagreements between teenagers and their parents — ANCSA village corporation shareholder conflicts — contested adoption proceedings — what do any of these have to do with family mediation?

Attorneys usually think about family mediation in its most frequently discussed form, namely divorce mediation. Or we may think of the even more limited area of custody dispute mediation.

As the field of family mediation matures in knowledge and experience, however, it has become apparent that those factors which make mediation work with divorce and custody disputes can be applied to a broad array of disputes involving family or quasi family members.

Mediation Programs for Teenagers. One area where the use of family mediation techniques has flourished in recent years, in Alaska and elsewhere, involves disputes involving adolescents. Mediation has often been used successfully in resolving such disputes, be they between adolescents and other children, their schools, or their parents or guardians.

The programs providing such mediation have often involved volunteer or public agency mediators. Perhaps the best known such program within the State of Alaska is that of the Alaska Youth and Parent Foundation.

AYPF's program trains volunteer mediators in techniques used to resolve adolescent disputes. Using two mediator teams to meet with family members, often in only one session of two to four hours, AYPF's program has been an effective addition to the social services community in the Anchorage area in dealing with adolescent problems.

In addition to AYPF's programs, a number of school administrations around Alaska have individuals on staff who have been formally trained in family mediation techniques. Such school employees, often school counsellors, are either engaged in providing mediation directly or are training others to mediate adolescent disputes.

What mediation has to offer in disputes involving adolescents is a method of empowerment of the participants, especially of the youngsters themselves, so that all involved individuals can be involved together in seeking interventions and solutions to childhood disputes.

Mediation can give the adolescents some of the recognition which they seek as to their position within the overall school or family system. Yet at the same time mediation can often sensitize the adolescents to the minimal norms that must be met in order for the system as a whole to be able to adequately function.

Many child experts believe that family mediation provides a useful tool to be used in resolving severe acting out behavior by adolescents.

Family Owned Business Disputes. Another non-traditional area where family mediation is having an impact concerns disputes involving family-owned businesses. Many of us in the practicing bar have experienced the frustration of being involved with such a dispute, where the rules of normal business relations and economic common sense seem to have been thrown out the window.

A number of the pioneer family mediators have commented about how they discovered the techniques of family mediation to be particularly effective in this area.

Often in such disputes it is not the economic issues which are most important to the parties, but more deeply felt issues of approval, personal security, confidence, and self worth.

Such considerations may easily be lost in the traditional adversarial legal approach to such matters, which emphasizes the economic interests of the parties and win-lose scenarios.

Many of the same dynamics which can make mediation work in a divorce mediation context are also at work in a family-owned business dispute. Thus for example there is often a need for a continued relationship between the family members after negotiations are completed which is similar to that found in a divorce case where there are minor children to be coparented.

This allows for the same type of interest based (as opposed to value based) bargaining, which can result in a win-win scenario for a mediated agreement. There are many important issues to the participants which can be accomodated beyond the mere economic bottom line. In many cases, a few sessions by the disputants with an experienced family mediator can resolve what had previously appeared to be a total impasse, when the impasse was based upon a hidden and non-business related agenda.

Adoption Mediation. The Fall, 1988 issue of the Mediation Quarterly (21 M.Q. 51,59), includes two separate articles about the use of family mediation techniques in adop tion matters. While this is not an area in which family mediation has had a substantial impact in the past, the articles may be a sign of things to come.

The first article concerns the use of mediation in an open adoption context, an area of increasing interest in the adoption field and one in which the use of mediation seems particularly suited. The authors, from Open Adoption and Family Services in Oregon, conclude that mediation is an integral, essential component of a successful open adoption program.

The mediation process, they assert, identifies the needs and concerns of all parties to the adoption, sets a plan of action before during and after placement, and gives both parties a sense of security and peace of mind throughout the adoption process.

As a result of the mediation process, they say, adoption becomes a more attractive option and has a greater chance of meeting the needs of all of the parties.

The second article, written by a family mediator in Canada who is trained as both a psychologist and a lawyer, describes the use of family mediation in a contested adoption context. The end result of mediation process was the ability of all of the parties to see each other's positions in the context of the best interest of their two year old child, and to resolve the case outside of court.

The contesting natural father agreed to withdraw his objections to the adoption and an agreement was reached whereby at an appropriate time the child would be told of the adoption and have the opportunity to read a letter from each of her natural parents as to the reason for her placement.

Pictures and videotape were to be exchanged from time to time, and the possibility of future visitation left open, if appropriate.

Adoption cases are just one example of an area of the law where family mediation techniques are being extended beyond the traditional areas of divorce and custody issues to other legal issues involving family members.

Indian Law and ANCSA

A particular interest of the writer is in disputes involving Alaska Native groups, particularly disputes within or between such organizations. As all of us who have represented ANCSA village corporations or tribal organizations have observed, many of the members of such organizations are related within a few degrees of consanguinity.

Village corporation or traditional village council disputes are often very much like other disputes involving family owned businesses in their dynamics. They differ primarily by the number of members of the "family" and in the fact that the voting power is more widely distributed than is the case in most family-owned businesses.

Other elements making family mediation suitable to normal domestic disputes are also appropriate to village disputes. Thus there is a need for continued relationship between the disputants, who live together in the same village, making a win-loss resolution less desireable than one which allows some satisfaction to all parties. The tremendous cost of litigation is another strong incentive towards mediated resolutions.

Such costs, which of course are not just limited to native disputes, are a factor which has been of concern to all of us who have been involved with this area of the law and have seen the tremendous financial waste incurred in unproductive tribal squabbles.

Many of the same considerations apply to disputes involving the ANCSA Regional Corporations. Indeed, some of the more innovative uses of alternative dispute resolution techniques to have occurred in the State of Alaska have involved resolving ANCSA related disputes between the various Regions.

The ANCSA 7(i) revenue sharing arbitration agreement is the most well known, but only one of various such techniques which have been used successfully to resolve disputes between the Regional Corporations.

Non Traditional Family Disputes. An area where family mediation seems particularly prevelant in Alaska involves the resolution of non-traditional family disputes. Same sex relationships or those involving parties living together without benefit of marriage have many unique characteristics.

At the same time they are much like traditional relationships in many other ways, especially in the anguish of the parties at the time of separation and the emotional nature of parties as they attempt to reach a final legal termination of their relationships.

Such relationships may not have the same concerns about future contact between the parties as do traditional marriages where there are children. (Although there are children involved in many such cases as well.) A factor which mitigates even more strongly in favor of the mediation approach to such disputes, however, is the uncertainty pervading the law in resolving such disputes.

Thus the parties prefer to reach a compromise agreement in mediation rather than risk the substantial costs and uncertainty of trial. Moreover, a public airing of such private matters is often abhorrent to the parties. For whatever the reasons may be, my own experience is that family mediation seems to be particularly prevalant in Alaska in resolving such non-traditional family types of disputes.

Conclusion. In sum, family mediation has many useful applications beyond resolving divorce and child custody disputes. Family mediation is an option worth considering in any dispute involving interactions between family members or others who have been involved in a close personal relationship.

In some cases family mediation techniques may hold the key to discovery of that puzzling hidden agenda which can result in an impasse in negotiations over what seem to be straightforward economic interests of the parties.

CLE CALENDAR 1989

Seminar Number	Date	Length	Subject	Place
#13	July 18		Foreclosures	Hotel Captain Cook
#06	Sept. 7	Half Day	Adoption Issues	Anchorage Hilton
#17	Sept. 7-8	Two Full Days	Fed. Sentencing Guidelines—in coop. with U.S. District and Probation Office	Federal Building
#10	Sept. 16-23	All Day	NITA of the North—8-day Intensive Trial Advocacy Program	Hotel Captain Cook
#15	October 27	Half Day	Maritime Personal Injury	Hotel Captain Cook
#18	Oct. 31 & Nov. 2	After-noons	Fed. & State Sentencing Guidelines	Anchorage Hilton
#19	Nov. 16	All Day	2nd Annual AK Native Law Conference	Hotel Captain Cook

Call the bar office at 272-7469 for information and sign-ups.

THE MOVIE MOUTHPIECE

Edward Reasor

My local priest is rather disappointed in me. At one of those theological discussions that run late into the early morning hours I ventured the opinion that two of the Indiana Jones movies, namely, "Indiana Jones And The Raiders of the Lost Ark" and "Indiana Jones and the Last Crusade", supposedly the last of the Jones movies, encourage people to read the Bible more than did the teachings of the Catholic Church.

He was not impressed by this argument, but, then he had not seen either movie. The truth of the matter is that people generally are not moved to read the Bible. In "Indiana Jones and the Raiders of the Lost Ark", movie — viewers were at least mildly interested in the Old Testament and whether there was in fact an ark in Israel in the days of the wars and prophets, and what contents the ark contained.

In "Indiana Jones and the Last Crusade", movie viewers are again encouraged to look at the Bible and the last supper of Jesus Christ found in the New Testament. The search for the Holy Grail was personified by the Catholic Church during the time of the crusades, the first one being in the early 12th century.

Whether you are Catholic or not, whether you are moved to read either the Old Testament or the New Testament, I strongly recommend "Indiana Jones and the Last Crusade" for your movie viewing pleasure as it is in my opinion the best of the three Indy movies.

Those of you with a more common sense approach to movies (the lawyer approach) should go see "Indiana Jones and the Last Crusade" because this movie has grossed over one hundred million dollars in only nineteen days after its original release, the fastest grossing movie ever made!

Economists tell us that one of the reasons "Indiana Jones and the Last Crusade" did so well so quickly is that people under 25 (that age group that will see a movie more than once) represented 61 percent of the audience. Some of these fans stood in line to see the movie twice and often three times.

Paramount's movie "Indiana Jones and the Last Crusade" stars Harrison Ford as the adventuresome archeologist, hero, Denholm Elliott as the knowledgeable museum curator and three new stars to the Indiana Jones adventures. They are the lovely blonde Alison Doody, a German archeologist who becomes infatuated with Indiana Jones as well as the quest for the cup that the Lord Jesus used at the Last Supper. John Rhys-Davies, who has played a villain in numerous South Eastern located films, but is now allied with Indiana Jones in his quest for the recovery of the holy cup for the betterment of mankind.

What really makes this the best of the three movies is the interplay, confrontation, love, and chemistry between father Jones starring Sean Connery (yes of James Bond films) and Harrison Ford as son.

"Indiana Jones and the Last Crusade" has a musical score that is both effective for the adventure scenes and melancholy as a mood setter for the more sober serious moments of the film.

This is through the courtesy of John Williams, a man who has been nominated for Academy Awards for music many times. Cinematographer Douglas Scocombe is a British photographer who worked on both earlier Indiana Jones adventures. Michael Kahn is editor, and as in every Jones film the action was directed by Steven Spielberg, the man who knows how to make money, the man Hollywood will not award the Oscar.

George Lucas, as in the past, teamed with Spielberg for the production of "Indiana Jones and the Last Crusade." He is one of the originators of the idea and one of the writers of both action and script, although, Jeffrey Boam is given full credit for this screen-play.

"Indiana Jones and the Last Crusade" opens with star River Phoenix playing Harrison Ford's part when Indiana Jones was a teenager. The opening shot is spectacular. Look for a rock that seems to balance in the great Utah desert.

In the Utah of 1912 we are introduced to Indiana Jones and his father. Indiana Jones while on a boy scout campout see adventurers stealing the crucifix formerly owned by Coronado. He tries to recover it so that it can be in a museum for everyone to see, but fails.

This sequence give the audience, as the film progresses, a more detailed background of Indiana Jones than the previous two films (supposedly because this is in fact the last of the trilogy). We learn for example that Indiana Jones as an adult is afraid of snakes because while attempting to rescue the crucifix as a teenager on a moving train he falls into a vat filled with snakes. We learn that he carries a whip because on the same train he falls into a lion cage and can only be saved through his own imagination and courage by using the training whip located on the wall of the lion's den. He cuts his chin on his first attempt. We learn as the film closes that professor Jones is called Indiana because that was the name of the family dog.

However, nostalgia for the moviegoers that enjoyed the first two Indy films is not enough for success. "Indiana Jones and the Last Crusade" released over the Memorial Day weekend resulted in a gross of $11 million on Memorial Day alone — another record — the biggest one day gross ever scored by any movie any where. In light of the fact that the total cost of the movie including its distribution and advertising was $50 million, "Indiana Jones and the Last Crusade" is a financial success already and this is before European showings, televisions, or videocassettes.

Why? In part because of the action. As Indiana Jones follows the clues of the diary written by his professor father who has spent his whole life in search of the Holy Grail, he is confronted with religious protectors of the Grail who will kill any one who gets close to finding it: rats in the sewers of Venice, speed boats, Nazis, machine guns, fighter planes of the German government, and tanks.

There is no time to go the lobby for coke and popcorn. If you do, by the time you return you will have missed at least three chase and escape sequences.

Whenever a movie has back-to-back action, there is tension. To relieve this in "Indiana Jones and the Last Crusade" the comedy starts almost immediately.

River Phoenix as young Indy whistles for his horse, the horse is beneath him as holds the crucifix of Coronado in his hand. He leaps for the horse to ride away from the bad guys, tumbles and falls as the horse moves away riderless. The head of the adventurers also whistles, only, a motorized vehicle pulls up to pick him up so that he can pursue young Indy.

Later a Nazi thug seizes the beautiful Allison Doody, threatening to kill her. Father Jones tells his son to ignore her and tells the thug to go ahead and kill her. He's convinced she's a traitor. Young Indiana Jones cannot do this so he surrenders. He then finds out that she is in fact a Nazi and that he misjudged her. He asks his father how he knew she was a traitor, "She talks in her sleep" replies the older Jones.

This after we know Indy partook of Allison Doody's sexual delights earlier. There is something humorous about a father and son sharing the same woman especially when neither knows. Comedy writing to relieve the tension of action film "Indiana Jones and the Last Crusade" is extremely well done especially in a later scene with father and son managing to get passenger seats aboard a helium balloon about to leave Germany.

One of their Nazi pursuers confronts father Jones, but before he can sound the alarm young Jones, now dressed in the uniform of a steward throws the Nazi through the window of the helium balloon. The passengers are aroused, not sure what has happened. Harrison Ford looks at them and announces "no ticket." All of them immediately look in their purse and coat pockets flashing their own private tickets.

It will not hurt your enjoyment of "Indiana Jones and the Last Crusade" to advise you that at the end Harrison Ford, Denholm Elliott, and Sean Connery all survive. There is enough here for a sequel and it would do rather well at the box office, but it is not to be. The relationship that has developed between father, (Sean Connery) and son, (Harrison Ford), is a simple delight. I could have watched more of this human, loving scene.

"Indiana Jones and the Last Crusade" is one of many films that I have watched twice. I was amazed at how much movie going techniques I missed the first time around. Like you, I got caught up in the action, drama, and suspense of this film and my mind wondered from the technical viewpoint.

When you watch it see if you can spot the following techniques: (1) Mood setting — in the young River Phoenix scenes the adventurer is wearing the hat that Indiana Jones made famous in his first two films.

He gives the hat to the boy after acquiring Coronado's crucifix through the bribery of a local sheriff. The scenes with the adventurer who is charged with getting the crucifix back from young Indiana Jones shows that he really isn't all that bad of a guy. At times his eyes sparkle in admiration of the spunk of young Jones and when he gets the cricifix back he says: "you lost today kid, but it doesn't mean that you have to like it," and then gives Indy the hat. The fact that young Jones accepted the hat and wears it on his field trips sets the mood of a man who learns something from an adversary.

(2). The use of the flash forward. After River Phoenix, Jones is now a doctor of archeology and he still is attempting to acquire the same Coronado cross. His adversary is still the rich villain who hired the earlier adventurers. Flash forward again — this time a closeup of the scar on the chin of professor Jones lecturing at a quiet, sedate, college. He tells his students that 75 percent of all archeology is done in the library and that they must read, read, read.

(3). Medium shots and use of background: Indy prior to discovering that Allison Doody is a Nazi traitor kisses her compulsively. She withdraws from the kiss and asks rather sarcastically "how dare you kiss me"? But, before he can answer she kisses him back only harder. This is a medium shot from the top of the heads to mid-waist. It allows the audience to enjoy the emphasis on the two people and at the same time outside the window a Venice gondolier is singing in the background. Because Ford comments on the song and the singer we feel that the singer is part of the scene too.

(4). Use of cross-cut to relieve action tension: Harrison Ford when confronted by the Nazis as to the diaries of his professor father detailing the route to the Holy Grail announces that the diary is in the hands of the museum curator. He goes on to say that the curator has friends in every town, that he is capable of speaking a dozen languages, that he is extremely talented, that he will blend in with the population and simply disappear, and that the Nazis will never find him.

The very next film clip is that of the museum curator (Denholm Elliott) asking out loud in a crowded square, "Does anyone here speak English or Ancient Greek?" This is the same curator who got lost in his very own museum.

(5). Action sequences: the best action sequence in the film for my money is when Harrison Ford and Sean Connery leave the helium balloon by running down the passageway and into the biplane which is attached underneath the balloon.

They have discovered that the Nazis were turning the balloon around, back for Germany, and the sequence involving the detachment of the biplane from the balloon, the flight of the biplane as it is pursued by fighter pilots, the erratic and negligent shooting at the fighter planes by father Jones, the landing, and the use of medieval literature by the father, (remembering a line from "The Song of Roland," about nature as a weapon, he uses his umbrella to frighten seagulls into the path of an oncoming fighter plane and it crashes).

Sometime ago in this column I recommended to first time bar candidates that a week before the bar exam they forego further study and attend a James Bond film. I have nothing to add to that except, if James Bond films are not available, check out any one of the Indiana Jones adventures, but most specifically, ask for "Indiana Jones and the Last Crusade", the best made of the three Indy flicks.

• Dealing with a deed-in-lieu

Continued from Page 5

reduction of the mortgage debt. It is not clear whether the reduction is applied first to the redemption price of the foreclosed property or first to the deficiency judgement.

8. Bankruptcy. BANCO must be concerned if the buyer files bankruptcy within one year after having given a DIL. In this event the bankruptcy trustee may try to upset the DIL transaction as a voidable preference under B.C. 547 or as a fraudulent transfer under B.C. 548. To protect itself, BANCO should confirm the buyers relative financial stability and also should only use the DIL when the value of the property, as shown by appraisal, is equal to or less than the amount of debt to the bank. If the property value is greater than the debt, the bank runs the risk of the trustee's attack to try to recover the equity for the bankruptcy estate. BANCO must also be concerned with being charged by buyer with having forced the conveyance under duress.

9. Retention of Deed of Trust. While it is important in the DIL transaction that the debt be cancelled, the bank may wish to keep the deed of trust alive since it may fear the presence of junior liens. By retaining the deed of trust (after cancelling the debt) the bank can foreclose in the event that a junior lien pops up at a later time and thus secure clear title.

10. Debt Cancellation. It is very critical in a DIL transaction that either the deed of trust debt be cancelled or equivalent protection given buyer. If the mortgage debt is not cancelled, the courts may treat the new deed as merely a deed absolute given as security for a debt (in other words, as another mortgage), or they may hold the DIL to be invalid. The courts look to see that the parties intended the deed to operate as an extinguishment of the mortgage debt, at least as to buyer. This just makes good sense, since in return for voluntarily deeding over his property the buyer is relieved of his debt obligation on the mortgage.

11. Alternate Debt. The buyer will sometimes pay to have the bank accept a DIL. The payment can be either in cash, an unsecured note, a confession of judgement or something else of value to the bank. From the defaulting buyer's standpoint, it sometimes makes good sense to pay the bank to do a DIL rather than face a substantial deficiency judgement which would result from a judicial foreclosure, or worse yet to face a suite on the note.

12. Redemption After DIL. There is no right of the defaulting buyer to redeem the property after a DIL.

13. Ownership Obligations. After accepting a DIL, the bank really is the owner of the property and has all of the obligations and liabilities of an owner, and prudently must insure the property against ownership liability, be prepared to provide management, and also be prepared to be responsible for any hazardous waste found on the property.

14. Clogging the Equity of Redemption. Remember the general rule that the bank cannot do anything to limit or restrict the buyer's right to redeem the property after foreclosure. Such limitations and restrictions are called "clogging the equity of redemption." This rule applies against contemporaneous clogging of the equity of redemption and is generally inapplicable to transactions subsequent to the original mortgage transaction. Most courts seem to permit the bank to purchase the buyer's equity of redemption, i.e., by use of the DIL. However, such a purchase is subject to careful review to ensure that the transaction is free from fraud, is based upon an adequate consideration, and that is, in fact, actually subsequent to the mortgage and not contemporaneous with it. It is this subsequent transaction exception upon which the bank will generally rely in taking a DIL.

15. Non-assuming Grantor of DIL. Can a buyer who purchased property but did not assume the underlying deed of trust give a DIL? Probably not, since the non-assuming buyer has no personal liability on the mortgage debt, and therefore a release of the debt would be no consideration for the DIL.

16. Fraudulent Conveyance. A.S. 34.40.010 generally provides that an owner cannot convey his property with the intent to hinder or defraud his creditors. Does this apply in a DIL transaction? Probably "yes," if the property is worth substantially more than the amount of the mortgage. (Given the present Alaska real estate values as compared to the existing mortages, this question won't arise very soon.)

17. Warranty Deed or Quitclaim Deed? Either deed is legally sufficient in the DIL transaction. The defaulting buyer seeks a "clean" transaction pursuant to which it transfers the property without any warranties of title or of physical condition in full satisfaction of the mortgage liability. The bank sees the transaction as an arms-length purchase of real estate in which it is entitled to receive all the warranties, title insurance and other trappings, commonly incident to the purchase of real estate.

18. Ancillary Rights. The bank will want to receive the usual purchaser's treatment in regard to the following ancillary rights in a DIL transaction:

(a)Leases. (An Assignment thereof)
(b)Personal property. (Bill of Sale)
(c)Contract rights. (Assignment)
(d)Architect's contract and drawing. (Assignment)
(e)Construction contract. (Assignment)
(f)Building permits. (Transfer)
(g)Loan commitments. (Assignment)
(h)Estoppel certificates from tenants and others.

19. Foreclosure After a DIL. If the bank does decide to preserve the deed of trust after taking a DIL, and later decides to foreclose the deed of trust to eliminate junior encumbrances, it would probably make sense to wait 90 days after recording the DIL so as to fall outside of the trustee's 90 day reach back period under B.C. 547.

20. Exotic Deviations. Very careful consideration of the outcome must be given if ancillary or additional agreements are entered into in the course of the DIL transaction, such as a lease back of the premises to the defaulting buyer; a share of the profits being given to the defaulting buyer upon resale of the bank. Such devices may be construed by a court as equitable mortgages or as clogging the equity of redemption.

21. Covenant Not To Sue. In our original very simple example of a DIL transaction, the debt obligation was cancelled. Since a mortgage can't exist without an obligation, the cancellation of the debt obligation in a DIL may operate to extinguish the mortgage. Thus when junior encumbrances are a worry and the bank wishes to preserve the deed of trust in order to later foreclose it and eliminate the junior encumbrances, the bank will be concerned that if it cancels the debt obligation it thus extinguishes the mortgage since a mortgage cannot exist without an obligation. The junior encumbrances then move up in priority. Thus, some banks preserve the debt obligation but in order to have sufficient "consideration" to uphold the DIL, the bank instead gives the defaulting buyer a "covenant not to sue" (i.e., an agreement that no claim will be brought against buyer personally.)

22. Attorney's Opinions. Since DIL transactions can be challenged from a number of different directions and since the courts will tend to scrutinize them closely, the bank may feel that it gets some protection or at least some additional comfort by requiring the defaulting buyers' attorney to give an opinion to the bank generally to the effect that the defaulting buyer understands what is happening, the transaction is for a fair consideration and not otherwise defective.

DOCUMENTATION OF THE DIL

Generally it is advisable to use the following documentation.

1. Settlement Agreement. This agreement includes the necessary representations as to value and intent, free will and similar items explaining and agreeing to the transaction. The settlement agreement should include a "covenant not to sue" or, if necessary, a "release of deficiency liability" in favor of the defaulting purchaser, rather than a satisfaction or release of the mortgage indebtedness itself. The essential matter, however, is that the parties specifically agree upon the effect of the DIL on the bank's right to continue foreclosure efforts if it chooses to do so. Provide that the deed of trust will remain of record, without cancellation or reconveyance. Specifically provide that the power of sale contained in the deed of turst has not been extinguished by merger so that it is available for later use. See, Strike v. Trans-West Discount Corp., 155 Cal. Rptr. 132 (1979).

2. The Deed-in-Lieu. The general practice in Alaska is to label the deed as a DIL, although some practitioners feel otherwise. There is no requirement that a DIL be labeled as such.

3. Estoppel Affidavit. This is a lengthy affidavit signed by the defaulting buyer stating that the DIL is not to be construed as a mortgage (i.e.,not a deed absolute) but as a final conveyance that is freely and voluntarily given for a fair consideration, such as the covenant not to sue or the cancellation of the mortgage debt.

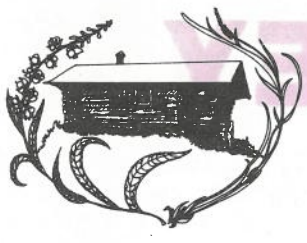
4. Other Documents. In certain transactions there would be the usual other documents to be recorded, such as assignments of recorded leases from the defaulting buyer to the bank.

5. Preliminary Title Search. It is advisable to order a preliminary commitment for title insurance in order to check for junior encumbrances at the start of the transaction. It is certainly wise for the bank to have an owner's title insurance policy issued for its protection if the DIL transaction is concluded.

6. Recording. It is important to record the settlement agreement, deed-in-lieu of foreclosure and the estoppel affidavit (and other miscellaneous documents related) promptly in order to prevent any further interests from cropping up in the meantime such as the defaultling buyer's bankruptcy.

CONCLUSION

The DIL is a very useful device which is often used and will continue to be used despite some dangers. In a sense, it is the mutual recognition of both the defaulting buyer and the bank that they both would be better served by a relatively quick resolution of their problem. Please call the author with other DIL situations you have experienced.



HISTORICAL BAR

Dealing with death up north

BY RUSS ARNETT

In Territorial days the U.S. Commissioners were ex-officio coroners. Modern society prefers to distance itself from physical contact with the dead. My experience as a coroner in Nome made me less spooked about touching dead bodies. The first time I actually touched one was in a shed in Nome used as a morgue. The bodies were stored there until summer when graves could be dug. The shed was owned by a deputy Marshall who I believed charged $25 or $50 for the storage. He was the closest to an undertaker that Nome had. There was no embalming. A burial permit was required but it just cost a few dollars. Funeral and burial were much less expensive than in most places. The Native Service would pay the cost of lumber with which Eskimos built the coffins for their dead. I suppose it would help the person building the coffin to grieve for the dead relative.

I spoke with a man who had just finished digging a grave, not a professional grave digger. He was in a sober and thoughtful mood. He said as he was digging his shovel unearthed part of a dress. He concluded that was getting pretty close to nature.

A plane crashed in white-out conditions with a bush pilot, who was Eskimo, two other Eskimos, and the local head of the Native Service. The latter was a civil servant of the highest order and my friend. Only he survived the crash. I was supposed to examine the bodies as coroner, but I did so without removing their clothes. They still had their parkas and mukluks on. The arms were rigid and stuck out from the bodies at an unusual angle. There was nothing to be done with the bodies but wait for summer to bury them.

The Native Service head lived for perhaps a day. I saw him in the hospital and asked him about the crash. He said they just ran into a white-out and crashed. Though on his deathbed, he was as warm and friendly as he had been before the crash.

A military freighter anchored offshore sent in a liberty party. Their boat shipped water in the heavy surf and sank. Some of the liberty party lived and some drowned. There were acts of heroism by local rescuers. I remember the description at the inquest of a survivor swimming to shore and dragging himself out of the frigid water. The inquest acted as a catharsis for the tragedy for the community. Later a Coast Guard captain came to Nome at the request of the public because of the deaths. Acts of heroism by the Coast Guard in maritime rescues in Nome many years earlier were recounted and thought perfectly relevant to the present situation. The captain said other ports had more traffic and needed a Coast Guard station more than Nome. The only sour note was from a Coast Guard legal officer who said we had no business to conduct an inquest.

One of the matters pending when I took office as U.S. Commissioner involved a healthy young Eskimo lad who died of drowning. We attempted to determine why he was in the ocean. We concluded that it was a beautiful, sunny summer's day, and with exuberance and zest for life he dove in and planned a swim. The water was just too cold.

Another pending matter involved the death of an alcoholic and tubercular Eskimo ivory carver. I entered his cabin with a Deputy Marshal to see if there was anything of value. I was fearful that the tuberculosis bacillus would leap up from the floor or drop down from the roof on me and burrow in. I had to write to the man's son, who was doing time at McNeil Island Penitentiary, of his father's death. I received a nice note back from the son.

The death in the North story that really grabs me involves an old timer who lived by himself in the wilderness south of Fairbanks. He decided to cash in his chips to the Great Dealer. At least this is how it was reconstructed. It appeared that as the method of suicide he chose to lay down in a stream. The stream later froze over and he was found there in spring after the ice had melted. This may be the antithesis of Sam McGhee's cremation and, to my thinking, much less appealing.

Peter Freuen recounts the praise Greenland Eskimos had for a mother who strangled her baby in a time of starvation.

Stephanson tells of the Eskimo father who asked his sons to leave him to die as he was old and tired and unable to keep up with them on the hunt. They insisted this was not a problem for them. They gave their father some hot tea which cheered him up for a while. When the father kept insisting that they leave him, they finally agreed. They built an igloo for him. When they returned a few days later, he was dead.

On the lighter side, and perhaps of some instructive value to our profession, I recall the death of a Nome lawyer who in life had faithfully represented the mining interests. He died in the saddle with a young lady not his wife. At the inquest she testified "I thought him comin', but him goin'."

MEMBERSHIP SURVEY

Continued from Page 1

address issues relevant to that person's practice situation and many asked why we were doing the survey.

One of the changes that we would recommend be made in future surveys of this type is to limit the issues addressed in a single survey. For example, an entire study could be based on gender-based differences in income or type of practice or working conditions. Other surveys could focus on private or public practice. Still others could address staffing issues or continuing legal education. Perhaps in the instant case we attempted to address too many issues relevant to different segments of the legal community.

Why did we do it? I am always surprised by that question, because to me the answer is obvious.

The Alaska Bar Association's primary responsibilities are the certification, education, and discipline of attorneys practicing in Alaska. The Juneau and Tanana Bars' services are of a more social nature, but they are, nevertheless, important as organizations to channel formal comment about regional concerns. Each exists to serve its constituency. Who are these people that comprise the Alaska Bar Association? What areas of law do they practice? How much do they make? Why don't they apply for judicial vacancies? What do they think of continuing legal education and the associated costs? Is base compensation in the public sector competitive with private sector incomes? Does the legal system, with its organized instruments of communication, succeed in addressing the needs of the persons on whom they most depend?

When I was on the Board of Governors endless hours were spent speculating on who it was that belonged to the Alaska Bar Association and what were their needs. Now we have a better idea.

From your comments we know that some of you have gripes not only about the way the Bar is run, but about the Court System and the perceived inability of many trial court judges to appreciate the problems of the small-office practitioner, or about the costs associated with delay or failure to discipline attorneys abusing the discovery process.

Some of you are not happy with the Alaska Judicial Council or the standards employed in the nomination of judicial candidates to the governor. Many more of you, however, are pleased with the efforts of your bar and of the Court System and of the programs that have been initiated as we near the twenty-first century.

If the various Bar Associations or the Court System, or the Judicial Council, for that matter, are to behave as responsive institutions then we need to know who our constituency isand how its members think and work. It is in this way that we best serve the public, the ultimate beneficiary of our efforts.

The survey is complete and its results have been published. Each member of the Alaska Bar Association can receive a more detailed report upon request of the Alaska Bar Association. For those of you with thoughts about the data, please do not hesitate to contact the Alaska Judicial Council with either your questions or observations. For those of you who desire additional information not reported in the survey that depends, in part, upon the use of one or more variables, please contact Dr. Rick Ender, Policy Analysts, Ltd., 2001 Banbury Circle, Anchorage, Alaska 99504 (Tel: 786-1760) after September 5, 1989 who, consistent with concerns of confidentiality, will produce information for a nominal fee ($50/hr.).

The author was executive director of the Alaska Judicial Council when this article was written.

Numbers tell composition of Alaska Bar

TABLE 2A
PROFILES OF CAREER GROUPS
PRIVATE BAR

	LENGTH OF PRACTICE IN YEARS			
PRIVATE BAR	**0–6**	**7–12**	**13–19**	**20 or more**
% Working In				
Anchorage	79.2	73.3	72.9	64.0
Roaded-Ferry	20.8	25.4	25.1	35.1
Rural-Bush	0.0	1.3	2.0	0.9
Sole Pract	13.9	29.9	28.6	44.5
Partner	13.9	45.0	59.3	50.9
Associate	69.8	21.2	8.0	3.6
Corporate	2.5	3.9	4.0	0.9
Gender				
Male	69.3	73.7	95.0	97.3
Female	30.7	26.3	5.0	2.7
Average . . .				
Age	34.0	38.5	42.9	53.4
Years of Practice	3.8	9.6	15.2	25.4
Years AK Practice	3.6	8.8	14.3	22.6
Years of Residence	12.2	13.3	19.1	26.8
1987 Law Income	$38,100	$73,800	$116,900	$121,300
1988 Law Income	$47,600	$81,500	$124,700	$121,200
% Member of Local Bar	77.4	59.3	67.9	78.7
% Applied for Judgeship	0.5	6.9	16.2	37.3
Low Salaries Important Reason				
Very	14.2	14.1	29.1	17.0
Somewhat	33.5	28.8	33.7	38.3
Not	52.3	57.1	37.1	44.7
Size of Firm				
1 Lawyer	14.1	27.0	21.3	35.8
2–3	21.2	21.7	26.4	22.9
4–9	20.7	21.3	20.8	17.4
10 or more	43.9	30.0	31.5	23.9

TABLE 2B
PROFILES OF CAREER GROUPS
PUBLIC BAR

	LENGTH OF PRACTICE IN YEARS				
PUBLIC BAR	**0–6**	**7–12**	**13–19**	**20 or more**	**Judges**
Ratio—Public/Private	0.46	0.45	0.28	0.09	
% Working In					
Anchorage	49.5	51.9	48.2	36.8	54.5
Roaded-Ferry	37.6	41.3	46.4	52.6	38.6
Rural-Bush	12.9	6.7	5.4	10.5	6.8
Prosecution	19.4	20.2	19.6	10.5	
Public Def	19.4	12.5	10.7	5.3	
State Other	31.2	44.2	55.4	47.4	
Govt Other—	30.1	23.1	14.3	36.8	
Gender					
Male	50.5	54.8	67.9	94.7	70.5
Female	49.5	45.2	32.1	5.3	29.5
Average . . .					
Age	34.1	38.1	42.1	51.1	44.8
Years of Practice	3.8	9.5	14.7	23.2	17.5
Years AK Practice	3.5	8.6	12.4	18.3	16.0
Years of Residence	10.6	13.0	15.6	23.3	19.7
1987 Law Income	$31,800	$49,700	$63,000	$69,000	$65,600
1988 Law Income	$38,600	$53,200	$68,100	$69,000	$67,100
% Member of Local Bar	47.8	34.6	28.6	47.1	54.5
% Applied for Judgeship	5.4	14.4	28.6	44.4	
Low Salaries Important Reason					
Very	6.2	0.0	11.8	12.5	28.6
Somewhat	16.9	26.9	29.4	31.3	45.7
Not	76.9	73.1	58.8	56.3	25.7

MEMBERSHIP SURVEY

The Alaska, Juneau and Tanana Bar Associations, the Alaska Judicial Council and the Alaska Court System jointly sponsored a survey of resident Alaskan attorneys to assess professional attitudes and to develop a baseline of information on a wide number of subjects relevant to the practice of law.

The Judicial Council has conducted past surveys of the Bar membership for purposes of judicial selection and retention evaluations. The Court System and Council have surveyed the Bar membership about pro tem judge performance, and the Bar Associations have typically provided assistance in survey design. The present survey assists in ongoing survey work by providing an overall perspective on the Bar membership that can be used to assess the representativeness of respondents to other Bar surveys. Data from the survey can also be used by the Bar Associations, the Court System and other groups to provide better service to Alaska attorneys and the public.

To conduct the survey the Alaska Judicial Council contracted with Policy Analysts, Limited, a professional organization that has worked with the Council on judicial selection surveys since 1980. The surveys were mailed to 1,953 attorneys and 1,083 responded for a return rate of 55.5%. This is a good return rate, especially given the length of the survey and the sensitivity of the subject matter. It reflects the strong interest of the Bar membership in the topics covered by the questionnaire.

Preliminary Considerations

Before summarizing some of the more interesting data, a few cautionary remarks would be appropriate.

1. The data are reported in a manner designed to protect the confidentiality of the respondent and to prevent abuse of confidential information. Consequently, there will not be as much detail as would be possible absent these concerns.

2. The survey questions were designed to assess issues relevant to many dififerent segments of the legal community. In this regard we were successful but there were some complaints about the relevancy of the questions to the practices of certain types of attorneys. The next survey will be designed to allow more flexibility in responses to accommodate the variations in type of practice.

3. Questions dealing with the amount of adjusted gross income from the practice of law allowed responses in the form of a check at the appropriate income interval. The income figures are not exact amounts because they are based on midpoint estimates of the intervals checked by the respondents. For example, while the 1988 average income of the respondents is calculated as $78,300, this is a "best" estimate. The actual income could range from $74,200 to $82,400. Income figures are expressed in terms of adjusted gross income. That is, this is income before taxes but after deduction of other items including law-related expenses.

4. Many of the numerical findings are expressed in terms of mean (average) results but occasionally the median (mid-term) is used. The median is more appropriate if the low or high ends of the range of responses would distort the mean.

5. The reader should note that analysis at a more general level may suggest different conclusions than analysis at a more detailed level. For example, the report states that males earn an average of $33,200 more than their female counterparts. To provide insight into the primary factors associated with gender-related compensation differences, a multiple analysis of variance was conducted. The added analysis showed that type of practice and length of experience have the most effect on gender differences in income. The $33,200 difference appears to drop to $4,500 when the factors of full or part-time status, location, type and length of practice are all considered simultaneously. Similarly detailed analyses were not conducted for most other variables, but could be if interest warranted.

6. The number of responses affects the validity of the result. Since there were many more attorneys practicing in Anchorage than in any other parts of Alaska the data concerning that city tend to be more reliable. More importantly, the data can be reported in greater detail because of lessened concerns about confidentiality. There is greater safety in numbers. Those in other judicial districts may be concerned or disappointed with the lack of specificity in the report concerning those areas. If additional information is desired the survey contractor, Dr. Richard Ender of Policy Analysts, Limited, 2001 Banbury Circle, Anchorage, Alaska 99504 (Tel: 786-1760) will, consistent with concerns of confidentialilty, provide more data. He will charge directly for these efforts at the rate of $50 per hour.

7. As with any other survey, especially a survey being conducted for the first time, there will be many unanswered questions. We urge anyone who has questions to contact the

Continued on page 14

TABLE 5
AVERAGE 1987 AND 1988 INCOME FROM THE PRACTICE OF LAW

Average Income	1987	1988	Private 1988	Public 1988
Total Mean Income	$ 72,400	$ 78,300	$ 89,700	$54,000
Total Median Income	55,000	65,000	65,000	55,000
Location of Office				
Anchorage	76,400	83,000	93,500	52,600
Roaded	66,100	69,500	79,400	56,200
Rural	48,300	61,200	75,000	58,500
Location of Practice				
1st District	61,000	64,600	72,900	54,600
3rd District	75,200	82,400	93,200	52,900
2 & 4th District	68,800	70,000	80,100	59,400
Private	**82,800**	**89,700**		
Sole	71,100	71,500		
Partner	117,100	127,700		
Associate	45,500	53,700		
Corporate	71,300	76,800		
Public	**50,300**	**54,600**		
Judge	65,600	67,000		
Prosecution	50,500	55,900		
Public Defender	43,800	47,500		
Other State	50,900	55,000		
Other Government	43,000	48,800		
Gender				
Male	80,600	86,500	97,000	57,500
Female	47,400	53,300	57,000	50,100
Age				
30 years or less	33,300	42,300	43,900	38,000
31–35	46,600	56,700	63,500	43,900
36–40	69,300	74,600	86,200	54,600
41–45	93,100	98,900	114,800	61,200
46–50	96,600	99,800	111,400	64,400
51 or more	92,300	93,300	104,000	74,500
Years of Residence				
1–5 years	40,600	51,200	55,900	43,600
6–10	57,500	65,100	75,300	50,300
11–15	81,900	88,500	100,800	60,000
16–20	92,200	96,700	107,600	64,300
21–30	78,500	78,900	87,200	57,400
31 or more	88,800	91,700	105,700	60,300

Years of Practice in Alaska	1987	1988	Private 1988	Pub 19
0–3 Years	30,100	39,600	41,900	36,[illegible]
4–6	46,600	55,200	59,800	48,300
7–9	59,900	64,100	72,300	52,100
10–12	77,800	84,000	95,300	57,700
13–15	101,900	108,600	125,400	69,300
16–19	112,400	115,900	127,800	68,200
20 or more	114,400	112,500	126,800	75,300
Years of Practice				
0–3 Years	27,900	37,500	40,500	32,100
4–6	41,900	49,400	53,400	43,400
7–9	56,300	62,400	69,900	50,700
10–12	73,000	79,400	90,000	56,200
13–15	99,000	106,100	123,200	67,700
16–19	109,000	114,700	127,000	70,300
20 or more	106,000	105,600	121,200	71,200
Satisfaction with Career				
Very Satisfied	82,700	90,600	107,900	56,700
Moderately Satisfied	68,300	74,200	84,200	53,500
Somewhat Dissatisfied	53,500	54,800	56,200	49,800
Very Dissatisfied	52,000	44,000	47,300	51,000
Work Status				
Full Time	75,500	82,500	94,300	55,800
Part Time	36,400	33,200	35,700	36,700
Part Time Due to Maternity/Paternity	32,500	32,400	30,400	36,700
Sabbatical Leave	78,800	50,500	50,000	55,000
Other	25,800	21,900	10,000	22,500
Size of Private Firm				
1 Lawyer			62,700	
2			85,300	
3–9			95,800	
10 or more			107,200	
Private Practitioners — Office in Alaskan Cities				
One			85,800	
Two or more			102,100	
Private Practitioners — Office Outside Alaska				
Yes			93,500	
No			80,100	

Private Practitioners Averaging Over $100,000 in Income

Admiralty/Marine	Mineral-Natural Resources	Government
Banking-Savings	Negligence-Def-Plain	Appellate Practice
Administrative Law	Land Use Law	Securities

• Survey findings offer member insight

Continued from Page 13

Alaska Judicial Council. We would be pleased to assist in further inquiry.

FINDINGS

The average attorney practices civil law full-time in a large law firm (by Alaska standards) in Anchorage, Alaska. He is 40 years old, has 11 years of experience, bills a little over 6 hours a day, works a 45-hour work week and has an adjusted gross income from the practice of law of $78,300. But one out of every three members of the Alaska Bar Association earns less than $50,000. Thirty-seven percent earn between $50,000 and $79,999 and 30% earn $80,000 or more. Ninety percent of those responding work full-time. Ten percent work only part-time, or were on sabbatical, retired, or were unemployed in 1988.

Private/Public Sector Comparisons

The ratio of attorneys in the public sector to those in the private sector is approximately 1 to 2 through 12 years of experience. After 12 years of experience there is a dramatic drop and only one out of every five attorneys with more than 12 years of experience works in the public sector (see Table 2). One conclusion that could be drawn from this is that attorneys from the public sector tend to enter the private sector as they gain in years of experience. Early career public sector attorneys earn an average of $9,000 less than their private sector colleagues. Career public sector attorneys will see their incomes rise by a factor of 1.79 over time. Private sector attorneys will see their incomes rise by a factor of 2.62. The difference between the two career paths widens over time to $56,600. A public sector attorney with between 0 and 6 years of experience will earn an average of $38,600 compared to a private sector attorney earning $47,600. He or she can expect to top out at an average income of $69,000 with 20 or more years of experience, compared to a private practitioner's income of $124,700 (see Table 2).

Judicial compensation patterns from the survey reflected an average income of $67,100 but this figure can be a bit misleading. The judicial officer category includes magistrates and other judicial officers some of whom work part-time. This reduces the average income of this group. Published federal and state scales state that the base pay of federal district judges is $89,500. The base pay for a state supreme court justice is $85,728, $79,992 for a court of appeals judge, $77,304 for a superior court judge, and $66,816 for a district court judge. Nevertheless, judges' earnings tend to be similar to the average sole practitioner or corporate attorney, and substantially below those of a partner in a private practice of law.

Most attorneys in prviate practice start their careers as associates and at some point between the seventh and twelfth years of their career they become partners or sole practitioners. Incomes for the attorney in private practice with 0 to 6 years of experience average $47,600. Between 7 to 12 years of experience incomes average $81,500 and between 13 and 19 years of experience the average is $124,700. Over time, the gap between partners and sole practitioners is $56,200 and between partners and associates is $74,000.

Fifteen percent of the respondents from Anchorage are state employees. Thirty percent of the respondents from the first and fourth districts are state employees, and 44% of bush Alaska respondents work for the state. Anchorage attorneys are more likely to have a civil practice compared to the balance of the state; criminal practices prevail in bush areas. Respondents in the First Judicial District, Fairbanks and the smaller road/ferry access communities in the Third Judicial Disitrict are likely to be older and have more experienced by an average of about two years. First Judicial District attorneys are more satisfied with their position and less likely to chose another profession than other attorneys in the state. Private practitioners in the Third Judicial District have higher incomes than attorneys working in the other judicial districts (see table 5). Private practitioners in the First Judicial District earn about $20,000 less, and Second and Fourth Judicial District attorneys earn $13,000 less on the average than Anchorage private practitioners.

Gender-Related Differences

Female attorneys in Alaska appear to have a level of economic activity and compensation below their male counterparts. This gap is most apparent in the private bar with income differences averaging $40,000. Hours worked averaged 4.2 hours a week less, and billable hours were an average 140 hours less annually than male practitioners. The study suggests some possible reasons for the differences, but does not provide conclusive evidence of causal relationships.

Women constitute a much higher proportion of the public bar (39.4%) than of the private bar (18.3%). Within the private sector, women are only 9.1% of partners but 32.7% of associates. These status and job differences play a large role in determining income. However, position is not the only reason for gender differences. Women earn less within every category of type of practice, with sole practitioners, partners and associates showing the greatest gaps (see table 7).

A second factor that is related to differences in gender income is experience. Male and female attorneys enter practice with similar salaries but differences average almost $50,000 after 15 years of practice. Among private attorneys with zero to three years of experience, 59.5% of women and 62.2% of men have associate status earning $40,400 and $43,600 respectively. For attorneys with 7 to 15 years of experience, about 11% of both groups are still associates, but only 15.6% of women are partners compared to 41.9% of the men. While the gender gap is lowest for partners ($12,000), it is $38,600 for sole practitioners and about $16,000 for associates.

A multiple analysis of variance was conducted to help understand the main factors affecting gender-related income differences. By analyzing average male and female incomes in the context of different variables the roles of specific factors can be assessed. Location of office explains almost none of the gender differences, while full-time/part-time status has a moderate influence. Type of practice and length of experience affect income substantially. The role of gender is reduced most noticeably when all four factors of status, location, type and length of practice are taken into consideration simultaneously. The initial $33,200 difference drops to $4,500.

These data highlight some of the more notable gender differences in the bar memberships. Women appear to be disadvantaged in two ways. First, a moderate gender gap in compensation does exist and is not explained by objective factors such as hours worked and years of experience. Second, female attorneys have a lower success rate in the private bar career paths most likely to lead to higher income. The success rate of females and equality of compensation is more readily apparent in the public sector than the private sector.

Judicial Applications

Judges' earnings tended to be similar to the average sole practitioner or corporate attorney but substantially below those of a partner. The survey asked what role compensation played in discouraging attorneys from applying for a judgeship. Of the respondents to this survey, 52.7% said that salaries and benefits were not an important reason for failing to apply for a judgeship. Examing the categories of respondents suggests some interesting conclusions. Those with more than 12 years of experience or incomes exceeding $120,000, viewed salaries and benefits as a very important factor in the process of deciding whether or not to apply for a judgeship. Those who thought salaries and benefits were somewhat important had an average income of $95,500. Those stating it was not important earned an average of $63,700. Since application is more likely to occur after 10 or 12 years of experience it is interesting that 62.8% of the private attorneys with 13 to 19 yeras of experience see salaries as a very or somewhat important problem.

Continuing Legal Education

Three-fifths of those who responded to the survey felt that there should be a minimum number of CLE hours in order to qualify to practice in a specialty and 51.7% believed that a minimum number of CLE hours should be required to retain a license to practice. Support for both of these concepts was lowest in the Second and Fourth Judicial Districts and bush Alaska, and highest in the First and Third Judicial Districts. Of those responding, 62.7% had participated in an Alaska Bar Association CLE seminar in the past twelve months. For those who attended CLE, the majority evaluation of the program presented was good, with 75.9% rating the CLE excellent or good and 2% as poor.

CLE program fees are a problem for some practitioners. About three-fifths state that fees are acceptable but 21.3% find them too high. Greatest interest was shown for the occasional 1 to 3 hours CLE programs and the concentrated 1 or 2 day programs. Anchorage attorneys tend to prefer the 1 to 3 hours occasional programs. Roaded/ferry and bush areas favor the concentrated format somewhat more. Combining these two approaches should draw the highest rates of participation.

Annual Bar Meetings

The survey asked whether Hawaii should remain the site for the midwinter Bar Association meeting. A majority (56.2%) preferred Hawaii, the current site. Even though many thought it was too expensive it appears that changing the location could lose more attorneys than it gains.

Participation in the ABA Annual Meeting is higher than the midwinter conference. Over one-third of the respondents attended at least one meeting in the past three years. Less than 14% attended two or more meetings. Participation is highest among Fourth Judicial District members and lowest among those from the First

Continued on Page 16

TABLE 7
GENDER DIFFERENCES AMONG LAW PRACTITIONERS

Categories	ALL ABA MEMBERS Females	ALL ABA MEMBERS Males	EMPLOYED FULL-TIME IN LAW Females	EMPLOYED FULL-TIME IN LAW Males
Age in Years	37.2	41.4	37.1	41.0
Years of Practice	8.1	12.8	7.3	12.4
Years of Alaska Practice	7.3	11.6	7.0	11.3
Estimated Income of . . .				
Sole Practitioners	$ 39,300	$ 77,400	$ 46,100	$ 82,900
Partners	$104,900	$129,900	$133,600	$131,300
Associates	$ 45,500	$ 57,800	$ 47,500	$ 59,000
Corporate	$ 74,200	$ 77,800	$ 74,200	$ 77,800
Judges	$ 61,900	$ 69,300	$ 61,700	$ 69,300
Prosecutors	$ 53,300	$ 57,300	$ 56,200	$ 57,300
Public Defenders	$ 43,100	$ 50,700	$ 43,000	$ 50,500
Other State	$ 49,900	$ 59,700	$ 49,900	$ 59,900
Other Govt/Non-Profit	$ 45,900	$ 50,200	$ 45,900	$ 50,600
Estimated Income with . . .				
0–3 years of exp.	$ 38,300	$ 38,000	$ 39,300	$ 39,500
4–6 years	$ 44,400	$ 53,300	$ 46,600	$ 53,600
7–9 years	$ 48,600	$ 70,400	$ 52,300	$ 71,600
10–12 years	$ 73,300	$ 82,700	$ 80,500	$ 85,200
13–15 years	$ 63,400	$114,900	$ 69,300	$116,500
16–19 years	$ 70,600	$118,900	$ 77,100	$122,900
20 or more years	*	$112,000	*	$115,700
Estimated Income of Practitioners With 7 to 15 years of experience				
Partners	$110,100	$122,400	$118,000	$123,400
Sole Practitioners	$ 42,400	$ 83,800	$ 49,700	$ 88,300
Associates	$ 49,300	$ 66,200	$ 56,500	$ 68,600

Male-Female Income Differences	Male Income-Female Income
All Respondents	$33,200
Controlling for Location of Office	$33,500
Controlling for Full-time — Part-time	$28,200
Controlling for Type of Practice	$15,500
Controlling for Years of Practice	$15,200
Controlling for Full-time/Part-time, Location of Practice, Type of Practice, and Years of Practice	$ 4,500

NOTE: Small sample size cause some full-time incomes to appear lower than incomes of all respondents.
* denotes a sample size too small to report.

Educate yourself in the Wrangell Mtns.

By Julie Clark

Want a unique Alaskan adventure, and earn one college credit? Enroll in History 193 offered by Prince William Sound Community College and Keystone Raft Adventures in Valdez. If you just want a great time, skip the course, just go for the fun and learn a lot too. The next course is scheduled for Aug. 9 through 13, five days of relaxation.

Lone (lone-e) Janson, a writer friend, is teaching a course on the history of the Wrangell-St. Elias area. When she asked if I wanted to go on this first raft trip, my first inclination was to decline. After all, they go down muddy rivers full of rapids. When in college, I almost drowned in the Gunnision River in three feet of water. Only a skinny weed I grabbed kept me from being swept downstream. I had also heard the terrified screams of rafters on the rapids on the Matanuska River, which convinced me that rafting was an insane sport designed for the demented.

But this was the maiden voyage for this particular trip; it's a course and there was room and the price was right (free), so I reluctantly agreed to go.

I called the number in the flyer, 835-2681 and soon I received the course materials. A long list of things to bring: warm clothes, a tent if you want privacy, sunglasses, knee high rubber boots, sleeping bag, foam pad, mosquito repellant, etc. Keystone Adventures would supply some raingear, the food, tents, life jackets, and waterproof containers. Two items puzzled me: a razor and a belt were on the list.

With my lightning powers of deduction, after having observed rafters on the Copper River, who looked cold, wet and bored, I figured this out. The razor was to cut wrists when one couldn't stand the excitement anymore. Failing that, if the blood was so cold it only congealed, the belt would be handy for hanging yourself, if a convenient tree could be found. Lone correctly pointed out that the razor was for men who wished to shave and the belt was a reference to beverages of the alcoholic persuasion.

The course starts from Valdez via Keystone's van to Chitina, but the party can be met in Chitina. Your professor, Lone Janson, Alaskan historian and writer of *The Copper Spike*, about the building of the Copper River and Northwestern Railrod, among others, tells us about the history of the area and the Native cultures on the way. She also tells stories about the people who lived and live in the area. Some of them she swears are even true.

Following the rails

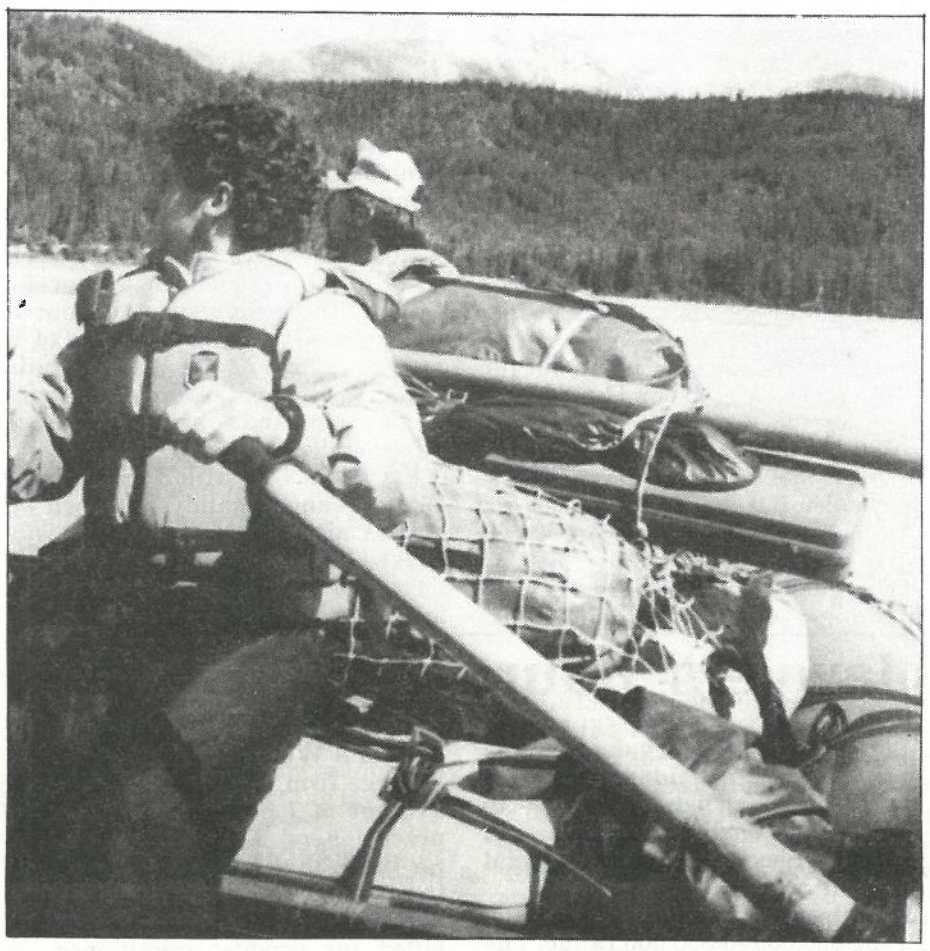
We take a brief tour of Chitina and then proceed along the old railroad bed from Chitina to McCarthy. The rails were removed just before World War II when the price of copper dropped and they were sold to the Japanese government, which promptly melted them down and sent them back as bullets and tanks in the war. We stop for refreshments with a homesteader along the way.

The road is gravel and takes about two hours, but we aren't bored. This is one of the most beautiful areas in Alaska. Some of the railroad trestles are still standing 50 years after they were last repaired. They were used by homesteaders 25 years ago and we appreciate their courage as we look down from one of them.

We cross the Kuskalana Bridge, 233 feet above the river, a span that struck strike terror into the hearts of the timid. Until recently, planks were laid along its length on the old railroad ties and the guardrail was nonexistent. Tourists, upon seeing the bridge, often gulped, turned pale and headed back to Chitina. Just since last year when a tall guardrail was installed, the traffic has increased.

Many years ago, when homesteaders used the bridge, they complained to the Alaska State Road Commissioner about loose planks on the bridge.

That worthy pooh-poohed any of their concerns until one day he happened to be a passenger in a pickup truck accompanied by two underlings. They started across the bridge when one of the big planks came loose and lifted the nose of the truck up and out over the river, leaving them teetering. The workers, younger and undoubtedly more agile, crawled over him and eeled out his open window in three seconds flat, leaving him dangling 200 feet above the Kuskalana, screaming unprintables and calling on the deity to save him. Early the next morning, men were out pounding nails on the bridge.



Our guides spot something off the port bow.

Along the way, you will see many ducks and geese and if the time is right, even grizzlies. I saw two on one trip and they really can do 40 m.p.h. and vanish in a flash. At the Gilahina trestle, a high curved bridge, our fearless guides walked out on it and took pictures.

The second day

At the McCarthy River, we camped for the evening. The guides, three young men who are on college or teaching breaks, set up our tent and did all the cooking and cleaning. We had salmon one night, spaghetti with moose meat, and a Mexican dinner to rival any place in Alaska, another night. Forget dieting for this five day trip and enjoy.

The next day our raft guides pulled us across the Kennicott River to McCarthy on two trams. They made us pull all three of them across. A short hike took us to the McCarthy Museum, which has many artifacts from the old days, when the town served as a rest and recreation area for the 800 miners, mostly bachelors, who visited the town for female companionship. Be sure to see the old still used during Prohibition.

We stopped at the McCarthy Inn for coffee and the owner gives a tour of the McCarthy Hotel across the street, restored to something of its glory in 1915. A federal agency insisted that they install a proper bathroom, which it lacked. McCarthy had a population of several thousand, but today has less than 35 year-round residents.

There are old ads, posters and calendars on the walls of McCarthy Lodge and the bar dating from 1910 through the forties, as well as old tools and other items of daily living of 50 or more years ago.

We took the McCarthy taxi up to the Kennecott mill and mine, which has made even more recent rough history. In March 1983, the man who went berserk and killed six people and wounded two others at McCarthy and burned the old lodge down, to get his first victim, who escaped.

It has since been restored and we were invited to go upstairs and look into the rooms, decorated with old magazine advertisements on the walls. My favorites are the one in the ladies' room downstairs advertising Sal Hepatica, which makes a young woman a great date instead of a dud, and the one in a room upstairs cautioning against "Armhole Odor."

If the day is fine, be sure to take a walk on the Kennicott Glacier. Those dirt hills in front of the lodge are not tailings from the mill, but are 'tailings' from the glacier. Underneath there still is glacier ice in many areas, and here and there are glacier lilies. (The copper ore was so rich that very little tailings were left).

You may walk into the old buildings, but be careful. The mill is especially treacherous, but the machinery in the buildings is impressive.

The third day

We camped again at the Kennicott River and the following morning our guides packed the raft.

Our guide, Jody, gave us a safety lecture after we put on the rain jacket, the rubber pants and boots, and the life jackets. It started out with what to do in case we fell overboard or what to do if we got jammed against a cliff, etc.

"Try to float downstream feet first to protect your head and then try to get over to a bank and out," quoth Jody deadpan. The backpack even had a little survival kit in it, meant to be reassuring, but which had the opposite effect.

We could get killed, I thought as I looked at that muddy rushing water. I prepared to walk back 14 miles to a friend's homestead for a ride to Chitina and my car. Only assurances from Lone convinced me to get on the raft.

The raft trip is rated as a Class III, based on the highest rating on the trip. The Kennicott is a short river, shallow, and fast over a lot of rock. There is a lot of splashing and I was sorry when we got to the Nezina which has fewer rapids. Along the way, hillsides are covered with wild flowers and future trips might catch a bear or moose drinking. It was too early for us, because the salmon had not yet migrated up to the creeks that feed the Nezina or Chitina in mid-June.

We got through the Nezina Canyon at a good clip. The tightly folded walls of sedimentary rock make a convincing argument for plate tectonics — a bumping of one land mass against another.

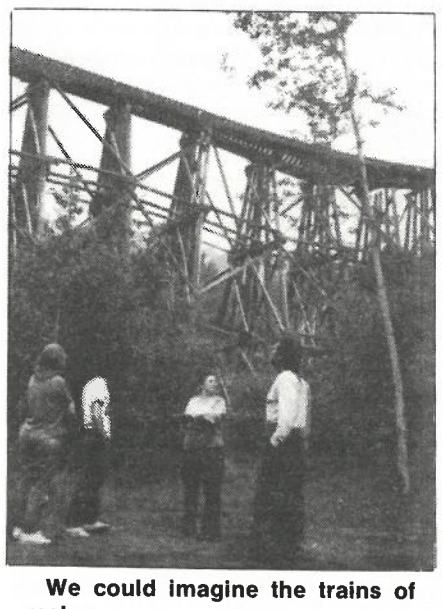
The Wrangell-St.Elias ranges are still building and there are many volcanoes, some still steaming, in the area.

We stopped at a trapper's cabin still mostly intact. Over the door, the words "Robert Lohse, 1924" are carved in a log.

I could barely stand up in the cabin. Mr. Lohse was either very short or got tired of cutting logs. Over the river is a cable. Once upon a time, there was a tram for crossing the river, but only the cable remains. We also had lunch, a curious mixture of cream cheese, raisins, and red onions, on a flour tortilla, which turns out to be quite tasty.

Along the way, we saw bald eagles. We stopped at one camp, next to the Gilahina River, and see two patrolling the Chitina River.

One can bathe in the Gilahina, a small rushing stream of clear green water (temperature about 17 degrees) if one is part polar bear. Our guides provide us with biodegradable soap, but we don't dally. I see bear scat, old and dried, just outside our tent and there are some fresh bear tracks, from a bear checking the stream for salmon. One of our guides carries a gun and offers to stand guard while we bathe, which we politely decline.



We could imagine the trains of yestervear...

That night the passengers revolted and complained. Although Jody, Bob and Mark are good cooks, their coffee leaves much to be desired. We had brought our own coffee (only instant is provided and it is an evil brew).

Continued on Page 16

• Don't forget your mosquito dope

Continued from Page 15

The cooks seem to believe one teaspoon of coffee per pot is sufficient, a notion we promptly corrected.

The fourth day

Next morning, we arise early. Lone goes over to get coffee and is greeted with two pieces of French toast with three matchsticks set in them for a birthday cake. She is serenaded by Jody, Bob and Mark. They are so awful, the river runs backward and the bald eagles scream in protest.

As we leave our campsite, we glide past the Gillihana River and see a mother merganser duck, who flops pitifully on the water in an effort to lead us away from her babies. Above her, in a lofty tree is the bald eagles' nest, and *their* baby. Perhaps the eagles prefer fish to duck.

Although we saw not a soul along the way, at this campsite there was evidence of previous campers. One had built a shelter of two limbs against a tree and placed bark across them. Some distance away was a large neat mound of brush. Either a survivalist camped there or a bear denned for the winter.

Our guides however, taught us "low impact camping." The result is that no one would even know we were there and thereby insure that the next campers would fondly believe they were the first. No rocks were piled up for a campfire, so there are no blackened rocks or trash to greet the next campers.

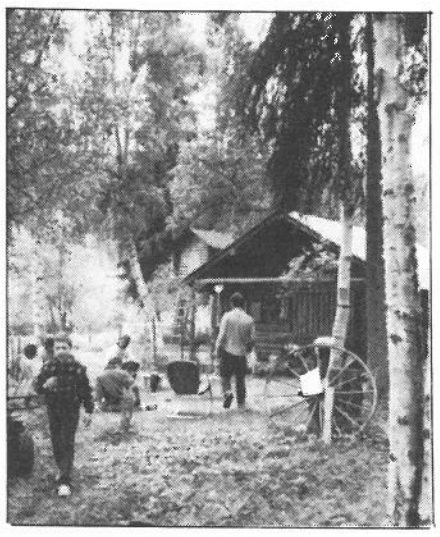
Camping was a new experience for me. I learned to keep the mosquito dope handy. A body can lose a quart of blood when it is insanely rummaging through a duffel bag looking for the bug juice as a horde of thirsty critters blithely drill through three or four layers of clothing. These mosquitos are definitely not the wimpy, city variety.

At our last stop, we camp on the Chitina River. I am debating on bathing in the little stream while Jody is swimming in the creek, all the while claiming it is refreshing as he turns a beautiful shade of blue. As I amble along looking for an area not so close to the Chitina River, I am greeted with another backside attired only in a birthday suit. They had set me up and are disappointed that I don't scream, at least not loudly.

The day is beautiful. Only tiny white puffs of clouds dot the blue sky.

Lone sits on a camp stool and tells us stories of the Ahtna Indians, Chief Nicolai and his discovery of copper as she prepares to sip on her drink. Suddenly she gets up, pours out the drink and dances around like a whirling dervish. Knowing how bad the coffee had been, I think she is registering some small criticism of the bartender, but she is trying to get rid of a bug that she believes is setting up to drill for oil on her leg.

Our guides laugh so hard, they are in danger of falling in the creek.



At home in the Wrangells.

Almost immediately, the puffy little clouds swell up and are joined by big black clouds. Had her rain dance lasted longer, we would have been soaked, but the clouds disappear.

While there we watch a monarch butterfly sitting in the ashes of a previous camper's fire. We think he is dying, but instead several more monarchs appear and do an X-rated dance all around our camp.

Murphy's Law still works. I had kept my camera handy, but when we get to Chitina, I can't find it. It was packed away when I wanted to take a picture of Mt. Drum without a cloud around it, a generally rare occurance.

Here the river is wide, but extremely shallow and we are grounded two or three times. At last we get to O'Brien Creek and wait for the van to take us back to Chitina, vowing to get into a bubble bath so deep a snorkel is required.

After this experience, I want to go down Keystone Canyon on a raft, a short trip of less than an hour, all rapids and quite exciting, I hear.

Travel advisory

Right now the McCarthy area is largely unknown to tourists, but the Park Service is pushing the Wrangell-St.Elias National Park and the wilderness experience will be gone. There will soon be as many tourists as there are at Denali, so this year may be the best time to go.

If your law practice is driving you crazy and you are tired of the yuppie rat race, I heartily recommend taking five or six days off for a trip such as this. Unless this is the year you win the lottery or Ed McMahon tells you that you are a millionnaire this is guaranteed to be a high point of your summer or even your year. You don't have to be a rugged outdoor type to have a great time.

Afternote: Last time, I reported on my attempt to quit smoking. Not a failure, but not a success, either. Have gotten down to less than one pack a day, a big improvement. Still working on it.

• Survey tallies lawyers' hours

Continued from Page 14

Judicial District. Reasons for attending the annual meeting varied but educational value was most often cited. Changing the annual meeting to a site outside of Alaska would not help. An analysis of responses indicated that the ABA would lose four times more participants than it could gain by meeting outside of Alaska.

Non-lawyer Support Staff

Practitioners in all judicial districts pay approximately the same beginning annual salaries for their most recently-hired, least-expensive legal secretary, with a median salary in the $18,000 to $20,999 range. Likewise, practitioners in all judicial districts paid approximately the same to their highest paid full-time legal secretaries. The average was in the $25,000 to $30,000 range, with Anchorage slightly higher and the bush area slightly lower.

The highest paid legal assistants (paralegals) are paid more in the Third Judicial District ($30,000 to $35,000 as a median range) than in the First, Second or Fourth Judicial Districts where median income for the highest paid legal assistants falls in the $25,000 to $30,000 range. The Third Judicial District and the Second and Fourth Judicial Districts, on the average, pay full-time legal assistants more than the average full-time legal assistant earns in the First Judicial District.

The ratio of non-lawyer support for practitioners in the private sector is 1 to 1.9. The range for nonlawyer support for practitioners in the public sector is from 0 to .9 paralegals per attorney. About sixty-five percent of all the respondents do not have paralegal assistants of any kind.

Hours Worked and Billed

Large firm practitioners work an average of 7 hours more than sole practitioners. Attorneys who work for firms that have offices in more than one city tend to work more hours. The average number of hours billed for private practitioners is 1,470 hours. The median is 1,550 hours. For public practitioners the average hours billed is 1,390 but the reader is cautioned that few public practitioners keep accurate time records unless pursuant to a reciprocal services agreement (RSA) or required under the conditions of government funding. Prosecutors, public defenders and judges works longer hours during the week than general government attorneys. Income is strongly related to the size of the firm and the satisfaction of the attornev with his/her profession. Those who work the hardest and earn the most tend to be the most satisfied with their profession. Those who work fewer hours and have smaller incomes tend to be less satisfied. Legal specialists have the highest income. General practitioners on the average have the lowest.

We have attempted to capsulize approximately 100 pages of narrative, charts and data in this executive summary. Obviously, there were many areas of inquiry that are not addressed in the summary or are inadequately reported. For those who may wisdh to rely heavily on the information reflected herein, we urge you to examine the more detailed analysis of the report as a whole.

Solid Foundations

Deposits in trust

By Mary K. Hughes

As a result of meeting with various members of the Alaska Bar Association in Juneau, Fairbanks and Anchorage on the Interest on Lawyers Trust Accounts (IOLTA) Opt-Out Rule, the Trustees of the Alaska Bar Foundation have become aware of the concerns regarding fee deposits. The question of whether to place such client fee deposits in the lawyer's trust account or in the business operating account was asked.

After discussions with Bar Counsel and a review of Ethics Opinion No. 87-1, the answer is: deposit client fee deposits in the lawyer's trust account.

"Non-refundable" fee deposits are perhaps a misnomer. A client fee deposit is exactly that — monies paid in trust by the client to be earned by the lawyer. As Ethics Opinion 87-1 indicates, fee arbitration is a common result of a lawyer's quest for non-refundability. Obviously, the decision of a fee arbitration panel supercedes the lawyer/client agreement. Thus, the fee deposit becomes refundable depending upon the lawyer/-client agreement, the number of hours worked and the state of mind of the client at the time of lawyer retention.

The Ethics Committee provided the following guidelines:

This committee finds that a non-refundable retainer may be charged to a client if the nature of the retainer as non-refundable is fully and clearly explained to the client, orally and in the written fee agreement, and if the fee is not excessive, considering the factors of DR 2-106:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

The Committee summarizes by opining that a lawyer must refund the nonearned portion of a non-refundable retainer upon withdrawal from representation. Further, refund is appropriate if, upon cessation of representation, the retainer is excessive under the circumstances.

If non-refundable retainers are indeed refundable, would not lawyers be well advised to cease in the misnomer and obtain a client fee deposit which is appropriately drawn against as earned?

BAR PEOPLE

Froelich, Reese to bench

Gov. Steve Cowper June 26 appointed Peter Froehlich of Juneau as a district court judge and John Reese of Anchorage as a superior court judge.

Froehlich, an assistant attorney general, former legislative aide and private practitioner, replaces Lyn Asper who resigned. Reese, a private practitioner since 1975 and former Alaska Legal Services lawyer, replaces Douglas Serdahely who resigned.

Froehlich, 42, has worked in the attorney general's office since 1981 on subjects from reviewing legislation to commercial law. He also served as counsel to the House Judiciary Committee and has worked summers as a salmon handtroller and crab fisherman.

Froehlich holds a bachelor's in economics from Marquette University and his law degree from Willamette University in Oregon. He is active in United Way, youth basketball and soccer and is the past president of Big Brothers/Big Sisters in Juneau. He is married and has two children.

Froehlich begins the end of July and will be paid about $67,000.

Reese, 45, has been in private practice since 1974 handling civil litigation and family law and some criminal matters. From 1973-75 he was deputy director of Alaska Legal Services and before that a staff attorney with Legal Services.

Reese holds a bachelor's in political science from Oklahoma State University and his law degree from the University of Oklahoma. He is a former board member of Abused Women's Aid in Crisis, the Academy of Model Aeronautics and chairman of Anchorage Historic Properties. He is married and has two children and will be paid about $77,000 annually.

Both appointees were submitted to the governor by the Alaska Judicial Council which conducted polls of Alaska lawyers on the candidate's qualifications.

Reese was honored for his outstanding service to the members of the Bar Association when he received the Distinguished Service Award at the 1988 Annual Convention.

—Office of the Governor, June 26, 1989

Scholarship awarded

Hughes Thorsness Gantz Powell & Brundin has targeted one student from each area high school for a scholarship in the amount of $1,000 to offset expenses during the first year of enrollment in an institution of higher learning.

Considerations in the selection process were scholastlc achievement, financial need, character, leadership, educational goals, and potential future contributions to the State of Alaska.

Scholarship recipients were Tracie Kingsland, Bartlett; Thomas Wall, Chugiak; Thomas Davis Jr., Dlmond; Scott Baer, East; Brad Mushovic, Service; and Angie Gossett, West.

Bar people move among firms, agencies

Hal Brown is resigning his position as Executive Director of the Alaska Judicial Council, effective July 15. He will be the new resident partner of the San Francisco law firm of Heller, Ehrman, White & McAuliffe.....***Joel DiGangi*** has moved from Palm Springs and is now with the Law Office of Julian C. Rise in Fairbanks.....***Jon DeVore***, formerly with the Bristol Bay Native Corp., is now District Counsel with the U.S. Small Business Administration.

Brian Doherty, formerly with the P.D.'s office, is now with Gilmore and Feldman.....***David Freeman***, previously with Owens & Turner, is now with the law firm of Wade & DeYoung.....***David Gorman*** has joined the law firm of Wade & DeYoung.....***Leslie Hiebert*** has moved from Austin, Texas and is now with the Office of Public Advocacy.

Elizabeth B. Johnston has relocated to London, England.....***Jo Kuchle*** is now working for the Fairbanks firm of Staley, DeLisio, Cook & Sherry.***V. Bonnie Lembo*** is currently with the Office of Special Prosecutions & Appeals.

Karen L. Loeffler, formerly with the D.A.'s office is now with the U.S. Attorney's Office.....***Mindy McQueen*** is now with the Department of Law in Fairbanks.***William Royce*** is now a sole practitioner. ***William Reeves***, formerly with Associated General Contractors, is now with Taylor & Hintze.

David and Ella Stebing have recently relocated to Anchorage from Fort Wayne, Indiana. David Stebing is now employed at Guess & Rudd. ***Doris Loennig***, formerly with Aschenbrenner & Brooks, is now with Bradbury, Bliss & Riordan in Fairbanks.....***Carla Grosch is leaving Alaska to attend a seminary in Berkeley, Ca.....Linda Cerro*** is associated with the firm of Reese, Rice & Volland.

Ericsson elected veep

The law firm of Martin, Bischoff, Templeton, Ericsson & Langslet is pleased and proud to announce that **Lloyd B. Ericsson,** a senior partner of the firm, has been elected vice-president of the Aviation Insurance Association.

The Aviation Insurance Association was formed to promote the general welfare of the aviation insurance industry. Membership includes aviation underwriters and reinsurers; agents, brokers and adjusting firms specializing in aviation and major law firms involved with aviation litigation.

Ericsson earned his undergraduate degree from the University of Kansas and his LL.B. from the University of Virginia and is a member of the Order of the Coif. He has been practicing law since 1965 and is admitted in Oregon, Washington, Alaska and Virginia. Ericsson's practice is concentrated in insurance defense and coverage matters relating to aviation and products liability.

Freeman joins firm

David M. Freeman has joined the law firm of Wade & De Young as a senior associate.

Formerly with Owens & Turner, P.C., Freeman will continue to concentrate in the area of labor and employment relations law from the management perspective. He will also represent Wade & De Young's construction industry clients. Freeman was admitted to the Alaska Bar in 1978.

After a one year clerkship with the Fairbanks Superior Court, he has been engaged in private practice for the past 10 years, primarily emphasizing representation of clients involved in labor relations matters.

Yerbich is back

Thomas J. Yerbich, partner in the law firm of Yerbich & Pace recently returned to the full-time practice of law following a 10-month sabbatical.

While on sabbatical, Yerbich completed a course of study in Business & Taxation Law at McGeorge School of Law, Sacramento, where he was awarded a Master of Laws degree.

Rhodes is clerk

Chief Judge H. Russel Holland of the United States District Court for Alaska has announced that **Phyllis Rhodes** has been selected as Clerk of Court to replace retiring **JoAnn Myres.**

Rhodes had been with the U.S. District Court for Alaska 16 years when she assumed the Clerk's position on July 1, 1989.

Myres is retiring with over 35 years service in the federal courts for Alaska commencing with the territorial courts before statehood.

Bauman speaks

Carl Bauman was a featured speaker at the Institute on Oil and Gas Operations in Federal and Coastal Waters, jointly sponsored by the Eastern and Rocky Mountain Mineral Law Foundations in New Orleans during May.

Bauman spoke on "Environmental Issues Pending and Forseeable Offshore Alaska." and is a partner at Hughes Thorsness Gantz Powell & Brundin. He heads the Natural Resource/Environmental Law and Litigation Sectlon within the firm.

TORT LAW

Summary judgement motions

Michael J. Schneider

BY MICHAEL J. SCHNEIDER

MOTIONS UNDER CIVIL RULE 56: PRACTICAL AND TACTICAL CONSIDERATIONS

I. Introduction

Motions for summary judgment or partial summary judgment are not granted very often. There are still good reasons to make these motions under A.R.C.P. 56. They include identifying and pinning down expert and other witnesses that may otherwise be hidden from scrutiny until much later in the litigation.

II. General Rules of Law Applicable to the Motion.

In order to justify summary judgment under A.R.C.P. 56, it must not only be shown that there is no genuine issue to be litigated, but also that the moving party is entitled to judgment as a matter of law. *Whaley v. State*, 438 P.2d 718 (Alaska 1968). The party opposing a request for summary judgment need not establish that they will ultimately prevail at trial. *Gablick v. Wolfe*, 469 P.2d 391 (Alaska 1970). Consistent with this concept, inferences of fact from proffered proofs are drawn in favor of the party opposing a motion for summary judgment and against the movant. *Nizinski v. Golden Valley Electric Association*, 509 P.2d 280 (Alaska 1973). Negligence claims in Alaska are almost never subject to summary determination. See *Lillicraven v. Tengs*, 375 P.2d 139 (Alaska 1962); *Swenson Trucking, Etc. v. Truckweld Equipment*, 604 P.2d 1113, 1118, 1119; *Carlson v. State*, 598 P.2d 969, 974 (Alaska 1979); and *Webb v. City and Borough of Sitka*, 561 P.2d 731, 735 (Alaska 1977).

III. Why Bother?

This is a very good question. I think the answer falls into two categories.

1. You May Win!

The easiest route is to try to show that the defendant was negligent per se (or that the plaintiff was comparatively negligent per se). The concept of negligence per se, as set forth in *Restatement (Second) of Torts.* § 286 (1965), was specifically adopted by the Alaska Supreme Court in *Ferrell v. Baxter*, 484 P.2d 250, 263 (Alaska 1971) and *Breitkreutz v. Baker*, 514 P.2d 17, 20 (Alaska 1973). Section 286 provides that a legislative enactment or administrative regulation will be adopted as the reasonable-man standard where:

A. it is designed to protect a class of persons which includes the one whose interest is invaded; and

B. it is designed to protect a particular interest which is invaded; and

C. it is designed to protect that interest against the kind of harm which has, in fact, resulted; and

D. it was designed to protect that interest against the particular hazard from which the harm resulted.

Most traffic laws are entitled to negligence-per-se treatment. *See Ferrell, supra*, at 264. If the statute or regulation in question simply sets forth the general or abstract standard of care, it may not be the subject of negligence-per-se treatment. *See Bachner v. Rich*, 554 P.2d 430, 441-42 (Alaska 1976) and *Breitkreutz v. Baker*, 514 P.2d 17, 22 (Alaska 1973). Plaintiff must still demonstrate the causal connection between the violation of the statute and the injury in question. See *McLinn v. Kodiak Electric Association, Inc.*, 546 P.2d 1305 (Alaska 1976).

We are a tremendously regulated society. Legislative enactments and administrative regulations touch virtually all aspects of our conduct. Alaska Statutes, Title 18, regarding health and safety, should always be consulted. Among other things, Title 18 demands that the Department of Labor establish standards at least as stringent as those required by OSHA. *See* A.S. 18.60.030(6). The Anchorage Municipal Code, Title 23, adopts by reference most national codes, *e.g.*, electrical, plumbing, signing, building, etc.

In your search for statutes and administrative regulations, you may wish to consult, generally, Philo, Harry M., *Lawyer's Desk Reference, 7th Edition*, The Lawyers Cooperative Publishing Company, Copyright 1987, Vol. 2, Ch. 16, Safety Organizations and Libraries; Ch. 17, Safety Standards and Codes; and Ch. 18, Government Information Centers.

The import of this information is clear. If you look hard, you may well find a legislative enactment or regulation for which an unexcused violation can be clearly established on the facts of the case. That sure helps out at the settlement conference.

2. You May Gain A Tactical Advantage.

It's often best to make the motion for summary judgment just as soon as you are in a position to do so. The opposing party can be caught in a situation where the record is not well developed in the case, where they have minimal facts from which to draw their response, and where it is very hard to articulate to the Court exactly why a decision on the motion should await further proceedings in the case. Under A.R.C.P. 56(f), an extension to obtain affidavits or gather further information can be requested. The Court usually wants to know exactly what you have in mind. A request to fish a little longer on the chance that you may catch something will frequently be denied. The opposing party is thus put at a considerable disadvantage. The motion may be decided in favor of the moving party on a rather incomplete record. While the opposing party has some remedies [*see for example* A.R.C.P. 77(m) and 60(b)], it's a bad spot to find yourself in.

The other nice thing about a motion for summary judgment is that it frequently generates lots of affidavits by the enemy. No matter how the record in the case develops after the motion, witnesses offering affidavits early in the case will find it hard to change their position later.

IV. Smoking Out the Lurking Consultant

If a motion for summary judgment or partial summary judgment is made on an important issue in the case, it is only the extremely confident practitioner who doesn't come to court opposing the motion with most of the means at his or her disposal. The identity and opinions of consultants (experts who are not expected to testify) is protected under A.R.C.P. 26(b)(4)(B).

A lot of litigators don't decide who is expected to be called as a witness at trial until the very last moment possible under the pretrial order. That means you won't find out who your opposing experts are until that moment. A motion for summary judgment can smoke these people out early because your opponent may have little choice but to use them to help counter the motion.

V. Summary and Conclusion

Even though motions for summary judgment are granted infrequently, they may be worth filing where a statute or administrative code section has clearly been violated. Even if unsuccessful, these motions often provide the moving party with a tactical advantage in developing the case and allow the moving party to identify experts that would otherwise be concealed until much closer to trial.

ESTATE PLANNING CORNER

Steven T. O'Hara

In this initial column, I broadly outline the wealth transfer taxes applicable here in Alaska. In subsequent columns, I will discuss the taxes in detail.

In the State of Alaska, we are concerned primarily with federal and Alaska transfer taxes.

On the federal level, there are three transfer taxes. First, there is the estate tax (I.R.C. 2001 et seq). This is the tax most clients at least know exists and it is payable on the event of a property holder's death.

Second, there is the gift tax (I.R.C. 2501 et seq). This tax is perceived necessary as long as there is an estate tax, because otherwise there would be a giant loophole from estate tax. To avoid estate tax, the taxpayer would gift all property away before death. As suggested later, this loophole actually exists but has been limited, in general, to $10,000 per donee per year (I.R.C. 2503(b).)

Third, there is the generation-skipping transfer tax (I.R.C. 2601 et seq). The objective of this tax is to assure that a transfer tax is paid at each generation. The federal government would like to see, for example, a tax paid when the grandparent dies, when child dies, as well as when grandchild dies.

The generation-skipping tax tries to catch those transfers that would avoid the payment of a transfer tax on the death of the middle generation — the child in our example. Like the estate and gift tax, however, the generation-skipping tax is not limited to family transfers. It could apply, for example, to gifts made by an unrelated party to my infant son, if the donor is more than 37.5 years older than the son (I.R.C. 2651(d).

By contrast, on the Alaska state level, there is only one transfer tax and that is the estate tax (A.S. 43.31.011 et seq). The state does not impose a gift tax nor a generation-skipping tax. Alaska's estate tax chapter defines the term "transfer" to include gifts (A.S. 43.31.420 (11).) But this definition applies only with respect to property transferred before death that is included in the decedent's gross estate for federal estate tax purposes (see, e.g., I.R.C. 2036).

On the death of an Alaskan or a person holding property here, the state "picks up" its share of the credit that the federal government allows for death taxes actually paid to any state (A.S. 43.31.011 et seq; I.R.C. 2011). Accordingly, the Alaska estate tax is often referred to as a "pickup tax."

In other words, the Alaska estate tax can, in general, be thought of as not increasing estate taxes but rather as a revenue sharing mechanism. If no federal estate tax is owed on death, then the federal estate tax death credit is unnecessary and not used, which means there is no Alaska estate tax due.

Significant other transfer taxes exist in other jurisdictions. Accordingly, whenever a client resides or has property located outside Alaska, whether that outside place is another state or a foreign country, the client ought to seek counsel on the possibility of additional transfer tax exposure. This issue may arise other than in the traditional estate planning context.

For example, suppose a client who is domiciled outside Alaska calls and says he owns real estate in Alaska and wishes to transfer it into an Alaska limited partnership or corporation and wants help in the formation of that entity. Transfer of that real estate into a partnership or corporation owned by the client may cause inclusion of that property in the client's state gross estate, for estate tax purposes, as an intangible asset. This would be a problem if the

Continued on page 19

Pacific Rim News

Law school clerk brings China news

By Barbara Hood

Ning Fu, a Chinese student at Lewis and Clark Law School in Portland, plans to return to her homeland when she graduates, notwithstanding recent events in Tiananmen Square.

Fu was in Anchorage this summer, clerking for Bradbury, Bliss, and Riordan. She will receive her J.D. next year and return to either the major port city of Xiamen or to Beijing. Fu previously practiced law and taught at Xiamen University. Both the university and the Chinese government want her to return and resume teaching and practicing law.

As a specialist in international economic law, Fu has potential lucrative options in Xiamen, an important trade center. But Fu is drawn to Beijing because, she says, "I think I can do more in Beijing. For my country, I should work with the government from the top level to improve the whole system."

"In China, there is no case law," she says, "and an attorney or judge doesn't have too much influence on the system. To improve the system you need to start through legislation." Only the National People's Congress, located in Beijing, can enact laws in most areas.

Despite recent developments in the economic laws of China, there have been few changes in other areas, such as criminal law and civil rights.

"Sometimes it's very hard for the leadership to change policy quickly," she says. Official bureaucratic inertia contributed to the recent resistance to the pro-democracy demonstrators at Tiananmen Square.

"The communist party and central government were shocked because it was the first time for the people to speak out and challenge the leadership," Fu says.

"The main purpose of the people who called for democracy and liberty was to show dissatisfaction with the high inflation and corruption in government. I think most students and demonstrators didn't want to overthrow the government. They wanted to improve the leadership. Average people have no authority over the party, and the party has severe problems purifying itself. Some officials use their power for personal benefit and people got mad about it."

Fu attributes the recent bloodshed to a temporary loss of governmental control. The government felt it needed the power back and "they knew who owned the army and who would win," she said, paraphrasing Chairman Mao.

"They just wanted immediate control, and they didn't have time to consider the result. I don't think they'll recognize the result for a couple of years. Ten or 20 years from now, leadership will agree that Tiananmen Square was very bad for the people. Right now the government doesn't have time ... they feel they need control."

Despite the current situation, Fu is confident that the government can change for the better.

"I don't think the communist party is bad," Fu states. It's changed for the better before to ensure its survival. For example, in 1958, the government initiated the "Great Leap Forward" movement and consolidated all lands in state hands. The decision, and accompanying natural disasters, left the country bankrupt and hundreds of thousands of people starved. In 1962, another leader took power and redistributed land back to families. The party survived, Fu says, because it changed. Of course, there are limitations on the government's ability to change quickly.

"My heart goes out to the students and people who want more democracy and liberty," Fu says, "but we have to face the reality of China. It's too early to expect human rights in the western style. Too many people struggle for daily life to be involved in concerns about human rights."

The main problem in improving democracy, Fu asserts, is that 200 million Chinese people are illiterate — nearly 20 percent of the population. "How can you expect these people to struggle for democracy?" she asks.

"I think better education is necessary for things to improve in China," Fu says. Only through education can the people be informed of how to improve the current system. From the human rights perspective, Fu predicts slow change. China has a long "miserable" history under a feudal system where individual rights were virtually nonexistent, she says. "Chinese never expected human rights," she says, "because people were tools."

In addition to educating the population, change will require greater focus on legal principles in addition to political ones by Chinese leadership.

"Congresspeople have a more political than legal background," Fu says. This isn't surprising, she explains, because there was minimal legal education or practice in modern China before 1964, and none between 1964 and 1979 — the years of the Cultural Revolution. One result is that political concepts such as "counterrevolution" become implemented as legal standards. Even before the events of Tiananmen Square, representatives with legal backgrounds had suggested that the term was vague as a basis for criminal penalties, but they were in the minority.

Also contributing to the slowness of change is the fact that, although there are three branches of government in China — judicial, legislative, and administrative — there is no system of checks and balances. The administrative branch is the highest authority, and controls the actions of the judicial and legislative branches.

Perceived political necessity likely contributed to the legal system's widespread imposition of the death penalty during the recent crackdown, Fu indicates. Although the law provides for capital punishment as the highest penalty for "counterrevolution," she says, "in a normal time, penalties would be lighter."

The speed with which executions have been carried out may also be a consequence of cooperation between trial and appellate courts. A defendant is tried in a "median" or city-level court, and has the right to only one level of appeal — to the provincial supreme court. The provincial court can then immediately deny the appeal.

"They can say, 'the facts are true and the law was applied correctly. We have nothing to change'," Fu explains. As a result, persons convicted can be executed within days of an offense. Although a defendant has a right to counsel in the proceedings, Fu says, "we don't have that much independence in the courtroom, because Chinese lawyers are not self-employed but are agents of the state."

"The best way for China to improve is to develop its economy," Fu says. With economic improvements, the inflation that contributed to the Tiananmen protests may be eased. But she recognizes that "the party needs time to adjust itself to the situation. I think it will now pay more attention to human rights and to individuals and in a couple of years we will see change; otherwise the party can't survive."

Notwithstanding the current situation, Fu believes the pro-democracy movement achieved its main purpose.

"Their protest was a warning. They told the government: 'you've got to change or you won't survive.' I believe the government will change. They know the people's power. The Chinese people are generally very conservative and obedient, but if they stand up, they can make changes that Western people can't. Because there are 1.1 billion people in China."

• Estate Tax Planning

Continued from page 18

client is domiciled in a state that has a significant estate tax of its own, such as Massachusetts.

I will now briefly summarize the most common credits, deductions, exclusions, and exemptions that are available. Detailed discussion of these items will follow in subsequent columns.

The most widely known of these items is the so-called unified credit. This credit is called the "unified credit" because it applies not only to estate tax, but also gift tax (I.R.C. 2010 & 2505). In other words, the gift tax and the estate tax were once separate systems, but are now unified and the credit that applies to them is thus called the unified credit.

In general, the effect of the unified credit is to exempt transfers of up to $600,000 per donor from the imposition of any gift or estate tax, regardless of the donee.

Also familiar is the unlimited marital deduction. Gifts or devises to spouses are generally not considered taxable transfers (I.R.C. 2056, 2523 & 2651(c).) A new major exception, under the 1988 tax act, is a transfer to a spouse who is not a U.S. citizen. The new general rule is simple and draconian. Gifts to spouses who are not U.S. citizens do not qualify for the marital deduction (I.R.C. 2056(d) & 2523(i).) This is a significant pitfall for the unwary.

Another commonly known item is the $10,000 annual exclusion from taxable gifts (I.R.C. 2503(b). This is a major exception and constitutes much of the estate planning that is left after the recent tax acts. The exclusion is $10,000 per donor per donee per year.

For example, consider a wealthy couple with four children and eight grandchildren. On Dec. 31 of last year, they could have transferred $240,000 to their descendants without incurring a taxable gift, and then on Jan. 1 of this year, they could have done the same, for total transfer-tax-free gifts of $480,000.

As mentioned earlier, a new general rule is that gifts to spouses who are not U.S. citizens do not qualify for the marital deduction. There is an important exception, however, to this general rule. Congress has increased the $10,000 exclusion to a $100,000 exclusion in the case of transfers to a spouse who is not a U.S. citizen (I.R.C. 2523(i)(2).)

Of significant importance is that the annual exclusions apply only to gifts of present interests (I.R.C. 2503(b).) In other words, a gift of a future interest generally does not qualify for the $10,000 or $100,000-alien-spouse exclusion. Most gifts made in trust are gifts of future interests.

There is, of course, a deduction available for charitable gifts and devises (I.R.C. 2522 & 2055. See also I.R.C. 2651(e)(3).)

In the generation-skipping tax arena, there are several significant exceptions, the most important of which is that each of us has been given a $1 million "GST exemption" (I.R.C. 2631). In contrast to the unified credit against gift and estate taxes, which is automatically applied on taxable gifts and on death, the GST exemption applies, in general, only when allocated by the transferor or his personal representative (I.R.C. 2632).

Finally, although it is not a transfer tax, the federal income tax must be mentioned. Before any transfer, the federal income tax consquences (to the donor, to her estate, and to the donee) must be considered.

• Bankruptcy filings

Continued from page 1

ruptcy courts. And, it is too soon to predict with any accuracy what economic impact the recent oil spill and the legislative modifications to ELF will have on the future financial health of Alaskans. The plain truth is that bankruptcy filings are flying upwards, not just creeping up. Whether this increase is the result of "smart people's" financial planning, or the result of "... a shrinking and poorer population...," only time, and history, will tell.

Bankruptcy local rules of practice to be amended

The Local Rules of Practice and Procedure for the District of Alaska Bankruptcy Court are currently undergoing amendment. Effective Aug. 14, 1989, a draft copy is available at no cost, upon written request, from the office of the Clerk of the Bankruptcy Court in Anchorage or Fairbanks. Public comment is encouraged. Please submit written comments, on or before close of business Sept. 14,1989, to the Clerk Of Court, U.S. Bankruptcy Court, 605 West 4th Avenue, Suite 138, Anchorage, Alaska 99501-2296.

Board proposes series of rule changes

The Board of Governors is proposing amendments to the following bylaw and bar rules. Please address any comments to the Board of Governors, Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510.

ELECTIONS

Article V. Board Elections. Section 5. Ballot Counting. The Executive Director and at least two members of the Association's Bar Polls and Elections Committee shall *review the* count *of* [the] votes cast and record and certify, in writing, the results of the election to the membership.

FEE ARBITRATION

RULE 39(a) **Notice Requirement by Attorney to Client**

At the time of service of a summons in a civil action against his or her client for the recovery of fees for professional services rendered, an attorney will serve upon the client a written "notice of client's right to arbitrate," which will state [THAT]:

You are notified that you have a right to file a Petition for Arbitration of Fee Dispute and stay this civil action [BY COMPLETING THE ENCLOSED FORM AND SENDING IT TO THE ALASKA BAR ASSOCIATION, P.0. BOX 100279, ANCHORAGE, AK 99510]. *Forms and instructions for filing a Petition for Arbitration and a motion for stay are available from the Alaska Bar Association, 310 K Street, Suite 602, Anchorage, AK 99501, (907) 272-7469.* If you do not file the Petition for Arbitration of Fee Dispute within 30 days after your receipt of this notice, you will waive your right to arbitration.

Failure to give this notice will be grounds for dismissal of the civil action.

RULE 39(b) **Stay of Civil Proceedings**

If an attorney, or the attorney's assignee, commences a fee collection action in any court, the client may stay the action by filing notice with the court that the client has requested arbitration of his or her fee dispute by the Bar within thirty days of receiving the notice of the client's right to arbitration. This notice will include proof of service on the attorney or the attorney's assignee. *If a civil action has been filed, the Alaska Bar Association must receive an order of stay priror to commencing the arbitration.*

RULE 40(r) **Confidentiality**

All records, documents, files, proceedings and hearings pertaining to the arbitration of any dispute under these rules will be confidential and will be closed to the public, unless ordered open by a superior court upon good cause shown, except that a summary of the facts, without reference to either party by name, may be publicized in all cases once the proceeding has been formally closed. *Bar Counsel may utilize arbitration records and decisions for statistical, enforcement and disciplinary purposes.*

CLIENT SECURITY FUND

Name Change

TITLE

Part V. [CLIENT SECURITY FUND) *LAWYERS' FUND FOR CLIENT PROTECTION*

RULE 45(b)

The "Fund" is the [CLIENT SECURITY FUND] *Lawyers' Fund for Client Protection* of the Alaska Bar Association.

RULE 45(c)

The "Committee" is the [CLIENT SECURITY FUND] *Lawyers' Fund for Client Protection* Committee.

RULE 46(c)

The form or application shall contain the following statement in bold type:

"THE ALASKA BAR ASSOCIATION HAS NO LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL LAWYERS. PAYMENTS FROM THE [CLIENT SECURITY FUND] *LAWYERS' FUND FOR CLIENT PROTECTION* SHALL BE MADE IN THE SOLE DISCRETION OF THE ALASKA BAR ASSOCIATION."

RULE 59

Except where otherwise specifically provided in this part, Rules 14 and 17 shall be applicable to this part; and in such cases the reference to "disciplinary proceedings" shall encompass [CLIENT SECURITY FUND] *Lawyers' Fund for Client Protection* proceedings and the reference to "members of hearing committees" shall apply to the [CLIENT SECURITY FUND] *Lawyers' Fund for Client Protection* Committee.

RULE 60(a)

Bar Counsel shall refer potential claimants to the [CLIENT SECURITY FUND] *Lawyers' Fund For Client Protection* at the completion of disciplinry proceedings when appropriate. Copies of the [CLIENT SECURITY FUND] *Lawyers' Fund for Client Protection* Rules and any pamphlet which describes the Fund and procedures involved in filing a claim may be made available to the public.

Payment Limits

RULE 53(d)

The loss to be paid to any individual claimant as the result of any dishonest act or omission in any one transaction, matter or proceeding involving any one lawyer shall not exceed the lesser of the following sums: (a) [$10,000] *$50,000*, or (b) 10 percent of the Fund at the time the award is made. The aggregate maximum amount which all claimants may recover arising from an instance or course of dishonest conduct of any one lawyer is [$50,000] *$200,000*. The total amount to be paid to all claimants in any one year shall not exceed 50 percent of the total amount of the Fund as of January 1 of the calendar year in which the awards are made.

REPRIMAND RULES

The Board has proposed changes to Bar Rules 10, 16, and 22 to remove the words "public" and "private" as descriptions for reprimands which it may issue to attorneys in its capacity as the Disciplinary Board. The Board believed that there should be only one type of reprimand issued by it in disciplinary matters whether the reprimand was administered by private stipulation between bar counsel and the respondent attorney or whether the reprimand was administered on a respondent attorney following the public hearing process.

The Board has also proposed a change to Bar Rule 28 which concerns circulating a notice of public discipline imposed to the state and federal bench, the Attorney General's office, and the National Discipline Data Bank. The Board believed that this provision should only apply to public censure, probation, interim suspension, suspension, and disbarment imposed by the Supreme Court.

Proposed Changes to Bar Rule 10, 16, 22, and 28:

Bar Rule 10

(c) **Powers and Duties.** The Board will have the powers and duties to

...

(8) impose [PRIVATE] reprimand as a Board upon a respondent attorney (hereinafter "Respondent") upon referral by Discipline Counsel under Rule 22(d);

Bar Rule 16

(a) **Discipline Imposed by the Court or Board.** A finding of misconduct by the Court or Board will be grounds for

...

(5) [PUBLIC] reprimand by the Disciplinary Board.

(b) **Discipline Imposed by the Board or Diecipline Counsel.** When Discipline Counsel has made a finding that misconduct has occurred, the following discipline may be imposed:

(1) [PRIVATE] reprimand in person by the Board, pursuant to Rule 10(c)(8); or

...

(d) **Conditions.** Written conditions may be attached to a [PRIVATE OR PUBLIC] reprimand or to a private admonition. Failure to comply with such conditions will be grounds for reconsideration of the matter by the Board or Discipline Counsel.

Bar Rule 22

(d) **Imposition of Private Admonition or Reprimand.**

...

In the discretion of Discipline Counsel, (s)he may refer a matter to the Board for approval and imposition of a [PRIVATE] reprimand by the Board, provided that the Respondent has, under Section (h) of this Rule, consented to the discipline before the Board.

Bar Rule 28

(h) **Circulation of Notice; National Discipline Data Bank.**

The Board will promptly transmit a copy of the order of disbarment, suspension, interim suspension, probation, or public censure [OR PUBLIC REPRIMAND] to the presiding judges of the superior court and district court in each judicial district in Alaska; to the presiding judge of the United States District Court for the District of Alaska; and to the Attorney General for the State of Alaska, together with the request that the Attorney General notify the appropriate administrative agencies. The presiding judges will make such orders as they deem necessary to fully protect the rights of the clients of the disbarred, suspended, or probationary attorney.

Discipline Counsel will transmit to the National Discipline Data Bank maintained by the American Bar Association, and any jurisdiction to which Respondent has been admitted, notice of all [PUBLIC] discipline imposed by the Court [OR THE BOARD] and all orders granting reinstatement.

The Past

Imagine a place,
Something like
An old, boarded-up
Theatre, where
The actors are stored
Along with the scenery
And the costumes
And the lights.

Available for hire.
Inquiries invited.
Agent on premises.
Performances may
Be scheduled upon
Short notice simply
By ringing the bell
Outside the stage door.

"Under No Management"
The billboard is other-
Wise silent. No plays
Are mentioned. No names
Either. It doesn't matter.
Once inside, the actors
Will provide whatever
An audience could ask.

Apparently always delighted
To perform, this engaging
Troupe prefers direction
From the footlights' other
Side. Even the placement
Of scenery is a matter which
May require consultation
With the audience.

Like Hamlet's rude company
Of players, they are anxious
To please patrons of their
Arts by whatever means are
Desired. No script is sacred.
Lines can always be improved.
Here, a little bit of business
Inserted. There, a cut or two.

Or, for those who do not
Care to meddle, a standard
Repertoire of old favorites
Is offered. Done in the
Traditional way. With much
Fanfare and frequent fol-de-rol.
Pre-tested before kings and queens
And uncrowned heads of state.

Either way (or both),
By spoken word and artifice,
These diligent craftsmen
Reshape worlds in memory
And lives, quite forgot;
Until it almost seems
That time itself has stopped, while
We are turned into ourselves again.

Harry Branson

YOU READ IT HERE FIRST

Real, actual TVBA revolutionary text

Continued from page 1

Fairbanks in June of 1989 to, among other things, speak to the Tanana Valley Bar Association about the present IOLTA (Interest on Lawyers' Trust Accounts) program and to explain recent changes. She was splendidly attired in basic black and wore appropriate pumps.

Ms. Hughes began her presentation by describing the IOLTA program and the successes it has recently experienced. Then it happened. The word MANDATORY slipped from her lips and the revolt was on. Ms. Hughes defended herself admirably from the onslaught that followed. Feverish debate, however, culminated in a motion that is now forged on the minds of every attorney in the State:

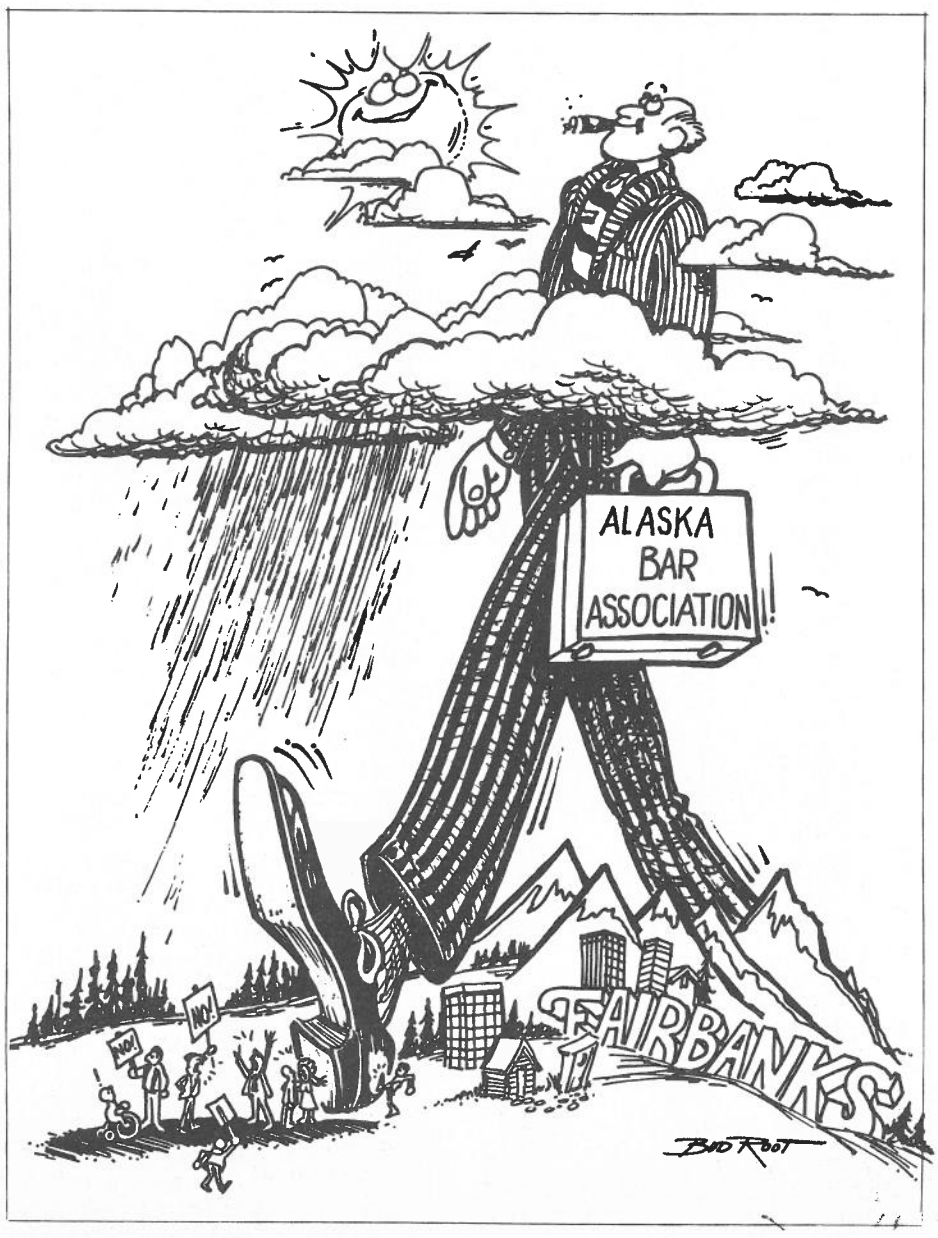
RESOLVED: That the Board of Governors of the Alaska Bar Association be told to stay out of our business.

As dramatic as the aforesaid resolution was, no indication was made as to who should convey this message to the Board of Governors and no one volunteered.

In attempting to reconstruct the events of that day, Bar Rag reporters consulted with a number of those in attendance. There was general unanimity among those interviewed against anything mandatory. Some voting on the resolution thought it related to mandatory CLE. Others recalled the discussion centering on mandatory dress codes. Some even believed the resolution to address drug testing. Regardless of the rationale, however, the unity and determination of those in attendance was clear. At least one member was heard to say: "Give me liberty or give me death." Another screamed as he left the meeting: "We must hang together or we will all hang separately."

Reaction by the Board of Governors to this insurrection has been mixed, characterized primarily by silence. While some believe that the Board will come down hard on this rebellious band of attorneys, others cite the success of Chinese students as an indication that the Tanana Valley Bar Association may well succeed in its noble quest.

The eyes of the world now lie on two people:Fleur Roberts, President of the Tanana Valley Bar Association; and Jeff Feldman, newly elected President of the Alaska Bar Association. Whose will is stronger? Who will prevail? The only thing that is now certain is that the Bar Rag will be there, once again providing its readers with a front row seat of history as it is being made.



The shot is fired:

June 30, 1989
Deborah O'Regan
Executive Director
Alaska Bar Associatoin
310 K Street, Suite 602
Anchorage, AK. 99501
Dear Ms. O'Regan,

I enclose herewith minutes of the meeting of the Tanana Valley Bar Association held June 23, 1989. I have been directed to forward them for the obvious reason that they must be published in the next edition of the Bar Rag, but for another important reason as well.

You will note in your careful review of these minutes that the TVBA adopted a resolution directed to the Board of Governors. Apparently the TVBA is of the mind that the Board of Governors is attempting to influence their professional lives, and, particularly, through the Bar Foundation. Well, what do you have to say about that? I await your detailed reply, to forwarad, as my office requires, to the members of the association.

As ever, I remain,
Yr. Obdt. Svt.
Daniel R. Cooper, Jr.
Vice-President
Tanana Valley Bar Association

June 23, 1989

President Fleur Roberts called the meeting to order prematurely at 12:20. Guests were Mary Kay Hughes, John Camasson, Sara (Julian Rice's secretary) and Carol (John Rosie's bookkeeper).

By way of announcements, Fleur Roberts noted she had just come from a luncheon at Alaskaland where the Tanana Valley Bar Association had received an award for supporting the Pro Bono Program.

With little further ado, President Roberts relinquished the floor to Mary Kay Hughes so that Ms. Hughes might instruct those present on the new IOLTA rules. Ms. Hughes immediately launched into tales of flory that draped the good works of the Alaska Bar Foundation. While in the midst of announcing that seven scholarships had been awarded to worthy people, she finally noticed that Judge Klienfeld was present at the luncheon, and stopped to greet him warmly. She later denied that she was either (a) currying favor or (b) campaigning.

Mary's history of the IOLTA program was long and involved and started back in 1986 with the voluntary IOLTA program. Highlights of this presentation were that there was a 14 percent penetration of the private bar (this woke up some criminal defense lawyers, but for the wrong reasons). The IOLTA Fund is currently generating about $8,000 a month in interest.

The heart of her message, however, was that participation in the IOLTA program would be MANDATORY after July, unless a person OPTS OUT prior to Sept. 1. Forms will be mailed soon. If a lawyer desires to opt out then the form must be returned promptly. In the future, it is anticipated that the IOLTA opt out election will be sent out on the back of the dues forms which will be mailed, as usual, in the last month of the year.

For those who wished to sign up for IOLTA, and have not yet done so, Mary passed out forms which were closely akin to an eye examination. Older members of the bar will need treatment from either an ophthalmologist or an orthopod in order to read these documents.

Mary noted that all banks (of which there are five left in Alaska) have agreed to participate in the IOLTA program. Art Robson, much to the dismay of those present, was somehow jolted from his usual somnambulant state. He noted there was, indeed another bank which was alive and well in the state and which did not participate in IOLTA and that bank was Mt. McKinley Mutual Savings Bank.

Based on some of Art's later comments, it was somewhat surprising that he would be aware of either Mt. McKinley Mutual Savings Bank or its inability to participate in IOLTA.

Mary made a few more comments, which included the use of a strange word "statementize", which apparently is a verb having to do with bank statements that may or may not be done to others in the rendition of banking services and may or may not be an unlawful act depending upon the presence of *mens rea*.

Just prior to accepting questions and comments from the floor, Mary, in her best hortatory style, urged the Tanana Valley Bar Association to "get with it." There was a murmur from the audience that Fairbanksans generally were "with it," that they likely exemplified the mainstream of the bar, and that it was even more likely that Anchorage lawyers were "out of it."

Dick Madson, apparently stimulated by the same virus that had affected Art Robson, shook his head and lamented that he can't find his number, can't find his trust account, nor can he find his virgin secretary who has gone off to some island. The missing number, and perhaps secretary, had something to do with the trust account.

There were also several inquiries addressed to Mary on behalf of Dick Madson whether one could place an automobile in one's trust account thereby creating revenue for the Bar Foundation. Her face slowly was overcome by a look of great dismay, and she declined to answer.

The virus which had previously struck Robson and Madson continued to roll around the room. Tom Fenton noted that IOLTA didn't sound like anything new. It's another case where the lawyer takes the money from the client and the client gets nothing at all. He said it sounded like business as usual. Bob Noreen launched into an explanation of why one would want to opt out of IOLTA which included, as a sound business reason, that one could then use one's trust account funds to collateralize loans.

Art Robson was really concerned about all this IOLTA stuff by this time. He wanted to know if he could have two trust accounts, one which was in the IOLTA porgram and one which was out. That way his clients could elect whether or not they wanted to have the interest earned on their money donated to worthy causes. When told he didn't have to offer this option to his clients, but rather that he could make the decision himself, he stated emphatically that he was leery of anyone's opinion that said that he didn't have to be ethical when he does. Art then launched into a story that started in 1957 in Alberta and concerned his uncle.

In spite of several urgings by Jim Blair for more detail, Art was soon sidetracked into a rumbling silence.

Bob Froseclose then explained to Art, vis-a-vis his proposed dual trust accounts, that he could be in or out. That is, if you're in you're in. And if you're out you're out. So you can be either in or out, but you can't go in and out because that's probably unlawful. (See, e.g., 14 percent penetration comment above).

Some members then present became concerned that the Board of Governors was trying to get the Tanana Valley Bar Association to do things that they shouldn't have to do. On motion duly made by Dick Madson and seconded by Bob Noreen and passed unanimously it was

RESOLVED that the Board of Governors of the Alaska Bar Association be told to stay out of our business.

Having taken care of that problem, Dick Madson then noted how nice Mary Kay Hughes looked that day. On motion duly made by Dick Madson and seconded by Art Robson and passed unanimously it was

RESOLVED that Mary Kay Hughes looks good in basic black, with appropriate pumps.

Blushing decorously, Mary responded to a question about "who paid for her trip to Fairbanks" by saying that the Bar Foundation did not fund her expenses. This drew several exclamations of awe for her generous nature. Mary, upon seeing the concern on the faces of the Tanana Valley Bar Association that she would have to fund the $232 round trip ticket from her own pocket stated, and I quote, "They don't pay my expenses, so I flew here today on my broom." Honest to God, she said that.

The membership having exhausted

Continued on Page 23

PART II: WHEN A BANK FAILS

The F.D.I.C. as bank liquidator

BY TOM YERBICH

This is the second of three parts of a discussion on bank failures. Part I dealt with a general background on the Federal Deposit Insurance Corp. in this process.

FDIC as Liquidator

The process of liquidating assets and paying off the creditors of the failed bank are mainly mechanical. The general powers and duties of the FDIC as liquidator are set forth in 12 USC 1821(d):

"Notwithstanding any other provision of law, it shall be the duty of the Corporation as such receiver to cause notice to be given, by advertisement in such newspapers as it may direct, to all persons having claims against such closed bank pursuant to section 193 of this title; to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; and to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidating of closed national banks, except as herein otherwise provided. The Corporation as such receiver shall pay to itself for its own account such portion of the amounts realized from such liquidation as it shall be entitled to receive on subrogation to the claims of depositors, and it shall pay to depositors and other creditors the net amounts available for distribution to them. The Corporation as such receiver, however, may, in its discretion, pay dividents on proven claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Corporation itself or as such receiver by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. With respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers and privileges now possessed by or hereafter granted by law to a receiver of a national bank or District bank and notwithstanding any other provision of law in the exercise of such rights, powers and privileges the Corporation shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency."

The general powers and duties of a receiver of a national bank are contained in 12 USC 193, which reads in relevant part, as follows:

"Such receiver, * * *, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct."

When the FDIC is acting as a receiver, it acts as trustee for the benefit of the bank and its creditors, depositors and shareholders and administers the remaining assets of the bank for their benefit. [25]

Creditors and Priorities - National Banks

When the assets have been liquidated, or sufficient funds realized from the liquidation of a national or district bank for payment of a creditors' dividend, the FDIC's Board of Directors orders that a ratable dividend be paid. The statutory provisions governing dividend payments, such are applicable to the FDIC as receiver, [26] are found in 12 USC 91 and 194.

12 USC 194, the priority statute, provides, in relevant part:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction * * *."

12 USC 91, clearly an anti-preference statute, reads, in relevant part: "all payments of money * * * made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in a manner prescribed by this chapter, or with a view to the preference of one creditor over another * * * shall be utterly null and void * * *."

Claims which are disallowed by the receiver must be established by adjudication by some court of competent jurisdiction before they can share in distribution of the insolvent bank's assets. [27] The proper court for claim resolution is the United States District Court in the district within which the principal office of the insolvent bank is located. [28]

a. Applicable Law

The allowance of claims against the assets of an insolvent national bank is a matter of federal law. [29] But what federal law? The courts must look to federal common law where federal statutory law does not provide the answer. In applying federal common law, "federal courts are free to apply the traditional common law technique of decision and to draw upon all sources of common law ..." Congress doubtlessly did not wish to cut state law completely adrift in this area and "many questions as to the liability of parties (parties) presumably contracted." [30] In making the determination as to whether state law is incorporated into the federal common law, a three-part test is applied: (1) whether the federal program involved is one which by its nature requires national uniformity; (2) whether adopting state law would frustrate the specific objectives of the federal program; and (3) whether applying an uniform federal rule would disrupt reasonable commercial expectations predicated on state law. [31]

b. Provable Claims

There is some measure of disagreement among the several circuits as to the test to be applied to proving claims. As a general statement, to be "proved," a claim must (1) exist before the bank's insolvency and not depend upon any contractual obligations or events arising thereafter, (2) be absolute and certain in amount when filed against the receiver, and (3) be made in a timely manner. [32] The Ninth Circuit has further refined the definition of "provability," adopting the equitable principles governing receiverships in lieu of the now repealed bankruptcy provabililty test. [33] Under this test, claims are divided into three classes: (1) Claims which at the commencement of the proceedings furnish a present claim; (2) Claims which at that time are certain but which are not matured; and (3) Claims which are contingent. The first two classes are clearly provable. The third class of contingent claims must be further subdivided into two subclasses: (1) Claims the worth or amount of which can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estates; and (2) Claims which are so uncertain that their worth or amount cannot be so ascertained. Claims in the first subclass are provable, while those of the second cannot be proved.

Among claims which are not provable are those for future rental arising out of lease terminations, which have neither accrued nor become unconditionally fixed prior to the time the bank was declared insolvent. [34] It should be noted, however, that the Ninth Circuit in rejecting the now outdated bankruptcy rules of provability in favor of the more flexible, broader equitable rules, has cast serious doubts on the continued viability of this holding. [35]

c. Priority

It must also be determined if, and to what extent any claims have priority. Section 194, by its very terms limits its priority to the United States for any "deficiency in redeeming the notes of such association * * *. "National banks no longer issue circulating notes (to which section 194 refers); and the general statute granting the United States priority for debts of insolvent [36] does not apply to national banks because the later pronouncement of Congress overrides the inconsistent earlier. [37] As a consequence there is no appareant basis for granting any general creditor of an insolvent national bank priority, except to the extent expenses of the receivership which shall be paid out of the assets of the receivership estate prior to any distribution thereof. [38]

There are, however, recognized exceptions to the "ratable dividend" rule. Ratability only applies to assets that belong to the insolvent bank and does not prevent beneficiaries from tracing funds held in trust by the bank. [39] This exception is not limited to express trusts, but extends to constructive trusts as well, such as: proceeds of school district warrants deposited for collection by bond holders; [40] drafts placed for collection but instead of collecting the drafts, the insolvent bank used them to adjust accounts with the bank issuing the draft; [41] or, receipt of funds for deposit by an insolvent bank and known to be insolvent by its responsible officers. [42] An exception which parallels trusts are special deposits or escrows. A deposit becomes impressed with a trust when such deposit is made with a distinct understanding that it is to be held for the purpose of furthering some transaction between the depositor and some third party, or where it is made under such circumstances as to necessarily give rise a clear implication that it is made for such purpose. [43] Finally, voluntary subordination of claims by creditors is permissible. [44]

d. Security Interests

Next our attention turns to the problems and issues related to security interests and liens. Are not secured creditors entitled to some form of priority over unsecured creditors? It is clear that an attorney can neither bring Article 9 of the Uniform Commercial Code into, nor apply the bankruptcy rules with respect to liens and preferences in, national bank receivership proceedings. The National Bank Act takes precedence over the Uniform Commercial Code, therefore the UCC can not be applied to determine the priorities of the various creditors of an insolvent national bank. [45] The Bankruptcy Code is expressly inapplicable [46] and any bankruptcy law that is applied would have to be by analogy. The presence of sections 91 and 194 indicates that Congress did not intend the state law of creditor's rights to apply in total to national bank receiverships. [47]

The National Bank Act is silent insofar as reference to secured claims is concerned and there is, therefore, no federal statutory law providing a rule of decision. Courts addressing the issue, have universally recognized that section 194 allows creditors the benefit of their security. [48] But to what extent can reference be made to state law to establish the existence of a secured interest or lien? Caselaw is considerably less than crystal clear on this point, failing to provide a "black-letter" rule of general application. However, from the various authorities regarding the application of federal law in general and specifically applying federal law to the issue of security interests and liens the following rules with respect to secured claims may be distilled.

1. The receiver in national bank insolvency proceedings takes the assets of the failed bank subject to security interests therein and liens thereagainst.

2. The existence of a security interest or lien is first determined by reference to Federal law (either common law or statutory) including the National Bank Act; in the event that no controlling Federal law either grants or prohibits the claimed security interest or lien, reference is made to the law of the State in which the main headquarters of the failed bank is situated to determine whether the creditor has a security interest in or lien against any asset of the failed bank.

3. Any security inerest or lien must have been duly perfected in accordance with otherwise applicable law (federal or state) unless to require such perfection would be contrary to or inconsistent with the National Bank Act.

4. The FDIC as receiver may avoid any security interest or lien under the preference provisions of 12 USC 91, discussed further below.

How to rank or prioritize competing security interests in the same assets remains unclear. If any law (federal or state), other than the National Bank Act, establishing priority as between competing holders of security interests or liens in the same asset must give way to 12 USC 194, then all such creditors claiming a security interest or lien therein share ratably in the asset(s) or proceeds thereof. If, on the other hand, state law is applied, the familiar principle of "first in time — first in right" of the Uniform Commercial Code would apply. There does not appear to be any compelling purpose of the Federal Bank Act which would be defeated or impaired by application of state law principles to competing claims of secured creditors; therefore, otherwise applicable federal or state law should determine the relative priority of competing security interests.

Fortunately, the impact of this omission in federal law and the attendant confusion that could result are minimized by several factors. First, conflicting security interests seldom arise because bank examiners would presumably discover them and bring them to the attention of the bank and the affected creditors. Second, bank borrowing is seldom secured; most bank borrowing being in the federal funds market on an unsecured basis. Also, to the extent bank borrowing is secured by bank collateral consisting of notes and securities, perfection is by a "pledge" whereby the secured party takes possession of the collateral and would be the only party secured in the collateral. No matter which law applies, state or federal, statutory or common, the result would be the same.

e. Preferential Transfers

Next we turn to preferential transfers under section 91, which is much less extensive than the concept of preferential and fraudulent transfers under the Bankruptcy Code familar to most lawyers who will be dealing with this problem. Furthermore, it

Continued on Page 23

• F.D.I.C. as liquidator

Continued from Page 22

has not been polished with a judicial gloss to the same extent as the Bankruptcy Code. Accordingly, it is not quite clear how section 91 applies in some of the situations that frequently arise in a bankruptcy proceedings.

The purpose of section 91 is to enforce equality of the division of available assets among the various creditors. [49] The key to the application of section 91 (other than the insolvency test) is that the transfer must be made "with a view to the preference of one creditor over another." A payment made in the ordinary course of business, even if made when the bank is insolvent, is not a preferential transfer. [50] On the other hand, a transfer made to the Federal Reserve bank by an insolvent bank to cover checks presented by the Federal Reserve Bank as collection agent for its member banks, constitutes a preferential transfer. [51] It has also been held that setoffs by a debtor of an insolvent bank against amounts owed the debtor by the bank are not preferential within the scope of section 91, [52] but a setoff using funds coming into the hands of the debtor after insolvency is preferential. [53] Furthermore, the knowledge and intent required to avoid a transfer relate to the knowledge and intent of the officials of the transferor bank [54], knowledge or lack thereof by the tranasferee is irrelevant. [55]

Interestingly, the Franklin National Bank case, which might have answered many questions concerning preferential transfers, never really made it to court on the merits of section 91. In exchange for $1.7 billion in loans it made to Franklin, the Federal Reserve had a security agreement with Franklin from the beginning but did not file the financing statement covering its interest in "accounts" or loans made by Franklin until the day Franklin closed. A bankruptcy attorney would scream "foul" and seek avoidance of the security interest. However, as part of a complex purchase and assumption agreement, the FDIC as receiver (generally the only person entitled to bring an action under section 91 [56], sold part of Franklin's assets to another bank and the balance to itself as corporataion, assuming the Federal Reserve Bank obligation, in exchange for a release of the security inerest and without challenging the validity of the security interest. [57] Although in part challenged twice, the transaction was upheld: in the first case because, as the FDIC had assumed the obligation, only it could be the aggrieved party even if there were a preferential transfer; [58] and, in the second, on the grounds that the purchase and sale transaction itself was within the discretionary powers of the FDIC. [59]

The rules of ratable distribution and preferential treatment are equally as applicable to the FDIC as receiver whether the purchase and assumption transaction or deposit payoff alternative is followed. In a purchase and assumption transaction, the FDIC takes the risk that the assets remaining in a receivership estate will be insufficient to satisfy the claims of the remaining creditors, whose claims were not assumed by the purchasing bank. As a consequence, the FDIC must stand ready to render the distribution ratable by supplementing the remaining assets should they fall short. [60]

Next issue: State Banks

FOOTNOTES

[25] *Case* v. *Terrel*, 78 U.S. 199, 20 L.Ed. 134 (1871).

[26] *First Empire Bank - New York* v. *FDIC*, 572 F.2d 1361 (9th Cir. 1978), cert. den. 439 U.S. 919, 99 S.Ct. 293, 58 L.Ed.2d 265.

[27] *White* v. *Knox*, 111 U.S. 784, 4. S.Ct. 686, 28 L.Ed. 603 (1884).

[28] 12 USC 94.

[29] *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942); *Interfirst Bank Abilene N.A.* v. *FDIC*, 777 F.2d 1092 (5th Cir. 1985) reh. den. en banc 782 F2d 1040; *FDIC* v. *Mademoiselle of California*, 379 F.2d 660 (9th Cir. 1967).

[30] See *D'Oench, Duhme & Co.* v. *FDIC, supra*, 315 U.S. at 472-474, 62 S.Ct. at 686-687, 86 L.Ed. 970-971 (Jackson, J. concurring) from which the quotations are taken.

[31] *U.S.* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979).

[32] *Interfirst Bank Abilene, N.A.* v. *FDIC, supra; FDIC* v. *U.S. National Bank*, 686 F.2d 270 (9th Cir. 1982).

[33] *First Empire Bank - New York* v. *FDIC, supra.*

[34] *Argonaut Savings & Loan Ass'n.* v. *FDIC*, 392 F.2d 195 (9th Cir. 1968) cert. den. 393 U.S. 839, 89 S.Ct. 116, 21 L.Ed.2d 110; *FDIC* v. *Grella*, 553 F.2d 258 (2nd Cir. 1977).

[35] *First Empire Bank* to cases involving leases and losses of future rent but neither overruled nor criticized the precise holding in *Argonaut*. Nevertheless, if, as the Ninth Circuit specifically stated, *Argonaut* rests on outdated principles of law should not *Argonaut* be overruled? In the opinion of this author, *Argonaut* does not reflect current law and should not be followed.

[36] 31 USC 191, fondly known as "R.S. 3466" its predecessor.

[37] *Cook County National Bank* v. *U.S.*, 107 U.S. 445, 2 S.Ct. 561, 27 L.Ed. 537 (1882).

[38] 12 USC 196.

[39] *Scott* v. *Armstrong*, 146 U.S. 499, 13 S.Ct. 148, 36 L.Ed.1059(1892).

[40] *Titlow* v. *McCormick*, 236 F. 209 (9th Cir. 1916).

[41] *People's National Bank* v. *Moore*, 25 F.2d 599 (8th Cir. 1928).

[42] *Richardson* v. *Oliver*, 105 F. 277 (5th Cir. 1900); *Cronkleton* v. *Ebmeier*, 38 F.2d 748 (8th Cir. 1930).

[43] *Merchants' National Bank* v. *School District*, 94 F. 705 (9th Cir. 1899).

[44] *FDIC* v. *Bank of America, N.T. & S.A.*, 701 F2d 831 (9th Cir.0, cert. den. 464 U.S. 935, 104 S.Ct. 343, 78 L.Ed.2d 310 (1983).

[45] *FDIC* v. *McKnight*, 769 F.2d 658 (10th Cir. 1985), cert. den. 475 U.S. 1010, 106 S.Ct. 1184, 89 L.Ed.2d 300.

[46] 11 USC 109.

[47] See also Official Comment 1 to UCC 9-104 which reads: "Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article." Sections 91 and 194 appear to fit within the contemplation of this Comment. (S.D.N.Y. 1978) aff'd and adopted on appeal 629 F.2d 233 (2nd Cir. 1980), cert. den. 450 U.S. 970, 101 S.Ct. 1492, 67 L.Ed.2nd 621.

[48] E.g., *American Surety Co. of New York* v. *Bethlehem National Bank*, 314 U.S. 314, 62 S.Ct. 226, 86 L.Ed. 241 (1941); *Earle* v. *Pennsylvania*, 178 U.S. 449, 20 S.Ct. 915, 44 L.Ed. 1146 (1900); *Merrill* v. *National Bank of Jacksonville*, 173 U.S. 131, 19 S.Ct. 360, 43 LEd. 640 (1899);; *Webster* v. *Sweat*, 65 F.2d 109 (th Cir. 1933); *Chemical National Bank* v. *Armstrong*, 59 F. 372 (6th Cir. 1893) mod. on rehrg. 65 F. 573 (1895); *Mermis* v. *Jackson*, 93 F.2d 579 (10th Cir. 1937); *Bell* v. *Hanover National Bank*, 20 F. Supp. 810 (S.D.N.Y. 1893).

[49] *Prentiss* v. *Chandler*, 85 F.2d 733 (9th Cir. 1936), cert. den. 300 U.S. 654, 67 S.Ct. 431, 81 L.Ed. 864.

[50] *McDonald* v. *Chemical National Bank*, 174 U.S. 610, 19 S.Ct. 787, 43 L.Ed. 1106 (1899); *Mechanics Universal Joint Co.* v. *Culhane*, 299 U.S. 51, 57 S.Ct. 81, 81 L.Ed. 33 (1936).

[51] *Hirning* v. *Federal Reserve Bank of Minneapolis*, 52 F.2d 382 (8th Cir. 1931).

[52] *Scott* v. *Armstrong*, 146 U.S. 499, 13 S.Ct. 148, 36 L.Ed. 1059 (1892); *Interfirst Bank Abilene, N.A.* v. *FDIC, supra; First Empire Bank -New York* v. *FDIC, supra.*

[53] *Hirning* v. *Federal Reserve Bank of Minneapolis, supra.*

[54] *Prentiss* v. *Chandler, supra.*

[55] *National Security Bank* v. *Butler*, 129 U.S. 223, 9 S.Ct. 281, 32 L.Ed. 682 (1889).

[56] *Steele* v. *Randall*, 19 F.2d 40 (8th Cir. 1927); but see *Federal Reserve Bank* v. *Omaha National Bank*, 45 F.2d 511 (8th Cir. 1931), cert. den. 282 U.S. 902, 51 S.Ct. 215, 75 L.Ed. 794, permitting a creditor to bring the action where the creditor would be the only one to benefit and would not have to share the recovery with any other person.

[57] The transaction was initially judicially approved *ex parte. In re Franklin National Bank*, 381 F.Supp. 1390 (E.D.N.Y. 1974).

[58] *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863 (2nd Cir. 1977), cert. den. 434 U.S. 1012, 98 S. Ct. 726. 54 L.Ed.2d 756.

[59] *Corbin* v. *Federal Reserve Bank of New York*, 475 F.Supp. 1060 (S.D.N.Y.1978)aff'd and adopted on 629 F.2d 233 (2nd Cir. 1980), cert.den. 450 U.S. 970, 101 S.Ct. 1492, 67 L. Ed.2nd 621

[60] *First Empire Bank - New York* v. *FDIC, supra;* but see *FDIC* v. *Citizen's Bank and Trust Co.*, 592 F.2d 364 (7th Cir. 1979), cert. den. 444 U.S. 829, 100 S.Ct. 56, 62 L.Ed.2d 37 (1980), where in a case involving a receivership estate left without assets after a purchase and assumption transaction, the court denied a claim against the FDIC on the grounds that the FDIC had immunity under the Federal Tort Claims Act.

• TVBA

Continued from Page 21

the topic of IOLTA, then turned to plans for the Christmas Party on July 7, 1989 to be held at the Kiwanis Park at 2:00 o'clock.

There was much discussison about the time the party should begin. Dick Burke wanted to start at 1:00 o'clock but Joan Robson wanted to start at 3:00 o'clock. When asked why Joan wanted to start the party later, Art Robson replied, and I quote, "she's nuts". Honest to God, he said that.

Discussions ensued as to whether or not Santa Claus would jump from an airplane to this year's party. Several people said he shouldn't be allowed to do so because he pissed off the kids last time. It was pointed out that there was a parachuting Santa Claus exclusion in our insurance policy. Then we remembered we didn't have an insurance policy. Dick Burke, unilaterally and *sua sponte* ruled from the floor that, with respect to jumping Santa Claus' there would not now, nor would there ever be, another Santa Claus parachuting into a TVBA Fourth of July Party.

There being no further business, if there had been any in the first instance, to come before the meeting, the meeting was adjourned.

CLE VIDEO REPLAY SCHEDULE 1989

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

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

FAIRBANKS LOCATION: Attorney General's Office, Conference Room, 100 Cushman, Ste. 400 — CLE Video Replay Coordinators, Ray Funk and Mason Damrau, 452-1568.

REPLAY DATES:

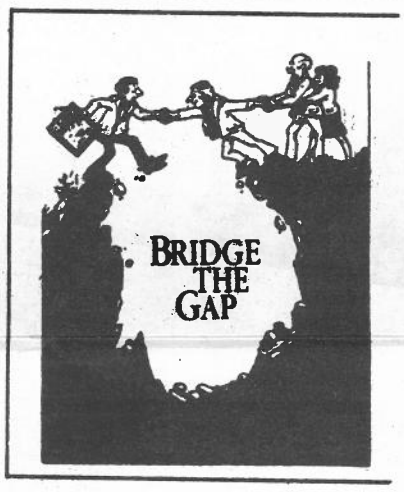
*** 1989 Revised Alaska Corporations Code**
Fairbanks: Aug. 23, 9 a.m.-5 p.m.

***Recent Foreclosure Issues in Alaska**
Kodiak: Aug. 5, Beginning at 10 a.m.
Fairbanks: Aug. 11, 9 a.m.-5 p.m.

***Adoption Issues**
Anchorage: Sept. 7, 9 a.m.-Noon
Juneau: Oct. 28, 9 a.m.-12 Noon
Kodiak: Nov. 4, Beginning at 10 a.m.
Fairbanks: Nov. 10, a.m.-Noon

***Maritime Personal Injury**
Anchorage: Oct. 27, 9 a.m.-Noon
Juneau: Nov. 4, 9 a.m.-Noon
Kodiak: Nov. 11, Beginning at 10 a.m.
Fairbanks: Nov. 11, 9 a.m.-12 Noon

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, P.O. Box 100279, Anchorage, Alaska, 99510 — phone 272-7469/fax 272-2932.



The Bar's Best New Seller:

Bridge the Gap Manual 1989

"I couldn't put it down once I finally managed to pick it up!"

Perry Mason

"Heavy reading!"

Judge Learned Hand

"A most impressive tome, methinks — but oddsbodskins, none of the lawyers in it DIE!"

Bill Shakespeare

Copies of the 1989 edition of the Bridge the Gap Manual are now available. In addition to materials revised by the substantive law sections, this year's edition contains information on Collections and Executions, Discovery, Fast Track Rule, Professional Conduct for the NonAttorney, and Tort Claims.

COST: $60.00 includes binder and manual of over 1,000 pages Shipping: $6.00 per binder

Please call 272-7469 to order.

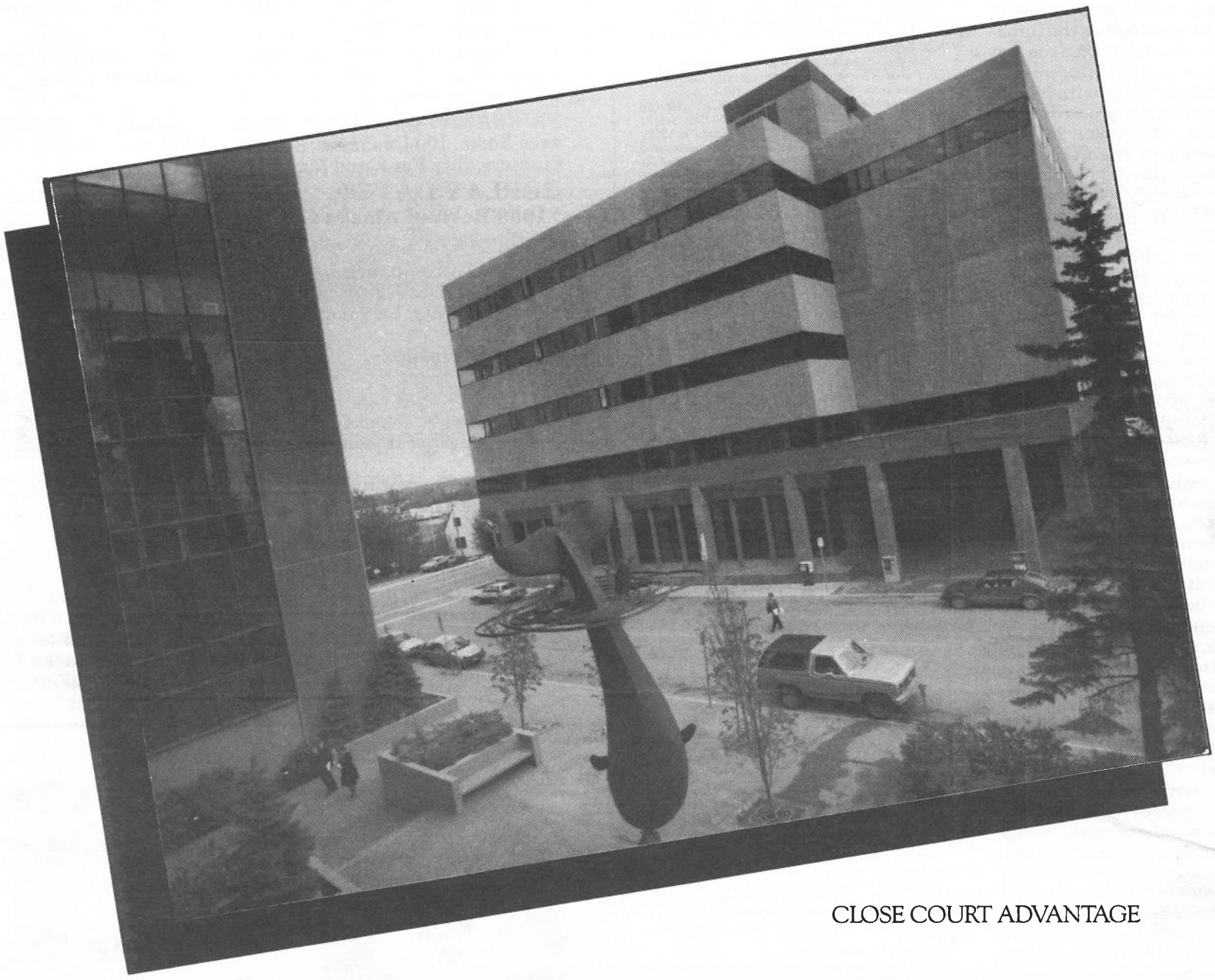
BRIDGE THE GAP VIDEO

The Bridge the Gap videotape on the April 20-22, 1989 seminar is also available. FEE: $70.00 includes tape rental and manual.

The Bridge the Gap seminar has been videotaped in 9 segments of approximately 2 topics per videotape.

INDIVIDUAL TAPE RENTAL (usually 2 topics) FEE: $10.00 per tape. The Manual is available for purchase separately under this plan.

Please call Mary Lou Burris, CLE Assistant, at 272-7469 for information on Bridge the Gap Manuals and videotapes.



CLOSE COURT ADVANTAGE

How much time do you spend in traffic? Probably much more than you realize. In fact, if most of us really analyzed what travel time costs us each year, the results might be rather unnerving.

Many Anchorage attorneys, like yourself, have discovered a way to make their time more productive. They've moved to the Carr Gottstein and 3rd & "K" buildings. . .where the courthouse, professional services, and many of the city's finest shops and restaurants are only steps aways.

Carr Gottstein Properties is now offering space in both of these buildings. Both overlook Cook Inlet, offer flexible office space and outstanding improvement allowances. View suites are available. Best of all, these prime office locations save you time. . .which saves you money.

For more information, call Susan Perri at 564-2424.

CARR GOTTSTEIN
Properties