Meet Alaska's favorite spy
--Below
The 9th Circuit Court celebrates 100 years
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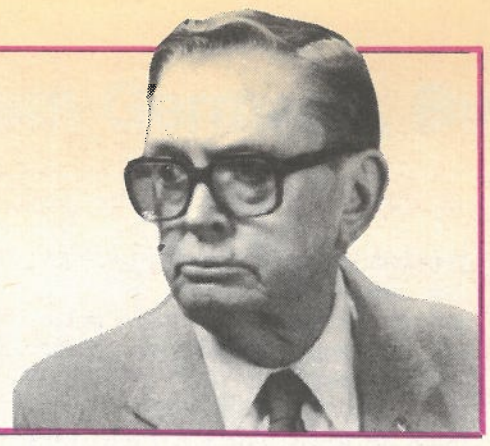

Odd Ketchikan shopping, TVBA housekeeping, tardy bankruptcy files, new probate feature, and the Movie Mouthpiece goes to school.

--Inside

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The Alaska BAR RAG

Dignitas, semper dignitas

JULY-AUGUST, 1991

VOLUME 15, NO. 4

This is really true

Little Pigeon views world: *Or*, TVBA knows the scoop

BY ART ROBSON

For some years now there have been outbreaks of undisguised jealousy among the various sub-units of the State Bar. These have all centered around the fact that the Tanana Valley Bar Association (TVBA), much like the Baltic republics in the Soviet Federation, has its own foreign policy committee. Actually, this wouldn't be so bad if the committee didn't make predictions which unfailingly come to fruition.

At the center of this controversy is the Chairman of the TVBA Foreign Policy Committee, respected Fairbanks attorney Richard D. Burke. A modest and gracefully greying gentlemen, Burke has the habit of pointing out "you just don't understand the situation - I do." Since it is clear that the U. S. State Department, and at least 90% of our political leaders, do not understand the situation, this article will plumb the reasoning behind the TVBA's superiority.

Burke became a non-person at the end of World War II. For nearly 30 years he remained, in the trade parlance, a "Spook". As a result, he can understand today's Yugoslavia. In discussing that situation with this author, he pointed out the differences between the various national groups in today's Yugoslavia, which include three major religious groups--Roman Catholic, Orthodox Catholic

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"I SURE KNOW WHAT TO CALL HIM..."

U.S. District Court restructures

M-J Roberts explains new set-up and titles

BY MICKALE CARTER

The recent title change from Magistrate to Magistrate Judge has caused some confusion among attorneys who practice before the federal bench in Alaska.

"Just what is the proper way to address a Magistrate Judge?" is a frequent question heard echoing the halls of the federal building. In its continuing effort to assist the Alaska Bar so that its members can avoid a bench/bar *faux pas,* your favorite bar newspaper assigned me the task of answering this timely and important question.

I interviewed Judge John Roberts, the only full-time Magistrate Judge in the District of Alaska, who provided the etiquette/information along with other insights into the function and purpose of the United States Magistrate Judge.

Judge John Roberts graduated from the Washington and Lee University law school in Lexington, Virginia, in 1968. This is the same law school that Supreme Court Justice Lewis Powell attended. In 1974, Roberts noticed a national flyer which advertised an opening at the U.S. Attorney's office for the District of Alaska. After being interviewed over the phone, Roberts asked his wife if she would like to go to Alaska. She didn't say "no," so they arrived in Alaska in 1974. G. Kent Edwards was the U.S. Attorney.

Moving from Florida, Roberts was not prepared for the cold weather. He and his wife were at J.C. Penney when the doors opened the next day to buy warm winter coats. Although Roberts came to Alaska because he loves the out of doors, he says he presently has very little time to really enjoy it. He goes hunting and fishing maybe once a year.

When Roberts first arrived at the United States Attorney's office, Lee Petersen and Sam Pessinger were assistant U.S. attorneys, and Roberts was the first in a string of people hired by G. Kent Edwards from out of state during those years. During the three years Judge Roberts was an Assistant U.S. Attorney, Bob Linton, Larry Berry, Chris Swinford, Renee Gonzalez, Dick Kibbey, Milton Moss, and Dan Dennis came from out of state to work as assistants in the office.

Roberts was appointed United States Magistrate in June,

Continued on page 18

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President's Column

By Pat Kennedy

I have been president of the Bar for about six weeks as this is being written, and it certainly is an interesting job. To show how interesting it is, I'd like to just pinpoint a few highlights:

• Immediately upon being given the gavel at the banquet on June 7, I had to give it back, because Dan was still president for another day.

After getting back to Anchorage from the Fairbanks convention, I flew to Arizona for the Arizona Bar Convention on a reciprocal exchange. A member of their Board had attended our convention in Fairbanks. In exchange for giving her a room in the Fairbanks Westmark, I got a room at the Keating Palace known as "The Phoenician," in Scottsaale, where the marble bathtub was bigger than my whole bathroom at home. The reason for the exchange was to attend the swearing in of the first woman president of the Arizona Bar. Alaska, of course, had the first woman president of any unified bar, Donna Willard, in 1979.

• Upon my return from the southwest, having lost almost a month in billable hours, I received my first correspondence as president. It was a comment on the discipline system, which cost the Bar 26 percent of its budget or $368,583 in 1990. An attorney who had been subjected to discipline described his irritation in graphic and gutter terms.

• On June 24, the Bar and the Supreme Court were sued by Homer Burrell in federal court. Mr. Burrell, according to his complaint, had filed grievances against four attorneys. In striking out all the provisions concerning confidentiality on the grievance forms, Mr. Burrell had filed nonconforming grievances. The Bar told him as such, but also added that there did not seem to be a disciplinary issue. He is suing to overturn the confidentiality rules and to force the B@r to investigate the grievances.

• On July 14, the Bar appeared in the ALASKA EAR. As the EAR always says, the truth is so limiting. The EAR was told that the Bar does care about having public members on the Board, and fought very hard to get Stan Filler's name sent for confirmation after he had served faithfully for almost a year in his interim appointment

• On July 17, I received a phone call from the American Bar Committee investigating the credentials of Clarence Thomas, nominee for the Supreme Court. The party on the other end assumed no one in Alaska had met him. In fact, many people had. He was here for the convention of the International Association of Human Rights Agencies in 1986.

I am not sure I will be able to stand it if this year gets any more exciting.

Editor's Column

By Ralph Beistline

In June of 1991, I attended the Bar Association's annual business meeting during the State Convention which was held in Fairbanks. During this meeting, President Pat Kennedy reported on the financial condition of the Bar Association and the very real possibility that Bar Association dues will be raised in the near future. Apparently this is a decision that the Board of Governors will be considering during the next 12 months. I suspect that if the decision is to raise dues, it will be submitted to the Bar Association for approval at next year's business meeting.

Of particular interest to me in looking at the Bar Association's finances was *The Bar Rag*. I noted that so far in 1991, the paper has been losing approximately $3,000 an issue which, over the course of a year, amounts to approximately $20,000. While this certainly is not the reason that Bar dues are again being looked at, it is an area over which I personally have some responsibility and, therefore, some concern. While I do appreciate the value of the paper, I would like to see it pay for itself or come very close to doing that. Therefore, I have recommended that some significant steps be taken in the next several months that are aimed directly at reducing the cost of the paper while still working to maintain its quality.

One thing that we are seriously considering is reducing the number of publications from six to five a year. This will effectively eliminate the summer edition of the paper and will result in an immediate savings of $3,000 to the Bar Association.

We are also going to now attempt to keep the size of the paper to 20 pages or less. This, too, will result in some cost-savings. Our goal is to have a slightly slimmer paper, which will require the reduction in length of some of our articles, and may also reduce somewhat the relatively wide scope of material that is included in the paper. This is not to say that we are abandoning the paper's three "E's"; to educate, entertain, and "enform." We are simply trying to reduce the cost of doing it.

We expect that advertising will remain at its current level and will be seeking even to increase that. We are considering a slight increase in advertising rates, however, and also are looking at other cost-saving possibilities in terms of the quality of the paper used and the publication arrangements with the printer.

While we do not expect these efforts to immediately bring the paper out of the red, we do think that they will be some very positive steps in the right direction.

We recognize that the current format of the paper is good and continually receive compliments from both within and without the Bar concerning the quality of the paper. We therefore do not want to stray far from what has proven to be a very successful endeavor.

While we do expect that dues may have to be raised somewhat to cover Bar Association expenses, we are hopeful that efforts such as we are suggesting with the paper can be looked at across the board, and that any dues increase that does become necessary will be minimal.

The Alaska BAR RAG

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Thomas J. Yerbich
Design & Production:
The Alaska Group
Advertising Agent:
Linda Brown
750 W. Second Ave., Suite 205
Anchorage, Alaska 99501
(907) 272-7500
Fax 279-1037

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Willard, Callahan, Abbott receive Bar Awards

Willard Receives Distinguished Service Award

Donna C. Willard was selected for the Alaska Bar Association Board of Governors Distinguished Service Award.

The award, presented at the 1991 Alaska Bar Association annual convention on June 7 in Fairbanks, annually honors an attorney for outstanding service to the membership of the Alaska Bar Association.

Ms. Willard served on the Board of Governors from 1977 - 1980, serving as president her final year on the Board. She was the first woman president of the Alaska Bar Association, and only the second woman president of any state bar association in the country. Ms. Willard served on various bar association committees, including committees on the Proposed Model Rules of Professional Conduct (1982), Errors and Omissions Insurance (1978-1979) and the Statute, Bylaws & Rules committee, which she chaired (1974-1977).

Following her service on the Alaska's Board of Governors, Willard actively participated on a national level. She is currently the Alaska Bar Delegate to the American Bar Assoiciation House of Delegates, and has served as the Alaska State Delegate for most of the past decade. Ms. Willard participated in several ABA committees and sections. She served on the executive council of the National Conference of Bar Presidents and was the president of the National Conference of Bar Foundations. She has also served as president of the Western States Bar Conference and as the Lawyer Representative to the Ninth Circuit Judicial Conference.

Ms. Willard served on the ALSC Board of Directors and also served as Special Bar Counsel for the Alaska Bar Association in discipline matters.

Born in Calgary, Alberta Donna Willard received her law degree from the University of Oregon in 1970. She came to Alaska in 1970 and worked as an associate in the then-law firm of Boyko & Walton. Since 1974 she has been a partner in various law firms. Currently she is in sole practice in Anchorage.

Larry Weeks presented Donna Willard with the Distinguished Service Award.

Callahan Receives Professionalism Award

Daniel L. Callahan, a partner in the Fairbanks firm of Schendel h Callahan, received the Board of Governors Professionalism Award on June 7 at the 1991 Annual Convention in Fairbanks.

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 coustesy and respect for clients and fellow attorneys.

Mr. Callahan, who was presented with the award by his partner, Will Schendel, expressed the hope that more attorneys would strive for a balance between their professional and personal lives. He said he has tried to stay home on Thursdays to spend time with his family since 1983, even though this might mean going back to the office after 9:00 at night.

Mr. Callahan received his J.D. degree in 1978 from the University of Oregon. He came to Alaska to work for Alaska Legal Services Corporation in January 1979. Since 1981 he has been in private practice with Will Schendel.

In announcing the Professionalism Award, the Board of Governors recognized Mr. Callahan's reputation for respect and consideration for opposing attorneys, judges, clients, court personnel and witnesses.

Steve Van Goor Photos

Partner Will Schendel (left) presents the Professionalism Award to Dan Callahan

John Abbott receives the individual Pro Bono service award, presented by Pro Bono Director Seth Eames (right).

LETTERS

Thorsness kudos

I write to congratulate John Thorsness on his election to the Board of Governors. John's commitment and good humor will be a wonderful asset on the Board.

Lloyd Benton Miller

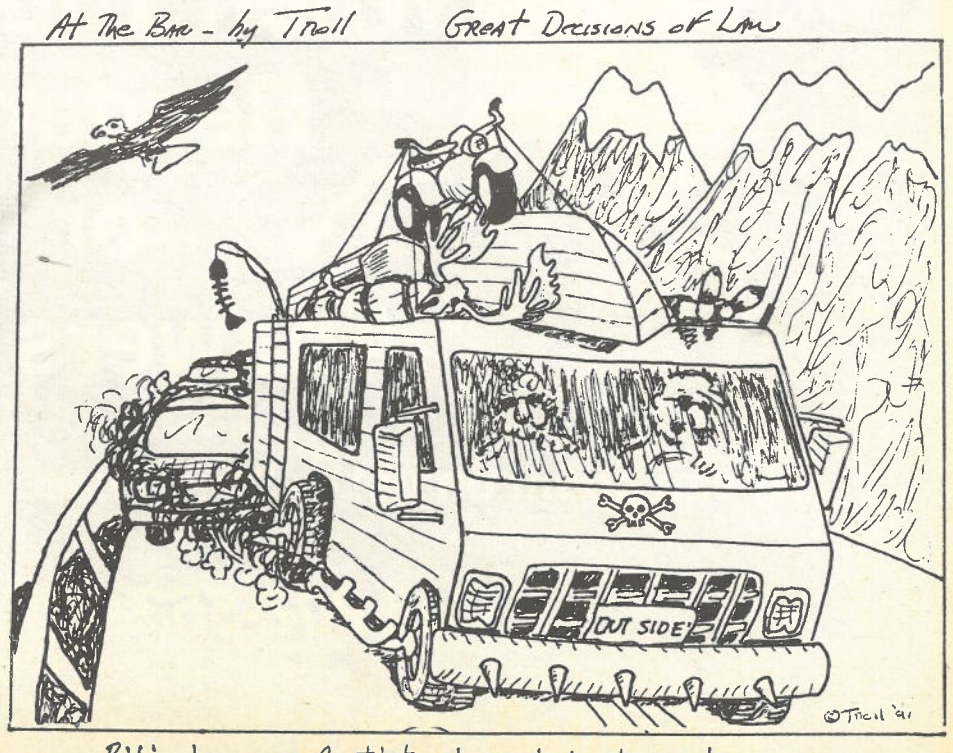
HLA asks help

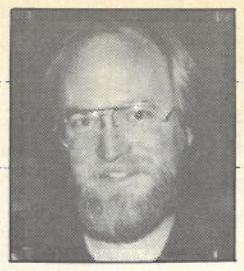
Recently the Handicapped Lawyers Association (HLA) was formed in an effort to bring people together who are handicapped/disabled. We are looking for those persons interested in advocacy, education, and networking. Any and all ideas will be appreciated.

As with many organizations our goals are to educate the public and the profession. The HLA desires advancement of the disabled. With the help of many we can work toward the advancement of the disabled as litigants and their full participation and inclusion in all aspects of the judicial system. We desire to break the barriers facing the disabled to hiring opportunities. The HLA, with your help, can speak directly to the needs of the handicapped/disabled.

Finally, diversity in the profession will strengthen the profession. Everyone interested in these goals should write and participate. If you have ideas, interest, or experience please write to me.

Victor J. Hoffer
Handicapped Lawyers Association
PO Box 934
Mt. Angel, Oregon 97362





Torts

By Michael Schneider

Civil Rule 82, following *Schultz v Travelers*

Schultz v. Travelers Indemnity Co., 754 P.2d 265, was decided by the Alaska Supreme Court in 1988. This important decision makes it clear that an insurance company must tender policy limits at the first opportunity in order to protect its insured from a probable excess verdict. The decision further leaves little doubt that policy limits are the nominal limits of the policy, plus Rule 82 attorney's fees, on the projected verdict that the plaintiff would have received had the case gone to trial. *Id.* at 266-67.

Following *Schultz*, it is clear that a pretrial demand for full policy limits should include a demand for maximum contested Civil Rule 82 attorney's fees. This position has been supported by at least one case from the superior court. *See McKinney v. Seymore and Allstate*, Case No. 3AN-85-13158 Civil, Memorandum Decision of December 29, 1989, p. 3, paragraph 1.

Some people would argue that this result is contrary to the 1986 amendment to AS 09.60.010, which provides that "attorney's fees may not be awarded to a party in a civil action for personal injury, death or property damage related to or arising out of fault . . . unless a civil action is contested without trial or fully contested as determined by the court."

The argument is invalid. An insurance company electing to settle an excess case is not generally in a position to concede both liability and all of plaintiff's claimed damages. To do so would not be in the interest of their insured, and they would likely be breaching their duty to defend, as well as their duty of good faith and fair dealing. *See* for example *Continental Insurance Co. v. Bayless & Roberts, Inc.,* 608 P.2d 281, 293 (Alaska 1990).

The outcome in *Schultz* was well grounded in logic and prior precedent of the Alaska Supreme Court. The result was thus of little surprise to insurance industry, which, for the most part, anticipated the decision by including endorsements in most policies limiting the amount of Civil Rule 82 attorney's fees payable under the policy to the maximum that would be awarded in a contested case, but only on so much of the award as would be paid by the policy. In other words, the most you could get from a $100,000 policy would be $100,000, plus Civil Rule 82 attorney's fees on $100,000, using the "contested" schedule of that rule.

If you represent a client whose damages far exceed the apparent limits of the insurance policy, it is probably a good idea to make sure that the Rule 82 attorney fee endorsement is valid before settling the case. Frequently the language of these endorsements or the circumstances under which they are issued make them defective. An insurance carrier who insists on offering no more than Rule 82 on its nominal policy limits may therefore find itself in an excess position.

Is the Endorsement Part of the Policy?

After you have obtained the policy, its related endorsements, and the declaration sheet, make sure that the policy form number on the declaration sheet matches up with the policy form that you have been provided. Also make sure that the endorsement that purports to limit the carrier's Civil Rule 82 exposure is specifically set forth on the declaration sheet. If it isn't, then the carrier is going to have a tough time arguing that the endorsement is part of the policy.

Carefully look at the dates on the declaration sheet to make sure that you are given the declaration sheet *that the insured was probably given* at the point in time before the event in question. A dec sheet issued after the fact may be a last-minute effort to cover a policy deficiency that existed at the time of your client's injury.

Did the Insured Receive the Endorsement?

In Alaska, it has long been the law that insurance policies are contracts of adhesion and an insured is legally entitled to that coverage which a reasonable person would expect under all the circumstances. *See* for example *Continental Ins. Co. v. Bussell,* 498 P.2d 706 (Alaska 1972); *Stordahl v. Government Employees Ins. Co.,* 564 P.2d 63 (Alaska 1977); *Starry v. Horace Mann Ins. Co.,* 649 P.2d 937 (Alaska 1982).

This notion is further bolstered by AS 21.42.250, which requires an insurance company to deliver a policy to its policyholder.

The carrier is going to have a hard time arguing that its Rule 82 exposure is limited by endorsement that was not received by the insured. It is pretty hard to "reasonably expect" that which you've never seen or been told of. *See Breeding v. Massachusetts Indemnity & Life Ins.,* 633 S.W.2d 717 (Ky. 1982); *Allstate v. Reeves,* 136 Cal. Rptr. 159 (Cal, App. 1977); and *Allstate Ins. Co. v. Randolph Davis and Lisa Zei,* U.S. District Court Case No. A85-174 Civil. Plaintiff's counsel will rarely have access to facts adequate to evaluate this question. Those providing independent advice to defendants, on the other hand, should be pounding the table if their client's carrier is relying on an endorsement that the insured has never received.

Does the Endorsement Clearly Warn the Insured of the Insured's Excess Exposure for Civil Rule 82 Attorney's Fees?

3 AAC 29.010 clearly authorizes an insurance carrier to limit its Civil Rule 82 attorney's fee exposure to the maximum that would be awarded on an amount equal to its policy limits. Nevertheless, (d) of that regulation provides:

> "An insurer limiting coverages permitted in (a) of this section must *clearly disclose* to its insured the limitation *and the insured's potential liability for attorney's fees* if the judgment exceeds the liability limits of the policy."

Emphasis added.

Few of the limiting endorsements that I have seen "clearly" disclose anything. Those that do, for the most part, fail to point out the nature and possible extent of the insured's excess liability or how that liability is computed. While these endorsements may be understandable to an attorney who

Continued on page 5

Hughes, Thorsness awards scholarships

Following a statewide essay competition, scholarships totaling $6,500 were awarded to six graduating high school seniors, including an Eagle River student, who was in Europe training with the U.S. Junior National Cycling Team when the awards were announced.

The annual contest is sponsored by Hughes, Thorsness, Gantz, Powell & Brundin, an Alaskan law firm with offices in Anchorage, Fairbanks, and Juneau.

This year's competition attracted more than 70 entires. The topic was "What position should the State of Alaska advocate regarding oil exploration in the Arctic National Wildlife Refuge?"

Windy Ok Cha East, a senior from Delta Junction High School, won the grand prize scholarship of $1,500. She is the daughter of George East of Delta Junction and will be attending Baylor University in the fall.

"Windy's essay contained all the classic elements of good writing," said Frank Pfiffner, managing partner of the law firm's Anchorage office. "She was creative, logical, articulate, and, most importantly, persuasive."

Brian Glaspell of Chugiak High received a $1,000 scholarship which he will apply to tuition at the University of Wyoming. Glaspell was in France training for an international race in Austria when the awards were announced.

"We didn't know Brian was a future Olympic contender until we notified his parents of the award," noted Pfiffner. "While all of the winners are outstanding young men and women, it is a particularly gratifying experience to recognize the scholastic accomplishment of a student who is also an international class athlete."

Two Anchorage seniors also were awarded $1,000 scholarships: Jeremy Crawford, son of Clarence and Diane Crawford, who graduated from Service and will be attending Western State College in Colorado, and Stephanie Bauer, daughter of Craig and Joyce Bauer, a Bartlett graduate who will attend Pacific Lutheran University in Tacoma, Washington.

Scholarships of $1,000 each also were awarded to Andrew Bennett, the son of Larry and Margaret Bennett of Fairbanks, who is a West Valley High graduate planning to attend Dartmouth College in New Hampshire, and Stephanie Kaye, Wasilla High, daughter of Barbara and David Kaye, who will attend the University of Alaska in Anchorage.

This was the second annual competition sponsored by Hughes Thorsness and the first year the competition has been offered statewide. Students interested in the 1992 competition may contact Pam Cone, director of client services at Hughes Thorsness, to get on the mailing list for the announcement of next year's competition and to request a copy of this year's grand prize essay. Cone's number is 263-8279. The firm's Anchorage address is 509 West Third Avenue, 99501. The third annual competition and essay topic will be announced next January.

• Negotiating the intricacies of Rule 82

Continued from page 4

works regularly with Civil Rule 82, they are not understandable to anyone else. These policy provisions in contravention of state law are void. *See Hillman v. Nationwide Mutual Fire Ins. Co.,* 758 P.2d 1248 (Alaska 1988) (exclusion contrary to uninsured-motorist statute is void); *Davidson v. Wilson*, 239 N.W.2d 38 (Wisc. 1974) (exclusions must follow format prescribed by statute or be deemed void).

Neither can it successfully be argued that approval of the endorsement by the State of Alaska, Department of Insurance, creates a presumption of validity. *See Walton v. State Farm Automobile Ins. Co.,* 518 P.2d 1399, 1400-01 (Ha. 1974); *Vantine v. Aetna Casualty & Surety Co.,* 335 F.Supp. 1296 (D.C. N.D. Ind. 1971).

Summary and Conclusion

Because cases are almost never completely "uncontested," and because a carrier owes today that which its insured will be liable for tomorrow, a policy "limits" demand should always include a demand for full contested Civil Rule 82 attorney's fees. If the policy in question appears to have an endorsement limiting the carrier's Civil Rule 82 attorney fee exposure, it is wise to be sure that the endorsement is, indeed, part of the policy, that the endorsement has been received by the insured, and that the endorsement clearly warns the insured of the nature and extent of the insured's excess exposure. If these conditions aren't met, the endorsement is likely to be invalid. A carrier more attentive to its policy language than the lay of the legal landscape will soon find itself in an excess position.

Bar wants comments on mandatory ethics course

In the following rules, additions are italicized while deletions are capitalized and bracketed.

Rule 5. Requirements for Admission to the Practice of Law.

Section 1.

(a) To be admitted to the practice of law in Alaska, an applicant must

(1) pass the bar examination prescribed pursuant to Rule 4;

(2) pass the Multistate Professional Responsibility Examination;

(3) be found by the Board to meet the standard of character and fitness, as required pursuant to Rule 2(1)(d);

(4) be determined by the Board to be eligible in all other respects;

(5) pay prorated active membership dues for the balance of the year in which he or she is admitted, computed from the first day of admission (DATE OF PAYMENT); (AND)

(6) *attend a presentation on attorney ethics as prescribed by the Board prior to taking the oath prescribed in Section 3 of this rule; and*

(7) take the oath prescribed in Section 3 of this rule.

(b) Within 60 days after receipt of notice of passage of the bar examination and certification to the supreme court for admission, or within 60 days of receipt of notice of passage of the Multistate Professional Responsibility Examination, whichever comes later, an applicant must file with the Alaska Bar Association a registration card, in the form provided by the Board, formally accepting membership in the Association and admission to the practice of law in Alaska.

(c) The Board may conduct a character investigation of an applicant, or may continue such an investigation, after the applicant has been permitted to take, or has passed, the examination prescribed by the Board pursuant to Rule 4. The fact that the Board has permitted the applicant to take the examination, and has given the applicant notice that he or she has passed the examination, shall not thereafter preclude the Board from denying the admission of the applicant on the grounds of character and fitness as set forth in Bar Rule 2(1)(d).

Solid Foundations

By Mary Hughes

The 1991 IOLTA Grants were awarded on May 24, 1991, by the Trustees of the Alaska Bar Foundation to five recipients:

The **Alaska Pro Bono Program (APBP)** is jointly sponsored by Alaska Legal Services Corporation and the Alaska Bar Association. It is a statewide, nonprofit, direct service program involving private and public sector attorneys in the delivery of free legal services to low income Alaskans.

For the 1991-92 grant year, $85,000 was provided from IOLTA funds to finance the Alaska Private Attorney Involvement Program. The legal services include such programs as the Elderlaw Project which serves low income Alaskans 60 years old and older, the Pro Se Clinics which provide advice in a question and answer format, and the Tuesday Nite Bar which offers information on Chapter 7 bankruptcy, uncontested divorces and custody.

There is widespread community support for the Alaska Pro Bono Program, with 55.8% of the Alaska State Bar Association's eligible membership participating. There are also over 176 other professionals ranging from court reporters to physicians involved in APBP's voluntary program.

The Immigration and Refugee Program, which was created in 1987 by Catholic Social Services, received an $18,000 IOLTA grant. This program assists immigrants in finding employment while providing them with social services such as food, shelter and clothing. Access to health care and education is also ensured. Catholic Social Services also acts as an advocate for the immigrant in cases of discrimination and within the legalization and asylum process. IOLTA funds will maintain existing legalization services. Catholic Social Services intends to add a Legal Affairs Coordinator to its program which will be partially funded by the IOLTA grant.

The Alaska Law Related Education (LRE) Program received $22,000 for its **Rural Outreach Project**. The Rural Outreach Project is an outgrowth of the Alaska LRE program which has been operative in the state for the past four years. The LRE has tailored its new program to pilot law-related education in rural Alaska. Two sites will be established to support efforts to create and implement a law-related program which involves community resources people such as magistrates, village police, safety officers/troopers and educators. The purpose of The Rural Outreach Project is to help secondary students develop an increased understanding of the United States legal system; the skills necessary to work as responsible citizens; and practical experience and person to person contact with law enforcement personnel.

The **Anchorage Youth Court** (AYC) is an alternative prejudicatory program which provides an opportunity for Anchorage area youth who are accused of breaking the law to be represented and judged by their peers. AYC is a court which emulates adult criminal proceedings with the roles of attorneys, bailiffs, clerks, and jurors being filled by trained young people.

The AYC received $50,000 in IOLTA monies to pursue three goals set by the AYC Board of Directors. These goals are to maintain a dependable, continued source of funding for Anchorage Youth Court, to continue improving the quality of the Anchorage Youth Court program through continued employment of the full time coordinator, and expand Anchorage Youth Court's services to a greater number of students.

The **Women's Education and Leadership Forum** (WELF) received $3,000. This grant funded the legal brochures distributed at its conference in March 1991, which was co-hosted by Sen. Ted Stevens. The conference was non-political in nature and focused on three points: to provide educational information on topics of universal concern to women; to provide networking opportunities among the attendees; and to provide information on resources and options available for women.

The trustees were extremely impressed with the applications submitted and the programs existing in Alaska which provide legal services for the disadvantaged or assist in the administration of justice, the two IOLTA grant purposes. Emergency grant requests may be submitted to the Alaska Bar Foundation at any time. The Trustees meet on an as-needed basis to review such applications.

Probate notes

Key probate factor is identifying family

BY ROBERT L. MANLEY

It is important to determine the legal status of family members. Certain family members have rights to wealth distributable as a result of the decedent's death. Those rights will vary depending on a variety of circumstances including the nature of the wealth to be distributed.

For example, the surviving spouse is entitled to 1) a share of an intestate estate (AS 13.11.110); 2) a share of the homestead, personal property and family allowances (AS 13.11.125-.140); and 3) the right to take an elective share of one-third of the augmented estate which may include non-probate assets (AS 13.11.070-.100). In addition, a surviving spouse may be entitled to retirement plan benefits, social security payments, wrongful death claim proceeds, life insurance proceeds, or tenancy by the entirety property.

You should make sure that the person across the conference table is really the surviving spouse. Persons in Alaska may not be joined in marriage except under statutory licensing procedures. (AS 25.05.011(b).) Alaska does not recognize common law marriages entered into in this state.

Edwards v. Franke, 364 P.2d 60, 63 (Alaska 1961). Common law marriages contracted outside of the State of Alaska are likely to be recognized in Alaska absent unusual factual circumstances. *See Burgess Construction Company v. Lindley,* 503 P.2d 1023, 1026 (Alaska 1972) (Erwin concurring); Restatement (2d) Conflict of Laws §283(2) and comments e-k (1971).

Under the probate code, a surviving spouse does not include someone who is divorced from the decedent or whose marriage to the decedent has been annulled. A decree of separation does not terminate status as a surviving spouse. (AS 13.11.300(a).)

In addition, a surviving spouse does not include a person who obtains or consents to a divorce or annulment, even if such is not recognized as valid by Alaska, unless the parties subsequently participate in a marriage ceremony with each other or live together as husband and wife. Likewise, a person is not a surviving spouse if subsequent to an invalid decree of divorce or annulment obtained by the decedent, the survivor participated in a marriage ceremony with a third person. Finally, a valid proceeding which concludes with an order purporting to terminate all marital property rights also terminates the status as surviving spouse for the purposes of the probate statutes. (AS 13.11.300(b).) These provisions basically codify estoppel principles.

The probate code provisions may not apply to non-probate property. For example, under the Retirement Equity Act of 1984, a surviving spouse is entitled to survivor benefits from most qualified retirement plans (e.g., 401K's and KEOGH plans) unless the spouse consents in writing to another beneficiary designation. 26 U.S.C. §401 & §417. This does not apply to IRA's.

Depending on the provisions of the plan, it is possible for a person to be a surviving spouse for the purposes of the probate code and other laws, but not be a surviving spouse qualifying for a survivor benefit from a qualified plan. *See Allen v. Western Conference of Teamster's Pension Trust Fund,* 788 F.2d 648 (9th Cir. 1986) (marriage was void because decedent's prior divorce was never finalized and accordingly the second wife was not a spouse for the purposes of qualified plan benefits despite the fact she was entitled to claim community property, bring a wrongful death action and take under the California laws of intestacy.)

Under the worker's compensation provisions, a surviving wife includes a divorced spouse who is entitled to receive support under the divorce decree. *Burgess Construction Company v. Lindley,* 503 P.2d at 1024-1025.

The definition of a surviving spouse may also be different for the purposes of various federal benefits. *See, e.g.,* 38 U.S.C. §103 (veteran's benefits); 42 U.S.C. §416 (social security benefits).

Under some circumstances children are entitled to shares in intestacy as well as the homestead, personal property and family allowances. (AS 13.11.015 & 13.11.125-.140.) Depending on the facts, children born after the execution of a will may be entitled to a share despite their omission. (AS 13.11.115.)

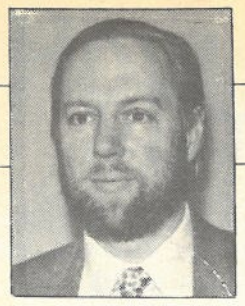
An adopted child is considered the child of the adopting parent and not of the natural parent except that if a child is adopted by the spouse of a natural parent, there is "*no* effect on the relationship between the child and *either* natural parent." (AS 13.11.045(1).) (Emphasis added). *But see* (AS 25.23.130(a)(1). ("the adopted person thereafter is a stranger to the former relatives for all purposes including inheritance, unless the decree of adoption specifically provides for continuation of inheritance rights").

Alaska recognizes informal equitable adoptions under some circumstances. *Calista Corporation v. Mann,* 564 P.2d 53 (Alaska 1977); *C Street Foodland v. Estate of Renner,* 596 P.2d 1170 (Alaska 1979).

Children born out of wedlock are considered children of the mother. Such children are also considered the children of the father provided that natural parents participate in the marriage ceremony either before or after the birth of the child regardless of the validity of the attempted marriage. Paternity can be established by an adjudication either before or after the father's death. An adjudication of paternity after the father's death requires clear and convincing proof. Paternity established by adjudication is ineffective to qualify the father or the father's kindred to inherit from or through the child unless "the father has openly treated the child as the father's and has not refused to support the child." (AS 13.11.045.)

Kindred of the half-blood inherit as if they were of the whole blood. (AS 13.11.035.) Heirs conceived before the decedent's death but born thereafter are entitled to inherit from the decedent. (AS 13.11.040.)

Moral: You need to ask the right questions to identify the players. You should consider reviewing the relevant marriage licenses, divorce decrees, birth certificates and adoption decrees.



Family Matters

By Drew Peterson

Attorney stress and coping in a family law practice

Have you noticed the number of attorneys who swear that they will never handle another divorce case? Or maybe you know someone who has taken family law cases only long enough to get her or his law practice established. As soon as there is sufficient work of other kinds coming in to pay the overhead, the attorney gets out of the family law business once and for all. Equally common is for family law matters to be routinely given to the youngest associate in the firm. The senior partners do not handle such matters and have not done so for years, except perhaps for a major client.

What is responsible for this inclination of attorneys to avoid family law? In many ways it is a very rewarding practice. More so than is true of most other areas of the law family practice resembles a helping profession, like medicine or counseling. As attorneys we call ourselves counselors. Most of us take substantial pride in that part of our contribution to society. Why then this aversion for family law?

In a previous issue of *The Bar Rag,* I discussed some of the findings of the book *The Process of Divorce,* by Dr. Kenneth Kressel (Basic Books, 1985), particularly those discussing the effect of lawyer style on divorce outcome. In Chapter 7 of Kressel's book, he also describes the difficulties encountered by attorneys in representing divorce clients.

The problematic divorce client

Kressel concludes initially that many of the stresses of practicing family law are directly attributable to the difficult psychological and financial circumstances of what he calls the "problematic client." These difficulties come first from the emotional instability of the typical divorce client. Studies demonstrate that divorce attorneys have at least a 50 percent probability of encountering clients suffering from severe bouts of lowered self-esteem, impaired powers of concentration, and ambivalent feelings about reaching settlement. In Kressel's own studies, emotionality of the parties was the single most frequent source of obstacles to settlement cited by attorneys involved with the divorcing process.

Also well recognized is the economic plight of the average divorce client. A national survey of persons seeking the help of a lawyer found that only clients with criminal or employment problems earn less on average than do divorce clients. Thus the client will almost certainly be worried about the affordability of legal fees, while the attorney will be equally concerned about collectibility. In this context Kressel discusses the studies which indicate that client satisfaction with lawyer services in divorce is correlated significantly with the degree to which the client felt that the lawyer had clearly set forth the basis of fees at the start of the relationship.

The problematic nature of the legal system and legal training

Kressel goes on to note that the problems caused by the divorce clients' difficult emotional and financial circumstances are significantly compounded by the nature of the legal system and the lawyer's own training. There is first of all the adversarial bent of the system itself, with the not infrequent use of legal threats and counterthreats and the attached emotional agitation of the parties. Such tactics are not likely to relieve the emotional upsets of clients, to say the least.

At the same time as following their ethical duty to zealously present their clients interests, the lawyers are exposed to pressures which run counter to such ethical directions. Thus there is an unwritten code that lawyers should often play the role of mediator instead of advocate. There is also the simple fact of the lawyers' dependence upon each other for successful resolution of the case, their anticipation of future interaction once the case is completed, and their concern for their professional reputation. All of these represent significant collegial bonds which run counter to the normal adversary spirit.

Difficulties for the lawyer in counseling cooperativeness

As we are all too aware, the prevailing stereotype is that it is the poor client who is likely to end up the unsuspecting victim of the lawyer's competitive zeal. In fact, however, the conclusions from the literature examining the situation are often the opposite. For example:

- Lawyers are more likely to be discharged by their clients when the hostility between the spouses is high.
- Lawyers frequently complain about client competitiveness and welcome help in controlling it.
- When lawyers play an active role in negotiations it is often because the parties' own negotiation relationship has broken down.
- Clients report getting more cooperative than competitive tactical advice from their lawyers.
- Client dissatisfaction with lawyer services often reflects high levels of stress in the spousal relationship.

The lawyer's most valuable potential ally in managing the client is likely to be the opposing attorney. Working together, the two lawyers may be able to inject enough reason and reality into the proceedings to produce a constructive negotiating climate.

Difficulties with criteria for a sound settlement agreement

Another source of potential difficulty for the divorce lawyer is the lack of consensus within the profession regarding the substantive criteria for a sound settlement agreement. In Kressel's study of New Jersey attorneys, there were frequent complaints about inadequate and unpredictable judges, court delays, and the absence of a consensus form the bench on may substantive issues.

Miscellaneous attorney stresses

Finally, the following hodgepodge of factors further contributed to the frustrations of lawyers in handling family law matters:

- The professional rule that the lawyers can deal directly with only one of the parties to a divorce, which serves to further increase communication problems inherent in the psychological divorcing process.
- The economics of the law practice, which may tempt an unethical, impecunious attorney to provoke conflict to increase fees. Kressel's conclusions from interviews with prominent attorneys found such practices to be a rare but nevertheless troubling aspect of family work.
- The fact that much of the lawyer's actual handling of the case occurs outside of the client's presence.
- Unconscious pressures which can result from the fact that the wife's legal fees are sometimes paid in whole or in part by the husband.
- Economic and other institutional pressures on the client for expeditious case management.
- The near or total neglect of such areas as child development, family dynamics, empathic listening, effective communication, and counseling skills in the professional training of attorneys.

Conclusion

Kressel concludes that the role of the divorce lawyer is unenviable in many ways. Much more than is true of the other professionals who deal with divorcing parties (divorce therapists and mediators), attorneys are exposed to extremely high degrees of occupational role strain. Thus it is no wonder that many attorneys avoid the practice of family law like the plague. If anything it is amazing that so many competent and caring lawyers have remained in the field of family law.

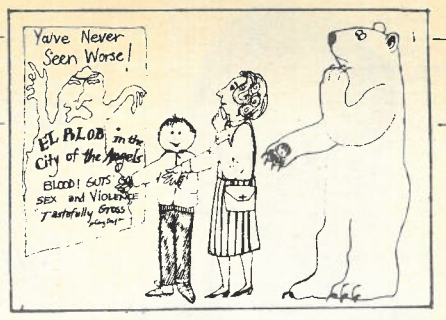
Johnson is new railroad counsel

Phyllis Johnson has been appointed general counsel for the Alaska Railroad Corporation. Johnson was graduated from the University of North Carolina Law School in Chapel Hill and has 15 years of legal experience. Johnson has worked for the ARRC since April 1986 when she joined as senior attorney for real estate matters. She was appointed associate general counsel in July 1987. Since that time she has been responsible for environmental and real estate issues affecting the railroad.

Succeeding Johnson as associate general counsel is Bill Hupprich who has been promoted from senior attorney. Bill was graduated from Lewis and Clark School of Law in Portland, Oregon, and has more than 10 years of legal experience. Hupprich joined the Alaska Railroad in January 1988 as senior attorney responsible for legal representation on several matters, including contracts, financial affairs, corporate policies and procedures and personnel issues.

Movie Mouthpiece

By Ed Reason



NEW YORK CITY — By the time you read this I will have either flunked out of or graduated from N.Y.U's famed film school. This is how I spent my summer vacation. I mention it in passing because James Woodman, one of the actors I used for my graduate film, was an extra in CITY SLICKERS, a story of three men at a dude ranch trying to recapture the juices of life and prolong the inevitable aging and boredom of middle life. His role was just walking in front of Billy Crystal near the Brooklyn bridge in New York, but it gave him work for three days and a hot daily meal. Sometimes filmgoers forget just how difficult a job acting is, so this column is for every S.A.G. member who has stood around for hours waiting to be shot on film that runs three seconds.

Billy Crystal, the stand-up comedian turned film star, is fantastic in CITY SLICKERS as a 39 year-old city man who ordinarily sells advertising for a radio syndicate in the Big Apple. He is invited to his son's school to describe his occupation and the pathetic way he describes his present circumstances causes him to realize that he really is not happy. This comes as no surprise to his wife, who earlier announced that Crystal was always unhappy on his birthday, a true fact that past birthdays have confirmed.

Patricia Wetting as Crystal's wife wants him to join his buddies Ed (Bruno Kirby) and Phil (Daniel Stern) on a real-life cattle drive to "go and find your smile," as she puts it. Ed, a sporting-goods salesman who continually dates younger girls to fight off fears of middle age, and Phil, who hates his wife, the boss' daughter, need to go too. These three have been going to out-of-the-way places together for years in an attempt to keep their boyhood friendship intact, as the opening shots of the running of the bulls ala Hemingway in Pamplona Spain, attest.

Billy Crystal stars as Mitch Robbins, a New York adman who joins two of city-slicker buddies on a cattle drive, to learn about life, love, and really smelly animals.

Crystal clearly carries the film. I have the distinct impression that he worked closely with writers Lowell Ganz and Babaloo Mandel. Every filmgoer is entitled at least once in a film comedy to a deep starting-from-the-gut laugh and I had mine during CITY SLICKERS when the trio is riding herd on the cattle as they discuss how to record a movie on a videocassette recorder while watching another program. The dialog ends up with one of the trio announcing that they have been discussing this mundane problem for four hours and although the cattle know how to record, one of them just simply will never get it.

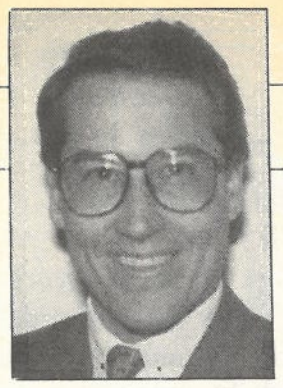
All boys dream of the west with tumblin' tumbleweed, heroes and villains, trials and successes, courageous endeavors, and solid independence. CITY SLICKERS tries to deliver all of that, perhaps a bit too much. In addition to the three main characters (Crystal, worried about aging and death; Bruno Kirby, worried about continuing to be tough and attractive to young women; and Daniel Stern, a philanderer worried about the pregnant sales clerk at his father-in-law's supermarket), the audience is introduced to an ensemble of comic subplots and minor characters just to make sure that your attention can be sustained for the 107 minutes it takes to drive a herd from New Mexico to Colorado.

The fellow tenderfeet are Jewish ice cream tycoons (Josh Mostel and David Paymer) who can sit around a campfire and accurately choose which ice cream to go with what dinner; a black father and son dentist team who can render emergency first aid, and a single attractive woman (Helen Slater). Toss into this film salad a drunk cook (Tracey Walter), two assistant trail hands who lust after the single trail woman, and a leathery, tough, seasoned cattle driver (Jack Palance) and the film will run its length and then some. Every possible base is covered by director Ron Underwood including a not needed "yee-haw" scene that really owes overt apologies to the wonderful movie makers of "Red River."

Jack Palance is Jack Palance. In real life he owns a working ranch and, of course, he has starred in classic Westerns ("Shane") since the late 40s. Watch his riding compared to Daniel Stern or Bruno Kirby. He knows not to bounce around like a ball. His trail philosophy is true Palance, too. He tells Crystal in one short sequence that he is tired of city slickers coming to a dude ranch after tying their rope into knots for 50 weeks and then expecting to unravel it in two. Life is simple. Find the one thing that is most important to you, keep it, and all the rest will fall in line.

Besides the belly laughs, CITY SLICKERS has beautiful cinematography of Northern New Mexico and Southwestern Colorado, a cattle drive of about 200 head, a fording river sequence, birthing calf comic relief (and the showing of the 90s sensitive man), a massive actual rainstorm, and an obligatory stampede scene.

Go see it and put a smile back on your own face.



Estate Planning Corner

By Steven T. O'Hara

A basic choice available to clients is whether to use a single pot plan, a multiple trust plan, or a combination of the two.

Suppose you represent a husband and wife with three children. The oldest child is a senior in college, and his education has been subsidized by your clients. The middle child is in high school, and the youngest child is in grade school. Your clients have decided upon an estate plan as long as one spouse is alive, but are unsure about what plan to implement upon the death of the surviving spouse.

One choice is to divide the available assets on the second death into three equal trusts so that there is one for each child. A disadvantage of this multiple trust plan is that it favors the oldest child whose education has already been subsidized. In other words, this plan does not permit the family funds to be aggregated and directed towards subsidizing the education of the younger children, as would normally be the case while a parent is alive.

Similarly, the multiple trust plan can cause problems where one child has a greater need for medical services than another child.

Accordingly, your clients may opt for a single pot plan, which more closely approximates the family treasury while a parent is alive. Here all assets on the death of the surviving spouse are aggregated in one trust, and the trustee has authority to make unequal distributions in accordance with the health, education, and support needs of the beneficiaries.

Of course, all single pot plans have a division date, when the remaining trust assets are distributed, either outright or in trust, among the then living beneficiaries. The division date is typically pegged to a date when presumably all children would have been provided an equal educational opportunity, such as when the youngest child has reached age 25.

While more closely approximating the family treasury, a single pot plan can breed resentment. The oldest child may resent having what he perceives as his share in a trust for as many years as it takes for the youngest child to reach age 25, with no guarantee that there will be any trust principal remaining at that time.

Suppose your clients, as described above, own a family business that is in the form of an S Corporation for federal income tax purposes. Suppose they have provided for continuity of management in the event of their deaths and wish their children, through their trusts, to continue as owners of the business after the death of the surviving spouse.

Under these circumstances, a single pot plan with multiple current beneficiaries is not available. This is because in order for the business to continue as an S Corporation, each trust owning stock in the corporation may have only one current income beneficiary (I.R.C. Sec. 1361(d)(3)).

It is important, therefore, to inquire whether a client's business is an S Corporation and whether the client wishes to preserve that status.

Preservation of S Corporation status may be very important. It may reduce federal income taxes substantially not only during the operation of the business but also, perhaps more importantly, upon its liquidation (I.R.C. Sec. 1363). In other words, a major advantage of S Corporation status is avoidance of double taxation upon the liquidation of the corporation (Cf. I.R.C. Sec. 302 & 336).

So like nearly all estate planning issues, a client's decision of whether to use a single pot plan or a multiple trust plan may be influenced by tax considerations, as well as by nontax considerations.

JURISPRUDENCE

By Daniel Patrick O'Tierney

"Foul Ball." "Softball bill strikes out." Seldom does a court decision give rise to such colorful newspaper headlines, or provide such a good example of the dynamic between our three branches of government.

In this case, the question was whether softball players are entitled to workers' compensation if they are injured while playing for a team sponsored by their employer.

The game began in June, 1986, when an Anchorage softball player was injured after work hours while playing for her employer's team. The employee filed a claim for workers' compensation on the premise that the injury "arose out of and in the course of her employment."

The workers' compensation statute (AS 23.30.265) defines the course of employment to include "employer-sanctioned activities at employer-provided facilities." The claimant asserted that the injury was covered under this law because of her employer's connection to the softball team. For example, the employer provided the softball equipment and uniforms, contributed to the league fee for the rental of the field, and encouraged employees to play or attend the company's games.

The Workers' Compensation Board concluded that participation on the softball team was both "employer-sanctioned" and that it occurred at an "employer-provided facility." Because the Legislature used the word facility and not premises in the statute, the Board determined that the injury did not have to occur on an employer's property to be compensable. Further, that by paying the league fee, the employer made available to its employees a field on which to play. Hence, the softball game was at an employer-provided facility.

Following an intermediate appeal and remand, the Board changed its decision in favor of the employer. Eventually, the injured softball player appealed to the Alaska Supreme Court. The Supreme Court decided that the conclusions of the Workers' Compensation Board were supported by substantial evidence and, therefore, reinstated the Board's initial determination in favor of the claimant.

At that point, the newspaper reports became animated. "The court threw a curve at softball when it ruled..." Employers and team sponsors became concerned about the risks of higher insurance rates associated with employee injuries in company-sponsored recreational activities. Some organizers worried about the potential discouragement of team sponsors altogether.

Consequently, certain legislators responded by stepping up to the plate with a "softball amendment" to an existent omnibus bill on workers' compensation issues. "A senate committee went to bat...to try to offset a recent Court ruling." The Legislature decided to clarify that the intent of the statute was not to allow for workers' compensation coverage of recreation activities, such as employer-sponsored softball teams.

The "softball amendment" added language to existent law to specifically exclude off-premises recreational activities sponsored by an employer that are not a condition of employment. The only exception was for activities at remote worksites. The remote site injury doctrine recognizes that, for on-call employees residing in remote workcamps, recreational activities can be properly considered work-related for the purposes of workers' compensation coverage. "Supporters hope the bills cover all the bases to solve the problem..."

The "softball amendment" bill passed both Houses of the Legislature before the seventh inning stretch. But then, the Governor vetoed the bill this summer. Apparently, he supported the intent of the "softball amendment" but considered the overall bill flawed in several other areas. "The Governor played hardball with a worker's compensation bill..." The Governor called for an in-depth review of workers' compensation laws next year.

Meanwhile, some legislators intend to promote another bill that deals exclusively with the liability of team sponsors. Of course, passage will have to wait for the next legislative session to convene in January, 1992. "The veto means the battle...will extend into extra innings."

So, softball players and fans will have to watch the sportspage headlines during the next legislative season to find out how this story ends. Hopefully, all three branches of government, and Alaska sport enthusiasts, will end up on the same winning team.

The preceding article is reprinted with permission of Alaska Business Monthly for which the author writes a regular column on legal matters of interest to the business community.

ALPS expands coverage

At its most recent meeting, the Board of Directors of Attorneys Liability Protection Society (ALPS) voted to broaden the effect of ALPS' already broad coverage by granting Defense Cost Coverage of $250,000 in addition to policy limits, for all policies with limits of $1,000,000/$1,000,000 or more. This change was subject to ALPS reinsurers, who by March 1, 1991, had given their unanimous approval.

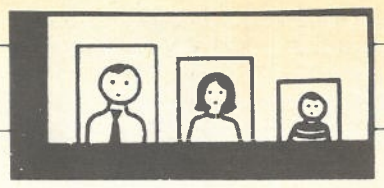
This approval from our reinsurers is a real vote of confidence in our entire operation—and our commitment to serve our lawyer-clients, commented ALPS' President Bob Minto. "Since the vast majority of our competitors offer policies which include Defense Costs in the policy limit—this improvement should once again demonstrate the advantages of doing business with ALPS," he continued.

ALPS currently insures over 2,000 lawyers in its 10 sponsor states including Alaska, and can provide up to $10 million limits in house—with Treaty Reinsurers responsible for any claim in excess of $100,000. Its management operates under the direction of a 10-member board of directors, all of whom are practicing attorneys.

Board proposes hardship standard for dues waiver

The board of Governors is recommending a change to the bylaws which would clarify that bar dues may be waived for hardship reasons. If you have any comments, please send them to Deborah O'Regan, Executive Director, at the Bar office. The proposed amendment is as follows:

Article III, Section 1(e) Waiver. The Board [of Governors] [, for good cause] may waive the payment of a member's annual membership fee [.] *upon a sufficient showing of hardship.*



People

Former Probate Master **Mary Ellen Ashton** has opened her own law office in Anchorage.....**Olof Hellen** and **Theodora Accinelli** have formed the firm of Hellen and Accinelli.....Immediate past Alaska Bar Association president **Daniel R. Cooper, Jr.** will be an assistant district attorney with the Fairbanks office as of August 1. Until then, Cooper is perfecting his fly fishing techniques.

Alicemary Closuit is now the standing master, probate, in Fairbanks.....**Rex Butler** and **Randall Cavanaugh** have formed the firm of Butler & Cavanaugh.....**Stephan Collins**, former law clerk to Judge Johnstone, is now with the U.S. Attorney's office.....**Dennis Cummings** has opened his own law office in Anchorage.

Kay Gouwens is an associate with Sonosky, Chambers, et.al.....**Trena Heikes** has opened her own law office in Anchorage.....**Michael Jungreis** is now a staff attorney with FDIC-Legal Division.....**Paula Jacobson**, former law clerk to Judge Ripley, is now with Lane, Powell, et.al.....**James Sarafin** has become a member and **Barbara Kissner** and **Andrew Lebo** have become associated with the firm of Wohlforth, Argetsinger, et.al.

David Lampen is now the Clerk of Court for the U.S. Claims Court in Washington, D.C.....**Douglas Marston** is with Gaitan & Cusack.....**Keith Sanders**, formerly of Bogle & Gates, and former law clerk to Justice Burke, is now Assistant Bar Counsel with the Alaska Bar Association.....**Spencer Sneed** and **Nancy Schierhorn** have joined Bogle & Gates.

Gail Shortell is with the Law Office of Peter Giannini.....**Sandra Saville, Dan Coffey** and **David Schmid**, formerly of Kay, Saville, Coffey & Schmid, have each opened their own law offices in Anchorage.....**Sue Ellen Tatter** is now with the federal Public Defender office.....**Millard Ingraham** has moved to Santa Barbara, California, to join his wife Elizabeth, who is in graduate school there.

Janice L. Hansen is the new Clerk of the Appellate Courts. She was formerly Chief of Adjudication, Alaska Worker's Compensation Board.

Douglas Carson, formerly associated with Groh, Eggers & Price, is now an Assistant Municipal Attorney in Anchorage....**Larry Wood**, formerly with the Alaska Railroad, is now a senior attorney with Alyeska Pipeline Service Company.....**Steve Morrissett**, former district attorney in Palmer, has relocated to Salt Lake City.....**Norma Gammons,** Discipline Secretary for the Alaska Bar Association, has been elected vice-president of the Billiken Chapter of Professional Secretaries International.

James Wright and his wife Debbie had a 7 lb. 9-1/2 oz. boy, William Gaffey on May 24.....**Scott Dattan** and his wife Carol had a beautiful daughter, Valorraine, on June 15.....**Alexander James Kubitz** is the second son of James Kubitz and Sue Urig, born on July 8.

Brian W. Durrell was named managing partner of the Anchorage office of Bogle & Gates on April 1, 1991, and also will practice in the areas of commercial banking, bankruptcy, real estate, corporations and estate planning.

Carlson killed in farm accident

Long-time Fairbanks attorney Lyle R. Carlson died on July 14, 1991 at his farm in Delta Junction, approximately 90 miles outside of Fairbanks.

State Troopers reported that Mr. Carlson died shortly after friends found him pinned between farm machinery.

Lyle was born April 4, 1936, in Langdon, North Dakota, where he was raised on his family's farm. It was this farming background that led him in later years to again pursue farming in Alaska. Mr. Carlson and his family owned a farm on the Delta barley project in Delta Junction. This was an important part of Lyle's life and an endeavor that brought great satisfaction to him.

Lyle attended school in South Dakota and received his Juris Doctorate degree from the University of North Dakota School of Law in 1960, where he graduated with distinction. thereafter, he joined the U.S. Air Force where he served in the Judge Advocate Corps. It was while serving in the Air Force in England that he met his wife, Barbara A. Harbord. They were married March 12, 1965, in Woodbridge, England. thereafter, Lyle and Barbara moved back to the State, where Lyle was stationed in Oregon for the duration of his active duty. During Carlson's years in the service, he received numerous citations and awards, and in 1969 received the Commendation Medal for outstanding performance. Lyle recently retired from the U.S. Air Force Reserve as a full colonel after 30 years of service.

Lyle R. Carlson joined the Alaska Bar in February, 1970.

In 1969, soon after his discharge from active duty, Carlson moved to Alaska. His first job as an assistant district attorney in Fairbanks, working under then-district Attorney Gerald J. Van Hoomissen. After two years with that office, Lyle went into private practice in Fairbanks, where he has maintained an office ever since. Lyle also practiced part-time in the Delta Junction area.

Lyle is remembered by both friends and associates as a true gentleman, a fine lawyer, and a generally good person. He was well respected by his colleagues and served his clients well. Lyle interests, however, far exceeded the practice of law. He was devoted to his family and found enjoyment both in his farming endeavors and in other outdoor activities.

Carlson was an avid Hunter, fisherman and pilot and was deeply involved with outdoor issues. He represented the Tanana Valley Sportsmen Association and one of the first challenges to the State subsistence law and kept closely advised with regard to developments in this area.

Lyle is survived by his wife, Barbara; sons Paul, David and Christopher; grandson Brandon Harris Carlson, all of Fairbanks; and many relatives outside Alaska.

A funeral was held on Thursday, July 18, at the Fairbanks Lutheran Church.

Shorthand reporters certified

Six Certified

The Alaska Shorthand Reporters Association recently completed its certification examinations for the past year. The following shorthand reporters in Alaska successfully completed the following certifications:

Registered Professional Reporters: Susan Muth Warnick, Gary Brooking, and Karyn H. Chalem

Certificate of Merit: Nancy Means

Lenny DiPaolo and Jeannie Snodgrass passed the Written Knowledge Test of the RPR examination.

Pro Bono Award

The Court Reporter Pro Bono award is given yearly by the Alaska Bar Pro Bono program to the court reporter participant who best exemplifies the true spirit of the Pro Bono program. This year's recipient is Teresa Mielke of Gemini Reporters.

Following graduation from the University of Alaska Anchorage with a degree in English, this lifelong Alaskan became a court reporter with R&R Reporters in 1975. In 1977, Teresa started Gemini Reporters with a partner, and in 1982 became its sole owner. Teresa has been participating in the Alaska Pro Bono program for the past four years.

Teresa has given generously of her time and the program is particularly appreciative of the manner in which she has provided professional, timely service to indigent litigants in a greater manner than was asked, even during busy time constraints.

Teresa juggles her career with a passion for bridge and a two-year-old child.

Previous recipients of the Alaska Pro Bono Award for court reporters include Marianne Lindley (1988); Lynda Batchelor (1989); and Georgi Haynes (1990).

New officers

The Alaska Shorthand Reporters Association elected new officers at their annual convention, held June 21-23 in Juneau.

Officers installed were: Rocky D. Jones, RPR (Ketchikan) - President; Jeanine M. Riley, RPR-CM (Fairbanks) - President-Elect; Julia Swenson (Juneau) - Secretary; Rebecca Zimmerman, RPR (Juneau) - Treasurer; Fred Getty, RPR (Anchorage) - Board member; Karen E. Ford, RPR (Anchorage) - Board member, and Marianne Lindley, RPR-CM (Anchorage) - Past President/Board member.

The Alaska Shorthand Reporters Association 1991 "Professional of the Year" was awarded to Susan Muth Warnick, RPR of Anchorage.

• If there was foreign intrigue, Burke was there

Continued from page 1

(similar to Russian Orthodox), and Moslem--together with the different alphabets (as well as different languages) used by each group; the tremendous antipathy between the various ethnic groups; and finally the influence of women. (Serbian mothers recently boarded buses in Belgrade and went to Army outposts where they retrieved their sons who were serving in the Yugoslavian national army). In Dick's eyes the only possible solution is the return of King Peter, with a Constitutional Monarchy along the lines of the British model, with the constitution providing a confederation (as against a federation) so as to preserve the necessary autonomy in language, alphabet, religion, etc.

Eye-witness to history

How did the Foreign Policy Committee become a member of the Republican National Committee, an eye-witness to some of the intimate moments of the Eisenhower and Nixon administrations (including Watergate), and a friend of two "kings" in the Middle East, all the while staying alive in spite of the KGB? This question calls for a narrative.

Richard Dryden Burke was born February 24, 1922, 40 miles south of the Oregon-California border. He was raised in Siskiyou County, around the base of Mt. Shasta and was a Southern Pacific Railroad family member through pre-Depression and Depression years.

Being only somewhat misguided, he enrolled at Stanford in physics, where one of his mentors was Professor Timoshenko, a Ukrainian who talked him into selecting Russian as an elective. Even as a student Burke was a Republican; and among his peers he was known for refusing to put up a poster of Franklin Delano Roosevelt when the U.S. embarked on WWII.

In June of 1942, our hero enlisted in the U.S. Army. He was given a commission in Ordnance because of ROTC training. He

Richard D. Burke

was immediately made a company commander by an officer who wanted to know "who the hell' he knew in Washington, D.C. It turned out that FDR, himself, was responsible and Burke was one of 23 persons who were supposedly skilled in Russian and who were under the direct command of the President (this makes one a bit of an oddball in the Army).

On to Camp David & China

When the U.S. Army finally got itself in gear, Dick was shipped off to Camp Richie (now Camp David) with the others in this group (mostly Poles, Czechs. and Ukrainians). At this special interpreter's encampment it was discovered that none of them spoke Russian well enough to get by, so they were divided into two groups. Burke went with the group going to the University of Indiana (the other went to Cornell), where they had one of the very first "crash" courses in Russian. The U. S. Military hierarchy was possessed of enough savvy social to also make part of their course sending them to bars to learn to drink.

The group, having finished its Russian course, was sent to Fort Totton in New York. While Dick relaxed and took in "Oklahoma" one evening, his close friend (a Pole) went out drinking. They returned to their quarters, where they were awakened at about 1:00 a.m., taken to and unmarked plane, given sealed orders, and admonished not to open them until they were at least 1,000 miles out of the U. S.

Dick's friend passed out in the seat next to him. Dick's orders directed him to Kunming, China, but his friend did not awaken to read the contents of his sealed envelope. The plane flew first to Newfoundland, then to the Azores, and the following morning they landed at an airport which turned out to be Casablanca. There, camels strolled up to the airplane to investigate the new arrivals. Dick's friend (with envelope still unopened), woke up, looked out the C-54's window at a camel, and said, "Jesus Christ, I'll never take another drink again as long as I live!"

The "route to China" continued through Algiers, Tripoli Cairo, Baghdad, Jerusalem and finally Karachi, where there was time to get off the plane and look around. This was our hero's first opportunity to see that people actually played musical instruments in front of snakes who stand on their tails and dance. In fact, when they arrived in Lalmanirhat, in Bengal Province, there were two dead tigers on the runway and the pilot was very upset about the tigers getting in the way of take-offs and landings.

In Delhi, Dick and his associates were the guests of an upper-class gentleman who took them home and entertained them, and while strolling in the garden, requested that Burke make no quick moves because his pet cobra was loose in the garden somewhere. This caused a quick return to the house, which Burke refused to leave until he left for the airport.

The next destination was Chabua, in what is now Bangladesh, where it was finally time to take a shower. As Dick showered, someone made off with his only clothes; the British resupplied him with their standard-issue outfit. Off in the C-54 again, they flew over Mt. Everest, passing over the famed "hump". Unfortunately, the Army and the British had re-outfitted the "troops" with tropical shorts and they nearly froze to death flying on oxygen in an unheated aircraft at its maximum altitude.

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Continued on page 15

How late claims are handled in code

BY THOMAS J. YERBICH

Section 523(a)(3)(A) of the Bankruptcy Code excepts from discharge unlisted or unscheduled debts where a creditor, without actual notice or knowledge of the bankruptcy proceedings, is precluded from timely filing a proof of claim.

For this article it is sufficient to understand that whatever the time limitations, the debt must be listed or scheduled, or actual notice or knowledge acquired, in time to permit the creditor to timely file his proof of claim. This is the sole requirement. Whether the debt was listed or scheduled, or notice or knowledge acquired, in time to permit other participation in the case is of no consequence. If listed, scheduled or actual notice is acquired in time to permit the creditor to file a proof of claim, the debt does not fall within the exception to discharge of § 523(a)(3)(A). [3 King, *Collier on Bankruptcy*, ¶ 523.13[5][a] (15th ed.)]

The key word in § 523(a)(3) is *timely* and its proper interpretation. If the word *timely* means filing on or before the claims bar date, then a claim scheduled after that date is not discharged. On the other hand, if *timely* means in sufficient time to permit the creditor to participate in time to preserve the creditors' rights to share in any dividend distribution from the estate, then the claim is discharged because no such right of the creditor has been prejudiced. The case law in this area is hopelessly deadlocked with no controlling decision that clearly holds one way or the other. The courts have followed two lines, the so-called "strict construction" approach represented by *In re Laczko* [37 B.R. 676 (9th Cir. BAP 1984) *aff'd without opinion*, 772 F.2d 912 (9th Cir. 1985)] and the so-called "liberal construction" approach represented by *In re Brosman* [119 B.R. 212, 1 A.B.R. 165 (Bkrtcy.Alaska 1990)]. For the reasons set forth hereinafter, the author suggests that the latter, rather than the former, interpretation is correct.

First, the legislative history of the Bankruptcy Code of 1978 supports the "liberal construction" interpretation. "The debt is excepted from discharge if it was not scheduled in time to permit *timely action by the creditor to protect his rights,* unless the creditor had notice or actual knowledge of the case." (Emphasis added) [S.Rep.No. 95-989, 95th Cong. 2d Sess. 78-79 (1978)].

Second, exceptions to discharge are generally narrowly construed *in favor of the debtor and against the creditor*. [*In re Klapp*, 706 F.2d 998 (9th Cir. 1983); *In re Neal*, 113 B.R. 607 (9th Cir. BAP 1990); *In re Stephen*, 51 B.R. 591 (9th Cir. BAP 1985); *In re Linn*, 38 B.R. 762 (9th Cir. BAP 1984)].

Third, § 523(a)(3) must be reconciled with § 726(a)(2)(C). As noted by Judge MacDonald in *Brosman*, one problem with *Laczko* is its failure to reconcile § 523(a)(3) with § 726(a)(2)(C). Section 726(a)(2)(C) allows payment to unsecured claims that are "tardily filed" if the creditor lacked notice or actual knowledge of the bankruptcy case and the proof of claim was filed in time to permit payment. These payments are accorded *pari passu* distribution with timely filed claims [*see United States v. Cardinal Mine & Supply, Inc.*, 916 F.2d 1087 (6th Cir. 1990); *In re Columbia Ribbon & Carbon Mfg. Co., Inc.* 54 B.R. 714 (Bkrtcy.S.D.N.Y. 1985); 4 King, *Collier on Bankruptcy* ¶ 726.02[2] (15th ed.); H.R.Rep. 95-595, 95th Cong. 1st Sess. 383 (1977); S.Rep. 95-989, 95th Cong. 2nd Sess. 96-97 (1978)]. Yet, § 523(a)(3) fails to differentiate between timely filed claims and tardily filed claims entitled to *pari passu* distribution. Nowhere does the statute address this inconsistency.

I share the opinion of Judge McFeeley in *In re Sandoval* [102 B.R. 120 (Bkrtcy.D.N.M. 1989)] adopted by Judge MacDonald in *Brosman*, that the statute [§ 523(a)(3)] requires that in order for the debt to be determined to be non-dischargeable, the creditor must show that as a practical matter, a timely proof of claim could not have been filed. Section 726(a)(2)(C) provides that a creditor can share in a distribution from the estate even if the creditor's claim is filed after the expiration of the claims filing period if two conditions are met: (1) the creditor did not have notice or actual knowledge of the case in time to timely file a proof of claim and (2) the claim is filed in time for it to share in a distribution.

As a rule, ambiguities, conflicts or inconsistencies in bankruptcy law are resolved in favor of the debtor, not the creditor; bankruptcy law is liberally construed to give the debtor the full measure of relief afforded by Congress. [*See Wright v. Union Central Life Insurance Co. (Wright II)*, 311 U.S. 273, 61 S.Ct. 196, 85 L.Ed. 184 *rehrg. den.* 312 U.S. 711, 61 S.Ct. 445, 85 L.Ed. 1142 (1941)] Furthermore, inconsistent provisions of the Bankruptcy Code should be construed in a manner harmonizing the discrepancy or reducing the inconsistency, rather than highlighting it. [*See In re Kaveney*, 60 B.R. 34 (9th Cir. BAP 1985); *In re Chandell Enterprises, Inc.*, 64 B.R. 607 (Bkrtcy.C.D.Cal. 1986)]

The construction of § 523(a)(3) suggested by the "strict construction" cases regarding the effect of the claims bar date, follow *Milando v. Perrone* [157 F.2d 1002 (2nd Cir. 1946)]. The author submits that reliance on *Milando* is misplaced. The cases relying on *Milando* do so on the premise that *Milando* was interpreting § 17(a)(3) of the Bankruptcy Act of 1898 (hereinafter "Act"). from which § 523(a)(3) is derived. [Although § 523(a)(3) has grammatical changes (substituting "timely filing of a proof of claim" for "in time for proof and allowance"), it is, for the most part, substantively unchanged from its predecessor, § 17(a)(3) of the Act.] This is perhaps true and, as a rule, cases decided under the predecessor remain authority for application of a substantially similar successor. Unfortunately, what *Laczko* fails to address is the context within which *Milando* was decided and the changes to the claim allowance section in the 1978 Code.

Proof and allowance of claims were governed by § 57 of the Act. Section 57(n) specifically provided that: "claims which are not filed within six months after the first meeting of creditors shall not be allowed." Although there were some statutory exceptions to the strict 6-month rule, there was no provision in § 57(n) of the Act similar to § 726(a)(2)(C). Thus, the creditors in *Milando* were absolutely precluded from having a late filed claim allowed, even though the creditor lacked notice or actual knowledge of the pendency of the bankruptcy case. On the other hand, with the enactment of the "tardily filed" provision of § 726(a)(2)(C), an untimely filed claim is nevertheless considered timely filed where the creditor lacked notice or actual knowledge of the filing. *Laczko* errs in blindly following the *Milando* "strict construction" reasoning without considering the relationship between § 17(a)(3) and § 57(n) of the Act and the corresponding sections, 523(a)(3) and 726(a)(2)(C), of the Code. Although Congress did not expressly suggest an intent to overrule *Milando* or disapprove of its rationale; clearly, in enacting § 726(a)(2)(C), Congress intended to grant unlisted or unscheduled creditors who filed otherwise untimely proofs of claim through no fault of the creditor, relief not available under § 57(n) of the Act by permitting them to participate *on an equal footing* in a dividend distribution from the estate. In so doing, Congress effectively stripped the underpinnings from *Milando*: a construction mandated by the strictly applied filing deadline requirements of § 57(n) of the Act.

In short, the underlying basis for the *Milando* approach, *i.e.,* once the statutory claims bar date passed, a creditor was absolutely precluded from participating in a distribution of the estate, was eliminated by § 726(a)(2)(C). The basis for the rule or rationale having been eliminated, it follows, *ipso facto*, that the rule should also fall.

Moreover, the interpretation of the term "timely" suggested by the author, and the courts in *Brosman - Sandoval*, is consistent with and follows the universally accepted rules of construction with respect to interpretation of the statutory provisions relating to dischargeability of debts. In particular, by limiting the application of § 523(a)(3)(A) to cases where the creditor is, because of the failure to schedule the debt, denied an opportunity to participate in the proceeding in a meaningful manner, *i.e.,* precluded from sharing in any dividend distribution from the estate, a creditor's essential rights are protected without interfering with the relief that Congress intended to confer on a debtor, particularly the "fresh start."

On the other hand, *Laczko's* strict construction approach has a draconian impact on an honest debtor in the absence of a late scheduled creditor having suffered any meaningful, significant or substantial harm, damage, detriment, or loss of a substantive right. The right of the creditor Congress intended to protect by enacting § 523(a)(3)(A) is the right to participate *pari passu* in any distribution from the assets of the estate: nothing more.

The only reason that a creditor in this situation would not be entitled to participate in a distribution would be if the creditor did not meet the lack of notice or actual knowledge requirement of § 726(a)(2)(C). In the event that a creditor cannot meet the threshold requirement of § 726(a)(2)(C), the creditor cannot meet the identical threshold requirement in § 523(a)(3)(A). Thus it follows, *a fortiori*, creditors in this situation either have a right to file "tardy" proofs of claim that will be treated as timely filed, or the creditor cannot establish that the debt is nondischargeable.

Finally, as the BAP acknowledges [*In re Lochrie*, 78 B.R. 257 (9th Cir.BAP 1987)], in order for a debt to be declared nondischargeable under § 523(a)(3), prejudice to the creditor must be shown. Under § 503(a)(3)(A) prejudice is limited to failure to participate in a dividend distribution. However, a creditor scheduled after the claims bar date, but before distribution, may file a claim and, pursuant to § 726(a)(2)(C), receive distribution just as if the creditor had been initially scheduled and a claim filed within the claims bar date. A creditor entitled to share *pari*

Continued on page 20

• Burke had some active globe-trotting years

Contined from page 13

artillery bombardment that was landing all about him. Every day at 11:00 a.m. the Japanese bombed Kunming and on the second day they bombed Dick; this, he took seriously. In just a couple of weeks, however, the troops quit fighting and everyone said the war was over.

In Delhi, Dick and his associates were the guests of an upper-class gentleman who took them home and entertained them, and while strolling in the garden, requested that Burke make no quick moves because his pet cobra was loose in the garden somewhere. This caused a quick return to the house, which Burke refused to leave until he left for the airport.

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Prisoner of civil war

Actually, what had happened was that the Chinese troops quit fighting Japanese troops and began fighting each other, with the great civil war in China having begun. Our hero was in a valley between two massive Chinese forces, and was not enjoying this at all.

Burke was still personally assigned to the President (now Harry S Truman), so nobody could give him much in the way of orders. However, one officer "convinced" him to attempt the rescue of some women in distress. The attempt went awry. As the heroics proceeded, the windshield was blown out of his jeep with a 37mm cannon. As a result, Burke became a prisoner of the communist Chinese forces, spend his time as the guest of a Chinese major who had recently graduated from the University of California, Berkeley. Mostly they played chess with the major insisting that Dick was not a prisoner, he was a guest, but if the guest wished to leave, he would be shot.

Prisoner exchanges were still fashionable in those days and when Burke was returned to the U.S. forces, he was given a medal. So he settled back to watch the war, much as people watched the Civil War in the United States. This was an occupation fraught with a few hazards, and at one point, an artillery shell entered the side of his tent, but exited the other side, leaving the occupants simply paralyzed with fear in the middle of a poker game.

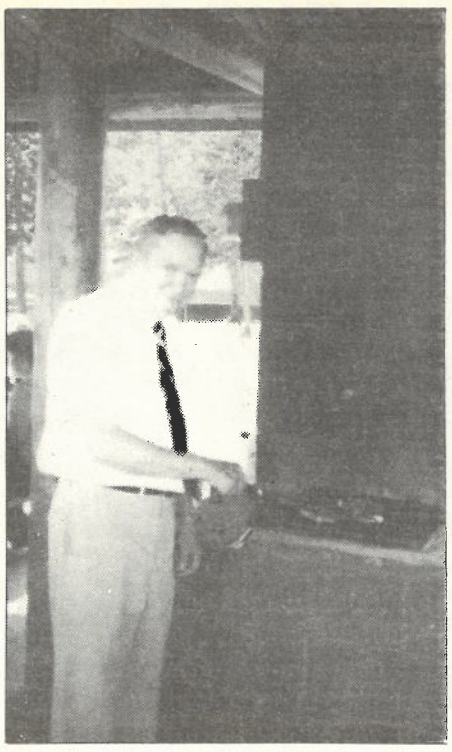
Japan surrenders to Dick

Three or four of his contemporaries being transferred to outer Mongolia made it appear that such would be his fate. He was given an alternative of Korea, which he definitely did not want. So he volunteered to be a Battalion S3, while awaiting the President to give him orders. One thing lead to another, and he, two other officers and four enlisted men were sent to Shanghai to take the surrender of the Japanese troops there. It turned out that the seven of them were the Americans who accepted the surrender of three million Japanese troops. The stacked rifles ran for blocks and the spoils of war, for Dick, consisted of all of the Samurai Swords he could possibly pack into any sort of luggage. These were ultimately distributed to friends and family at home.

In any event, the U.S. Government ultimately ran out of other officers, and while waiting around, Burke became commander of the port of Shanghai. Considering that he knew nothing about port management, the assignment was challenging in the middle of a civil war.

Meeting the Soviets

The State Department needed an interpreter for a dinner with the Soviets and somehow managed to wrangle the authority to order Burke's attendance at this affair. In typical World War II fashion, his Camp Richie Training remembered, Dick prepared for the hard-drinking Soviets by drinking a glass of olive oil. This enabled him to chug all eight toasts and still interpret Russian to English and English to Russian. The U.S. Minister to China's wife had not had the forethought to use the olive oil and she passed out, falling down a series of stairs out into the street. As a result, the U.S. Minister and his wife were deported the following day. The Russians, however, took a shine to Burke and their name for him translates as "little pigeon". At this point, one of Wild Bill Donovan's Office of Special Services (OSS) recruiters tied into Burke and the OSS (forerunner to the CIA) began running his life and did so through Oct. 7, 1947.



Richard D. Burke (aka R. Dryden Burke in Tanana Valley Bar minutes), tends to some cooking at the TVBA's Annual Christmas Party in July.

Unfortunately, General George Marshall (author of the Marshall Plan, U. S. Secretary of State, etc.) decided that the Nationalist Chinese were to stop fooling around with the
Communist Chinese. He ordered them to sign a truce. The Communists broke the truce, and things started to go to hell in a handbasket very rapidly. Daily sabotage, arson, artillery bombardment, ship sinkings, etc. were the order of the day for port commander Burke.

His last big duty as Port Commander consisted of evacuating all Japanese who had ever been in China. This was done in a series of LSTs (Landing Ship Tanks) and other non-suitable craft. Since they all had to be out by January 1, 1946, they left only with the clothing they could carry and the equivalent of $10, crammed into a mass of American ships. A great number of these ships proceeded to roll over and sink, killing almost everyone aboard.

Out of China

One carnage leads to another and all the U. S. Marines who had been in North China were loaded on ships (but not overcrowded so as to sink. They left Shanghai because of the Marshall-imposed truce. Come July, 1946, Dick decided that there was a particularly nice troop ship in port to load Marines, so he signed orders ordering himself to sail. His Russian secretary came to wave good-bye and so the ship was held while Dick got to kiss her a fond farewell with 600 Marines cheering him on.

After navigating through nine miles of mined waters the ship reached the Yangtze, which Burke says you can't see across because it is so big. The mud it carries stains the Pacific for 100 miles out into the ocean.

All of this traumatic action had reduced our youthful spook to a 99-pound weakling. He made secret spy trips, such as to the Philippines to get silk pajamas and scotch for ranking staff officers. There he developed a distaste for the natives because they were having a civil war and were not at all pleasant. They also had one of their mosquitoes give him malaria.

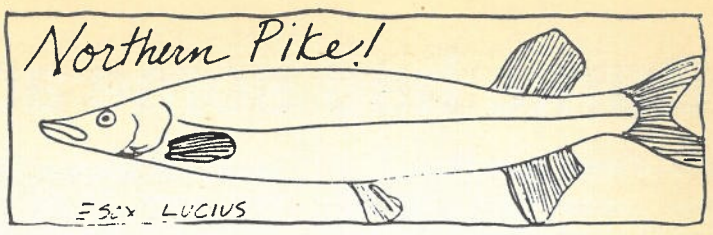
Even when his weight got up to 120 pounds our hero still looked like General Wainwright when the Japanese released him; and the service indicated that he could not stay in the Army because he couldn't cast a shadow. Hence, back to Stanford.

Not having received his degree in physics, Burke petitioned the university and was given one. He also took a second degree in Russian, but not before Stanford (not wanting to be a patsy) made him take Russian culture and even more Russian before he got the degree. Since no one was bothering him, he also enrolled in journalism graduate school, where he learned that he did not want anything to do with a career in writing obituaries.

This being a dull moment in an otherwise unbelievable career, Burke went to Washington, D.C. where he waited "on ice" for three months, taking batteries of tests

Continued on page 19

Annual bar convention held in Fairbanks



Alaska Bar Association Elects new officers

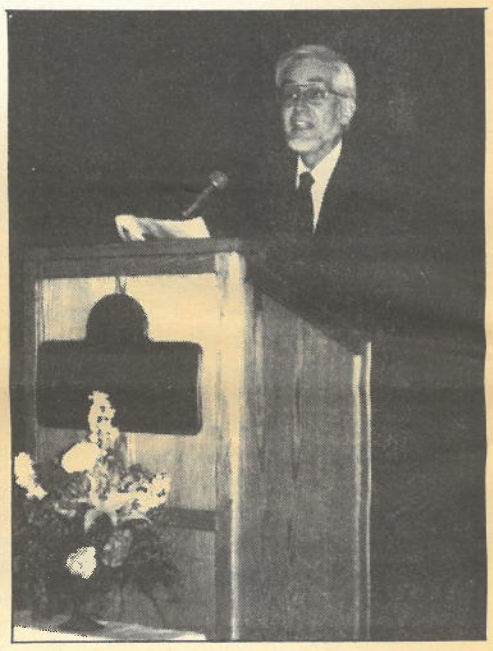
Elizabeth Page Kennedy was elected President of the Alaska Bar Association during the annual convention held in Fairbanks June 6-8.

Ms. Kennedy is an attorney in sole practice in Anchorage. Other officers include Juneau City and Borough Attorney Barbara J. Blasco as president-elect; Beth Lauesen, a public member on the Board of Governors and an intake resource coordinator for Project TEACH with ACCA from Fairbanks, as vice-president; Philip R. Volland, a partner in the Anchorage firm of Rice, Volland & Gleason, as secretary; and Daniel E. Winfree, a partner in the Fairbanks firm of Winfree & Hompesch, as treasurer.

At left, Dan Cooper, outgoing Bar Association president, passes the gavel to incoming president Pat Kennedy at the June 7 convention banquet in Fairbanks. At right, Cooper gives David Call his pin marking 25 years' membership in the Alaska Bar Association.

Counterclockwise from top left: Justice Jay Rabinowitz presented the Pro Bono service award to the Fairbanks Attorney General's Office, accepted here by Becky Snow on behalf of the office. Alex Sanders, chief judge of the South Carolina Court of Appeals, regaled banquet attendees with stories of what's it's like to be a judge. Alaska Attorney General Charles Cole speaks to the Bar at a convention luncheon.

Steve Van Goor Photos



U.S. District Court Chief Judge Russel Holland speaks at the annual Alaska Bar Association convention in Fairbanks.

Congratulations to the following 25-Year Members of the Alaska Bar Association

Peter Bartlett
George L. Benesch
Ronald G. Birch
Brian J. Brundin
Edward G. Burton
David H. Call
G. Kent Edwards
Martin A. Farrell
Sheila Gallagher
James A. Hanson
Lloyd I. Hoppner
B. Gil Johnson
W. Bruce Monroe
Herbert A. Ross
William G. Ruddy
Richard H. Shaykin
Benjamin O. Walters, Jr.
John Wittemyer

Taylor wins 5K run

A 5 kilometer walk/run was held on June 9, 1991, in conjunction with the bar convention in Fairbanks. Thanks to all who showed up for a scenic tour along the Chena River. The following are the results with appropriate notes:

1.	Warren Taylor	19:33.4[1]
2.	Ron Smith	19:57[2]
3.	Tamaris Dortch	20:28[3]
4.	Robert Hickerson	20:33
5.	Jeanie Campbell	21:47
6.	Charlie Cole	24:40
7.	Jamie Callahan	26:19
8.	Liz Hickerson	28:01[4]
9.	John Mason	29:22
10.	Jill Brunner	42:41[5]
11.	Laura Brunner	43:48
12.	Niesje Steinkruger	44:35[6]
13.	Jo Kuchle	44:39
	Gene Therriault	44:39 (tie)
15.	Cynthia Klepaski	44:45
16.	Chris Ashburn	48:15.8
17.	Stephanie Cole	48:16
	Mark Ashburn	48:16 (tie)
19.	Mary Ann Foley	51:25
20.	Vincent Vitale	51:26[7]
	Judy Rich	no time[8]
	Will Schendel	no time[9]

[1]First lawyer; first male.
[2]Winner in judge/magistrate category.
[3]First non-lawyer; first woman; she'd already won a 10 km race that day!
[4]Cut the course!
[5]First kid
[6]Winner, "big judge' category; no appellate judges showed up.
[7]Last and proud of it!
[8]Dropped out with an injury.
[9]Conscripted into service.

Submitted by Daniel L Callahan

Special Thanks to our 1991 Annual Convention Sponsors

ALPS Through Sedgwick James
Dean Moburg & Associates
The Michie Company
Midnight Sun Court Reporters
R & R Court Reporters
National Bank of Alaska
Retirement Planning Associates - Neal Martin
Rollins Burdick Hunter of Alaska Inc.

Send in clean lawyer jokes

Ninth Circuit marks anniversary

June 17 marked the 100th anniversary of the first session of the United States Court of appeals for the Ninth Circuit. The circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington.

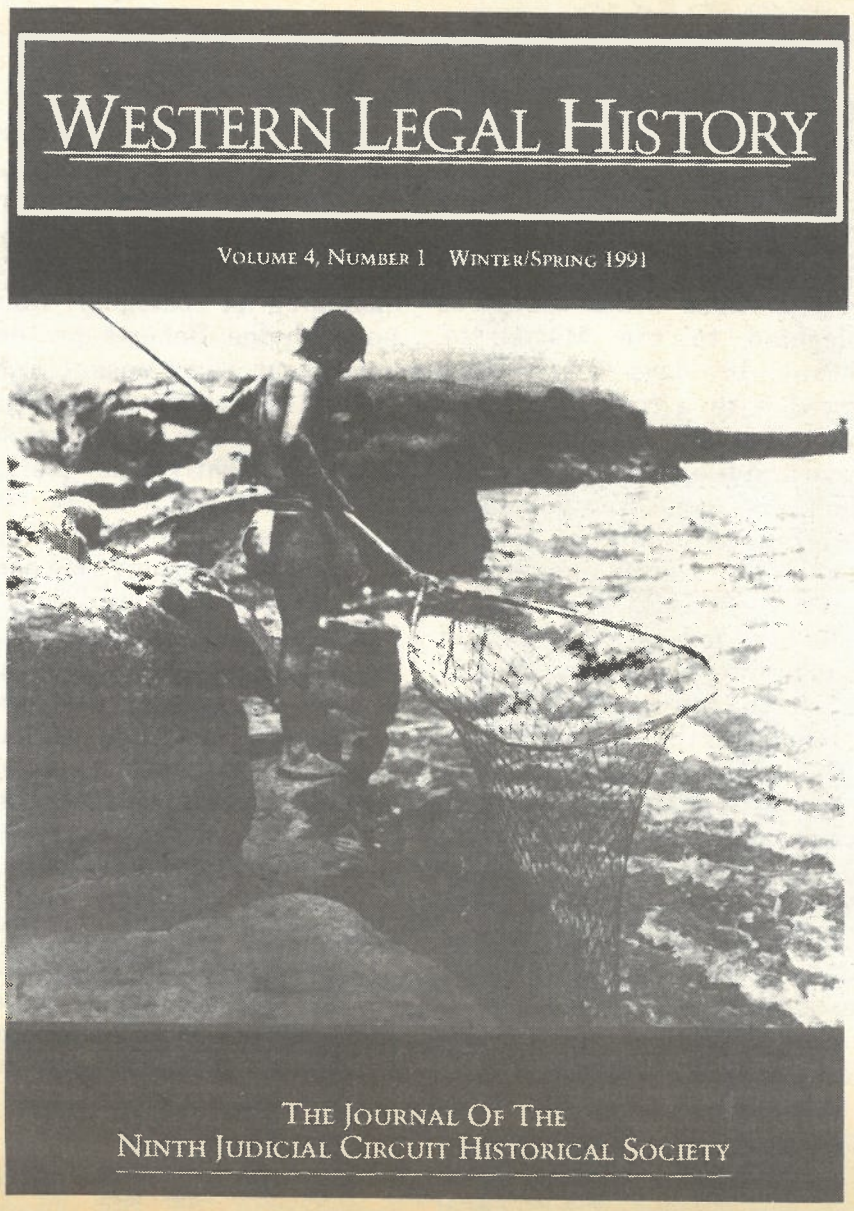
Justice Stephen J. Field of the United States Supreme Court presided over the opening session of the court, which occurred in a dusty, somewhat drab courtroom in the old Appraisers' Building at 630 Sansome Street in San Francisco. The court's present headquarters at Seventh and Mission, which survived the 1906 earthquake, sustained damage in the 1989 Loma Prieta earthquake. Pending repairs to that building, the court's headquarters are scattered in buildings throughout downtown San Francisco.

In its early years, the court consisted of two circuit judges (a third was added in 1895) with the third member of the panel drawn from the region's district judges. The court now boasts 28 active and 10 senior circuit judges, and also draws on 87 active and 40 senior district judges to form appellate panels.

The circuit is the country's largest in geographic size, population, volume of litigation, and numbers of judges. In 1989, the court handled appeals in 6,300 cases — the approximate number it heard in all of its first 40 years from 1891 to 1931.

According to Chief Judge J. Clifford Wallace of San Diego, the Supreme Court reviews only a dozen or two of the Ninth Circuit's decisions each year. As a practical matter, for litigants in the Far West's federal courts, the Ninth Circuit's decision is the final disposition of the case.

To commemorate the court's centennial, David Frederick, Esquire, under the supervision of Senior Circuit Judge Joseph T. Sneed, is preparing a book-length history of the court's first 50 years.



The Journal of the Ninth Judicial Circuit Historical Society is one of a number of projects the organization sponsors to collect, preserve, exhibit and in other ways document the rich Western history of the federal court. Since 1987, when the society began taping members of the bench and bar, the oral history program has become the nation's most ambitious legal project of its kind. More than 120 narrators and volunteer interviewers have been involved to date. The society's Northern Office is located at 620 S.W. Main St., Portland, Ore. 97205. (503) 326-3458.

Bush picks Kleinfeld

President Bush has nominated Judge Andrew Kleinfeld for the 9th Circuit Court of Appeals, according to Sen. Frank Murkowski and Ted Stevens, and Rep. Don Young.

Since 1986, Judge Kleinfeld has served as a United States District Judge for the District of Alaska. Prior to that, he served as a trial lawyer in Fairbanks, as a part-time United States Magistrate for the District of Alaska as head of the Alaska State Bar Association, and as a law clerk to the Honorable Jay A. Rabinowitz of the Alaska Supreme Court. He earned his law degree from Harvard Law School and his undergraduate degree from Wesleyan University.

The 9th Circuit covers nine northwestern states, including Alaska and Guam.

Vet appeals judges lose pay raise

WASHINGTON, D.C. - the Senate Veterans' Affairs Committee June 6 voted 8-4 to drop a proposed $7,600 per year pay raise for the six associate judges of the Court of Veterans Appeals. The amendment to cancel the proposed pay raise was offered by Sen. Frank Murkowski (R-Alaska).

"I respect the work of these judges, but I simply do not believe the pay raise is needed or justified," said Murkowski. "Although it was recommended by the chief judge of the Court of Veterans Appeals, his testimony failed to convince me that the taxpayers need to spend an additional $50,000 annually to pay veterans appeals judges the same as the justices of the U.S. Court of Appeals."

"These judges have served less than two years and started with an annual salary of $89,000," Murkowski said. "As a result of the Congressional pay raise, their salaries were increased to $125,000. There is simply no merit in bumping their pay another $7,600."

• Federal, state selection processes differ

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1977, at the peak of pipeline construction; there was lots of litigation.

(The judicial selection process is different than the process followed in state government. Although the Circuit Court selects the Bankruptcy Court Judges, the District Court Judges choose the Magistrate Judges in a merit selection process, with interviews being conducted by a panel selected by the District Court. The merit selection panel, which includes two lay people, solicits comments from the community and the Bar for people who have applied to become Magistrate Judges. The final determination is, of course, by the Judges. Full-time judges sit for eight years; part-time judges serve for four years. Judge Roberts is serving his second eight-year term).

Since Roberts became a Magistrate, the position has undergone many modifications since the pilot program for the magistrate position began in 1968. The purpose of the United States Magistrate was to assist the District Court Judges.

In 1976 the position was further clarified, as it was again in 1979. The statutes relating to Magistrates are found at 28 U.S.C. §§ 631 *et seq*. 289 U.S.C. § 636 sets forth the power of the United States Magistrate. A Judge may designate a Magistrate to hear and determine any pre-trial matter pending before the Court except a few listed motions which include motions for injunctive relief, judgment on the pleadings, and summary judgment. The Judge may review any pre-trial matter which it has delegated to the Magistrate if it is shown that the Magistrate's order is clearly erroneous or contrary to law. The Court may request that the Magistrate conduct hearings and make recommendations of those motions which cannot be delegated to the Magistrate. Within 10 days after being served with a copy of the recommendation, the party may serve and file written objections. The Court must then make a *de novo* determination on the portions of the report that are objected to. (28 U.S.C. § 636(b).)

The local federal rules contain a magistrate rules section, setting forth the general powers and duties of the Magistrate.

Judge Roberts is presently the only full-time Magistrate Judge; five part-time Magistrate Judges serve in Alaska: Judge Harry Branson, Anchorage; Judge Patricia A. Collins, Juneau; Judge Thomas Fenton, Fairbanks; Judge George L. Gucker, Ketchikan; and Judge Matthew Jamin, Kodiak.

Judge Roberts believes many attorneys confuse the difference between a request for reconsideration and an objection. Local Magistrate Rule 12 sets forth the standard of review. Appeals are taken from matters which are delegated by the District Judge to the Magistrate. (*See* Local Magistrate Rule 5). On matters which are sent to the Magistrate for recommendation, an objection is appropriate. The Magistrate reviews the objections and determines whether he will alter his findings. He then sends forward the entire file to the Judge to whom the matter is assigned, for final action.

28 U.S.C. § 636(c)(1) allows the parties in any litigation to consent to an action being handled completely by the United States Magistrate, with no monetary or category limitations. Judge Roberts presently has about six consent cases. Around the country there have not been very many consent cases. Currently, the Clerk of Court sends out a notice when the case is filed, which indicates that the parties may consent to the Magistrate handling the case. Judge Roberts thinks that this is perhaps not a good time because the parties are unfamiliar with the case, although there is discussion about the possibility of allowing Judges to bring up the Magistrate Judge option during the scheduling conference. (Consent can be made at any time).

Consent cases can be appealed to the District Court in the same manner as an appeal from a judgment of the District Court to the Court of Appeals. (28 U.S.C. § 636(c)(4).)

That brings us to the current organization of the District Court, which recently was modified. The United States Magistrate now carries the official title of United States Magistrate Judge, one of three classifications of Judges within the District of Alaska: District Court Judge, Bankruptcy Judge, and Magistrate Judge.

Magistrates handle a variety of cases. Under the local rules, some cases automatically go to the Magistrate. For example, there are certain criminal proceedings which are delegated to the Magistrate Judges. These include post-indictment arraignments, pre-trial conferences, and supervision of the plan for prompt disposition of criminal cases under the Speedy Trial Act. In addition, Social Security cases, Civil Service Commission appeals, orders and actions of the Immigration and Naturalization Service, and actions regarding orders of the Interstate Commerce Commission. (*See* Local Magistrate Rule 9.) In addition, the Judges assign individual matters on cases to the Magistrate Judges for proposed findings of fact and recommendations. (*See* Local Magistrate Rule 4.)

In addition to the regular assignments, Judge Roberts also receives the cases in which the part-time Magistrates must recuse themselves. The part-time Magistrate Judges are cross-trained so that they can act in Judge Roberts' and Judge Bransons' stead when they are unavailable.

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The important thing to note from all this is that the proper way to address a Magistrate Judge is by the appellation "Judge." The improper way can be found on the restroom walls at the correctional center.

Want seafood? Try the doc's office...or a bar

BY DAN BRANCH

I was about to enter the local fish market on Tongass Avenue when Martha stopped me. She wanted to know my purpose. I told her about my plan to secure some fresh shrimp for dinner. "That," she said, "would be a big mistake." I expected a warning about tainted product but Martha was only concerned about my pocketbook.

Fifteen years in Ketchikan had taught Martha many things. She knew where to set crab pots and how deep to troll for king salmon. She also knew where to buy things.

"Only a rookie," she told me that day, "would buy shrimp at the fish market." Apparently, smart people get their big spotted shrimp at the Potlatch Bar. She once got a better price for the crustaceans at the obstetrician's office. When he closed up shop Martha looked to the Potlatch for the large shrimp. She buys the smaller striped shrimp at the local newspaper.

I was having a hard time believing my friend so I asked with a hint of sarcasm, if she bought her fruit at the public utility office. She explained with great patience that, "as everybody knows, one buys fruit at the Wolf Point Scenic Turnout."

"Oh sure," I told her, "and you probably get your crabs there too."

"No," she said, "I get them at the supermarket."

When I denied ever seeing live crabs for sale there, she told me to look in the parking lot.

Ignoring Martha's advice, I entered the fish store and found Julie looking over the inventory. When I told her about Martha's unusual sources for food Julie nodded wisely and agreed that things seem to work out that way in Ketchikan. "You have to take your wild meat where you can find it," she said. "Sometimes it turns up in strange places." I asked for an explanation. Julie told me a fish story.

Last week Julie's husband Mike and a friend took his boat over to Bostwick Bay to troll for winter king salmon. They are an elusive fish so the men planted several crab pots to increase their chances of bringing some home. With the pots in place, Mike and his partner set out the fishing gear. After baiting their double hooks with herring they dropped the setups over the side and ran out some line. Heavy down-rigger weights were used to insure that the herring would dart about at the depth of 40 feet.

With the lines out, Mike adjusted the throttle of the trolling motor and the men settled in for some coffee and conversation.

Half way through his second cup Mike's pole bent over double. He had hooked a winter king. Mike's partner killed the outboard and reeled in his line to clear the deck for landing a very large fish. The salmon didn't run with the line or dive for the bottom. Instead, it zigzagged left then right in a strange way.

Mike didn't think much about this zigzag at the time. He was too busy cranking in his fish. He brought the brute closer to the boat by carefully raising the rod tip above his head and then dipping it slowly to the water's surface as he reeled in line.

When only 20 feet of monofilament were left in the water Mike heard his prey. The beast broke the water's surface and let out a very loud quack.

Looking at the source of that very un-fish-like sound, Mike saw the black and white feathers of a merganser at the end of his line. After a brief time on the surface, the fish duck dove back into the waters of Bostwick Bay. Mike overcame his foe's efforts to escape and brought the merganser to the side of the boat where his friend secured it with the net.

The bird had taken the herring cleanly and Mike's hook was lodged in its bill. Since duck

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• On the lam from Germany, Burke joins the think tanks

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with questions such as: "Would you rather kill your mother or your father (choose one)?"

Whatever the results were supposed to be, Burke apparently chose correctly. His CIG handler (the new name for the OSS) managed to keep him entertained going to a social gathering with Helen Hayes and otherwise making the circle of the politically prominent.

Burke was getting tired of the normal screw-ups, but turned down a request to become a Russian librarian. One day, he was grumbling in front of a young attorney who seemed to be looking for business. Burke decided that he would like to sue the U. S. Government, which turned the young man off. When Dick mentioned that the CIA was the part of the Government that he wanted to sue, the attorney was then turned back on, so together they sued the secret bastion of our security.

Admiral Hillencotter was then the head of the CIA, and sent an agency limousine for Burke, to discuss settlement of the case. Sitting around a green felt table, they asked what he wanted, and Dick indicated that "$5 per day and a train ticket back to California" would do. This seemed so reasonable that this is how it was settled.

Ultimately he found out what happened. He had been scheduled to go to our consulate in Vladivostok, but it was closed by the Russians in retaliation for our closing their embassies (for KGB activities of torturing and interrogating people while they were still in the U.S.).

Assignment: Germany

In any event, other spooks now began to offer him jobs, and while he was considering one that needed a masters degree, they suddenly told him to "leave tomorrow" for Germany, where he would have new bosses. (This was the beginning of a nine-year "top secret" period in Burke's career).

During this time, he discovered that the Danube often ran red, rather than blue, because various foreign intelligence agencies, the KGB, and their counterparts from the Warsaw Pact nations were permitted to simply murder their opponents at will. All of this activity reached its peak in 1955, Soviets were forced to withdraw from Austria. The Hungarian revolt followed in the fall of 1956.

Burke was the one who gave the word to the Hungarian freedom-fighters, through Radio Free Europe, that the U.S. Third Army was committed to move in and help them if they could successfully revolt and kick out their puppet Communist government. The history of this is known to everyone. They did successfully revolt, then President Eisenhower chickened out. The Hungarians were massacred by Russian tanks, and the cold war reached its greatest intensity. The Suez Crisis soon followed.

At this point someone got a little too much information, and Moscow Radio not only divulged Burke's whereabouts and activities, but put a very substantial price on his head. As a result he disappeared, sneaking out by the best means the U.S. could find.

When he arrived in New York, as a civilian passenger with obviously incorrect papers, he was still packing the two pistols that he carried for safety. This created a bit of a confrontation with U.S. Customs officials. Dick finally solved the problem by telling them to "get out of the way". He proceeded to the East River, threw his armament in it, and decided it was time to lead a peaceful life.

Peaceful think tanks

Burke's desire for a peaceful life lead to being a member of the Rand Think Tank, starting in 1957. He and Nancy Nimitz (the admiral's daughter) each wrote books while there, and his, entitled "Determination of Orbits," had to do with Solar Mechanics and was sold in the Soviet Union. It is now out of print.

Dick gained repute as a "Soviet expert" and one of his chief tasks in this capacity was to keep Air Force General Curtis LeMay briefed, which was slang for trying to keep him under control. LeMay was one who wanted to nuke even the mosquitoes that bit him, thinking that this would somehow solve all the world's problems.

Burke then transferred to an outfit called the Planning Research Corp. and was manager of its Washington office, spending his time being a "Soviet expert," briefing people, and running secret errands. After three years of this, the work day (normally 20 hours per day and 7 days a week) brought health deterioration which led to a sabbatical, but no relief from spook assignments.

In 1962 Dick went to an Army Think Tank doing more of the same things and while there, wrote (while on a mission to Panama) part of the contingency plan for Panama, providing for the deployment of U.S. troops in the event that Panama was invaded by Cuba. In 1989, when we actually did invade Panama, it was Burke's plan that was used. This made him feel as though he had accomplished something, though he is not yet sure why it was that we decided to invade Panama.

In this period the revolutions of Nicaragua and Guatemala were underway, and Burke was on the scene for portions of these conflicts.

In 1963 Burke started law school at night, which was somewhat difficult because he was also expending considerable effort on a problem in the Straits of Magellan (South America), along with helping to plan sundry security measures in certain Columbia, Peru, and Bolivia.

In 1966 Burke made his last trip to Germany and thereby wound up his "spook" activity overseas.

Another foreign policy employer had him commute to the Naval Carrier *USS Forestall*, which had a computer that processed intelligence data. Burke's assignment was to ensure that the input and output of data were valid.

On to Alaska

After this, Dick practiced in the Washington D.C. courts on criminal and civil matters and then, in 1971, he came to Alaska.

For more than a decade in the Far North, Dick still had one burning desire with respect to his own foreign policy, so in 1984 (as a guest of the Austrian government) he returned to Budapest where he ceremoniously (but surreptitiously) revisited the bridge between the cities of Buda and Pest. There, he put his own soul at peace for the horrible carnage brought on by the 1956 promise of U.S. assistance, which never materialized.

(Dick did agree to go to the Persian Gulf recently, but only if the Pentagon would promote him from his present grade of major, to brigadier general. For some odd reason, the Pentagon missed a golden opportunity).

In terms of acknowledgements for particular assistance in his career, Dick says that he would like to thank the Black Watch (the Forty-Second Highland Regiment) who kept him supplied with Scotch during the entire period of the 1948 Berlin Blockade. All other "Thanks" relate to events that are, even today, "top secret."

NOTICE OF AMENDMENT TO CIVIL RULE 82

The Alaska Supreme Court has amended Civil Rule 82 by adding a new subparagraph (a)(5) as shown below. This amendment is effective July 15, 1991.

(5) A motion for attorney's fees must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees.

If you have any questions about the amendment, please call the Court Rules Attorney at 264-8239.

Get Help From The Substance Abuse Committee

If you are concerned about your own use of alcohol or drugs, or by a fellow attorney, call one of the members on the Substance Abuse Committee. This is a referral and information committee. All inquiries will be confidential.

John Abbott
John Reese
Nancy Shaw
Mike Lindeman
Brant McGee
Cliff Groh, Sr.

Get your T-shirts in the fish store

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season had closed a couple of months ago and Mike didn't like merganser meat anyway, he released the bird. It floated about on the surface of the bay for awhile before flying to quieter waters. The men pulled their nearly full crab pots and returned home.

Her story over, Julie purchased a tee-shirt from the fish monger and left the store. That is when I finally figured it out. In Ketchikan, you buy underwear at the fish store, fruit and crabs in parking areas, and shrimp from the Potlatch Bar. The same Ketchikan warp must also affect the harvest of waterfowl. I guess I wasted a lot of time last season hunting for waterfowl with a shotgun and decoys. Next fall I'll just troll for ducks with Mike.

DIAL 800-478-7878 FOR CLE & BAR INFO

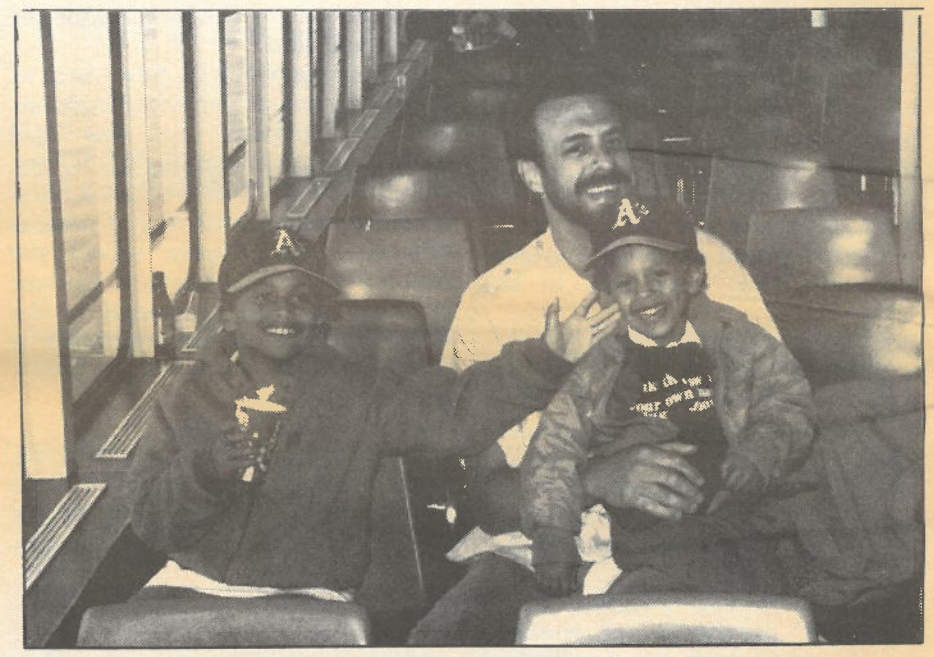
The Alaska Bar Association now has an 800 information number thanks to the Alaska Bar Foundation. The outgoing tape message on this number gives you the Bar office hours, address, phone, fax, upcoming CLEs, and other program information — such as the Bar Exam and MPRE dates and locations.

If there is other information that you think would be helpful to have on this tape, please call Barbara Armstrong, CLE Director, at the Bar office at 272-7469.

TANANA VALLEY BAR

Housekeeping chores at the Tanana Valley Bar

Followers of the Minutes of the Tanana Valley Bar Association will be gratified to learn that an age-old controversy has, at last, been laid to rest. Supreme Court Justice Jay Rabinowitz has finally returned the plastic flowers the TVBA has employed for the purpose of condolences to the ill and deceased. Rabinowitz made the presentation of the reusable bouquet during the annual bar association convention in Fairbanks in June, along with a second bouquet "for interest."



Judge Peter Froelich relaxes on the Riverboat Discovery during the June bar convention with his sons Kaleb, 9, and Ephraim, 5.

Steve Van Goor Photos

• Late bankruptcy filings

Continued from page 14

passu in the distribution has not been prejudiced by the initial failure of a debtor to list or schedule the creditor. Creditors cannot have the best of two worlds. They cannot be entitled to have claims treated as timely filed, eligible to participate in a distribution *pari passu*, and then assert claims were not discharged because the debtor failed to initially properly schedule the claims. [*See In re Butt*, 68 B.R. 1001 (Bkrtcy.C.D.Ill. 1987)]

A creditor in an asset case listed or scheduled, or otherwise receiving notice or acquiring actual knowledge of a bankruptcy case, before distribution and in sufficient time to file a "timely" proof of claim under § 726(a)(2)(C) should not be permitted to "elect" not to file a proof of claim and avail itself of the remedy of nondischargeability under § 523(a)(3)(A). To hold otherwise grants a creditor an election of remedies in the absence of a clear showing that such an election was contemplated by Congress in enacting the Bankruptcy Code of 1978. Likewise, in a no-asset case where assets are subsequently discovered, a late-scheduled has the same right to notice to file a proof of claim as "timely" listed or scheduled creditors; accordingly, no prejudice results to the creditor from late scheduling in no-asset cases either. [*Cf. In re Bowen*, 102 B.R. 752 (9th Cir. BAP 1989)].

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