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The Alaska BAR RAG

Volume 13, Number 3

Dignitas, semper dignitas

May/June, 1989

Lawyers reveal & respond to spill rumors

Melvin Belli, King of Torts hits the state

By Imre Nemeth

They call him the king of torts in legal circles, and he says it's a badge he wears with honor.

To those he represents, he's considered the most powerful lawyer they can have on their side. And this time he's on the side of fishermen, processors, tender operators, seiners and a host of others in their fight for reparation for economic damages brought on by the nation's largest oil spill

At Exxon Corp., officials there would rather he didn't call at all.

Melvin M. Belli Sr. is his name. At age 82, he's still one dangerous guy to meet in court. And he's no fan of anybody, regardless of national corporate standing, who despoils the environment. Belli is generally known for representing Jack Ruby (who shot Lee Harvey Oswald and later died in prison of a reported infection to the brain before the case went to trial); taking on a number of cases against Coca Cola; and for representing (non criminally) Jim and Tammy Bakker. But Alaska, he says, maintains a special place in his heart, one that doesn't take kindly to sharing space with a sour memory.

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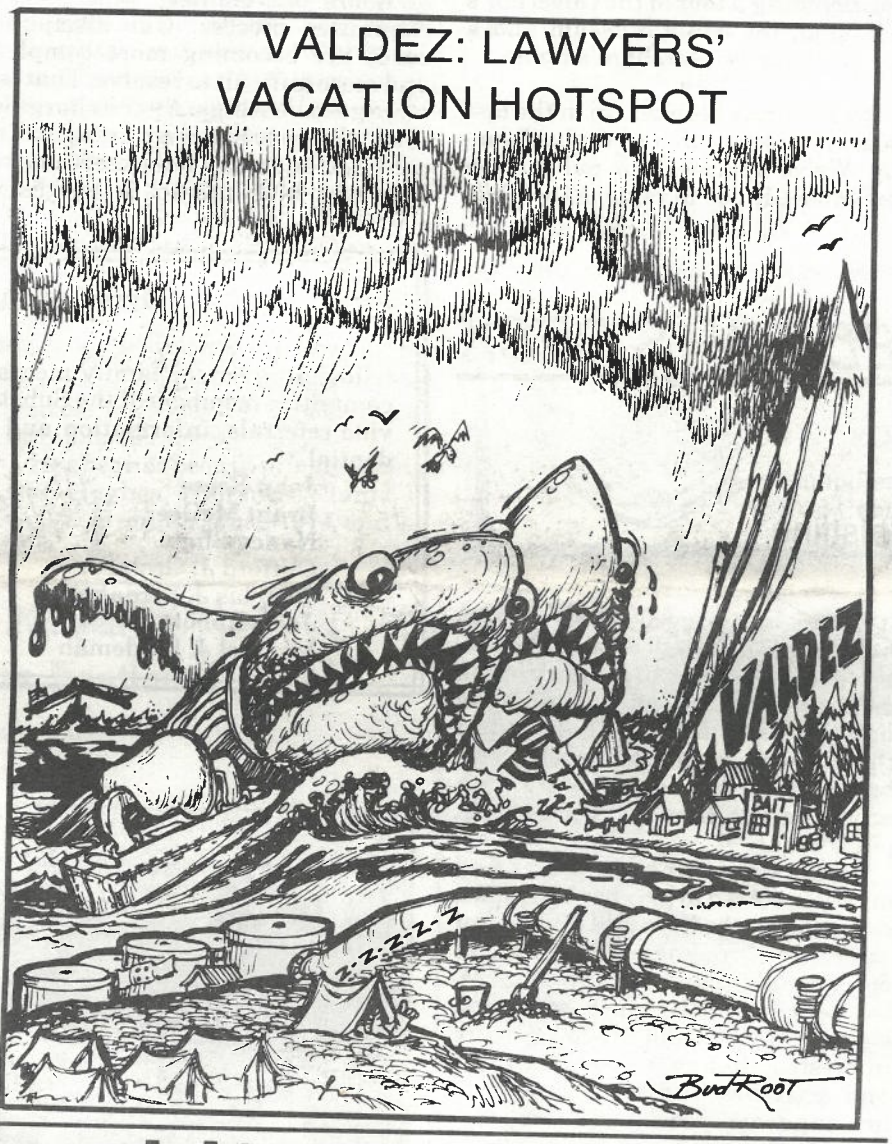

Spill rumors unfounded; alien invasion likely

Only hours prior to this publication, highly skilled Bar Rag investigative reporters received a tip, from a heretofore reliable source, that a major oil spill had occurred in the Valdez Harbor (which according to oil company personnel is impossible), and that unidentified flying objects had landed in courthouses throughout the state, where aliens had occupied the bodies of certain undisclosed court personnel.

Efforts to follow up on the oil spill rumor were frustrated when local media representatives feigned disbelief at our questions. However, Bar Rag reporters doubt the substance of this rumor, noting that Valdez is booming with sightseers and is enjoying an unseaonably high number of vacationing attorneys from the Lower 48 states.

The UFO lead, though, appears to be of substance. Ever increasing reports have been received of extraterrestrial activity in and around courthouses throughout the state. It has been noted that in both Anchorage and Fairbanks none of the clocks in the courthouse show the same time. Courthouse personnel should be extra vigilant to note and report any actions by co-workers that might suggest an alien orientation.

No matter how clever these aliens might be, they will be found! Nothing can be kept from the ever vigilant eyes of the Bar Rag.

Judge Fitzgerald to senior status

By Mikale Carter

As of Jan. 1, 1989, Judge James Martin Fitzgerald, United States District Judge for the District of Alaska went on senior status. He plans to work nine months a year as a trial judge, six months in Anchorage and three months in the Lower 48 His story is another in an interview series by Mickale Carter, Bar Rag contributing writer.

I interviewed Judge Fitzgerald on May 3, 1989. Judge Fitzgerald, although a joy to chat with, was very difficult to interview. He artfully transformed each query into a discussion requiring my opinion. He genuinely wanted to know about me and my experiences. He talked about Montana, where I grew up. He wanted to know my opinion about Roe v. Wade. When I persisted in asking about his background, he asked his secretary for a resume he could give to me. Much of the factual information in this article is from the two resumes he provided.

Judge Fitzgerald is a remarkable man. Although he has earned the right to be self-satisfied and pompous, he is neither. He is rather unpretentious, unassuming and modest. The son of an Irish immigrant, he attended grade school in a two-room country schoolhouse in Oregon. After graduating from high school in Portland, Ore., he joined the Army in September of 1940, and he was honorably discharged in February 1941. After the bombing of Pearl Harbor, in July of 1942, the youthful Fitzgerald joined the U.S. Marine Corps, and was honorably discharged in December 1946.

A 1950 graduate from Willamette University in Salem, Ore., Fitzgerald continued his education and earned his L.L.B. from Willamette in 1951. In 1952 he moved to Ketchikan, where he was the Assistant United States Attorney for the First District. In 1953, while still an assistant U.S. attorney, he moved to Anchorage.

Fitzgerald was the city attorney for Anchorage from June of 1956 through April of 1959 and when Alaska became a state he was appointed to the position of Legal Counsel to then Gov. Bill Egan, who then appointed him Commissioner of Public Safety for the State of Alaska. After a short tenure in 1959, Judge Fitzgerald was appointed Superior Court Judge in November, 1959, at a time when there were only eight Superior Court Judges and three justices on the Alaska Supreme Court.

Because none of Alaska's first judges were experienced, each traveled to Newark, New Jersey for training.

Continued on Page 4

Convention '89
Juneau!

Alaska Bar Association
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Anchorage, Alaska 99510

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FROM THE PRESIDENT

Larry Weeks

Convention time in Juneau looks good. We've had lots of sunshine this spring. It looks like we may have visitors from two or three foreign countries, and we've invited lawyers from Hawaii, California and Iowa. If they show, we will have a seminar on Friday afternoon: "What it Takes to be a Good Lawyer in ... (Japan) (Soviet Union) (Hawaii)," etc. Tanana Valley members can participate as if they were from a foreign land, too.

There will be a good "Media and The Law" seesion with hypotheticals including sealing court settlements, allowing access to search warrants, opening Supreme Court deliberations to the public, excluding prior bad acts from the jury but not the press in high profile criminal cases, and others.

The Juneau Bar Association, in response to all the good wishes received from sibling organizations around the state, has submitted a resolution for the business meeting requiring 15 hours of CLE each year to remain a lawyer.

A Linda Rosenthal concert will include classy snacks and a cash bar to honor the visitors. On another evening lawyers will entertain on fiddle, guitar and bass during a harbor cruise and buffet.

The banquet speaker will be Bill Kovach, former editor of the Atlanta Constitution and New York Times Washington Bureau Chief. He is now a fellow at the Neiman Foundation at Harvard. He's replacing Howard Simons, Neiman Fondation Curator, who couldn't appear because of illness.

The Governor and Chief Justice will speak and there are some interesting social opportunitiee for spouses, including a tour of the Governor's mansion, the State Museum and a tea at Judge Wickersham's home.

•

The Bar has been active in the last year. It looks as we've survived sunset. We've approved for publication the Model Rules to replace the Code of Professional Responsibility. We've got the computerized Bankruptcy Court access up and test running.

We spend an enormous amount of time and money on discipline matters. In preparing to deal with the legislature on sunset, I discovered that the State of Alaska appropriated about $850,000 to Occupational Licensing for the investigative function of their enforcement for some 30 odd professions. They do the enforcement for contractors, doctors, dynamiters, accountants, electricians, pharmacists, dentists, realtors and a host of other professions.

The Alaska Bar spends about $330,000 of our members dues for the same functions and devote hundreds of hours of volunteer time in the committee prccess. Our discipline cases are becoming more complex and more difficult to resolve. That is, more go to hearings. After a charge is filed, all of our hearings are open. In contrast, one of the few exceptions to the Open Meeting Act is the disciplining of doctors in hospital settings. We actually enact discipline on a regular basis, as you can tell from reading the advertisements in the paper. On the other hand, it's been a long time since you've read of any of those other professions having someone suspended.

•

We are surveying and polling the membership at every ppportunity. The Judicial Council has had very good returns on its economic survey of our members. We've got one coming out now for the second Bankruptcy Judgeship. The Congressional Delegation was cooperative with us in doing the Federal District Court survey. We have tried to ask your opinion or your vote on a host of choices. There is more participation by the membership in sections, CLE and other activities than ever before. All together it's been an active year for the Bar and we expect a pleasant June Convention to kick off the next year's activity.

THE EDITOR'S DESK

Ralph Beistline

My thoughts are of summer. When I was 12 years old, I made a mistake that has haunted me ever since. Especially in springtime! 28 summers have come and gone and still the thought of this mistake resurfaces—from nowhere and without warning.

The mistake I speak of occurred in August of 1961, in the fourth inning ot a Little League baseball game. I was pitching and had done quite well. The cleanup batter for the other team came to bat and I easily got two strikes on him. Our second baseman then came over and told me that this guy was a sucker for high changeup. Play resumed and I delivered a high changeup. That mistake has haunted me ever since.

I learned that once a pitch is thrown it cannot be retrieved, and so I stood helplessly as the ball cleared the center field wall. I was first angry at the center fielder for not catching the ball (it was 20 feet over his head). I then became angry with the second baseman for his advice. More than anything else, though, I wanted that pitch back.

It is now another spring and I find myself involved in another ball game, reporting on the lives and interests of attorneys throughout the state. We don't concentrate on your mistakes, but recognize they can happen and we can learn from them. We are interested, though, in your thoughts and activities and look forward to hearing from more of you this summer. Have a good one!

Drug or Alcohol Abuse

If you are concerned about your own use of drugs or alcohol or by a fellow attorney or family member, call one of the following steering committee members of the Substance Abuse Committee. They can provide referrals, information and other assistance. All calls are confidential.

John Reese
Brant McGee
Nancy Shaw
Clifford J. Groh Sr.
Douglas J. Serdahely
John Abbott
Michael J. Lindeman

ANN OMINOUS, J.D.

By Nancy Walseth

The Alaska Bar Rag

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Alaska Bar Association
1988-1989

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

June 5 - 7, 1989, Juneau
June 8 - 10, 1989, Annual Convention
Centennial Hall, Juneau

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IN THE MAIL

Issues

Mr. Beistline's column in the March/-April issue of the Bar Rag identified some very important issues, and I can't resist your invitation to take up the cudgels on one of them. The following comments speak for myself alone, and are not written in any official capacity.

I used to think that Alaska had the least bad of all the imperfect systems of judicial selection and retention. I'm much less sure of that any more, after the organized opposition to Justice Matthews in 1980 and Justice Rabinowitz in 1988, and the defeat of three members of the California supreme court at a yes/no retention election in 1986. The people who opposed these judges did not argue that the judges should be removed because they were corrupt, senile, lazy, intemperate, or bigoted. They opposed these judges because of the merits of their judicial decisions.

Probably at once the most important and the most difficult of the many jobs society gives its judges is the countermajoritarian one: the job of protecting the minority from the majority or, more generally, protecting us as a society from ourselves. By definition judges will not be popular on those occasions when it is necessary for them to do this. This may make judges look "liberal" to conservatives and vice versa. If so, so be it.

A sitting judge is a sitting duck and cannot defend himself or herself. If the judge is to be defended, lawyers must come to his or her defense. When a judge facing retention election is attacked based on the merits of judicial decisions, it is the duty of lawyers as individuals and of the organized bar as an institution to come to the defense of that judge. If we understand the importance of an independent judiciary and want to preserve it, then we cannot decline to rise to the defense of the judge who is attacked.

Between elections, maybe we should put effort into public education programs directed to the proposition that the countermajoritarian role of the courts is not only legitimate, it is essential. The hearings on the Bork nomination two years ago gave this issue extensive publicity. Judge Bork's nomination was rejected for many reasons, but one of the most important ones was his apparent lack of concern for the countermajoritarian role.

Closer to home and more specifically, perhaps we should take a close look at alternative judicial retention procedures. There are jurisdictions which, like Alaska, use merit selection procedures and provide merit reviews after a judge has been on the bench for a period of years but, unlike Alaska, have no judicial elections of any kind.

The time to begin looking at these alternatives is now. It will be too late after the present system leads to nonretention of a judge because that judge had the courage to do his or her job. It is already too late, for instance, in California, where meaningful reform of the selection and retention process no longer appears politically feasible. Perhaps this review of alternatives is an appropriate joint function of the Judicial Council and the organized bar.

—Robert D. Bacon

Observations

Since you are very interested in what happens at the state and federal courthouses, I would like to offer two observations about which your readers should be informed.

For several years now, the state court has been utilizing this procedure for release on bail called the "Third-party custodian." It began about eight years ago when an assistant district attorney recommended that a defendant be released to his mother. Nowadays, every defendant just about, is being put on the TPC trip. You would not believe what a costly strain is being placed on the court system to process these types of conditions. It is bottle-necking the court system with long and drawn out bail hearings that wastes everybody's time. Plus, the prison system for pre-trial detainees is clogged up because 25 percent of the population in the jails can't come up with an acceptable TPC so they sit in the can and the taxpayers are paying the bill. The DA's Office even has to hire extra help to process the data collected about a prospective TPC to see if that person is suitable to be a TPC. In practice, the selection and qualifications of a TPC is generally an arbitrary call by the court and DA's office.

In extraordinary circumstances, a TPC is fine to allow one to be released, but in most cases, a TPC is silly. In most cases where a TPC might be considered to be helpful, a defendant should be required only to call in once a day. But to live, eat and sleep with the TPC is crazy.

Another facet of the current court system's procedure should be examined. That of petty fines. In a great many cases, defendants are assessed small fines. Then they don't pay the fines and a bench warrant is issued. Then they get picked up, go to the magistrate, get released, and it goes 'round and 'round. Why not have the defendants sign a release and have the fine get paid from their permanent Fund Dividend if they don't pay the fine by a certain date. That procedure would save the court system millions and if you check it out you'll see that this is the correct fact.

I urge you to examine the TPC procedure very carefully in dollars-and-cents; interview the Supreme Court Justices; interview a few attorneys and Assistant DA's and you'll see that the TPC is a costly and needless imposition upon the defendants and the public.

—Warren Rogers

Youth Court

The Anchorage Youth Court is a program in which certain first time juvenile offenders are being adjudicated by their peers. Approximately 100 students (grades 7 through 12) recently completed a course of study, passed a Bar Examination and now are members of the Anchorage Youth Court Bar. Members will act as prosecutors, defense attorneys, judges, jury, bailiff and clerk. Youth Court Judge the power to order that a defendant pay restitution and serve up to 80 hours of community work service.

The Youth Court has received tremendous support from the community, and trials presently are taking place. There is a need at this time for members of the Alaska Bar to serve as advisors to the teams of prosecutors and defense attorneys, to the judges and to the court. Criminal trial experience is not a prerequisite, and only a small commitment of time is required. You primarily will serve as a sounding board by answering questions that the students have concerning legal and procedural issues.

This is a rare opportunity for lawyers to give something back to the community, and a rewarding way to meet students who are dedicated to understanding and upholding the law. If you are interested in assisting the Youth Court, or if you have any questions, please call Heidi Houk, Anchorage Youth Court Coordinator, at 694-3090.

—Steven Pradell
Legal Advisor
Anchorage Youth Court

The Alaska Bar Rag welcomes letters, articles, observations and advice from its readers. Send to the address on the facing page.

STATE OF ALASKA
DEPARTMENT OF ADMINISTRATION/OFFICE OF PUBLIC ADVOCACY
REQUEST FOR PROPOSALS
ASPS 90-012

Proposals will be received by the Office of Public Advocacy until 5:00 p.m. on May 22, 1989 for the following:

The Office of Public Advocacy desires to contract with private attorneys and other professionals to accomplish the following statutory functions:

A. Attorney services for criminal cases in areas where there is no OPA staff coverage; and multiple co-defendant and OPA conflict cases in Anchorage, Fairbanks, and Barrow.
B. Attorney services for wards and respondents in guardianship proceedings.
C. Visitor services in guardianship proceedings.
D. Expert services in guardianship proceedings.
E. Attorney representation for child in need of aid, child custody, and juvenile delinquent cases.
F. Guardian ad litem representation for which OPA is responsible under AS 44.21.410(a) and OPA conflict cases in Anchorage, Fairbanks, and Barrow.

AREAS TO BE SERVICED

(1) Barrow	(10) Kodiak
(2) Kotzebue	(11) Dillingham
(3) Nome	(12) Naknek
(4) Fairbanks	(13) Juneau
(5) Bethel	(14) Sitka
(6) Palmer	(15) Wrangell
(7) Anchorage	(16) Petersburg
(8) Valdez/Cordova	(17) Ketchikan
(9) Kenai Peninsula	

Interested persons may submit proposals on any area for any function.

Proposals that include an annual or monthly flat rate for all cases in a given class and area or a per case rate are desirable.

Interested persons may obtain copies of the Request for Proposal from:
Office of Public Advocacy
900 W. 5th Avenue, Suite 525
Anchorage, AK 99501
(907) 274-1684

Fitzgerald: like what you're doing

Continued from Page 1

The Superior Court then attempted to impose on the Alaska Bar the rules they learned, which apparently had worked well in New Jersey. The court, however, found that what works in New Jersey doesn't necessarily work in Alaska. The court learned the lesson that in order for rules of court to be effective in Alaska, they must be supported by the Bar Association. Judge Fitzgerald believes that the various Bar Association committees which suggest rule revisions are very crucial to the administration of justice in Alaska.

Judge Fitzgerald was a Superior Court Judge for 13 years, serving as was the presiding judge from 1969 to 1972. In December of 1972 he was again appointed by Gov. Egan, this time to the Alaska Supreme Court, where he served until March of 1975, when he was appointed United States District Judge for the District of Alaska by President Gerald R. Ford.

Judge Fitzgerald and his wife, Karin, have four children: Dennis, Denise, Debra and Kevin. Both Kevin and Debra are attorneys; both were law clerks for Judge James Serdahely who had clerked for the Alaska Supreme Court while Judge Fitzgerald was a Justice on that court.

When Judge Fitzgerald first came to Anchorage in the early 1950s, the Anchorage Bar was much smaller than it is presently, he says. The Bar Association would meet on Saturdays at noon at a Fourth Avenue cafe which was destroyed in the earthquake of 1964. He estimated that at that time there were no more than 20 or 25 members of the Anchorage Bar Association.

Judge Fitzgerald would like to be remembered as a good judge. When asked what it takes to be a good judge

(he said in his typically modest fashion), he replied that a judge must like what he is doing. And for the majority of his time on the bench he has liked being a judge, Fitzgerald said.

When queried about what aspect of being a judge he didn't like, he recalled something which was once said by Bill Nesbett: "Judges have to walk alone." At first, Judge Fitzgerald thought that this was not so, but he said he's come to believe that to a substantial extent. Nesbett was right. Fitzgerald says he has become more isolated and restricted in what he can do over the years. He thinks that maybe the state court system is a little more relaxed than the federal system. There are things that he used to do which he does not do now because people would not think those actions would be appropriate. There are things that he would like to do or say, but he simply cannot. "Judges get into trouble when they open their mouths," says Fitzgerald.

On Sept. 20, 1988 the trial of the case of *United States v. Lewis Dischner and Carl Mathisen* began. On Thursday, April 27, 1989, the jury began its deliberations. The trial lasted over seven months. This was Judge Fitzgerald's longest trial. There were 20 volumes in the file before the first juror was even called. The judge estimated that there were 100,000 pages of documents. His only comment about the case was, "The attorneys worked hard."

Judge Fitzgerald says he cannot select from all the cases that he has tried (or been involved with) those which stand out as being more important or more interesting than the others. There are just too many cases which he finds interesting because of one aspect or another, he says. Some had very interesting personalities involved; others had interesting facts, and some — like the case involving the catastrophic aircraft crash in Bombay, India — were interesting in that he applied the law of another jurisdiction (in that case the law of India).

Judge Fitzgerald has presided in courts in other states including Oregon, Washington, California, Arizona, New Mexico and Guam. He observed that Alaska attorneys differ from the attorneys in these other states. Alaska's attorneys are younger, more independent and innovative. He noted that practice in Alaska is not a conservative practice.

Experience also has tempered Fitzgerald's judicial outlook. When he was younger, things seemed more clear-cut. He perceived the world as black or white. He has come to realize that there are many other shades or gray. As Judge Fitzgerald prepares for a slower pace he believes that he has become more sensitive to the issues that are really relevant in each case.

Convention to vote on trio of resolutions

Resolution #1

Resolution Regarding Mandatory Continuing Legal Education

WHEREAS, continuing education fosters ths goal of this body that its members provide a consistently high quality of service, by helping attorneys to keep informed of developments in the law and to advance their legal skills and knowledge, and

WHEREAS, continuing legel education may also improve the public's perception of the legal profession,

BE IT RESOLVED that the Rules of the Alaska Bar Association shall be amended to require each active member to complete a minimum of 15 houre of continuing legal education annually.

Submitted by the Juneau Bar Association

Resolution #2

WHEREAS, every person licensed to practice law in the State of Alaska is obligated to become a member of the Alaska Bar Association pursuant to the provisions of the Alaska Integrated Bar Act A.S. 08.08, and

WHEREAS, the powers of the Board of Governors are set forth in the Alaska Integrated Bar Act and the Alaska Bar Rules, and

WHEREAS, these powers are limited primarily to admissions, discipline, licensing, continuing education and defining the practice of law, and

WHEREAS, the Board of Governors is often asked to take positions and expend funds of the association on matters which are not directly related to the powers of the Board, and

WHEREAS, the present By-Laws of the association do not set forth any restrictions on the powers of the Board to take positions and expend funds on such matters,

NOW, THEREFORE, BE IT RESOLVED, that Article IV Section 1 of the Alaska Bar Association By-Laws be amended to provide as follows:

"Section 1. Duties, Responsibilities and Limitations.

The Board of Governors is the governing body of the Alaska Bar Association, and is vested with power and authority including adopting regulations and policies concerning the activities, affairs and organization of the Alaska Bar, and collecting and disbursing all monies of the organization. The Board of Governors shall not take a position on any matter nor expend funds of the association on any matter which is not directly related to and consistent with the powers of the Board as set forth in the Alaska Integrated Bar Act and the Alaska Rules of Court."

DATED this 21st day of April, 1989.

Submitted by 10 members of the Bar

Resolution #3

WHEREAS, the Young Lawyers Section of the Anchorage Bar Association is the sponsor of the Anchorage Youth Court; and

WHEREAS, the Young Lawyers Association has received a grant to begin a Youth Court Program in Anchorage; and

WHEREAS, the Anchorage Youth Court Program has received a grant from the Anchorage Bar Association for operation during the first year; and

WHEREAS, the Anchorage Youth Court is formed of a coalition of junior and senior high school students and members of the Alaska Bar Association in Anchorage; and

WHEREAS, the purpose of the Anchorage Youth Court is to give youthful, first-time offenders the option of being tried by a jury of their peers; and

WHEREAS, one of the benefits of the Anchorage Youth Court is to give students respect for the training in the law; and

WHEREAS, there are currently 100 students who have attended the Youth Court Bar course, have passed the Youth Court Bar examination and are prepared to participate in the Anchorage Youth Court; and

WHEREAS, there is a need for qualified attorneys to aid the Youth Court in training and preparing students for trials;

BE IT THEREFORE RESOLVED, that the Alaska Bar Association encourages its members to help the Anchorage Youth Court by volunteering to participate in training of Anchorage Youth Court members; and

BE IT FURTHER RESOLVED, that members of the Alaska Bar Association residing outside of Anchorage consider starting similar organizations in their own communities.

Submitted by 10 members of the Bar

Effective May 1, 1989, certain bankruptcy information regarding main case data such as debtor name, case number, trustee name, S341 meeting and discharge dates will be available through Motznik Computer Services.

This information will include cases filed on or after Jan. 1, 1986, forward. This information will be updated by Motznik on a weekly basis. For additional information or how to register for this service, contact Bob Motznik at 276-6254.

Alaska Supreme Court Decision Notes

By Ron Flansburg

BANK ENTITLED TO EVERYTHING BUT THE KITCHEN SINK

The Alaska Supreme Court Adopted The Modern Trend In Fixtures Law Embodied In Restatement (Second) Of Property Section 12.2(4) By Holding That A Tenant Is Entitled To Remove Any Permissible Annexations So Long As The Landloard And The Tenant Have Not Agreed Otherwise And So Long As The Freehold Can Be Restored To Its Former Condition. The trial court's decision preventing a tenant from removing fixtures because the fixtures were not necessary for the tenant's business was reversed on the grounds that there is no reason to require a tenant to abandon property that he has affixed to the leased premises so long as he can restore the premise to its former condition. *Interior Energy Corporation v. Alaska State Bank,* Op. No. 3424, April 14, 1989.

A DEED OF TRUST FORCLOSURE ALLOWS PUCHASER TO TERMINATE A PRIOR LEASE

Identified As A Case Of First Impression In Alaska, The Supreme Court Declared That A Deed Of Trust Foreclosure Entitles A Purchaser To Extinguish A Prior Leasehold Interest. While reaching a contrary conclusion, the Supreme Court announced that a lessee remaining in possession after the sale is a tenant by sufferance and liable for the fair rental value in lieu of the contract rent. *Interior Energy Corporation v. Alaska State Bank,* Op. No. 3424, April 14, 1989.

PLAINTIFF'S COUNSEL ALLOWED TO ATTEND MEDICAL EXAMINATION

In Another Case Of First Impression, The Supreme Court Considered A Party's Right In A Civil Action To Have His Attorney Present During An Examination By A Physician Hired By His Opponent. In a three-to-two decision, the Court aligned Alaska with those jurisdictions which allow plaintiff's counsel to attend and record, as a matter of course, court-ordered medical examinations in civil cases reasoning, in part, that there is a constitutional right to counsel in civil cases arising under the Alaska due process clause. *Svend Langfeldt-Haaland v. Saupe Interprises, Inc.,* Op. No. 3415, February, 17, 1989.

"PREVAILING PARTY" STATUS IS NOT DEPENDANT UPON AFFIRMATIVE RECOVERY

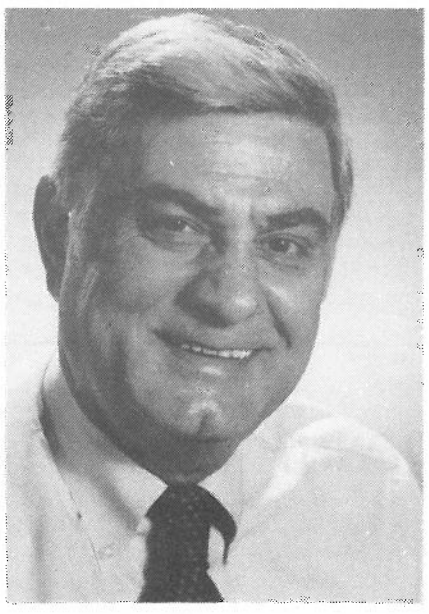
The Supreme Court Upheld A "Prevailing Party" Ruling By The Trial Court Under Civil Rule 82 Even though The Party Prevailed On Only One Out Of Four Issues Reasoning That One Who Defeats A Claim Of Great Potential Liability May Be The Prevailing Party Even though The Other Side Receives An Affirmative Recovery. *Day v. Moore,* Op. No. 3422, March 24, 1989.

Even Though A Plaintiff Injured In A Helicopter Crash Established Liability Against ERA Helicopters, Inc. (ERA) And Received A Verdict For $141,676.00, The Supreme Court Upheld The Trial Court's Determination That ERA Was The prevailing Party On The Grounds That ERA Had Defeated A Claim In ExCess Of One Million Dollars And Was Not Required To Pay Any Money Because The Verdict Was Not In Excess Of The Sum The Plaintiff Had Settled For With The Helicopter Component Manufactures. The Court pointed out that past decisions establish that "it is not an immutable rule that the party who obtains an affirmative recovering must be considered the prevailing party." *Buoy v ERA Helicopters, Inc.,* Op. No. 3423, March 31, 1989.

Ronald D. Flansburg practices with the law firm of Boyko, Breeze & Flansburg and devotes a portion of his practice to Appellate Advocacy.

CONVENTION

Pulitzer winning Kovach is part of media panel



Bill Kovach

Bill Kovach, former editor of the Pultizer-Prize-winning Atlanta Journal-Constitution and current Nieman Fellow at Harvard University, is slated to participate in the "Media and the Law" panel, Friday, June 9, and to address the Bar members at the Awards Banquet, Saturday, June 10.

Mark Schoenfield, author of "Legal Negotiations" (Shepard's/McGraw-Hill 1988) will conduct a day-long CLE on Saturday, June 10, focusing on strategies and techniques for lawyers.

Other guest speakers at the 1989 convention include "Media and the Law" panelists Judge Walter Carpenetti, Superior Court, First Judicial District, State of Alaska; Judge Mary E. Greene, Presiding Judge, Superior Court, Fourth Judicial District; James H. McComas, Attorney at Law; Annabel Lund, Reporter, Juneau Empire; and Dean Gottehrer, Special Assistant to the Commissioner of Administration, State of Alaska. Gov. Steve Cowper will address the membership at the opening luncheon on Thursday, June 8; Chief Justice Warren W. Matthews is the keynote speaker at the Friday, June 9 luncheon; and Neal Blacker, American Abritration Association, Northwest Regional Vice President will discuss "The Growing Field of Alternative Dispute Resolution" at Saturday's luncheon on June 10.

Spouse Activities

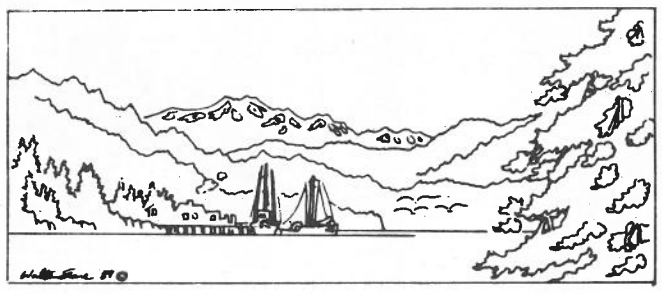
Bring a spouse or guest to Juneau! While you're busy with meetings and CLE's, your spouse/guest can tour the Governor's Mansion and Capital Building, meander through the Alaska State Museum, and go to tea at the Historic Wickersham House. These activities are FREE to all spouses/guests of Bar members attending the convention. Call 272-7469 for more information.

Alaska Bar Association Annual Meeting

The Annual Business Meeting will be held on Thursday, June 8, 1989, in Centennial Hall, Juneau from 2:30-5 p.m.

Friday, June 9 — "Media and the Law" with Bill Kovach, former editor of Atlanta Journal-Constitution; Judge Walter Carpeneti, Superior Court, First Judicial District, State of Alaska; Judge Mary E. Greene, Presiding Judge, Superior Court, Fourth Judicial District; James H. McComas, Attorney at Law; Annabel Lund, Reporter, Juneau Empire; and Dean Gottehrer, Special Assistant to the Commissioner of Administration, State of Alaska. This panel will discuss such topics as "Cameras in the Courtroom," "Opening Up of Supreme Court Deliberations," and "Public Disclosure of Judge Qualifications." (3 CLE Credits)

Saturday, June 10 — "Legal Negotiations" with Mark Schoenfield of Torshen, Schoenfield & Spreyer Ltd., Chicago—a day-long seminar focusing on techniques and strategies for successful legal negotiations. Role-playing and video feedback critique will be part of the program. (3 CLE Credits).



SCHMOOZ ON THE FRIDAY CRUISE

Great food, great music, great scenery! Board a cruise boat at Juneau Harbor, and then relax on the water while munching shrimp-filled croissants, ceviche, fruit and cheese, roast beef mini-sandwiches, and more, catered by the renowned Fiddlehead Restaurant. Listen to the sounds of "The Grateful Dads (or Honest Lawyers One Flight Up)." Tickets are $49 per person (includes cruise, food, one non-alcoholic beverage, tax and gratuity). A no-host bar will be also be available. Cruise will last about 2 - 3 hours, Friday, June 9. Call the Bar office tion at 272-7469.

1989 CONVENTION OPENING CONCERT & RECEPTION AN EVENING WITH LINDA ROSENTHAL

Linda Rosenthal, violinist, and Lisa Bergman, pianist, will present a concert at 6:30 p.m., Thursday, June 8, at Centennial Hall, followed by a reception.

This event is in honor of convention visitors from other countries and states. Tickets are available to Bar members and guests for $10 per person; non-Bar members $15. Call 272-7469 for further information.

Ten section meetings set

Annual Section Meetings will be held at the 1989 Annual Convention at Centennial Hall on Thursday, June 8, as follows:

8:30 a.m.-10:15 a.m.
- **Administrative Law**
- **Economics of Law Practice**
- **Family Law**
- **International Law**
- **Torts Law**

10:30 a.m.-12:15 p.m.
- **Alaska Native Law**
- **Criminal Defense Law**
- **Criminal Prosecution Law**
- **Employment Law**
- **Natural Resources Law**

CLE Faculty

Mark K. Schoenfield is a partner with Torshen, Schoenfield & Spreyer Ltd. in Chicago where his area of emphasis is civil litigation, corporate and business law. For more than 12 years, he has taught negotiation skills to professionals through in-house programs for corporations, law firms, accounting firms, management consulting firms, the American Bar Association and National Institute for Trial Advocacy, among others. Mr. Schoenfield was a member of the faculty at Northwestern University in the Law School and the Center for Urban Affairs and Policy Research. He has written two books and several articles on negotiation, client counseling and trial preparation for numerous publications, including *The American Journal of Trial Advocacy* and the *American Law Institute.*

Bill Kovach, former editor of The Atlanta Journal-Constitution and former Washington bureau chief of The New York Times is one of the most respected journalists in America. He is currently at Harvard University as a Nieman Fellow. Kovach, a Tennessee native, began his career as a general assignment reporter for the Press-Chronicle in Johnson City, Tenn. He later worked for The Nashville Tennessean and joined The New York Times in 1968. While at The Nashville Tennessean the case of *Kovach v. Maddux* became a footnote in First Amendment law: the Federal District Court used the First Amendment to strike down an act of the Tennessee legislature. After reporting stints in New York City, Albany, Boston, and Washington, Kovach returned to the New York Times as U.S. Deputy National Editor. He became Washington Bureau Chief of The New York Times in 1979. He left the Times in 1986 to become editor of The Atlanta Journal-Constitution. During his tenure as editor, The Atlanta Journal-Constitution established an impressive record of five Pulitzer prize nominations and one Pulitzer prize. No other newspaper has ever had more nominations in a single year.

This year's convention brochure cover art and drawings are the work of Walter Share, a member of the Alaska Bar Association who draws when he isn't busy drafting briefs.

Walter donated his artwork to the Bar Association for the 1989 Convention.

Solid Foundations

By Mary K. Hughes

On March 30, 1989, the Alaska Supreme Court amended DR 9-102 to provide:

(C) Unless an election not to participate is submitted in accordance with the procedure set forth in paragraph (D), a lawyer or law firm shall establish and maintain an interest bearing insured depository account into which must be deposited funds of clients which are nominal in amount or are expected to be held for a short period of time ...

(D) A lawyer or law firm who elects not to maintain the account described in paragraph (C) shall make such election on or before Sept. 1, 1989, on a Notice of Election form provided by the Alaska Bar Association.

The amended rule is effective July 15, 1989.

The Board of Governors of the Alaska Bar Association suggested to the supreme court the amendment in order to generate additional IOLTA (Interest On Lawyer Trust Accounts) participation. Although the voluntary IOLTA program has generated in excess of $100,000 since its inception, as of March 31, 1989, of the 1,500 attorneys eligible to participate in IOLTA, the voluntary program has only a 14 percent participation rate. In order to more fully educate Alaskan lawyers and/or business managers for Alaskan law firms with respect to IOLTA, an IOLTA briefing will be held in Juneau at the annual convention on Thursday, June 8, at 2:30 p.m., in Centennial Hall. Further, the Alaska Bar Foundation trustees will be meeting with various Juneau lawyers and law firms who are not now participating in the IOLTA program during the annual convention. A continental breakfast seminar will be held in Anchorage Tuesday, June 27, at the Hotel Captain Cook, at 8:00 a.m., and a luncheon presentation at the Tanana Valley Bar Association meeting will be held in Fairbanks on Friday, June 23, at noon, at the Regency Hotel.

The law firms and lawyers who are presently participants in the IOLTA program do not have to do anything as a result of the court's amendment.

Lawyers and law firms who are not participants must either open an IOLTA account for their trust monies or file with the Alaska Bar Association a notice of election by Sept. 1, 1989. IOLTA accounts are extremely easy to open. National Bank of Alaska, First National Bank of Anchorage, Security Pacific Bank Alaska and Key Bank of Alaska have had IOLTA trust accounting for lawyers for several years. B. M. Behrends Bank, Denali State Bank and First Bank of Ketchikan also offer IOLTA accounts. Any lawyer or law firm who is not an IOLTA participant need only check with these financial institutions to open an IOLTA account. An IOLTA trust account does not change the relationship between the lawyer and the banking institution nor is there additional bookkeeping for the lawyer.

Individualized discussions with respect to IOLTA are available by calling Deborah O'Regan, 272-7469, or Mary Hughes, 274-7522.

IOLTA OPT-OUT UPDATE

Mary Hughes on behalf of the Trustees of the Alaska Bar Foundation will provide information on the recently adopted IOLTA opt-out amendements to DR 9 102.

JUNEAU

June 8, 1989, Thursday at the Bar Convention Business Meeting: 2:30 p.m., Centennial Hall. This meeting is open to all Bar Members. There is no charge for attending the Bar Business Meeting. Law firm accounting staff are encouraged to attend the IOLTA portion of the meeting.

FAIRBANKS

June 23, 1989, Friday at the TVBA regular lunch meeting: 12:00 Noon, Regency Hotel. Please call Fleur Roberts, TVBA President, for reservations: 452-7620.

ANCHORAGE

June 27, 1989, Tuesday at a continental breakfast: 8:00 a.m., Hotel Captain Cook. Reservations required. Please call 272-7469. There is no charge for breakfast.

These 30-40 minute presentations are sponsored FREE OF CHARGE by the Alaska Bar Foundation. LAW FIRMS ARE ENCOURAGED TO SEND THEIR BUSINESS MANAGERS AND/OR OTHER ACCOUNTING STAFF WHO DEAL WITH THE FIRM'S TRUST ACCOUNTS TO THESE PRESENTATIONS.

Please call 272-7469 for more information and to make reservations for the ANCHORAGE program.

DON'T FORGET
ALASKA BAR ASSOCIATION ANNUAL CONVENTION
JUNE 8, 9 & 10
CENTENNIAL HALL
JUNEAU

Bar to consider several resolutions

Several resolutions have been submitted for consideration at the annual business meeting of the Alaska Bar Association on June 8 in Juneau. These resolutions include requiring each active member of the Bar to complete a minimum of 15 hours of CLE annually; prohibiting the Board of Governors from taking a position on any matter not consistent with the Alaska Integrated Bar Act and the Bar Rules; and supporting the Anchorage Youth Court.

Resolutions were to be submitted 45 days before the annual business meeting and signed by at least 10 active bar members or sponsored by a local bar association. Resolutions may be considered at the annual business meeting if 35 members in attendance at that meeting sign a petition requesting consideration of that resolution.

Things to do in Juneau

The Juneau Bar Association is planning a number of special programs and services in Juneau for Bar members including "Places to Stay" (a bed and breakfast program), Child Care Services, and recreational events such as a fun run/foot race, tennis tournament, golf tournament, sail boating, power boating, biking, and fishing. Please call the Bar office 272-7469 for more information.

Kovach replaces Simons

Howard Simons, former editor of the Washington Post, was originally scheduled to appear as a panelist and the banquet keynote speaker for the 1989 convention. Due to ill health, Mr. Simons has been forced to cancel his trip to Alaska. Bill Kovach, former editor of the Atlanta Journal-Constitution, will take his place on the program.

Hospitality Suite

The Anchorage Bar Association will host the 1989 Bar Convention Hospitality Suite in the Juneau Westmark Hotel, Tongass Suite. Come socialize and relax in the Tongass from noon on daily beginning Thursday, June 8.

"Grateful Dads" Receive Anonymous Challenge

Battle of the Generations to Take Place at Convention

The main act

The "Grateful Dads (or Honest Lawyers One Flight Up)" will be performing at the convention on the boat cruise scheduled for Friday, June 9. An unsigned letter was delivered recently to the Bar Office throwing down the gauntlet before the feet of these musicians. Will Av Gross, Hal Brown and Tom Koester take up the challenge? Will blood and broken strings be strewn on the deck? Don't miss this clash of the Titans!

The challenge

Tell those aging string pluckers in Juneau that they've got a big problem. "The Ungrateful Sons" are coming to town for a "battle of the bands." Tell Gross, Brown and Koester to bring body bags. They'll need'em.

BAR PEOPLE

Ann and **Fred Brown** had a baby girl, Sara Jane, on April 9.

Ann Prezyna writes that she has been promoted to the position of Associate Regional Counsel in the U.S. Environmental Protection Agency, Region 10, Seattle. She is now Chief of the Water Branch in the Office of Regional Counsel, which means she oversees water quality enforcement in Alaska, Idaho, Washington and Oregon.

Carole Baekey writes that she has moved from the University of Zululand to the University of Natal (South Africa) where she is both teaching law students and developing a legal education and assistance project for the rural Natal Province (predominately Zulu). Carole wrote in March, "news of the bitter cold you suffered was in the international news and there was no envy emanating from me. Just think, in another three months, you will have what passes for spring weather in most of the world."

Konrad Alt is now employed as Counsel to the Committee on Banking, Housing and Urban Affairs of the U.S. Senate .... **Fran Bremson**, the Circuit Executive for the U.S. Courts for the Ninth Circuit, has resigned to accept a position with the Legal & Governmental Information Services Division of Mead Data Central Company in Dayton, Ohio. Fran will be manager for Legal Data Collection .... **Dr. Lee S. Glass**, J.D., M.D., is now of counsel with Russel & Tesche. Dr. Glass is residing in Seattle.

Susan Daniels, formerly Assistant Bar Counsel for the Alaska Bar Association, is an associate with Russell & Tesche .... **Timothy Burgess** has joined the U.S. Attorney's Office in Anchorage ... **Phillip Benson** has moved to Claremont, California .... **Madelon Blum** and **James Bryan Wright** have become partners at Lynch, Crosby & Sisson.

Janet Crepps has moved to Caldwell, Idaho ... **John J. Connors**, formerly with Staley, DeLisio, et.al., is now an assistant borough attorney with the Fairbanks North Star Borough .... **Harold Curran** is Special Counsel in the Anchorage Liaison Office of the North Slope Borough .... **Julie Garfield** is now associated with a law firm in San Rafael, California .... **Thomas Flippen** is now with a law office in Osaka, Japan.

Thomas Waldock is the Vice-President of Adminisitration of Enstar Natural Gas. Co. .... **Marvin Frankel** is now living in Las Vegas, Nevada .... **Barbara Franklin** is now living in Anchorage .... **Penelope Horter** has relocated to Tucson, Arizona .... **Roger Holl** has relocated from Kenai to Anchorage .... **David Kosterlitiz** is District Counsel with the IRS in Washington, D.C. .... **Paul Lynch has moved to San Diego, California.**

Thomas Miller has moved from Fairbanks and is now employed by a law firm in Sacramento, California .... **Lisa Murkowski** Martell is now associated with Hoge & Lekisch .... **James Blair, Ron Baird, Charles Cohen, Dan Cooper, Maryanne Boreen, Herbert Ray** and **Marshall Witt** have associaited with the firm of Bradbury, Bliss & Riordan ... **Marcus Paine** is with the Public Defender Agency in Palmer.

Daniel Patrick O'Tierney has been appointed by Gov. Steve Cowper to the Alaska Public Utilities Commission as the attorney Commission member .... **Ken Norman** is in Houston, Texas .... **Ken Rosenstein** is now associated with the firm of Lynch, Crosby & Sisson .... **Chuck Ray** is associated with Tugman & Clark .... **Karen Rasmussen** has moved from Juneau to Missoula, Montana.

Jerry Ritter has moved "in house" as legal counsel for Ahtna Inc. .... **Douglas Serdahely** is now with Bogle & Gates .... **James Shine** is associated with Hughes, Thorsness, et.al. in its Juneau office .... **J. Anthony "Tony" Smith** has become a member of Davis Wright & Jones in Anchorage .... **Joseph Charter** is moving to San Francisco to open an office there of Hellen, Partnow & Condon .... **Patrick J. Simpson** has joined Perkins Coie as a partner and head of the Portland office business department .... **David L. Zwink** has announced the opening of his law office in the Krenik Building, 165 E. Parks Highway, Ste. 201, Wasilla.

Bogle & Gates expands

Bogle & Gates, a national law firm headquartered in Seattle, Wash., has announced a major expansion of its international law practice.

Jim Tune, the firm's managing partner, says Bogle & Gates recently established international consulting affiliates in Washington, D.C. and Seattle. The consulting companies, TradeNet and World Trade Link, will be led by individuals with extensive public and private sector experience in trade negotiations, international commerce and government relations.

James D. Dwyer, attorney and former executive director of the Port of Seattle, recently joined Bogle & Gates as director of the International Commercial Law Section. He will chair the two new affiliates and coordinate Bogle & Gates' international operations. According to Dwyer, Bogle & Gates' association with TradeNet and World Trade Link will enhance and broaden the firm's international presence and capabilities.

TradeNet is headed by James A. Langlois, who is also president of Pacific Rim Resources Inc., a Seattle-based management consulting firm.

According to Langlois, the new company offers a full range of international trade consulting services to domestic and foreign firms. For example, TradeNet will work with buyers and sellers to develop international or domestic distribution channels, structure international transportation or trade arrangements and provide assistance to firms dealing with U.S. Customs, the Department of Commerce or other regulatory agencies.

TradeNet will also take advantage of its extensive network of contacts in the timber, apparel, agriculture and fisheries industries by working with clients to identify investment opportunities or to implement joint ventures, mergers and acquisitions.

World Trade Link, the Washington, D.C. affiliate, will be headed by Ambassador William H. Houston III. Until October of this year, Ambassador Houston was the chief textile and apparel negotiator for the United States and a senior official in the Office of the United States Trade Representative.

World Trade Link will concentrate on advising domestic and foreign companies and associations, as well as foreign governments, on trade negotiations, import restrictions and export opportunities. Currently retained by the Seattle-based National Apparel and Textile Association, World Trade Link also provides extensive data analysis and statistical reporting in the textile and apparel field. Seattle is a leading port of entry in the United States for the Pacific Northwest's multi-billion dollar wearing apparel industry.

Bogle & Gates also recently accepted an invitation to join the Pacific Rim Advisory Council as the law firm member from the Pacific Northwest. This referral network of law firms is working together to serve clients engaged in international commercial transactions by providing the highest quality of legal services throughout the Pacific region wherever there is a need for in-country representation.

Through PRAC, Bogle & Gates will have ready access to legal and consultative resources in 11 countries and 17 major trade centers around the world, increasing the scope of international services the firm can provide to its clients.

Established in 1891, Bogle & Gates approaches its centennial as one of the most prominent law firms on the west coast. Expanding steadily in both its services and client base during recent years, this latest move demonstrates its growing international focus, as well as its awareness and appreciation of the increasing globalization of financial markets and foreign trade investments.

Bogle & Gates now has seven offices throughout three states, including Alaska, and Washington, D.C. with legal services provided by over 200 attorneys.

David Gorman has joined the Anchorage law firm of Wade & De Young where he will concentrate on representing the firm's construction and commercial clients. Gorman was admitted to the Alaska bar in 1979 and has been in private practice for the past seven years, specializing in trial and appellate work.

Gorman

Basking in the Kauai sunshine following the conclusion of the 1989 Hawaii Mid-Winter CLE "Unorthodox Trial Techniques" are (l to r) seminar presentor Joe Principotta, jury selection consultant; Audrey Levine, Duke University/Alaska Law Review Staff Editor; presentor Edgar Paul Boyko, one of Alaska's most colorful trial attorneys; Tracy Goad, Duke University/Alaska Law Review Note Editor; and Barbara Armstrong, Bar Association CLE Director. (Reposing in Mr. Principotta's right hand is one of the CLE participants, Mr. Yorick—alas, we knew him well).

Record number of candidates run for the Board of Governors in '89

A record number of candidates ran for the Board of Governors this year. Six seats were up for election, with two of the vacancies resulting from the mid-term resignations of Judges Dana Fabe and Mike Wolverton. The seats currently held by Ken Eggers, Jeff Feldman, Pat Kennedy and Mike Thompson were also up for election. In the 3rd Judicial District, the following members were elected:

Jeffrey M. Feldman, 3-year term
John M. Murtagh, 3-year term
Bruce A. Bookman, 2-year term
Alex Young, 1-year term

Other candidates, in alphabetical order, were:

Lynn M. Allingham, William G. Azar, Homer L. Burrell, Dan K. Coffey, Robert E. Congdon, Richard H. Foley Jr., Peter W. Giannini, Lewis F. Gordon, Ronald A. Offret, Susan Orlansky, Nancy Shaw, Randall Simpson, John B. Thorsness, Diane F. Vallentine, Phillip Paul Weidner and Larry D. Wood.

1st Judicial District
Michael Thompson (elected)
Sarah J. Felix

At-Large Representative
Elizabeth "Pat" Kennedy (elected)
Sen Kwang Tan

In other advisory polls, the candidates were as follows (listed with the top candidate first and then in alphabetical order):

Alaska Legal Services Corporation, 1st Judicial District: Barbara J. Blasco (top candidate), Dennis L. McCarty, Arthur H. Peterson, Janine Reep and Richard Whittaker. 3rd Judicial District—Regular: David S. Case (top candidate), Robert K. Stewart Jr. 3rd Judicial District—Alternate: Timothy E. Troll (top candidate), Mary Kancewick.

9th Circuit Judicial Conference, Millard F. Ingraham (top candidate), James R. Blair, William D. Cook, Parry Grover, Daniel W. Hickey and Phillip Paul Weidner.

Success of liability protection society depends on its support

The ultimate success of Attorneys Liability Protection Society (ALPS) is directly related to the support it receives from the reinsurance community. After recently returning from London, Robert W. Minto Jr., president of ALPS, reported that ALPS reinsurers were "delighted" with its progress to date and had given it a vote of confidence by renewing their contracts with ALPS.

"Our reception from all of our reinsurers was superb! Not only were they willing to continue their contracts, but offered some additional enhancements to us which can only further improve our bottom line and make us more competitive," said Minto. "As a result of a new facultative reinsurance compact, ALPS will also be able to increase the limits it offers potential insureds from the existing $5 million limit to $10 million. This means we are one of only three providers in the U.S. that can offer up to $10 million limits, in house."

ALPS currently retains $100,000 of each loss — with any loss in excess of $100,000 passed on to ALPS' various reinsurers. This assures that any one loss will not devastate ALPS' financial condition, allowing ALPS to insure both more firms and offer higher larger limits.

In commenting on the future of ALPS, Minto said, "I feel we are over the hump now. With the first year of operation under our belt, a good first year and support from our reinsurers, ALPS will remain a force in the legal malpractice field for the long pull. This, coupled with our apparent ability to make the commercial carriers more competitive, means we are off to a great start."

Attorneys Liability Protection Society is a risk retention group sponsored by the Bar Associations of Alaska, Delaware, Idaho, Kansas, Montana, Nevada, North Dakota, South Dakota, West Virginia and Wyoming. It offers limits up to $10 million on a Claims Made form of policy with a wide variety of deductibles available. Attorneys who are interested in more information concerning ALPS should phone its toll free number at 1-800-FOR-ALPS.

BAR POLL TALLY SHEET
Third Judicial District, Superior Court (Anchorage)

Candidate	Professional Competence	Integrity	Fairness	Temperament	Suitable Experience	Overall Performance
John E. Reese	Good	Good	Good	Good	Good	Good
Glen C. Anderson	High Acceptable	Good	Good	Good	High Acceptable	High Acceptable
David Mannheimer	Good	Good	High Acceptable	High Acceptable	High Acceptable	High Acceptable
David C. Stewart	High Acceptable	Good	High Acceptable	High Acceptable	High Acceptable	High Acceptable
Nelson G. Page	High Acceptable	High Acceptable	High Acceptable	High Acceptable	High Acceptable	High Acceptable

Other applying: Terry C. Aglietti. Jacob H. Allmaras, Don C. Bauermeister, Dan E. Dennis, William J. Donohue, Phillip J. Eide. William H. Fuld. Benjamin O. Walters Jr., Larry D. Wood

BAR POLL TALLY SHEET
First Judicial District, Superior Court (Juneau)

Candidate	Professional Competence	Integrity	Fairness	Temperament	Suitable Experience	Overall Performance
Margaret W. Berck	High acceptable	Good	High acceptable	High acceptable	High acceptable	High acceptable
Peter B. Froehlich	High acceptable	Good	High acceptable	High acceptable	Acceptable	High acceptable
David T. Walker	High acceptable	Good	High acceptable	High acceptable	Acceptable	High acceptable

Other applying: Monte L. Brice, Patrick W. Conheady. David A. Ingram, Stephen J.Pearson.

The tabulation of survey scores from members of the Alaska Bar Association evaluating judicial candidates for the Anchorage Superior and Juneau District Court positions was released April 27 by the Alaska Judicial Council. Twenty-one separate candidates applied for the two judicial positions.

Candidates were rated on professional competence, integrity, fairness, judicial temperament, and suitability of the candidate's for the position. Candidate evaluations are summarized in seven ranges: Excellent (4.5-5.0), Good (4.0-4.49), High Acceptable (3.5-3.99), Acceptable (3.0-3.49), Below Acceptable (2.5-2.99), Deficient (2.0-2.49), and Poor (1.0-1.99). Copies of the surveys are available, upon request, from the Judicial Council.

The following is a summary of the highest placements from the survey, together with other candidates listed alphabetically. Highest (third judicial district): John E. Reese, Glen C. Anderson, David Mannheimer; David C. Stewart; (first judicial district) Margaret W. Berck, Peter B. Froehlich and David T. Walker.

Others applying: Terry C. Aglietti, Jacob H. Allmaras, Don C. Bauermeister, Dan E. Dennis, William J. Donohue, Phillip J. Eide, William H. Fuld, Benjamin O. Walters, Larry D. Wood, Monte L. Brice, Patrick W. Conhead, David A. Ingram, Stephen J. Pearson.

The Judicial Council was to meet in Anchorage May 8 and in Juneau on May 9, 1989 to interview the candidates. Following the interviews, the Council will nominate two or more persons for each vacancy to the governor, who will then have 45 days to make his appointments.

Juneau!

NOTICE REGARDING DELINQUENT FINES

All persons who have been convicted of criminal and minor offenses in the State of Alaska and whose fines are delinquent must pay the fines to the court within 15 days from the last date listed below. If you do not have money to pay the fine at this time, you may contact the court and request an extension of time to pay the fine. If you fail to pay the fine or contact the court regarding this matter, your account will be referred to the Attorney General's Office for collection or a bench warrant will be issued for your arrest. Payment of fines and requests for extension of time to pay a fine must be made directly to the court which imposed the fine. All checks and money orders must be made payable to the "State of Alaska" and should include the court's case number, if known.

May 16, 1989
Dates of Publication

Arthur H. Snowden, II
Administrative Director
Alaska Court System

THE MOVIE MOUTHPIECE

Edward Reasor

"Dead Calm" the Warner Bros. release that terrorized half of Anchorage during the April showing, is a suspense thriller — a rather terrifying story of a young couple recuperating from a personal tragedy (a devastating automobile crash that takes the life of the young couple's son and almost kills the mother as well).

To recuperate from this personal tragedy, father and mother decide that a private cruise on their own yacht would be just the ticket, only it is strangely interrupted violently by the appearance of a mysterious lone survivor of a ship whose entire crew has perished.

The production of "Dead Calm" would make a movie in and of itself. "Dead Calm" is based upon a novel written in 1963 by Charles Williams. At that time the flamboyant genius and master movie maker Orson Welles spotted the novel as a first rate subject matter for a motion picture. He hired a bright young attorney and they purchased the film rights for a song. Welles wrote the screenplay, himself, remaining quite faithful to the book.

Welles then began production of what he called "The Deep" in 1968 off Yugoslavia's Dalmatian coast. Welles had a hell of a time raising the money to finish the production (this unfortunately has been the history of Orson Welles' move making career). He was a genius all right, but banks just didn't think that his movies would make money. Bankers, unfortunately, are not interested in works of art but in interest and they wanted their money back at a healthy return.

Welles struggled along making the movie starring his good friend Laurence Harvey for about two years. Welles both acted in and directed the film, and in between he begged money from various bankers. Unfortunately, the star that could have carried the movie from the standpoint of audience identification (Laurence Harvey) died in 1973.

I am really not sure what has happened with the Welles' film in progress, but my friends in Hollywood have told me that he did in fact finish the film and that it is locked in his vault and now belongs to his estate. I hope so, I would like someday to see Welles' version and compare it to the modern Warner Bros. production directed by Phillip Noyce now called "Dead Calm."

Somewhere along the line another bright young lawyer representing Welles' estate decided that since Welles hadn't released the film, the movie rights could still be sold. So that's what happened. The condition of the sale was that no one read Welles' screenplay, or viewed his finished or unfinished movie (or whatever remains in the vault) and that they start from scratch. That's the film that Warner Bros. has released, with a new screenplay by Terry Hayes, who also shared duties as co-producer.

Sam Neill plays veteran sailor John Ingram who with his beautiful wife Rae (Nicole Kidman) sails the ocean in an attempt to soothe the memory of the rainy disastrous night that cost the life of their son. The seagoing hitchiker who was first seen as an occupant of a dinghy and whose character name in the movie is Hughie Warriner is played by a relatively unknown Chicago born actor, Billy Zane (as I have said, the film that Welles made is locked in the vault. No one has seen it. My guess, however, would be that this is the part Welles played in his finished production).

What you see in the modern version "Dead Calm" is John and Rae spotting a dinghy being rowed away from a schooner that is sinking. Hughie Warriner's story is that all of the shipmates have died of food poisoning and he is the only survivor. John Ingram rows out to the schooner to take a closser look and as he heads back finds that his own yacht is at full sail with his wife on board screaming as it heads in the opposite direction.

Sam Neill does an excellent job of portraying veteran world sailor John Ingram. In the novel Ingram was a career Royal Australian officer. Actor Neill delivers a credible performance, especially in light of the fact that the gaffers of the crew tell me that Neill was seasick every day of filming.

The Ingram's sailboat in real life is an 80-foot blue-water racer. All of the filming of "Dead Calm" — from scratch to finish — was filmed over a 14-week period and largely in Whitsunday Passage, an ocean area northeast of Sydney between the Great Barrier Reef and the mainland of Australia. The advantage, of course, was that waters in the Great Barrier Reef remain relatively calm for days on end and that's exactly what was needed for a film of this magnitude.

My hat is off to cinematographer Dean Semler. Almost all of you have seen some of Semler's movies. He was largely responsible for "The Road Warrior" and "Mad Max Beyond Thunderdome." One of the brilliant things he did in the modern "Dead Calm" was to attach a camera and

Nicole Kidman and Sam Neill (above) play the heroine and hero of the movie "Dead Calm." Playing the nasty is Billy Zane.

camera operator far out over the water on pulleys and cables called halyards. That's why sometimes you feel like a seagull following the vessel.

The music composer of the modern "Dead Calm" is, of all things, a 33-year-old rock-musician, Graeme Revell. Revell's main background is in the London area and he has made such weird albums as insects making sounds through the use of a synthesizer. All of you good Catholic boys will remember your childhood when you listen to the closing music in the rite-of-passage sequence where wife Rae achieves her strength. What you are listening to is a beautiful soprano singing Latin lyrics as a symbol of growing strength.

Well, if your appetite is now whetted, I suggest that you look for the following things that I spotted in the modern "Dead Calm:"

• The tragic death of the young son of the recovering couple as he sails through the windshield because he removed his seatbelt just before an accident.

• The audiences' first view of a dinghy pulling away from the sinking schooner photographed almost in a mist giving the appearance of a mysterious sea hitchiker.

• The contrasting shots of the two vessels and thus the contrast of the lives of the two parties. Water filling up the sinking schooner, then crosscut to the bright clean dry yacht well kept by the grieving couple.

• An extreme long shot of the schooner as it remains motionless in the water, the husband laying wounded in the sea hitchiker's dinghy and his own yacht sailing away in the opposite direction with an unconscious wife.

• The barely detectable slight smile of hope and the facial close-up expression of confidence as the husband begins to repair the sinking schooner and to sail after his own yacht and his kidnapped wife.

• The first sex scene where the unwilling but faking wife makes love to her kidnapper in an effort to slow the yacht down for eventual rescue by her husband.

• The contrasting view of the forward movement of the yacht now under sail (not diesel) as the control of her vessel is once again gained by the wife as she now searches the ocean for her husband.

• The red sunset just behind the yacht as the wife spots the schooner Ingram has set on fire as a signal, and gently turns the yacht in that direction for hopeful rescue.

• The reaching hands from the fast sailing yacht as Rae pulls her dehydrated husband aboard the sailboat. Then, the very close shot of the reunion of two lovers, a husband and wife united after a second tragedy, ready to continue life.

Rules and bylaw amendments

1. Admission without Examination Rules

The Board of Governors is proposing an amendment to the Bar Rules which would tie the reciprocity provision into the jurisdiction which the applicant took the bar exam, rather than the jurisdiction(s) in which the applicant engaged in the active practice of law. Bar Rule 2, section 2 sets forth the requirements for applicants to be admitted to the Alaska Bar Association without examination. The amendments would be as follows:

Bar Rule 2, Section 2(a)(1): has passed a written examination required by another reciprocal state, territory, or the District of Columbia for admission to the active practice of law, and

(2) has engaged in the active practice of law in one or more [reciprocal] states, territories or the District of Columbia for five of the seven years immediately preceding the date of his or her initial application.

2. Deadline to Transfer to Inactive Status

The Board of Governors is proposing to amend the Bylaws of the Alaska Bar Association to require members to make the election to go on inactive status by Jan. 1 of the applicable year in which they want to be inactive, rather than the current deadline of Feb. 1. The relevant section of the bylaws would be modified as follows:

Article II, Section 2(b): Member Transfer Requests. Requests from members to transfer from active to inactive or retired status may be granted if submitted to the Executive Director no later than *January* [February] 1 of the applicable year.

3. Allowing Executive Director to Waive Bar Application Deadline for Good Cause

The Board of Governors is proposing a bar rule amendment which would allow the Executive Director the discretion to accept bar applications after the deadline. The change to the bar rules would be as follows:

Bar Rule 3, Section 3: An application shall be filed not later than May 1 for the July bar examination and not later than Dec. 1 for the February bar examination. In the event that an application is filed late, an additional late filing fee of $25 shall be paid if filed not later than 14 days after the last day for filing a timely application, and a late filing fee of $100 shall be paid if filed thereafter; provided, however, no application shall be accepted for late filing unless such application is filed at the office of the Alaska Bar Association not later than June 15 for the July bar examination and January 15 for the February bar examination. *The Executive Director may, for good cause, accept applications for late filing after June 15 and Jan. 15 deadlines. A total late filing fee of $125 shall be paid for applications accepted after June 15 and Jan. 14.* (An untimely application shall be considered an application for the next following examination unless withdrawn by the applicant.

4. Proposed Amendments to Bar Rules Concerning time Period to Probation

The Board of Governors is proposing rule changes to eliminate the time limits for probation so that the Board could make time period recommendations appropriate to the case and the court would have the discretion to set the initial period of probation and to direct extensions justified by the circumstances of the case. Bar Rules 16 and 28 would be amended as follows:

Bar Rule 16: (a) **Discipline Imposed by the Court or Board.** A finding of misconduct by the Court or Board will be grounds for

...

(3) Probation imposed by the Court [for a period not to exceed two years]; or

...

Bar Rule 28: **(e) Probation.** Probation may be imposed in accordance with Rule 16(a)(3) only in those cases where there is little likelihood that the attorney on probation will harm his clients or the public during the period of probation and where the conditions of probation can be adequately supervised. Probation may be renewed by the Court for an additional period [, not to exceed two years,] if the Board so recommends and the Court concurs in the recommendation. The Board's recommendation for renewal of probation will be submitted to the Court not more than six months, nor less than 60 days prior to the expiration of the original probation period. The attorney on probation will be advised of the recommendation and be given an opportunity to be heard by the Court. The conditions of probation will be specified in writing.

Corollaries for having a successful practice in the Bush (clip and save)

By Dan Branch

The Alaska Bar Association once gave each successful bar applicant a copy of "How to Start Your Own Law Practice." Written by some guy on the east coast, the book contains the basic truths of private practice.

My fellow Alaska Legal Services workers gave me a copy of the book, along with a gold-colored honey bucket, when I retired from the Bethel Office. A paper clip marked the section of the book entitled, "get your money up front." That's how I learned the first basic truth of private practice.

Unlike most legal rules, the first basic truth applies equally in the Bush and the city. Of course, as I learned after a few years on my own in Bethel, there are come corollaries to the rule that only apply in the boonies.

Bush Corollary Number One: Don't agree to barter for services. One of my fellow Bethel Bar members learned this one hot August day. He had just gotten off the phone with one of his slow paying clients. "My family has to eat, you know," he told the tight-fisted man.

"I never thought of it that way," the client said, "I'll be right over to take care of my bill." True to his word, the client appeared shortly thereafter pushing a wheel barrow. Blow flies were buzzing happily around the dozen silver salmon in the barrow. "Here ya go," he said. "At 75 cents a pound, this should pay off my bill. I'll pick up the wheel barrow tomorrow."

Bush Corollary Number Two: Don't judge a book by its cover. The people living in towns like Bethel are usually very independent. They don't put much stock in appearance and care little of what people think of their Levi jeans or dented trucks. The fisherman from an outlying village that comes into your office with a stained feed cap in his hand will pay his bills promptly. It's the guy with the crease in his chinos and a smile in his eye that will stiff you.

Bush Corollary Number Three: Love those $100 bills. Checking accounts were relatively new things in Bethel when I hung out my shingle. People used banks to hold their money for awhile. When they wanted to buy something they would withdraw as many $100 bills as needed to fill their needs.

A lot of folks just skip the banks altogether, choosing to carry all their money around with them. During billing week, I would spend a lot of time holding out my hand to receive one century note after another from clients paying off their bills. Some slapped the bills vigorously on to my palm while others reverently stacked them on the secretary's desk. At the end of the day, I'd feel like a bootlegger standing in the bank line, wallet bulging with "C" notes.

Bush Corollary Number Four: It's not really your money. It costs a lot to do business in the Bush. It always seemed like most of the money went to secretaries, rent, and gas for the truck. The rest went for income tax prepayment. I never put receipts into my personal checking account for fear of being swept by cabin fever onto a mid-winter jet to Tonga financed by the IRS.

"How to Start Your Own Law Practice" contained other basic truths. Most of them proved out in my private practice. The author did miss some important points. He fails to adequately cover ways of insuring that you will be able to take vacations.

In small towns like Bethel, all the law firms have some involvement in each court case. This means that one lawyer's vacation causes a huge reduction in court busines and grumpy judges. The other lawyers usually sign the stacks of stipulations presented to them by would-be vacationers. They understood the second basic truth of private practice: what goes around, comes around.

OIL SPILL

Spill draws attorneys seeking clients

BY STEPEN J. VAN GOOR

In some respects, it seems the second most widely reported story following the Exxon Valdez oil spill on March 24 has been the influx of attorneys to Prince William Sound communities in search of clients.

The Board of Governors met in an emergency teleconference meeting on March 31, 1989 to discuss a report that attorneys had been soliciting clients in the area. The Board felt that there wasn't enough reliable information at that point to take action but indicated that the situation should be monitored.

The whole area of attorney advertising and solicitation has undergone considerable change since 1977 when the U.S. Supreme Court issued *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). With that watershed case, came freedom for attorneys to advertise and, to some traditionalists, the freedom to lower the public's perception of attorneys and the practice of law.

Bates and the cases which have followed have raised consititutional questions concerning some of the advertising provisions in Disciplinary Rule 2 of the Alaska Code of Professional Responsibility. Fortunately, those problems are directly addressed in the proposed Model Rules of Professional Conduct recently approved by the Board for publication and comment by the membership before submittal for final review by the Supreme Court.

In general, the proposed Model Rules prohibit attorney advertising which is false or misleading or which states or implies that the attorney is a "specialist" except that a lawyer admitted as a patent attorney may indicate that fact. Alaska currently has no procedure for accrediting or recognizing specialities in the law. These prohibitions are bar counsel's primary concerns when advertising questions arise during this interim period.

Attorney advertising can and does take many forms: phone books, newspapers, magazines, billboards, firm announcements, radio, television and so forth. With the U.S. Supreme Court's 1988 decision in *Shapero v. Kentucky Bar Association*, 108 S. Ct. 1916 (1988), an attorney may also send letters to potential clients including those whom the attorney knows or believes are in need of legal services. Of course, as mentioned earlier, these communications must not be false or misleading or indicate that the attorney is a specialist. Further, the proposed Model Rules require the attorney to maintain records of this type and all other types of attorney advertising.

Solicitation

The U.S. Supreme Court's decision which allowed so called "targeted" letters subject to reasonable regulation was perhaps the most significant development in attorney advertising in recent years. Prior to the court's decision, "targeted" letters were a form of solicitation prohibited by Disciplinary Rule 2-104. In ruling on this type of communication, however, the court indicated that there was still a legitimate interest in regulating *in-person* and *telephone* solicitation by attorneys.

Thus, in person and telephone solicitation of prospective clients is still prohibited by DR 2-104. The proposed Model Rules also prohibit in person and telephone solicitation of a prospective client with whom the attorney has no family or professional relationship that the lawyer reasonably believes would give rise to an expectation that the lawyer will recommend appropriate or necessary legal action.

Enforcement

In general, complaints that an attorney has unethically solicited a case are comparatively rare. This is probably due to the fact that a client who is happy with the result which the attorney has obtained is unlikely to complain afterwards about the way the attorney got the case. It is equally unlikely that the opposing party will learn of the solicitation unless, for some reason, this fact is disclosed by the attorney or the client. However, solicitation complaints provable by clear and convincing evidence will subject an attorney to professional discipline under either the current or proposed rules.

Bar counsel and members of the Ethics Committee are available to informally answer practitioner's questions concerning what would be acceptable as advertising and what would be prohibited as solicitation. Complaints about a lawyer's conduct in this area should be directed to bar counsel at the Bar Association's offices.

• Belli: 'Alaska is one of my favorite places'

Continued from Page 1

Soon after the spill, which contributed more than 10 million gallons of unrefined crude to the water, shores and wildlife of Prince William Sound, Belli flew over the impacted area to get a grip of what damage it actually caused. He wasn't pleased. In fact, the plight of the otters and seabirds inflamed his sensibilities.

"I flew over the territory and saw these otters covered with oil and I was shocked," he said. "It was a frightful, frightful thing."

Belli and the Alaska firms he's teamed up with are the most visible among the cadres of lawyers on the Exxon accident.

Given an historical time warp, Belli says he may have chosen a career path somewhat different than the one that's earned him his distinction. He's always said that given the right set of circumstances, he would've moved his practice to Alaska during those bawdy territorial days, established himself and later run for the senate ("and stayed there").

Then, he said, Exxon would certainly have a set of teeth on their tail.

A few days prior to the spill, Belli said he just happened to have been practicing one of his favorite heaven-watching pastimes—looking at the night sky for wisps of the Aurora Borealis. He said the state is one of his personally favorite places to visit and has been for years (Belli also has the distinction of winning the highest claims award ever given in a case when the state was still a territory, he noted).

Soon after Capt. Joeseph J. Hazelwood made his celebrated wrong turn in the $125 million Exxon Valdez, Belli's long-time friend Ed Reasor gave him a call. Reasor, an Anchorage attorney, wanted to know if the king of torts would assist him on the case.

Belli, who has his headquarters in San Francisco, said yes.

Some grumbling on a local scale targeted the Bay Area attorney as somewhat of an ambulance-chaser ready to hop on the big band wagon of Exxon-blasters, more interested in the national hype and resulting publicity than for work (and early in the spill Belli was quoted as predicting damage awards that would hit $1 billion).

Belli said that's not true.

"I wouldn t be up there if Ed hadn't called," he said in early May. "We get 50 new cases a day in our offices."

He said another one just isn't that necessary — about like a new hole in the head.

The firm of Belli, Belli, Monzione, Fabbro, & Zakaria has associated with Smith, Coe & Patterson as well as Reasor on the case. So far, their list of clients on this particular case has expanded to more than 1,500 plaintiffs. Those being represented hail primarily from the fishing industry. The case is just one of two dozen 20 substantial lawsuits recently filed against Exxon.

The plan of action, says Belli attorney Randall Scarlett follows a unique procedure. The strategy is to obtain immediate relief for those the firm is representing. The best route to obtain this, Scarlett maintains, is through invoking a worst-case reparations fund established back in the early 1970s by Congress when it authorized the trans-Alaska pipeline.

Belli said it's never been used. From

Continued on Page 14

14 Outside attorneys are in Alaska to work on oil spill actions

Melvin Belli and his law firm are not the only Outside lawyers who are participating in the case of the *Exxon Valdez.*

As of mid-May, 14 attorneys had filed with the Alaska Bar Association under Alaska Civil Rule 81, which allows out-of-state attorneys to practice in Alaska in association with a member of the Alaska Bar. They will assist in the representation of clients in 10 individual civil cases, said the Bar.

Bar Counsel Stephen Van Goor said it is "fairly common" in large civil cases for Alaska to see appearances from attorneys outside our borders. Malpractice, large construction cases, corporate disputes and aviation accident cases are common areas of litigation and legal counsel where this occurs, said VanGoor.

"This is not an extraordinary situation," said VanGoor. "What is unique about the Exxon oil spill, though, is the number of large (business) corporations involved, and the number of complex issues involved."

Out-of-state attorneys are required to provide a certificate of good standing in their jurisdictions (from their state bar or court) and pay a modest $100 fee under the Rule 81 procedure.

VanGoor said the Bar expects additional Rule 81 appearances in coming months.

Know your federal spill laws

Environmental contamination nat'l problem

By Kent E. Hansen
And Adam Babich

Contamination of the environment with toxic, carcinogenic, mutagenic and teratogenic substances is a nationwide problem. Relatively few contaminated sites, such as Love Canal, the Rocky Mountain Arsenal and Times Beach, have received national publicity, but practically every community must deal with seepage from landfills, leaking storage tanks, midnight dumping, and perhaps, an overturned tank truck or railroad car.

At stake are human health, the quality of life, and economic vitality. Local governments cannot afford to rely solely on the state or the federal government to solve local problems. Whenever hazardous materials are involved, public expectations — and emotions — run high. A community's highest priority may be viewed as a minor issue by state and federal agencies. When those agencies arrive on the scene, local concerns may, and often do, take a back seat.

Furthermore, the evidence is overwhelming that attempts of the U.S. Environmental Protection Agency (EPA) to address problems caused by toxic and cancer-causing pollution are hopelessly bogged down in bureaucratic red tape. [1] If the public and environment are to be protected, such protection must be spearheaded at the local level.

The Comprehensive Environmental Response, Compensation, and Liability Law [2] (CERCLA) allows local governments — municipalities, counties and special districts — to move directly against polluters to prevent environmental contamination and obtain court-ordered cleanups.

Additionally, CERCLA authorizes local governments to recover damages for injuries to natural resources and to obtain reimbursement for expenses incurred in responding to actual or threatened contamination, including attorney and expert consultant fees. Problems which trigger local governments' authority to act under CERCLA include actual or threatened groundwater or surface water contamination, releases of chemical vapors into the air, and contamination of soils with metals, chemicals or radioactive substances.

Despite some early confusion, it is now clear that such authority is not limited to sites identified by EPA on the National Priorities List and does not require prior approval by EPA or state governments.

Remedies under CERCLA tend to be underutilized, perhaps because environmental litigation has become such an extremely specialized field. CERCLA litigation overlaps and requires familiarity with all of the major federal and state environmental laws. The combined effect of complex statutes, lengthy administrative regulations, multiple defendants and extensive discovery typically involved in environmental enforcement cases may cause local officials to question whether they have the resources and expertise to tackle yet another difficult problem.

However, because CERCLA authorizes recovery of costs, including attorney and expert witness fees, local governments have the option of employing specialized outside counsel and expert consultants to supplement their staff attorneys and technical experts. This article is intended to help local governments recognize and take advantage of opportunities available under CERCLA. [3]

Local Governments as Plaintiffs

To date, few local governments have used CERCLA to its full potential to obtain environmental cleanups and recovery of expenses and damages. Rather, local governments generally play a secondary role to EPA and the states. The result is a process which often is unresponsive to legitimate local concerns.

Indeed, in some cases, EPA has even attempted to hold local governments responsible for cleanup costs. Fortunately, the courts have now recognized that local governments' enforcement authority under CERCLA is identical to that of states. [4] The practical effect of these rulings is to enable local governments to act on an equal footing with EPA and the states. Local governments have independent authority to recover damages for injuries to natural resources, obtain cleanup orders, and recover investigation, litigation and other expenses.

Thus, local governments may take the lead in addressing environmental contamination to assure prompt protection of their citizens and the environment and to minimize the possibility of cleanup actions which ignore community priorities and values.

Cost Recovery

CERCLA allows any local government which has acted in response to an actual or threatened release of a hazardous substance to recover all expenses incurred in a manner not inconsistent with the "National Contingency Plan" — EPA regulations establishing procedural methods and substantive criteria for developing cleanup plans. [5]

Recoverable expenses include the costs (e.g., employee salaries, related overhead and consultant fees) of activities such as: emergency responses by local fire departments; installation of security fencing; investigation of releases or threatened releases of hazardous substances; environmental sampling and monitoring; provision of alternative water supplies; temporary evacuation and housing of threatened individuals; health monitoring; and storage, confinement, neutralization, destruction or treatment of hazardous substances. [6]

Attorney fees and other enforcement costs are also recoverable. [7] Moreover, because local governments act as "states" when litigating under CERCLA, it is the defendants' urden to prove that recovery of expenses should not be awarded. [8]

In an action to recover expenses, CERCLA provides for issuance of a declaratory judgment which is binding in subsequent actions. [9] This provision allows a local government to obtain a ludicial declaration that the cleanup plan it has selected conforms to CERCLA and that the defendants are liable for the costs of implementing, or overseeing implementation of, the plan. [10]

Thereafter, expenses may be recovered periodically as they are incurred. By providing for prompt reimbursement of essentially all expenses related to enforcement efforts, Congress ensured that environmental enforcement would be affordable to local governments.

Cleanup Orders

As originally enacted, CERCLA did not provide for court-ordered cleanups in actions brought by state and local governments. [11] Following the 1986 amendnents to the statute, however, CERCLA authorizes local governments "to enforce" any federal or state standard, requirement, criteria or limitation applicable to CERCLA cleanups. [12]

This provision grants the courts authority to award injunctive relief. [13] Local governments may use actions for cost recovery and declaratory judgments to establish standards and criteria applicable to specific sites. When site conditions fail to meet those standards or criteria, courts may use their injunctive authority to order responsible parties to take remedial action under governmental oversight.

CERCLA authorizes local governments to recover damages for injuries to natural resources.

Congress mandated that damage recoveries be used to "restore, replace, or acquire the equivalent of" injured natural resources."

Natural Resource Damages

Because they fall within CERCLA's definition of "states," local governments may recover damages for injuries to resources "belonging to, managed by, controlled by, or appertaining to" each such government. [14] Additionally, local governments may recover for injuries to the public's interests in all natural resources within their borders, including those owned privately. [15] Thus, CERCLA recognizes the public's interest in the integrity of the environment as a whole, rather than limiting recoveries to the market value of publicly owned resources.

Determining the extent of injury to natural resources and quantifying the resulting damages can be an expensive process; however, CERCLA authorizes recovery of the reasonable costs of a damage assessment, including interest, from defendants. [16] CERCLA prescribes no particular measure of damages but specifies that damages are not limited to the costs of restoring or replacing injured resources (traditional measures of damages in property damage cases). [17] Economists have identified four categories of benefits derived from natural resources for which damages may be assessed:

- User values are the benefits individuals receive from direct use of a resource, including consumptive uses, such as fishing and hunting, and nonconsumptive uses, such as swimming and hiking;
- Option values are derived from individuals' desires to preserve the option to use a natural resource, even if they are not currently using it;
- Bequest values are derived from the wish to preserve resources for the benefit of future generations; and,
- Existence values are derived from the satisfaction of simply knowing that a resource exists, even if no use occurs. [18]

The Department of the Interior has promulgated complicated regulations for calculating natural resource damages. [19] If a damage assessment is performed according to the regulations, that assessment is presumed accurate, unless the presumption of accuracy is rebutted by the defendants at trial. [20] Use of the regulations is optional, however.

Because the regulations suffer from serious limitations which would undervalue damages in many cases, they should be analyzed carefully and applied on a case-by-case basis. It often may be preferable to measure damages by examining the total diminishment of benefits derived from each injured natural resource.

Congress mandated that damage recoveries be used "to restore, replace, or acquire the equivalent of" injured natural resources. [21] This requirement is most easily implemented by recovery and disbursement of damages on a local level.

Broad Application

CERCLA provides authority for local governments to address both actual and threatened "releases" of hazardous substances" from "facilities." [22] "Release" is defined broadly as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance, or pollutant or contaminant). [23] "Hazardous substances" include heavy metals, radioactive materials, industrial chemicals, PCBs, and other toxic, carcinogenic, mutagenic and teratogenic substances.

The term is *not* limited to wastes and is defined to incorporate most substances regulated under the major federal environmental statutes, including the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act. [24]

Additionally, EPA may designate other substances as "hazardous" under CERCLA. [25] Substances may be subject to CERCLA even if they are exempt from regulation under other statutes. [26] For example, mine drainage, fly ash, and coal tar have been found to contain hazardous substances" within the meaning of the statute.

The term "facility," is defined to encompass "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." The term includes, *inter alia*, buildings, structures, pipes, wells, pits and lagoons, but not consumer products in consumer use. [27]

CERCLA's broad definitions of "release," "hazardous substance," and "facility," in conjunction with local governmental authorities under other federal environmental statutes, allow local governments to take the lead in addressing essentially any problem involving environmental contamination.

Statutes of Limitations and Notices

Statutory limitations on CERCLA lawsuits to recover expenses differ depending on whether the expenses were incurred during a "remedial action" — an action designed, after substantial study, to provide permanent solutions to problems posed by environmental contamination—or a "removal action" — an action taken as quickly as practical to address immediate risks to the public or the environment.

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OIL SPILL

• Melvin Belli

Continued from Page 1

this fund, $100,000 should be available to those impacted by damage to the ecology and to their economic livelihood through the spillage of oil. The fund's initial purpose was to provide some sort of interim relief.

"The approach is to obtain some interim relief without releasing Exxon," Scarlett said.

That's just one avenue. The other is through litigation.

Scarlett says his firm has diversity of talent and depth of resources for the class action case. For the fight against Exxon, the group of lawyers is hauling out the big guns.

Negligence on the part of Exxon may be the key approach. Belli says there's definitely guilt involved. There's enough to spread around, even to the rest of the country—due to its citizens dependence on oil and constant demand for cheap sources. But, Belli says the point is that the greater guilt (substantially more) lies with the company responsible for plowing a huge tanker on a relatively small reef off to the side of a channel 10 miles across.

(The latest joke circulating through the coastal communities defines the number of people it takes to captain an Exxon tanker. The answer is one and one-fifth).

What's really wrong is that Exxon was using the philosophy of "it really happen to me," Belli said. "It can happen and it did happen."

The solution to these potential catastrophes isn't simple. It's political, based on economics and definitely more intricately tied to life as Alaskans know it. But Belli feels that the aggressive search for new reserves and the pursuit of discovery at all cost should be curtailed until such a time as the oil companies can say the Valdez spill could ever happen again.

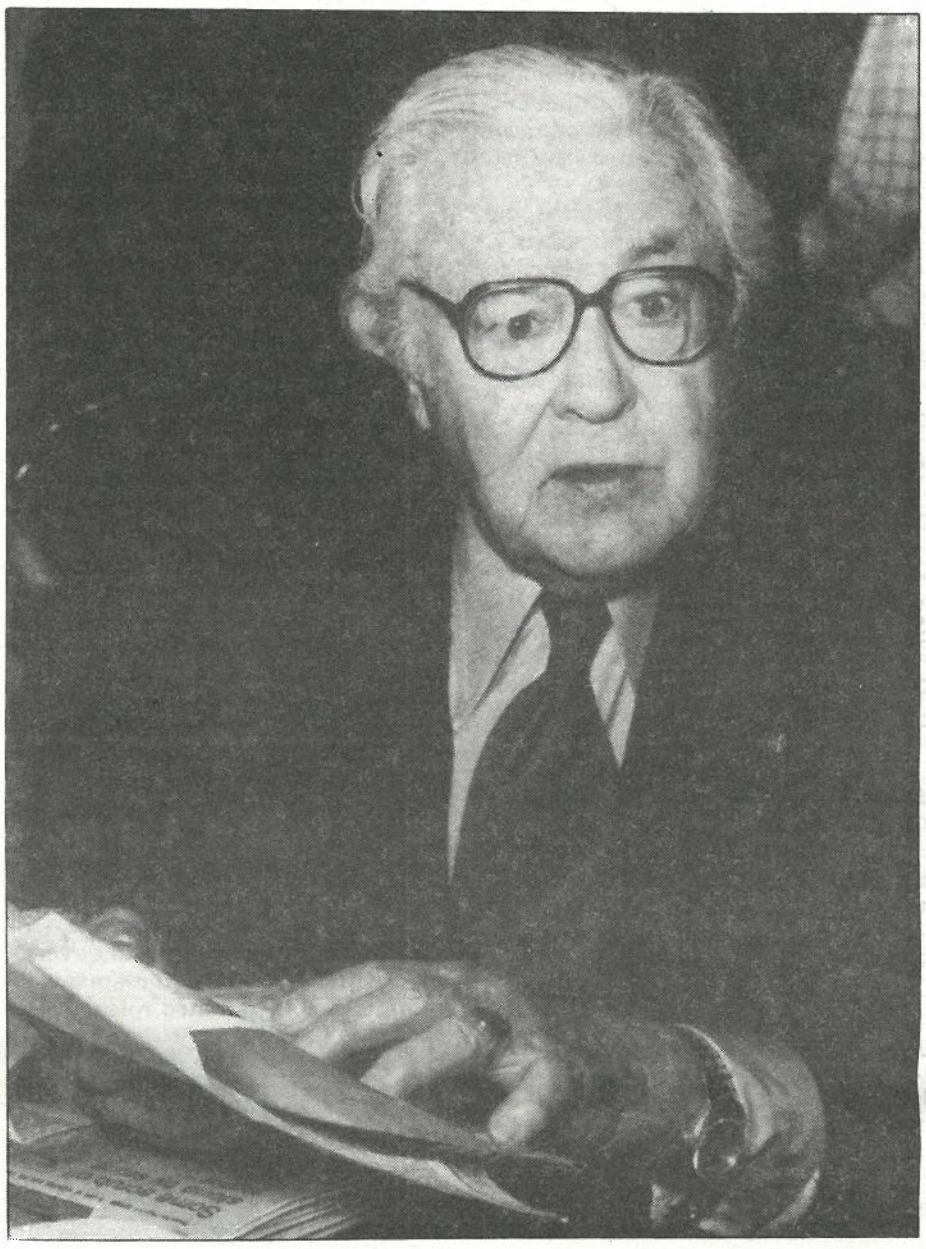
"The first thing I'd like to see come from this case is to try to turn the clock back," he said. "That's impossible. So, the next best thing is compensation and punitive damages to show that if you do anything like that again, we'll kick the crap out of you."

Until the time when something like cold fusion makes burning oil archaic, "we have to be damned careful how we extract oil."

Belli said he'd like nothing better than to try this case before an Alaskan or any jury in the country.

As yet, no settlement agreement has been reached, and the real battle may end up taking place in the courtroom. Scarlett says lawyers from his firm have met with Exxon's legal representatives but haven't worked out any "nuts and bolts" agreements.

Asked what would happen if Exxon's people said something like, "Okay write up a bill and we'll pay it," Scarlett said the lawsuit would probably be settled. No problem.



Well-known attorney Melvin Belli holds court for the press on the Prince William Sound oil spill. ANCHORAGE TIMES PHOTO

• Damage suits have 3 years to file

Continued from Page 13

A lawsuit to recover "remedial action" expenses must be commenced within six years after the initiation of on-site construction.[28] A suit to recover costs of a "removal action" must, with some exceptions, be commenced within three years after the action is complete.[29]

Actions to recover natural resource damages generally must be commenced within three years after the date of the discovery of the loss and its connection with the release, or by March 23, 1991, whichever is later.[30] However, damage suits regarding sites listed on EPA's National Priorities List, federal facilities or other facilities at which CERCLA cleanups are scheduled may not be brought before cleanup plans are selected, provided that the federal government is proceeding diligently with appropriate studies (This provision does not affect the right of local governments to bring cleanup or cost recovery suits).

Damage suits regarding such sites must be brought within three years after the completion of cleanup actions and no sooner than 60 days after the local government gives notice of intent to file suit to the President of the United States and potentially liable parties.[31] Whenever any kind of lawsuit is brought under CERCLA, the plaintiff must provide a copy of the complaint to the United States Attorney General and to EPA.[32]

The release of any hazardous substance — regardless of quantity or concentration — may give rise to liability.

Liability

CERCLA designates four broad categories of "responsible parties," — parties who, regardless of fault, are liable for environmental cleanups, governmental expenses and natural resource damages. Responsible parties include: (1) the current owner or operator of a site; (2) the site's owner or operator at the time of disposal of hazardous substances; (3) persons who arranged for disposal, transport or treatment of hazardous substances; and (4) persons who accepted hazardous substances for transport "to facilities ... or sites selected by such person[s]."[33]

To establish liability, a local government need demonstrate only that there has been a release or threatened release of a hazardous substance from a facility, that the defendant falls within one of the four categories of responsible parties, and that some governmental expenses have been incurred in responding to the problem.[34] If these elements are satisfied and no defenses apply, the defendant is strictly liable for cleanup, expenses and damages; the government need not prove negligence or other wrongful conduct.[35]

The release of any hazardous substance — regardless of quantity or concentration — may give rise to liability.[36] Moreover, there is no need to "fingerprint" wastes. In other words, it is unnecessary to prove that the contamination can be traced back to each defendant's hazardous substances.[37]

When two or more persons have contributed to a single, indivisible harm, liability is joint and several.[38] Thus, in most circumstances, a responsible party is liable under CERCLA for all contamination at a site. Joint and several liability may be avoided only if the defendant proves that harm is divisible *and* that there is a reasonable basis for apportionment of damages.[39]

It generally is impossible to divide into distinct harms the problems created by environmental contamination, especially when the hazardous substances have become commingled. Attempts by defendants to apportion damages based upon volume of wastes (e.g., number of barrels) have been largely unsuccessful and even "minor" contributors to a problem have been held responsible for the entire cleanup.[40]

CERCLA encourages a fair apportionment of damages and costs by providing responsible parties with legal recourse against one another to ensure that each pays its fair share.[41]

The only defenses to liability expressly allowed under CERCLA arise when a release or threatened release of a hazardous substance, and the resulting damages, are caused solely by: (1) an act of God, (2) an act of war, or (3) the act or omission of an unrelated third party.[42]

The courts are divided as to whether equitable defenses are available.[43] Additionally, there are several narrow limitations to CERCLA liability. For example, natural resource damages are not available where both the release of a hazardous substance and the resulting damages occurred wholly before 1980, or from a party operating within the terms of a permit or license which authorizes the irreversible and irretrievable commitment of natural resources.[44] Neither expenses nor damages may be recovered for injuries resulting from a "federally permitted release."[45].

However, even these limited defenses and narrow limitations to liability are unavailable to owners, operators, or transporters who knowingly fail to notify EPA of the existence of a facility at which certain types of hazardous substances have been stored, treated or disposed of, and of any known, suspected or likely release of such substances.[46]

Imposition of strict, joint and several liability, together with CERCLA's limitations on defenses, may appear harsh at times — especially when the activities giving rise to liability occurred before enactment of CERCLA.

However, this result reflects a policy determination by Congress that, regardless of traditional notions of fault, those responsible for the management and disposal of hazardous substances—rather than the taxpayers — should bear the costs of needed cleanup.[47]

Conclusion

CERCLA creates powerful tools for local governments to address problems created by toxic and hazardous chemicals. Taking the lead in protecting their citizens and environments allows local governments to ensure the predominance of local concerns in the cleanup process and in allocation of damage recoveries. If statutory remedies are used effectively, cleanup and environmental enforcement will proceed at the expense of responsible parties, not local governments and their taxpayers.

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Footnotes

1. *See. e.g.*, Surveys and Investigations Staff, *A Report to the Committee on Appropriations U.S. House of Representatives on the Status of the Environmental Protections Agency's Superfund Program* at 13 (March 1988).
2. CERCLA § 101-405, 42 U.S.C. § 9601-9675.
3. For an overview of potential remedies under other federal environmental statutes see Babich and Hanson, *Opportunities for Securing Enforcement of Environmental Laws and Cost Recovery by Local Governments and Citizen Organizations*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10165 (May 1988).
4. Mayor of Boonton v. Drew Chemical Corp., 621 F. Supp. 663 (D.N.J. 1985); City of New York v. Exxon Corp., 633 F. Supp. 619 (S.D.N.Y. 1986).
5. CERCLA § 107(a)(1)-(4)(A). 42 U.S.C. § 9607(a)(1)-(4)(A). The National Contingency Plan is codified at 40 C.F.R. Part 300.
6. CERCLA § 101(23) and (24). 42 U.S.C. § 9601(23) and (24). 7. CERCLA § 101(25). 42 U.S.C. § 9601(25).
8. *E.g.*, United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 747-48 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).
9. CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2).
10. *See* Babich and Hanson, *Declaratory and Injunctive Relief for States Under CERCLA*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10216, 10219-20 (June, 1988).
11. *E.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1049-50 (2d Cir. 1985).
12. CERCLA § 121(e)(2), 42 U.S.C. § 9621(e)(2). *See also* CERCLA § 310(c),42 U.S.C. $ 9659(c).
13. *See* Babich and Hanson, *supra* note 18 at 10220.
14. CERCLA § 107(a)(1)-(4)(C) and (f)(1), 42 U.S.C. § 9607(a)(1)-(4)(C) and (f)(1). Mayor of Boonton v. Drew Chemical Corp., 621 F. Supp. 663 (D.N.J. 1985); City of New York v. Exxon Corp., 633 F. Supp. 609, 619 (S.D.N.Y. 1986).
15. 40 C.F.R. § 300.73.
16. CERCLA § 107(a)(1)-(4)(C). 42 U.S.C. § 9607(a)(1)-(4)(C).
17. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).
18. R. Rowe and W. Schulze, *Natural Resource Damages in the Colorado Mountains: the Case of the Eagle Mine*, Proceedings of AERE Session on Assessment of Natural Resource Damages Under CERCLA, Allied Social Science Association's Meetings, Chicago, Illinois, December 28-30, 1987.
19. The "Type B" regulations for detailed natural resource damage assessments were published at 51 Fed. Reg. 27,674 (Aug. 1, 1986) and 53 Fed. Reg. 5166 (Feb. 22, 1988). The "Type A" regulations applicable to coastal and marine environments appear at 52 Fed. Reg. 9042 (Mar. 20, 1987).
20. CERCLA § 107(f)(2)(C), 42 U.S.C. § 9607(f)(2)(C).
21. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).
22. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).
23. CERCLA § 101(22), 42 U.S.C. § 9601(22). There are a few narrow exceptions such as releases confined to a workplace (if the exposed employee can assert a claim against the employer), engine exhaust emissions, certain releases from nuclear incidents, uranium mining or uranium mill tailings, and the normal application of fertilizer. *Id.* Also, CERCLA does not provide a remedy for problems arising from the application of pesticides registered under the Federal Insecticide, Fungicide, and Rodenticide Act. CERCLA § 107(i), 42 U.S.C. § 9607(i).
24. CERCLA § 101(14), 42 U.S.C. § 9601(14). Excluded from the definition are natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel, and petroleum (including crude oil).
25. CERCLA § 102(a), 42 U.S.C. § 9602(a).
26. Eagle-Picher Ind. v. United States, 759 F.2d 922, 930 (D.C. Cir. 1985).
27. CERCLA § 101(9), 42 U.S.C. § 9601(9).
28. CERCLA § 113(g)(2)(B), 42 U.S.C. § 9613(g)(2)(B).
29. CERCLA § 113(g)(2)(A), 42 U.S.C. § 9613(g)(2)(A). If, however, the remedial action was initiated within three years after completion of a removal action, costs incurred in the removal action may be recovered in the suit brought to recover the costs of the remedial action. CERCLA § 113(g)(2)(B). 42 U.S.C. § 9613(g)(2)(B).
30. CERCLA § 113(g)(1)(A) and (B), 42 U.S.C. § 9613(g)(1)(A) and (B).
31. CERCLA § 113(g)(1), 42 U.S.C. § 9613(g)(1). Cautious practice would include giving notice before filing suit at any site to avoid even the possibility of a motion to dismiss on jurisdictional grounds.
32. CERCLA § 113(1), 42 U.S.C. § 9613(1).
33. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).
34. *E.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1044-45 (2d Cir. 1985); United States v. Wade, 577 F. Supp. 1326, 1333-34 (E.D. Pa. 1983).
35. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 743 (8th Cir. 1986) cert. denied, 108 S. Ct. 146 (1987).
36. *E.g.*, United States v. Conservation Chemical Co., 619 F. Supp. 162, 238 (W.D. Mo. 1985); United States v. Wade, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983).
37. United States v. Wade, 577 F. Supp. 1326, 1333-34 (E.D. Pa. 1983); Violet v. Picillo, 648 F. Supp. 1283, 1293 (D. R.1. 1986).
38. *E.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-10 (S.D. Ohio 1983).
39. Id. at 811.
40. *See* Rhode Island v. Picillo, No. 83-0787 P, Slip. Op. (D.R.1. March 8, 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983); United States v. Medley, 25 Env't Rep. Cas. (BNA) 1315, 1319 (D.S.C. 1987).
41. *See* Rhode Island v Picillo, No. 83-0787 P, Slip. Op. (D. R.1. March 8, 1988).
42. CERCLA § 107(b), 42 U.S.C. § 9607(b).
43. *E.g.*, compare United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987) ("CERCLA provides only three defenses to liability"), and United States v. Stringfellow, 661 F. Supp. 1053, 1061-1062 (C.D. Cal. 1987) ("Congress intended to impose strict liability on defendants sublect only to the affirmative defenses listed in § 107(b).") with Violet v. Picillo, 648 F. Supp. 1283, 1294-1295 (D.R.1. 1986) (defendants are not barred from asserting equitable defenses under CERCLA).
44. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1). This exemption from liability applies only where specific resource tradeoffs are understood, anticipated and expressly allowed. Idaho v. Hanna Mining Co., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20360 (D.Id. 1987).
45. CERCLA § 107(j) 42 U.S.C. § 9607(j).
46. CERCLA § 103(c), 42 U.S.C. § 9603(c).
47. *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985).

Quiting smoking ... for real

By Julie A. Clark

As I write this, a lulu of a shiner adorns my left eye, complete with small mouse beneath the eye. It's a beaut — violet, mauve, puce, chartruese and other colors not even invented yet. A Hollywood make-up artist would be green with envy! I also have a dermabrasion on the left side of my forehead—and didn't pay a plastic surgeon a dime. My addiction to cigarettes is at least partly responsible.

It happened this way. I caught the skiing bug recently and was skiing at Alyeska: I got cold sitting on the chair lift for so long and the easy slope was fast and icy, but shortness of breath was the factor that really did me in. It takes good lungs to ski and mine are tarred after 30 years of smoking and a three-pack-a-day habit.

The wipeout was spectacular, my wind was gone, and I saw stars. I didn't like riding the basket down, even if I was almost at the aid station when I crashed and I especially didn't like missing the next day of skiing—because the instruction sheet said symptoms of head injuries can occur as long as 48 hours later. So I gave myself a birthday present—I pledged to quit smoking .

I'm going to try to quit smoking. This is about the fifth and, I hope, the last time in my life I've made this pledge. By going public, maybe this time I will be able to quit—for good.

Is it going to be tough? Do I have the willpower? Want to make book on it? Here are the facts.

Unraveling the cause

I am a very hooked smoker. I'd smoke in my sleep if someone held the cigarette for me. The smell of a dirty ashtray is obnoxious to most people. I love it! I started in college as many people do. One day another college student asked me, then nearly 19, if I went to the Gunnison, Colo., junior high school. I was highly insulted and determined then to look 'sophisticated.' I took up smoking with a vengeance. Didn't the movie stars look sophisticated and glamourous?

Back when the Surgeon General issued his first report on smoking, smoking was socially acceptable and even desirable as the movies portrayed. The heroine would languidly blow smoke in the hero's face and say something smart and drive him mad with lust. The hero looked pretty sexy, too, as he drawled some bon mot with a cigarette dangling from his lips. Most adults then smoked and I wanted to look grown up.

I was hooked within a month and nearly strangled one of my roommates when she hid my smokes and it was 40 below outside. I'd have walked or run the mile for a Cam..., no, Winston, then and I hadn't been somking more than a couple of months. The dirty rat was herself an addicted smoker and knew the torture she was inflicting. She would have deserved strangulation and I would have said so at the trial, hopefully with a jury of smokers, who would have found it justifiable homicide!

Looking back, it's certain that all I looked like was a 12-year-old smoking a cigarette but I was determined to learn to smoke.

Now anyone would say I look my age. Smoking does that to people, makes the faces of smokers look like a desert area after two weeks of tank maneuvers (parents, try telling that to your teenage daughters. That will get their attention more than concerns about their health. Teenage girls seem to be the ones now most likely to take up the habit).

The first try

I first quit cold turkey while in law school for nearly eight months, only because my father, a former three-pack-a-day smoker, who quit about the time I took it up, paid me the munificent sum of $150 a month not to smoke. The crafty devil knew what an addiction it was, that I was an impecunious law student and decided to help me out with school if I quit smoking. The payments quit when I came into a tidy sum, and that first drag on a cancer stick came less than two hours later. (Funny isn't it, how in the '30s and '40s the slang for cigarettes was 'cancer sticks' and 'coffin nails' yet it took the feds 30 years and millions in research to come to the same conclusion.)

As a result of my effort to quit smoking in law school I gained 50 pounds but could run up a long flight of steep stairs like a gazelle on amphetemines. The pounds came off the following year, but back to three packs a day, I sounded like a steam engine with a leaky boiler chugging its way up a steep grade as I climbed those same steps the next summer, where I worked for an attorney in Bay Minette, Ala., during the summers.

On my first attempt in law school, (dear old dad bribed me, remember) friends avoided me. Genghis Khan and Dracula were models of graciousness and civility compared to me.I therefore holed up in my tiny apartment with the hot and cold running cockroaches in Fayetteville, Ark., and did domestic things, even found the cockroach nest on the top of a 10-foot cabinet. (The old house which had been converted to apartments was not new when the War Between the States was progressing.)

I am embarrassed to admit it, but I did the unspeakable — I sunk to crocheting. (I now wear the creation, a hat, skiing.) I sunk yet lower. I embroidered and unfortunately ate. Anything. Dry crackers, old candy, stale bread, to try to quell the beast: the desire for some of that good old nicotine. I stopped in January but the desire for a cigarette was still strong in August. I can certainly understand the addict.

I dreamed about smoking that time, months after I quit.

The two poor cats I took down to law school with me started to acquire hang dog, shifty looks and slunk around and under the furniture, eyeing me for any signs that I might see them as they busily worked to reduce the mouse and roach population in the old house. They also wore rather moth-eaten fur coats during that period. When I couldn't take anymore crocheting, I petted the cats and those two cats got more petting than any 12 cats should reasonably have to stand. When I lit up again after eight months, I could swear they both smiled.

Other tries

Over the years I have quit both — cold turkey and gradually. For me gradually works better, despite those reformed smokers who swear by cold turkey. Remember the movie "Cold Turkey" with Dick van Dyke, where a whole town tried to quit smoking? Van Dyke used an interesting substitute — sex — but nearly caused his own divorce.

One time several years ago, I almost got another black eye from trying to quit smoking cold turkey. I was at a nice restaurant and another smoker was filling the air with those beautiful clouds of smoke. Unconsciously, I had happily turned toward it and breathed the smoke like a dog breathing the perfume of other dogs on a fire hydrant. When we left, the woman who was sitting at the table gave me a murderous look that would have frozen a charging rhino in its tracks. She probably thought I was flirting with her husband!

From my past history of quitting anything can happen. One cold turkey try resulted in a depression that was almost suicidal. After rejecting poison as unavailable, slashing wrists as possibly painful and a gun as likely to miss, I went to the store for some more smokes after moving my large refrigerator single handedly to find the pack that I was sure was behind it. A prospector who had just found his mother lode could not have been more ecstatic with joy. That try lasted three days.

Another cold turkey try found me gulping drinks with the abandon of a wino who has just spent three weeks in the slammer. Bye, bye cancer and emphysema but look out liver—cirrhosis was on the way. A friend of mine says her own husband went out and bought her a pack of cigarettes because he missed his wife so much. She had turned into a zombie for months and he felt he was married to a stranger.

At this writing, my car ashtray has been carefully polished to mint condition. No more smoking in the car. I don't smoke on long trips with non-smokers, so I can do that. That's the first step in my program along with waiting half an hour and more before lighting up in the morning and stopping an hour before bedtime. Later, I'll stand in one place to smoke the cigarette. My back starts to hurt if I stand in one place for more than two or three minutes and I find myself stubbing out the cigarette half smoked. The last time I quit smoking (December, 1987) that worked quite well, I didn't gain 50 pounds or turn into an evil-tempered harridan and although I started again, it took two months to get back to three packs a day and the craving, while off the cigarettes, was not nearly as bad. In fact, my mistake was taking a cigarette offered to me.

This time I'll make certain I don't run out of nicotine chewing gum. That gum was a real help provided it is not chewed. I expect that I may carry some of it around for as much as a year for those urges that creep up and grab a smoker at odd times and places and turn us into wild-eyed ravening beasts, ready to do in our nearest and dearest if we don't ge another cigarette.

Paybacks are important in any addiction. Channel 7 once had a program that gave the results of research. For one, smokers were able to concentrate better and, surprisingly, are more productive on average despite our taking time to hunt for a lighter, a match or another pack. There were others too but I was too busy doing three or four things at once, so didn't hear all of it.

Smoking can be relaxing or energizing, even a social interaction with a stranger — "Don't you feel like a pariah?" we say as we both light up and draw gratefully into our protesting lungs the nicotine, tars, carbon monoxide and god-only-knows what else that the tobacco companies put into the damn things.

They don't have to tell us the ingredients, because those senators from the Carolinas and Virginia carry very big sticks in Congress (although cosmetics we apply only to on our faces must list the ingredients). Hmmm ... maybe that postcard I saw years ago of a mule cocking his leg in the tobacco fields with the caption "Your cigarettes taste different lately?" is more true than we know.

For those of you who feel tempted to look down on us as we stand blue and shivering and coughing by the west door of the courthouse at 30 below with a howling wind clawing at every coat seam and down our necks, holding a cigarette in numb fingers, pity us junkies instead. Maybe you tried smoking but were among the lucky 10 percent who aren't hooked by the noxious weed or maybe your body protested much more loudly than mine did when you tried to take up the habit.

What works for that small embattled cadre of us smokers still willing to brave public and private wrath depends on the individual. For me, a person who can never do just one thing at a time, it promises to be quite a trial. Willpower I have. But changing a bad habit or dieting, etc. takes more than willpower. It takes some serious behavior modification. That's why a gradual approach will work better for me, but for you smokers who want to quit: maybe you are different and cold turkey will work better for you.

I'm smoking as I write this and listening to the radio but the ashtray only has six butts in two hours. Guilt and the fact that I am conscious of smoking while I am writing cut the consumption by more than half.

I'll report on my progress and if there are any of you who also have been thinking of quitting, give me a call. Abject misery loves company and maybe we can trade tips on beating the habit.

Reframing divorce legal issues

By Drew Peterson

One of the techniques used by family mediators is called "reframing." By reframing the issues in dispute between family members the mediator attempts to change the nature of the dispute from a win-lose controversy focused on past behavior of the parties to a win-win scenario focused on mutual, future-oriented opportunities. Reframing techniques are highly touted in the literature on mediation. They are also techniques that can be applied generally in life and are certainly not limited to use by family mediators.

I am currently reading a book called "Divorce Mediation—Theory and Practice," edited by Jay Folberg and Ann Mile (The Guilford Press, 1988). While not exactly exciting bedtime reading, is intended as a comprehensive review of the current state of the field of divorce mediation, as presented by the leading authorities in the field. Many of the recognized authorities in the field of family mediation have contributed chapters to the book, which is successful overall in being comprehensive and insightful.

One of the chapters which particularly impressed me was entitled "The Legal Dimension Of Divorce Mediation," written by Stepehn K. Erickson, an attorney-mediator in Edina, Minnesota. The chapter compares the similarities and differences between mediation and the traditional adversary approach to divorce, stage by stage. Erickson discusses the way in which mediators reframe the major issues in a divorce action in a way which I found helpful in explaining the difference between family mediation and the adversarial approach to family law. I am endebted to Erickson for his insightful chapter, from which I have stolen most of the rest of this article for the *Bar Rag*.

Parenting. Erickson states that in the matter of parenting, the legal adversarial system asks the question, "Who will be awarded custody of the children after the divorce?" Erickson compares the question so framed to the classic law professor examples of an inappropriate leading question: "When did you stop beating your wife?"

The more appropriate question to ask, and that upon which the mediation process focuses, is, "What future parenting arrangements can you agree to, so that each of you can continue to be involved, loving parents?" Such reframing of the issue is future-oriented rather than past-oriented, and allows the parties to focus their energies on their mutual love for their children and desire to maintain quality relationships with them rather than their past differences.

Other vocabulary changes used in mediation to reframe issues concerning the children include the following:

- Parenting instead of custody;
- Access instead of visitation;
- Time sharing arrangements instead of visitation schedules;
- Shared duties instead of rights;
- Limited parenting duties instead of noncustodial parent;
- Residential parent instead of custodial parent.

Child Support. In the area of child support, the adversarial system most often asks, "What amount of child support will the husband pay to the wife for the support of the children in her custody?" Erickson asserts that the way in which the adversarial system frames the child support question is a major part of the current disgraceful statistics concerning child support non-compliance. I am not sure that I would go that far, but certainly one of the most impressive things about divorce mediation is the successful compliance rate which it has had demonstrated with mediated child support agreements, as compared to child support awards established through the adversarial process. Mediation reframes the child support question as "What amount of money does each of you need to pay to meet the basic monthly expenses of the children?"

Erickson makes the observation that he has found couples in mediation to have a tendency to underestimate personal expenses, while the tendency he has observed in the adversarial process is to overestimate them, so as to have bargaining room later. He also believes that the parties see more clearly the reason for a transfer payment from one spouse to the other after going through the family budgets in the mediation process, including a separate budget for the needs of the children. Mediation will also allow for the use of innovative mechanisms for the determination and management of child support, to meet the particular needs of the children and concerns of the parents. Such mechanisms can often make agreement more palatable to the supporting parent, and improve compliance thereafter.

Allimony. In the area of spousal support, the question which the adversarial system usually asks is "What amount of alimony whould the husband pay to the wife and for how long?" Erickson's suggested reframing of the issue becomes "How will each of you share responsibility for the more dependant spouse to become independant?" Framed in such a way the responsibility for solving the problem rests with both spouses. Erickson notes that the non-dependant spouse is often unaware that the dependant spouse usually is just as urgently desireous of becoming independant as the non-dependant spouse is of becoming free. Mediation allows the parties to express such feelings to one another directly and to take joint responsibility for solving the dilemma.

Property Division. In the final major area of dispute at divorce, that of property division, the individual involved with the adversarial process is encouraged to ask, "How can I obtain as much for myself as possible?" In mediation, the issue is reframed to be, "How can the two of you divide your property in such a way that meets both of your needs in the future?" Thus the focus in mediation is more on the process and less on the outcome. Erickson further divides the question down into five separate subquestions, which he admits are not much different overall from the steps that attorneys follow in preparing the typical divorce case. They are:

1. What property are you doing to divide?
2. What understanding and knowledge do you need to arrive at an intelligent, fair property division?
3. What is the value of your property assets?
4. What standard of fairness should be applied to the property division process?
5. Given that the above four questions have been answered, what property should each of you have?

The fourth step, asking the couple to determine the standard of fairness to be applied, is perhaps the most innovative part of the mediation process. Erickson notes that it is not uncommon in his mediation practice for couples to agree on an unequal divisions of property, giving a greater share to the dependant spouse. Also the parties in mediation may have more freedom to use innovative methods of distributing the property than might exist in the adversarial process.

Conclusion. While reframing of issues if divorce into a more positive future-oriented perspective is a technique used by divorce mediators, there is no reason that such reframing cannot be used by anyone involved with the family legal system. Such reframing of the issues is increasingly being seen in the courts and in the approaches of experienced family attorneys to the emotionally wrenching disputes involved with divorce. Mediation, however, is particularly well suited to allowing the parties to themselves resolve the important issues resulting from the termination of their marriagae. By reframing the ultimate legal issues involved with divorce into future-oriented, win-win scenarios, family mediation can often provide more productive, less traumatic, and more enforceable resolutions of family legal disputes than can the traditional adversarial process.

Cook Inlet Pre-Trial facility has revised visitation policy

The Cook Inlet Pre-Trial Facility wishes to inform members of the Alaska Bar Association that a revised visitation policy for this institution (CIPT) will be implemented effective May 1, 1989, which virtually ceases visitation during scheduled meal periods (11 a.m.-1 p.m. and 4 p.m.-6 p.m.).

Your assistance and cooperation in this matter is greatly appreciated.

—Phillip Briggs, Superintendent
Cook Inlet Pre-Trial Facility

Visiting Schedule:

A prisoner housed within this institution may have a visit with in the first twenty-four (24) hours of incarceration. Other than the aforementioned, attorneys/professional visits shall occur during the hours listed below.

1. Secure and Contact Visitation:

Monday through Friday

Regular Visitors:

Morning—Visitors are admitted between 0850 hours and 1020 hours. Morning visits end at 1100 hours.

Afternoon—Visitors are admitted between 1250 hours and 1420 hours. Afternoon visits end at 1500 hours.

Evening—Visitors are admitted between 1750 hours and 2020 hours. Evening visits end at 2100 hours.

Attorney/Professional Visitors:

Morning—Visitors are admitted at 0800 hours and conclude at 1100 hours.

Afternoon—Visitors are admitted at 1300 hours and conclude at 1600 hours.

Evening—Professional visitors are admitted at 1800 hours and conclude at 2100 hours with the exception of attorneys who may remain until 2300 hours.

Saturday, Sunday, and Holidays

Regular visitors:

Daytime—Visitors are admitted between 0850 hours and 1420 hours. Daytime visits end at 1500 hours.

Evening—Visitors are admitted between 1750 hours and 2020 hours. Evening visits end at 2100 hours.

Attorney/Professional Visitors:

Daytime—Visitors are admitted beginning at 0800 hours and conclude at 1600 hours.

Evening—Visitors are admitted at 1800 hours and conclude at 2100 hours, with the exception of attorneys who may remain until 2300 hours.

2. Intra-Institutional Visiting:

Morning—Visiting between legally related prisoners will occur between 0900 hours and 1100 hours on Saturday and Sunday.

3. No prisoner will be allowed to remain in an attorney/client visiting room during established meal periods.

Practical Pointers

Discovery of "other claims files"

Michael J. Schneider

BY MICHAEL J. SCHNEIDER

This article is intended to discuss and provide authority for the discovery of the defendant insurance company's other similar claims files by plaintiffs in insurance bad-faith litigation. The benefits and burdens of this tact will be discussed.

The Relevance Threshold

In order to be discoverable, an item sought in discovery must be relevant. If apparently inadmissible, it is still discoverable if "the information sought appears reasonably calculated to lead to discovery of admissible evidence." A.R.C.P. 26(b)(1). Defendants frequently argue that what goes on in other claims files is simply not relevant. This contention has been aptly described as "patently meritless" by the supreme court of California. *See Colonial Life and Acc. Ins. v. Superior Court*, 31 Cal. 3d 788, 791, 183 Cal. Rptr. 810, 813, 647 P.2d 86, 89 (Cal. 1982).

Other claims files are relevant to prove a "practice" in violation of the Unfair Claim Settlement Practices Act

Alaska's Unfair Claim Settlement Practices Act is found at A.S. 21.36.125. It precludes a person from committing, with such frequency "as to indicate a practice," fifteen (15) separate and specified forms of conduct statutorily defined to be "unfair." The acquisition of the defendant's other similar claims files allows plaintiff's counsel to determine whether the bad-faith conduct important in the underlying case is duplicated with such frequency as to indicate "a practice" by the corporate defendant. This can be extremely powerful evidence. In cases where underlying contract damages have already been paid (e.g., the UM case where the claimant obtained the limits of the policy following an arbitration, or in the "late pay" or "short pay" case) it can be the **only** really exciting evidence you have.

Our supreme court has indicated that the Unfair Claim Settlement Practices Act does not provide the basis for a private cause of action. *See O.K. Lumber Co.. Inc. v. Providence Washington Ins. Co.*, 759 P.2d 523, 926-927 (Alaska 1988). Nevertheless, unexcused violations of Alaska's Unfair Claim Settlement Practices Act should be admissible on the issue of negligence. *See Restatement (Second) of Torts* (1965), § 288(b)(2), *Ferrell v. Baxter*, 484 P.2d 250 (Alaska 1971), *Colonial Life and Acc. Ins. v. Superior Court*, 31 Cal. 3d 788, 791, 183 Cal. Rptr. 810, 813, 647 P.2d 86, 89 (Cal. 1982), *Moore v. American United Life Ins. Co.*, 197 Cal. Rptr. 878, 887, 150 Cal. App. 3d 610, 625-627 (Cal. App. 3d Dist. 1984), *Lair v. Nationwide Mutual Fire Insurance Co.*, Case No. 3AN-84-2585 Civil, consolidated with Case No. 3AN-84-11521 Civil, and Comments to Alaska Pattern Jury Instructions Nos. 3.04, 3.045. and 3.05.

Other claims files are relevant to establish a basis for punitive damages

As the court in Colonial Life stated, "Other instances of alleged unfair settlement practices may also be highly relevant to plaintiffs claim for punitive damages." *Colonial Life and Acc. Insurance v. Superior Court*, 183 Cal. Rptr. at 814, 647 P.2d at 90, citing *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141 (Cal. 1979).

Privacy considerations

You can expect the superior court to be concerned about the privacy of claimants whose files might be the subject of your investigation. We customarily offer to enter into a stipulation binding our firm, its employees, consultants, and experts to the effect that we will not release, reveal, or attempt to use in evidence, the contents of any of the files obtained pursuant to our discovery efforts without further order of the court. We also promise not to contact the claimants identified in such files without an additional order of the court. Finally, we agree to delete names from copies of files retained by us. *See for example* Order of Jan. 25, 1988 in *Snitker v. Government Employees Insurance Agency and Crawford and Company*, Superior Court No. 3AN-87-3345 Civil.

Advantages of obtaining other similar claims files

The advantages are obvious. If other similar claims files reflect a pattern or practice of unreasonable or outrageous behavior, the punitive damage value of the case skyrockets. Such evidence also kills defense arguments that your client's predicament was merely the result of good-faith differences of opinion. In cases where underlying compensatory damages have already been paid, the defense may even admit that the claim was handled negligently. Mere negligent handling does not expose the insurer to punitive-damage liability. *See for example Taylor v. Superior Court*, 598 P.2d 854 (Cal. 1979), *Neal v. Farmers' Insurance Exchange*, 582 P.2d 980 (Cal. 1978), *Silberg v. California Life Ins. Co.*, 521 P.2d 1103 (Cal. 1974), *Colonial Life Ins. Co. v. Superior Court*, 647 P.2d 86 (Cal. 1982), and *ARCO Alaska Inc. v. Akers*, 753 P.2d 1150, 1153-1154 (Alaska 1988). The "oh, gosh, this one just slipped through the cracks" defense is quickly gutted by strong evidence of a custom and practice of bad-faith claims handling. Finally, insurance companies simply get very nervous when some adverse party is about to climb into a number of their closed claims files.

The disadvantages of obtaining other similar claims files

Some of the disadvantages of attempting to get this information are as follows:

A. The defense can be expected to vigorously oppose an attempt to obtain similar claims files.

B. You can expect to spend hundreds (and, more probably, thousands) of dollars on consultant and/or expert fees for the review and evaluation of these files.

C. The number of "similar claims" could be so great that the problem of handling and managing the information exceeds its benefit (some ways around this will be suggested below).

D. Many claims files now exist only in computerized form. Accessing these files may require custom programs and computer sophistication beyond what most of us possess or want to afford.

E. A review of the files, once obtained, may not support the contention that the defendant is engaged in a pattern and practice of improper claims handling.

Some practical/tactical considerations

Similar claims files can generate devastating information. The defense should be advised that any outstanding settlement offers will terminate upon receipt of an order from the court granting plaintiff access to similar claims files.

Don't phrase your request for "other **similar** claims files" too broadly:

> in order to establish "a pattern of unfair claims practices" the antecedent **practice** must be substantially similar. (emphasis added).

Moore v. American United Life Ins. Co., 197 Cal. Rptr. 878, 887, 150 Cal. App. 3d 610, 625 (Cal. App. 3d Dist. 1984). Similarly, it can be argued that the antecedent **claim** must be substantially similar. A request for "all uninsured-motorist claim files" or "all property-damage claim files" may be too broad.

It is hard to find a qualified expert who has the depth and breadth of experience in claims handling to be able to evaluate these claims files and integrate the information in the files with standard practice in the industry. Even so, you have to have one of these people lined up before you get the files.

Every carrier that we've ever litigated with has its own internal policies and procedures for the handling of claims. These should be obtained well in advance of any review of similar claims files by you or your experts. The expert should conduct the review of the similar claims files to determine compliance with 1) the Unfair Claim Settlement Practices Act, 2) fair claims handling duties as established by case law, 3) industry standards for claims handling, and with 4) the company's own internal policies and procedures.

When the number of similar claims files is so numerous that you don't want, or can't afford, to deal with them, or the defense successfully argues that you should not be allowed to have access to all of them, then it may be possible to agree upon a random selection process. In a case that we were involved in, the court ordered the defending carrier to produce a list of its similar claims files. We then randomly selected fifty (50) from the list. Those 50 were then made available to us. *See* Order of Jan. 25, 1988, in *Snitker v. Government Employees Insurance Agency and Crawford & Company*, Case No. 3AN-87-3345 Civil.

Other authority

In addition to the cases mentioned above, consider reading the following: *Punitive Damages in Bad-Faith Cases*, 4th Ed., John C. McCarthy, § 3.74, *et seq., Bad Faith 1986*, by Levine, Shernoff, Kornblum & Olson, p. 2.118 *et sec.*, and *Plaintiffs Right to the Claim File, Other Claim Files and Related Information: The Ticket to the Gold Mine*, Thomas E. Workman, *Tort and Insurance Law Journal*, Vol. XXIV, No. l, Fall 1988, p. 137.

Summary and conclusion

Other similar claims files are always discoverable in insurance bad-faith litigation if proper care is given to protect the privacy of the nonparty claimants. This sort of discovery frequently reveals dramatic evidence of improper claims handling that can be used to bolster an otherwise lackluster bad-faith case. As Mr. Workman suggests in his article, other similar claims files may, indeed, be "the ticket to the gold mine."

— United States District Judge Bar Poll —

A total of 1,102 members of the Alaska Bar Association responded to a poll done to evaluate the seven applicants to fill the U.S. District Court Judgeship position vacated by the retirement of Judge James Fitzgerald. The applicants were ranked "well qualified," "qualified," or "not qualified" by those who felt they had sufficient knowledge of the applicants to rank them.

Of those ranking the applicants, 95 percent ranked Daniel A. Moore Jr. as qualified or well qualified. Eighty-nine percent of those ranking James K. Singleton Jr. ranked him qualified or well qualified. Of those ranking Michael R. Spaan, 68 percent found him to be qualified or well qualified. Spaan, currently U.S. Attorney, withdrew his name for consideration before the results of this poll were known. Mary K. Hughes had 67 percent rank her well qualified or qualified. Fifty-nine percent of those ranking Kenneth P. Jacobus ranked him qualified or well qualified. Christopher E. Zimmerman had 55 percent of those ranking him decide that he was qualified or well qualified. Thomas J. Yerbich had 32 percent rank him qualified or better.

Bar Association officials said the poll,. in its entirety, would be provided to Sen. Ted Stevens for the Alaska Congressional Delegation for their information in recommending persons to fill the vacancy. The recommendation is made to the Attorney General who reviews such suggestions for the President.

BAR POLL TALLY SHEET — TOTALS
United States District Judge

Candidate	Well Qualified	Qualified	Not Qualified	Lack Sufficient	Totals
Daniel A. Moore Jr.	690	198	45	159	1,092
James K. Singleton Jr.	323	375	83	311	1,092
Christopher E. Zimmerman	55	101	126	810	1,092
Michael R. Spaan	160	330	229	373	1,092
Mary K. Hughes	136	281	202	473	1,092
Kenneth P. Jacobus	167	343	361	221	1,092
Thomas J. Yerbich	13	119	277	683	1,093

Bar Poll Tally Sheet
United States District Judge

Total Ballots Received	1,102
Total Valid Ballots	1,092
Total Invalid Ballots	10
First Judicial District	103
Second Judicial District	13
Third Judicial District	837
Fourth Judicial District	100
Active Out-of-State	39

Thanks to all the Bar poll Committee members and volunteers who helped tabulate the Federal District Judge ballots. We had an overwhelming response to the poll and had it not been for all the Bar members who gave so much time, we'd still be counting ballots!

MISS GRAMMAR

Shunning the frumious virgule/solidus

By Karen Larsen

Dear Miss Grammar:

What does the diagonal line, usually called a slash, really mean? "And" or "either?" For example, I have a trust deed before me, reading "John Jones/Mary Smith as beneficiary." Does that mean that *either* Jones or Smith is the beneficiary or that *both* are the beneficiaries?

—M. Williams

Gentle Reader:

In contending with the *virgule* (the real name of the slash (also called diagonal, separatrix, shilling mark, slant, stroke), Miss Grammar is remined of a line form Carroll's "Jabberwocky:"

"Beware the Jubjub bird, and shun
The frumious Bandersnatch!"

In our case, we would do well to shun the frumious virgule, as will soon become apparent.

First, the virgule does have some more of less legitimate and useful employment:

1. to divide dates (8/3/88);
2. to divide fractions (3/4), although sometimes called a *solidus* when used to separate numerals;
3. to show line division in poetry (Sweetest love I do not/For weariness of thee);
4. to indicate choice, as in a test (is/is not) or invitation (will/will not) or the debatable and/or;
5. to indicate "per" (miles/hour);
6. to show connection of some sort (report filed by Donald Hastings/Los Angeles); and
7. to indicate that a person or thing has two functions (the owner/manager).

Notice that items 4 and 7 present the very problems that began this discussion: No. 4 indicates "either" and No. 7 indicates "and." How are we to know which is meant? It is better, Miss Grammar opines, *in the writing* to use the virgule only for "either" and to clearly state "and" when that is what is meant. In No. 7, the writer should say "the owner and manager."

Most dictionaries will stress the "eitherness" of the virgule, and William Safir in *I Stand Corrected* (Avon Books, 1984). p. 404, draws our attention to the court's seeing it that way, too, in *Miron Rapid Mix Concrete v. Bank Hapoalim, 432 NYS2d 776, 777-778 (1980).* A check payable to Revel/Miron Ready Mix" was endorsed and cashed by Revel only. Were both signatures necessary to properly negotiate the check? The court held the check was properly paid with endorsement of only one of the named payees.

We see, Gentle Readers, that a virgule can be of much more detriment than benefit, and you may be as puzzled as Miss Grammar as to why one would make a check or trust deed to two persons, separating their names with a virgule. "And" or "or" would have been much the wiser choice.

While she is at it, Miss Grammar is not fond of the and/or combination. Either "and" or "or" is usually adequate, or another phrasing will do as well.

A. All dwellings and/or other structures on the property are included in the contract.

B. All dwellings and other structures on the property are included in the contract.

C. All structures on the property are included in the contract.

If the writer wishes to keep the and/or distinction, he may easily do so with the phrase "or both."

A. Lessee will provide insurance covering fire and/or wind damages.

B. Lessee will provide insurance covering fire or wind damages or both.

C. Even better:

C. Lessee will provide insurance covering damages by fire or wind or both.

One final note — one of Safire's readers makes this observation: "I am ... surprised that you should cite legal decisions in support of usage. Surely one knows prima facie that lawyers and judges are incompetent on matters of English usage," Safire, p. 408.

This simpleton has greatly piqued Miss Grammar. She considers most lawyers and judges to be highly competent in English and often extremely sophisticated in the more subtle points of grammar; no other profession, with the possible exception of the academic, cares so much about the written word.

Comparatively Speaking ...

Related to the "and/or" problem is the matter of a certain kind of comparison. Phrasing a comparative construction can be vexing indeed. Usually the frustrated author degenerates into a state of fussing with "and" and "or." Examples:

A. Please deposit with American Express the greater of 30 percent of the March 1987 profits and $500,000.

B. Please deposit with American Express the greater of 30 percent of the March 1987 profits or $500,000.

Now "B" is better than "A," to be sure, but it is still imperfect to the discerning ear and eye because "greater" here may seem to modify only "30 percent of the March 1987 profits." Best is:

C. Please deposit with American Express either 30 percent of the March 1987 profits or $500,000, whichever is the greater.

Note: if your opinions number more than two, you will use "greatest" or "least," not "greater" or "lesser." Example:

Henderson is contractually bound to produce the proceeds of the stock sale, the income from Sage Ranch, or his life savings, whichever is least.

The late Judge Solomon said many years ago, "the legal draftsman must write for unidentified foe as well as known friend. He must write so that not only a person reading in good faith understands but a person reading in bad faith cannot misunderstand."

And that, gentle readers, is why we all work so hard on details that the average person may consider unworthy of notice.

Larsen is with Miller, Nach, Wiener, Hager & Carlsen, Ste. 3300, U.S. Bancorp Tower, 111 S.W. Fifth Avenue, Portland, Ore. 97294.

Law school enrollment is up

Law school enrollment increased 2.3 percent this year over last year, and both women and minorities increased their proportions of the total number of law students, says the American Bar Association.

Enrollment of students seeking a juris doctor (JD) degree, the basic law degree, increased to 120,694. That included an increase of 4.4 percent, to 42,860, in first year enrollment levels. When calculations were based on overall enrollment, including post-JD students, the increase was 2.2 percent, to 125,866.

Women now represent 42 percent of all law students and of all students in a JD program. First year enrollment of women this year is 5.1 percent higher than it was last year, increased from 17,506 to 18,395. A total of 50,932 women are seeking juris doctor degrees, while the total of women students, including those in postgraduate programs, is 52,565. Last year, women represented 41.5 percent of the first year class, and 41.0 percent of total law school enrollment.

Minority enrollment increased dramatically. First year minority enrollment increased by nine percent, from 5,105 to 5,565. Enrollment by minorities seeking juris doctor degrees was up 5.8 percent, from 13,194 to 13,962. Minority students represented 11.6 percent of students in juris doctor programs, and 13 percent of the first year class, increased from 11.2 percent of the juris doctor enrollment and 12.4 percent of the first year enrollment last year.

Only a slight increase was recorded in the number of degrees awarded in 1988, to 35,701 compared with 35,478 in 1987.

The figures were compiled by the Office of the American Bar Association Consultant on Legal Education, headed by James P. White at Indiana University School of Law in Indianapolis. The office surveys ABA approved law schools every year to determine enrollment trends. A formal report, including breakdowns of minorities by race and other information, is due to be published in May.

Bank failure: the aftermath

The role of the FDIC

PART I

BY THOMAS J. YERBICH

So the bank has closed — now what? Bank closures, after decades of relative quietude, have become fairly commonplace throughout the United States; reaching nearly epidemic proportions in some areas, most notably the "oil-patch" states. The thrust of this dissertation is on the impact of a bank failure on depositors, creditors and borrowers of the failed bank. Examination of the causes or impact of bank failures on local, national or, in some cases, international financial/economic infrastructure is beyond its scope.

For bank depositors, creditors and borrowers alike there are inevitable disruptions and inconveniences associated with a bank closure. Fortunately, as a result of the design and operation of the banking system, in most cases disruptions and inconveniences for depositors and borrowers are inconsequential. In fact, except for the publicity, name change on the branch where one banks, and the psychological anxiety and uncertainty involved, in the majority of cases it is "business as usual."

Depositors continue to make deposits in the same branch and writing checks using the same check books. Borrowers continue to make payments to the same place, in the same amount and often times using the same payment coupons—the main change being the payee has a different name. Eventually, of course, depositors get new check books and borrowers new payment coupon books, but nothing else radically changes. Unfortunately, this is not, as will be seen later, the case with respect to creditors of the bank.

On the other hand, a bank closure may result in checks not clearing, depositors being unable to continue to write checks, having to wait for money that has been deposited and a change of banks. The impact of a bank closure on depositors is primarily dependent upon the manner of the closure (whether it is a purchase and assumption transaction or a deposit payoff). The impact on borrowers is dependent not only upon the manner of the closure but also on the individual status of the loan, i.e., whether it is a "current" or "troubled" loan. For a more complete picture and better understanding of how to deal with the problems of bank closures, some background need be provided.

BACKGROUND

Federal Deposit Insurance Corporation

The predominant "player" in a bank closing, whether it be a federally-chartered (national) or a state-chartered bank, is the Federal Deposit Insurance Corporation (FDIC). The overwhelming majority of banks in this country are members of the FDIC, which insures deposits to a maximum of $100,000. The FDIC is not, however, a regulatory agency in the classic sense; it is an insurer. [1] Contrary to popular misconceptions, the FDIC does not close failed banks. The power to close failing banks is vested in the Comptroller of the Currency (national banks) or the bank regulatory/supervisory agencies of the several states (state banks). The FDIC can, however, effectively compel closure of a bank by terminating deposit insurance. [2]

The primary non-insurer role of the FDIC in bank closures is that of a receiver. When a national bank is placed in a receivership (closed), the Comptroller is required by statute to appoint the FDIC as receiver. [3] Alaska statutes also provide for the elective appointment of the FDIC as receiver of closed state banks insured by the FDIC. [4] It is the role of the FDIC in failed bank situations and in dealing with the FDIC which will consume the major portion of this paper.

The role of the FDIC as "receiver" is independent of its role as insurer and administrator, which is the FDIC as "corporation."The FDIC as corporation, in failed bank situations, is obligated to pay off, or in some other form provide for, insured deposits. [5] The FDIC as receiver engages in the traditional activities of a receiver, i.e., collecting assets and paying off creditors (other than insured depositors). [6] The two roles are, for the most part, performed simultaneously and the line of demarcation between the two is often-times difficult to distinguish. It is, however, important to keep the distinction in mind when dealing with the FDIC and to note in which capacity the FDIC is operating with respect to the particular problem at hand.

FDIC Alternatives

The FDIC, as receiver, has two alternatives in dealing with failed banks: the purchase and assumption or deposit payoff. As a matter of institutional preference, the FDIC favors the purchase and assumption route and, because it is the least disruptive and presents the fewest problems, so also should depositors, borrowers and most creditors.

Purchase and Assumption Transaction

Under a purchase and assumption transaction, the failed bank is merged into a profitable bank. Simply stated, the profitable bank purchases the assets (including the goodwill) and assumes the deposit liabilities of the failed bank. If necessary, the FDIC as receiver pays the acquiring bank, in cash, the amount by which the assumed deposits exceeds the value of the assets acquired and the premium agreed to be paid by the acquiring bank. It may also provide the acquiring bank with financial assistance, [7] but only to the extent as is determined to be less costly to the FDIC than liquidation through a deposit payoff. [8] To complete the transaction, the FDIC as receiver transfers to FDIC in its corporate capacity the remaining assets of the failed bank and FDIC the corporation assumes the liabilities not assumed by the acquiring bank. Purchase and assumption transactions may also be available in situations involving failed state banks. [9]

From the point of view of depositors, most borrowers and many creditors, a purchase and assumption transaction is quick, easy and uncomplicated. [10] Yesterday they were dealing with "Failed Bank" and today with "Acquiring Bank." Eventually, the bank customer may find the branch at which he or she banked closed, although the FDIC typically requires the acquiring bank to keep all branches open for a period of 30 days after the acquisition. For the depositor who has deposited more than $100,000 with "Failed Bank," a purchase and assumption transaction results in the entire deposit being assumed by "Acquiring Bank," with no loss to the depositor as might result in a deposit payoff involving the attendant $100,000 insurance limitation.

Deposit Payoff

The deposit payoff approach is used when other approaches are unavailable or have been tried unsuccessfully. The FDIC is authorized to make a payoff "whenever an insured bank shall have been closed on account of inability to meet the demands of depositors." [11]

The FDIC is required to make payment of insured deposits as soon as possible after a bank closes, either in cash or by making available a deposit in a "new bank" or in another insured bank "in an amount equal to the insured deposit of such depositor." 12 The FDIC may "in its discretion" require proof of claims before paying and, when it is not satisfied as to the validity of a claim for an insured deposit, require court determination of the claim before paying. Regulations of the FDIC require that one or more Claims Agents be appointed and to maintain a temporary office at the site of the closed bank for purposes of receiving claims of insured deposits and making speedy payment of such claims.

In the case of a national or District bank the FDIC, upon payment, is subrogated by force of law "to all rights of the depositor against the closed bank to the extent of such payment. [13] Before the FDIC makes payment to depositors of closed state banks, the FDIC must obtain agreements of subrogation or otherwise be assured of its rights of subrogation. Accordingly, when the creditors line up for their ratable dividends the FDIC takes its place among them.

Deposit Definition

Inasmuch as the FDIC, in its corporate capacity in a deposit payoff, is only required to payoff "insured deposits," the definition of what is an "insured deposit" has particular importance. The amount of the deposit that exceeds the $100,000 limit is, of course, not insured. To the extent that more than $100,000 is deposited, the depositor becomes a general creditor. in multiple account situations a problem arises from language in the statute [14] that "in determining the amount due any depositor there shall be added together all deposits in the bank maintained in the same capacity and the same right for his benefit either in his own name or in the names of others except trust funds ***."As a result, numerous, often times ingenious, multi-deposit schemes have been devised attempting to increase coverage.

In determining whether the accounts should be aggregated into one "insured deposit," the courts look for actual separateness of capacity disregarding separate accounts which are held as a sham or as an accounting practice or for the convenience of the depositor.

In one case, three partners operated two businesses under different fictitious names, maintaining two accounts in each fictitious name in the same San Francisco bank. The Court of Appeals refused to allow separate treatment finding that the capacity was not altered by operating under two fictitious names, nor was it affected by the manner in which the partners conducted their accounting practice or segregated their funds. [13] In this same vein, regulations of the FDIC specify that deposits held by a corporation, unincorporated association or partnership that is not engaged in any independent activity are deemed owned by the person(s) owning the entity and will be added to any individual accounts held in their individual cpacity in the same institution for purposes of the aggregate $100,000 limit. [14] An "independent activity" is any activity other than one directed solely at increasing deposit insurance coverage. [15]

In another case, the executors of a will maintained two accounts in the same bank, one of which held the corpus of the estate and the other held the income. The District Court found that the separate accounts were maintained as an accounting practice by the executors but that, in reality, the income account was as subject to the administration of the executors as the corpus, therefore the accounts constituted but a single "insured deposit." [16] On the other hand, accounts held jointly with different individuals have been held to be held in a different capacity. [17] The District Court, ruling in favor of the depositor, found substantial support for its conclusion in the published FDIC pamphlet which stated that bank deposits in an individual account and joint accounts are deemed held in different rights or capacities. In short, the FDIC was taking a position inconsistent with that which it had publicly state. [18] The FDIC has, by regulation, accepted separateness of joint from individual accounts. [29] The FDIC, however, places a regulatory gloss on qualifying: each joint owner must have personally executed the deposit account signature card and possess withdrawal rights; also, if accounts are held by the same combination of joint owners, they will be aggregated for purposes of determining the $100,000 insured limitation. Furethermore, both the regulations and the judiciary require that each joint owner must have an identifiable actual interest in the account; a mere "dummy" or "straw man" will not suffice.

Recently, the FDIC attempted, by regulation, to aggregate into a single "insured deposit" funds deposited by or through a deposit broker with other funds of the depositor deposited by or through the same broker in different insured institutions. The Court of Appeals, in striking the regulation, did so on the basis that the definition in the regulation was contrary to the plain, unambiguous language of the statute. [20] On the other hand, the Supreme Court held that a standby letter of credit does not constitute a deposit despite the plain language of the section 1813 (1) (1) that a letter of credit is within the definition of a deposit. [21]

Special provisions are made for trust funds held by the bank in a fiduciary capacity, including funds held as a trustee, executor, administrator, guardian or agent. In such cases, each trust or estate is treated as a separate depsoit for purposes of determining an "insured deposit." [22] By regulation the accounts of estates and trusts are not aggregated with the accounts of the beneficial owners or the individual accounts of the fiduciary. [23]

Where a public entity holds different funds for several different purposes in the name of one official, and that official stands in a different relation to each of the funds, each fund is treated as a separate "insured deposit" insured to the $100,000 limit. [24]

The author is a member of the Alaska and California Bars. Part II, appearing in July, will discuss the role of the FDIC in a state bank situation.

• Footnotes

[1] The regulatory agencies involved in banking are the Comptroller of the Currency (federally-chartered banks), Federal Reserve Board (member banks of the Federal Reserve system), and Alaska Department of Commerce & Economic Development (state-chartered banks).

[2] 12 USC 1818(o) requires the Comptroller to place a national bank which has lost its FDIC insured status into receivership. Alaska statues (AS 06.05.355(c), 06.05.470(a)(7)) compel the same result. In addition, for a state bank, termination of FDIC insurance results in loss of membership in the Federal Reserve System. 12 USC 1818(o).

[3] 12 USC 1821(c)

[4] AS 06.05.470(z). 12 USC 1821(e) compels the FDIC to accept appointment as receiver whenever appointment is lawfully tendered by the appropriate state banking supervisory authority.

[5] 12 USC 1821(f)

[6] 12 USC 1821(d). Detailed discussion of the FDIC as receiver is contained infra.

[7] 12 USC 1823(c)(3)

Continued on Page 21

Samantha Slanders

Advice from the Heart

DEAR SAMANTHA: I am a young attorney who has been practicing law in Alaska for approximately 18 months. I did well in law school and passed the bar exam easily. Yet, I always feel inferior when talking with my colleagues. For example, last week I was at a luncheon and was seated at a table with a number of attorneys. Discussion turned to a case I had never heard of before, and within moments they were actually talking about the case footnotes. I sat in silence, totally embarrassed and lost to the conversation.

How can I solve this problem?

Lost in Alaska

DEAR LOST:

Your problem essentially is that you want to appear smarter than you are. I had that problem for a number of years and certainly empathize with your situation. There is a solution, however, which I have discovered, and which in many respects is the secret to my current success.

First, you must understand that knowledge is not the answer. Anyone can be smart. What you have to do is appear smart. I do this by a technique I call "aggressive conversation." Had I been seated with your colleagues when discussion of a case I had not heard of arose, I would have feigned familiarity with it. I would have asked the month the decision was rendered, and then would have argued briefly that it was a month earlier. I would have expressed pleasure that someone other than me had read the footnotes. I would have then spoken about the importance of footnotes in these cases and would have referred to footnote II (fictitious footnote) in the *Salamander* case (fictitious case) and noted how it effectively changed the outcome of the entire case. Before anyone could have asked any details about the Salamander case, I would have directed the conversation toward the case we were discussing and asked them what they felt the court was really trying to say. I would have then emphatically agreed with the most senior attorney at the table, or a judge, as the case might be.

This technique has proven effective for me, and I am proud to say that it has led directly to my current employment where I write advice columns for people throughout the country. In fact, I have found the less knowledgeable I am about a subject, the more convincing I can be. Give "aggressive conversation" a try and keep us posted.

Samantha

Imposed disciplinary actions

Attorney A received two private reprimands by the Disciplinary Board for two separate violations of DR 5-104, Limiting Business Relations with a Client.

Attorney B received a written private admonition for failing to communicate with a client.

Attorney C received a written private admonition for failing to communicate with a client.

Attorney D received a written private admonition for making an improper offer of proof to a court.

Attorney E received a written private admonition for engaging in a pattern of neglect in representing a client, including failure to timely notify a client of a deposition and of the inability of the attorney to attend, and requesting that the client call the attorney immediately concerning the deposition but then failing to return the client's messages.

Supreme Court

In the Disciplinary Matter Scott D. Harless, respondent. Supreme Court No. S-3050, ORDER: ABA File Nos. 85.239; 86.141/148; Before: Matthews, Chief Justice; Rabinowitz, Burke, Compton and Moore, Justices.

This matter having come before the court for review of the findings of fact, conclusions of law, and recommendations of the Disciplinary Board of the Alaska Bar Association, pursuant to Alaska Bar Rules 22(n) and (r), and the court being advised in the premises,

IT IS ORDERED;

1. On review of the entire reccrd in this case, we AFFIRM and ADOPT the decision of the Disciplinary Board of the Alaska Bar Association.

2. Scott D. Harless is suspended from the practice of law in the State of Alaska for a period of four years, effective immediately.

3. Discipline Counsel for the Alaska Bar Association shall comply with all requirements of Alaska Bar Rule 28, which includes, *inter alia*, the transmission of a copy of the order of suspension to any jurisdiction other than Alaska to which Scott D. Harless has been admitted to the practice of law. Scott D. Harless shall also comply with all requirements of Alaska Bar Rule 28.

4. Any application by Scott D. Harless for reinstatement to the practice of law in Alaska shall comply with all requirements of Alaska Bar Rule 29.

Entered by direction of the court at Anchorage, Alaska on March 1, 1989.

/S/ David A. Lampen
Clerk of the Supreme Court

Continued from Page 20

[8] 12 USC 1823(c)(4)

[9] AS 06.05.470(z) implicitly authorizes a purchase and asumption transaction by authorizing the FDIC to "liquidate, reorganize, merge or consolidate the bank in any manner permitted by the laws of the United States ***"

[10] From the standpoint of the FDIC and the acquiring bank, the transaction is anything but simple and uncomplicated. The process usually starts some time before the actual closing with the FDIC contacting potential "Bidders." Interested banks submit bids specifying the assets to be purchased, obligations (other than deposits) to be assumed and price, including premium for goodwill, to be paid. The purchasing bank may not purchase all of the "assets" of the failed bank (e.g., problem loans, certain real property, furnishings, fixtures and equipment may be excluded). The FDIC may guarantee certain obligations assumed by the acquiring bank and a typical FDIC purchase-assumption transaction agreement includes a "Buy-back" provision under which the FDIC agrees to repurchase a specified amount of loans purchased by the acquiring bank, provided the bank tenders those rejected loans back to the FDIC within an agreed time period (e.g., 30 to 60 days).

[11] 12 USC 1821(f)

[12] Ibid

[13] 12 USC 1821(g)

[14] 12 USC 1813(m)(1)

[15] Bulasky v FDIC, 383 F.2d 383 (9th Cir. 1967)

[16] 12 CFR 330.5, 330.6

[17] 12 CFR 330.7

[18] Phair v FDIC, 74 F.Supp. 693 (D.N.J. 1947)

[19] DeLorenzo v FDIC, 259 F.Supp. 193 (S.D.N.Y. 1966), adhered to 268 F.Supp. 378 (1067)

[20] Reliance on the DeLorenzo approach may be risky as the rationale is contrary to a long line of cases (particularly in the income tax area) that refuse to apply estoppel against the government even when official information publications are involved or to prevent the responsible public official from retroactively correcting "mistakes of law."

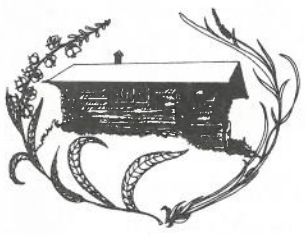
[21] FAIC Securities Inc. v U.S., 768 F.2d 352 (D.C. Cir. 1985)

[22] FDIC v Philadelphia Gear Corp., 479 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986)

[23] 12 USC 1813(p), 1817(i)

[24] 12 CFR 330.4

[25] 12 USC 1821(a)(2)(A); FDIC v Casady, 106 F.2d 784 (10th Cir. 1939); 12 CFR 330.8



HISTORICAL BAR

By Russ Arnett

The most notorious wedding which I performed as U.S. Commissioner in Nome in 1952 united a waitress and a bartender in holy matrimony.

Then as now, marriage was a mixed bag. The ceremony took place in the bar owner's residence. The wedding party wanted to start the drinks before the ceremony, but this I refused as being inconsistent with the solemnity of the occasion. The reception was a the Board of Trade Bar. For years afterward there was extant of picture of me drinking French 75s, which consisted of gin and champagne, directly from an upraised and tilted punch bowl.

One of the wives present professed her affection for me, and I for her. Alas, she had a husband. After the party I staggered back to my cabin, falling in the snow along the way at least once. We had no Commission on Judicial Conduct in those days to play Monday morning quarterback.

Nome had a small Air Force base at the time. There were no restrictions on-the relations between the GIs and the Eskimo girls. Much of that scene was sordid. A major problem was the differing views of sexual morality of the GIs and the Eskimo girls. Under the traditional Eskimo culture, premarital sex violated neither the laws of God nor of man. The conquest was really no conquest at all. The prey did not perceive the predator as a threat. The Don Juans and Casanovas were usually callow youths.

One day an Eskimo girl who hung out in the bars and wore a black leather jacket applied for a marriage license with a young GI. The GI was very nervous but I thought sincere. I thought well of the girl whom I believed was proceeding for all the right reasons. I went over the business about the blood test and in due course issued the marriage license. The GI asked if I would perform the ceremony. I agreed. At the time of the ceremony he appeared uncertain though he said nothing to indicate this.

Later I was confronted by his base commander. He accused me of using poor judgment in permitting a mixed race marriage. He said the girl would never be accepted by the GI's family and home community. I reluctantly promised the base commander I would call him before performing marriages of GIs and Eskimos in the future.

There was a booklet containing the marriage ceremony which I presume had been used by generations of Commissioners. It read as though written in the time and style of James II. It contained a declaration of the couple, who were usually Eskimo, of "and therewith, I plight thee my troth." I probably did not have the civil or ecclesiastical authority to do so, but I eliminated this.

A number of Eskimo villages were dominated by a missionary or church. King Island was dominated by the Catholic Church. All of the residents would come by skin boat to Nome each summer with their Irish priest. He had performed marriages during the winter at King Island and really did not see the need of the civil aspect of marriage. I tried to persuade him to become a marriage commissioner so he could issue licenses and marriage certificates, which he resisted. He would, however, reluctantly bring the bride and groom in so I could tie the civil knot.

The local doctor would not deliver Eskimo babies because the parents could not pay, so Eskimo births were assisted by one of two Eskimo midwives, Flora or Fanny. They faithfully came in afterward for me to make out the birth certificates for which I was paid about $3 by the Territory. The interesting part was that they thought it necessary to discuss with me the various obstetrical problems encountered during labor and birth.

Flora and Fanny were wonderful, charitable women. Their presence at the birth could have been more sustaining to the mother than would the presence of the doctor.

One of the cultural beauties of Eskimo life was "Eskimo adoptions." Though the $20 filing fee, which would have been mine, prevented most of them from being legal adoptions, the Eskimos readily and lovingly assumed parental responsibilities where the mother was unable to do so.

There was no concealment of biological parenthood. One day a young mother came into my office with an infant less than a week old and handed her child to me. She had been told I was in charge of adoptions. She probably had little difficulty finding others better able then myself to take the child.

I think it was Wickersham who told of a trading post on one of the Interior rivers which was served by stern wheelers that made regular though brief visits. Two middle-aged spinsters disembarked and met a village girl with her red-headed child.

One of the puzzled spineters asked "is the father red-headed?" The mother replied, "I don't know, he never took his hat off."

Delegation sends judgeship to President

The Alaska Congressional Delegation May 15 recommended Daniel Moore Jr., James Singleton Jr., Mary Hughes and Kenneth Jacobus for consideration as the new Federal District Court Judge for Alaska.

Moore is an Alaska State Supreme Court Judge, Singleton is an Alaska Court of Appeals Judge, and Hughes and Jacobus are in private practice.

The four candidates will be considered by Attorney General Richard Thronburgh for the position vacated by Chief Judge James Fitzgerald, who has decided to assume senior status.

The Congressional delegation recommended the four candidates in a letter to Thornburgh. The Attorney General will review the candidates and recommend one applicant to the President for his appointment.

The President's appointment requires confirmation by the U.S. Senate.

"It is our pleasure to recommend for your consideration the four longtime Alaskan attorneys who ranked highest in the Bar poll — Daniel Moore, James singleton, Mary Hughes and Kenneth Jacobus," the delegation wrote Thornburgh.

The delegation recommended the four in order of their ratings in the Alaska Bar Association poll. The association surveyed its members, with 1,102 Alaska attorneys responding.

Moore was ranked well qualified or qualified by 95 percent of those who felt they had sufficient knowledge of the applicant. Eighty-nine percent gave Singleton a similar ranking, with Hughes receiving 67 percent. Fifty-nine percent of those ranking Jacobus indicated he is well qualified or qualified for the position.

A 34-year Alaska resident, Moore practiced law in the firm of Delaney, Wiles, Moore, Hayes & Reitman and served as a District Magistrate and a Superior Court Judge before his appointment to the State Supreme Court in 1983.

Moore has been an active member of the Alaska Bar Association and has served on the organization's Board of Governors, Civil Rules Committee and Judicial Qualifications Commission. He is a graduate of the University of Notre Dame and the University of Denver Law School.

Singleton has been a judge on the Alaska Court of Appeals since it was created in 1980. He was also a Superior Court judge, an attorney with Delaney, Wiles, Moore & Hayes and an associate of Anchorage lawyer Roger Cremo.

Active in the legal community, Singleton is serving on the Alaska Supreme Court's criminal rules revision committee and was a member of a state commission which investigated charges of biased sentencing against members of minority groups. He also was a member of the State Criminal Justice Center Advisory Board at the University of Alaska and worked on the preparation of an appellate practice handbook.

Singleton also has been active in organizations and boards dealing with child abuse and neglect. He received his undergraduate and law degrees from the University of California in Berkeley.

Hughes has been in private practice with Hughes, Thorsness, Gantz, Powell & Brundin since 1974 and has been a partner in the firm since 1977. She has also served as a hearing officer for the state Department of Education in special education and for the state Department of Law in employment issues.

Hughes is presently trustee and president of the Alaska Bar Foundation. She also has served as president, treasurer and a member of the board of governor of the Alaska Bar Association. A founding member of the Anchorage Association of Women Lawyers, Hughes was the organization's president in 1976 and 1977.

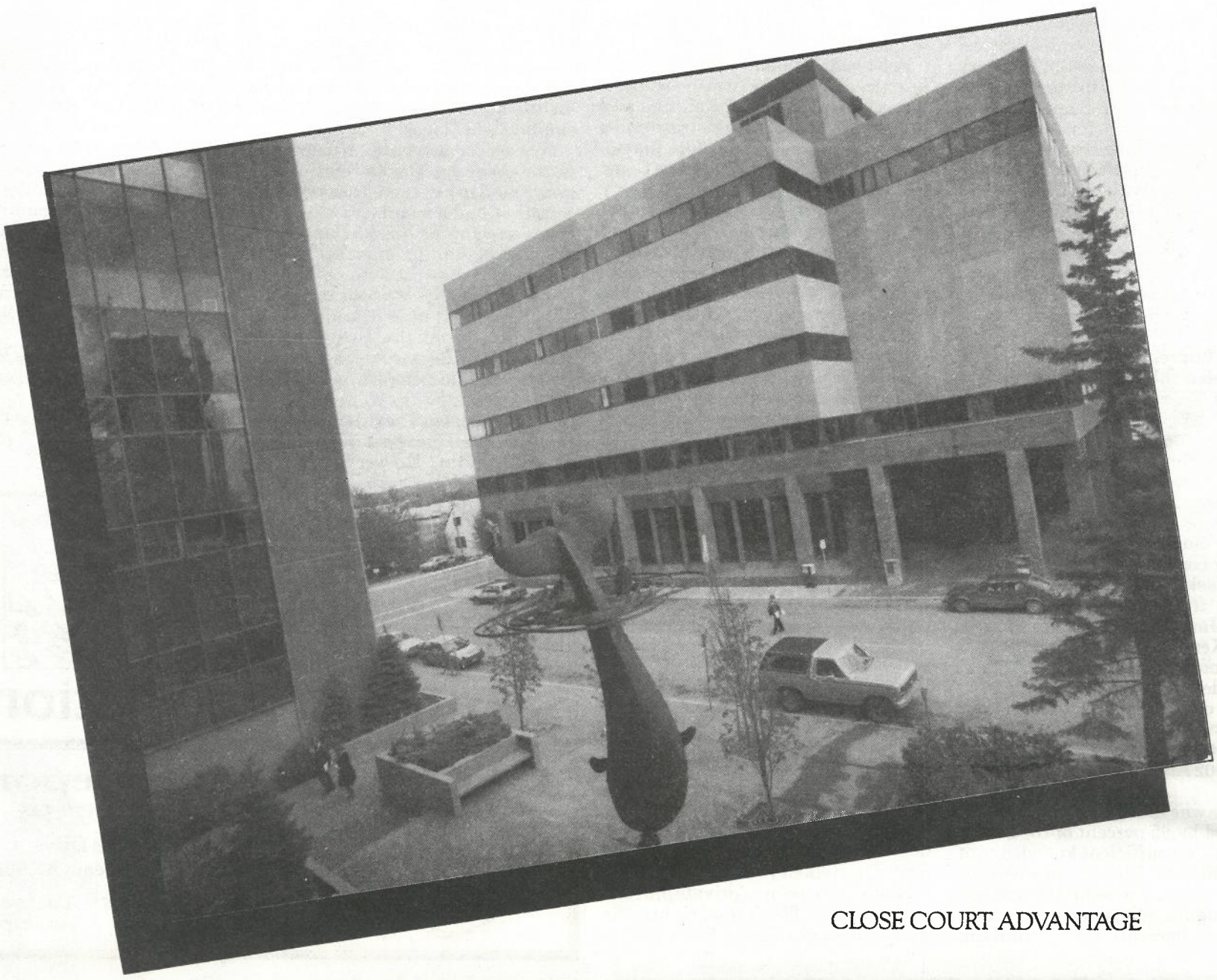
A graduate of the University of Alaska, Hughes received her law degree from Willamette University College of Law.

Jacobus is also a partner in the law firm Hughes, Thorsness, Gantz, Powell & Brundin. He served as city attorney and prosecutor for the cities of Valdez and Seward and was a law clerk for Alaska Supreme Court judge Jay Rabinowitz. He is also an attorney in the U.S. Army Reserve.

A member of the Alaska Bar Association since 1969, Jacobus is chairman of the organization's Ethics Committee. He has also served on the Disciplinary Committee and as a Continuing Legal Education instructor. In addition, he was on the board of directors of the Alaska Alaska Legal Services Corporation and is treasurer of the Anchorage Bar Association.

Jacobus received his B.S. and J.D. degrees from the University of Wisconsin.

—Press release, Alaska Congressional delegation, May 15, 1989



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