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The Alaska BAR RAG

Volume 13, Number 6 — *Dignitas, semper dignitas* — November-December, 1989

Alaska lawyer bails out; hung up over Alps

By Hugh B. White
In the third person

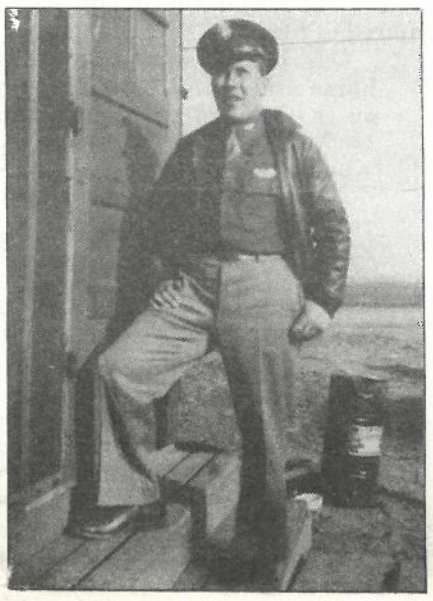
It was a beautiful sunny day in Italy and the belly of Europe on the 9th day of June 1944.

After a sleepy 4:30 a.m. briefing, Hugh and his nine-man crew were flying their B-24 Liberator from their base at Venosa, Italy, in a formation of 36 bombers which were a part of a stream of bombers that stretched as far as th eye could see, and farther, both in front of their formation and behind.

It was one of those historic 1,000-plane raids. The bomber stream was headed up the center of the Adriatic Sea, across the coast of the Gulf of Venice a little east of that city of canals, over the Tyrolean Alps of Austria and on to the City of Munich where the railroad yards were to be bombed.

The crew had been assigned to fly the point position of the second "V" of a six-plane formation, so their bomber was kept just behind and under the tail of the lead plane with a bomber flying beside each wingtip. This six-plane formation flew on the right and a little behind and above a similar formation while the third six-plane formation flew on the left and a little behind and below that lead formation. Behind this 18-plane formation was another such formation from the same base and Air Corps Group (it was Army Air Corps in those days). In front and behind these two 18-plane formations were many similar formations, which made up the bomber stream, from many bases in Southern Italy.

Crewmembers were relaxed, even though they had been briefed to expect determined enemy opposition.



Hugh White at the barracks.

When they had reached their assigned altitude of 20,000 feet, Hugh turned the control of the plane over to his experienced co-pilot and, since it was going to take nearly five hours to reach the target area, he relaxed in the warm sunshine streaming through the window and took a nap. The crew jovially bantered back and forth over the intercom, but no radio transmissions could be made for that might alert the German military forces of their approach.

The flight was uneventful until it was southeast of Munich. Suddenly a nerve-shattering and excited voice came over the intercom, "Bogies at two o'clock high" and, then, all h— broke loose. Hugh looked out the window beside the co-pilot and there were two Messerschmidt 109's, side

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Judge Fraties remembered as a master of all his trials

By Harry Branson

The first time I encountered Gail Roy Fraites, we were on opposite sides of a motion to change child custody. I represented the moving party, a reasonably well-to-do father who could offer his son a comfortable standard of living. Gail's client was a free spirit, openly contemptuous of her ex-husband's middle class values.

She and her son were living on a borrowed boat in Juneau in the middle of the winter. She didn't see anything wrong with her living arrangement; and neither did Gail, who began the festivities with a 30-minute opening statement on the American Frontier Spirit as exemplified by his client. By the time he began rolling across the prairies in a Connestoga wagon, I knew we were beaten. The rest of the day was spent in a mopping up operation. I don't suppose my client ever really understood why he lost; but I did.

Gail performed magnificently for his client that day; but there was more to it than that. He never consulted a note. He didn't appear to consult his client, or care particularly what she had to say on the witness stand, either. He was in control of the courtroom, and he knew it. Whenever he had an opportunity, he continued to expand upon his opening statement. The words flowed from his lips in torrents. He didn't seem to address the particular issues in the case; but it didn't matter. Gail was happy just to be there, plucking metaphors out of the air, riding up and down the scales, and knocking our socks off. He sounded like a man running for political office, whipping

PHOTO BY JAMES H. BARKER, BETHEL

Gail Roy Fraties

his supporters into a frenzy and overpowering any skeptics in the audience. He loved what he was doing and so did the judge, who dealt with my objections much like a man impatiently swatting at a fly.

When I met my wife at the Anchorage airport that evening, I told her that I had just spotted another one of those rare and wonderful birds, the Wild American Trial Lawyer, in full plumage. To me, this term describes a man or woman for whom trial is not simply a means to an end, but an end in itself.

Continued on page 6

American Bar annual meeting rates as a hectic gathering

By Donna C. Willard

Although only slightly more than 8,000 members attended the 1989 American Bar Association Annual Meeting in Honolulu, a marked decrease from the past two years (undoubtedly because of expense and distance), the agenda provided was even fuller than usual.

Depending upon one's interests, there was literally something for everyone, from substantive law courses on a wide variety of topics to showcase presentations on such issues a "Resolving Disputes in Pacific Ways" (also the theme of the meeting) and "Peaceful Resolution of International Disputes."

The Association's policy-making body, the House of Delegates, met for two full days on Aug. 8 and 9 and considered over sixty items, the most controversial of which concerned the various proposals to protect the Stars and Stripes.

THE FLAG ISSUE

Although not originally on the agenda, the Chairman of the House, George Bushnell, appointed a Task Force on the First Amendment shortly before the Annual Meeting and that group presented its recommendations as a late filed report.

The Task Force unanimously opposed adoption of either a constitutional amendment or federal legislation which would criminalize the desecration of the American flag as a political protest. After extensive, sometimes highly emotional debate, the House approved the substance of the resolution.

However, it was also made clear

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FROM THE PRESIDENT

Jeffrey Feldman

Lawyers are a suspicious lot. Some who read my last column doubted that all of the items I reported were true. I guess it's hard to believe that sometimes truth is stranger than fiction. So, let me state at the outset that everything in this column is the honest-to-God, no fingers-crossed, scout's honor truth.

Picking a jury is among the most difficult of trial tasks. There is something about the feigning of interest in what would under ordinary circumstances be the mundane circumstances of another person's life that taxes even the most skillfull of us (ie: "Oh. so you have two sons, Mrs. Jones,...that's very interesting, are they both alive?").

When I went to work for then-Public Defender Brian Shortell in 1976, the *voir dire* style of Charles Garry, who had defended a number of well-publicized Black Panther cases, had become fashionable among young criminal defense lawyers.

Garry's book on jury selection urged us to aggressively attempt to ferret out and neutralize racism during *voir dire*. This was an admirable, if difficult, goal. One my colleagues (I think it was Bill Bryson, but maybe not) used what had become a popular line of questioning in the Garry mold. He inquired of one very middle class juror:

> Q:Now, Mrs. MacDonald, if you were on a camping trip with two friends, one black and white, and you found that you had forgotten your toothbrush, whose would you borrow?

This question presumably was supposed to sensitize the potential juror to the subtleties of racism. Unfortunately, the point was hopelessly lost on the juror, who responded:

> A: That's disgusting,...I would *never* use anyone else's toothbrush.

On another occasion, another of my colleagues, Sue Ellen Tatter (who, before becoming a federal prosecutor, enjoyed a former career as a defense attorney), found herself defending one of several young men jointly charged with a minor offense. Pursuing the O.D.D. ("Other Dude Did it") defense, Sue Ellen hoped to plant the seeds of reasonable doubt in the minds of prospective jurors. Facing a very large woman who was the mother of four children, she thought she had stumbled on the perfect analogy to drive home the subtle concept of reasonable doubt. She inquired of her:

> Q:Mrs. Gilly, suppose you came home and found cookie crumbs on the kitchen counter and the cookie jar completely empty, wouldn't you have a reasonable doubt about which of your children had taken the cookies?

Again, the point slipped by, as the juror quickly responded:

> A: Nah,...I'd beat all their butts.

Brian Doherty, who recently made his way to private practice after laboring for several years as a public defender, once tried a case before Judge Mark Rowland. He thought he had prepared his client well for trial, providing all the "do's" and "don'ts" of proper courtroom behavior. The jury panel assembled in the back of the courtroom and Brian turned to face the group as the standard, general questions were asked. Turning his back to the judge and his client, counsel inquired:

> Q:Has anyone ever been charged or convicted of a criminal offense?
>
> (A few jurors raised their hands).
>
> Q: Anyone ever been convicted of drunk driving or possession of drugs?
>
> (Small response).
>
> Q: Anyone ever had any unfortunate contacts with law enforcement officers?

At that point, Judge Rowland called Brian to the bench and whispered to him, "I hate to interrupt you, counselor, but I thought you should know that your client has raised his hand in response to the last three questions."

In another case, then-assistant public defender (now potato magnate) Mark Weaver represented a fellow charged with assault. The identification by the victim was weak, save for his recollection that the assailant wore a distinctive pair of white, leather shoes. Just before trial, Mark made arrangements to make sure that his client had a decent suit of clothes to wear so as to favorably impress the jury. On the morning of trial, there was some consternation as to what to do when the defendant showed up at the office nicely decked out in all of the newly acquired clothing and,.....you guessed it, wearing a distinctive pair of white, leather shoes.

Such moments of unplanned humor are not confined to the life of an advocate in the criminal courts. When the Alaska Supreme Court held arguments years ago in the *Ravin* case, which affirmed a constitutional privacy right to personal possession of marijuana, one of the justices sought to test the limits of counsel's argument. He inquired:

> Q: What happens when an individual who has smoked marijuana becomes high and wants to drive home?

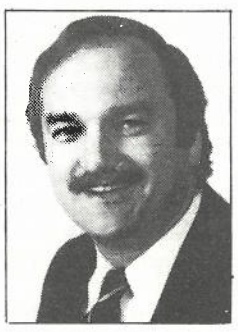
Counsel responded:

> A: Your honor, when you smoke marijuana and get high, you don't want to go home.

My partner, Jim Gilmore, tried a divorce case that has recently completed its well-known journey through the appellate courts. During an early hearing in the case, counsel for the wife attempted to establish that the husband's budget for his own expenses was inflated because some of his personal expenses would be born by his firm. The cross-examination of the husband proceeded as follows (I swear, this is a verbatim transcript):

> Q: Do you customarily take reimbursement for your business expenses?
>
> A: If it is truly a business expense I charge the client, yes.
>
> Q: Do you take reimbursement, other than your draw for your automobile?
>
> A: The answer is, yes. I have a firm credit card that pays for gas. It's going to be taxable income to me now because of the change in the tax laws so I'm going to have to pay the firm back or pay for it.
>
> Q: But at this point the firm pays for your gasoline?
>
> A: No, I'm going to have to pay it as of January 1st.
>
> Q: So, it's your testimony that you will not be passing gas through the firm anymore?

So, for those of you who didn't believe any of that stuff in the last column and thought I made it all up, rest assured that I am not that funny a guy. I just report the news, folks, I don't invent it.



THE EDITOR'S DESK

Ralph Beistline

Time moves quickly by. It seems that it was only yesterday that we were struggling to repair the air conditioner and planning a Fourth of July picnic. It is now forty degrees below zero in Fairbanks and the holiday season is upon us. Once again we find ourselves at the end of a year. In fact, this is the last edition of the Bar Rag to be published in this decade. When we write again it will be the 1990's and the last decade of the twentieth century.

We do not despair, however, with the passage of time, although we do marvel at how it seems to be moving at an ever-increasing pace —as if it must be somewhere soon. In fact, we note that the years have seen great progress and many improvements in both the Alaska Bar Association and in the overall quality of legal services that exist within the state. This is due, of course, to the attorneys who have invested their time in all of these areas.

As we look to the future, we can expect that the pace of time will quicken, but we should also expect to see continued progress within the legal community. We should all strive to take a more active role in Bar Association activities. We should work individually to ensure an even higher quality of legal services for Alaskan residents, and we should strive to ensure that basic legal services are available to all those who find themselves in need of them. Worthy goals, I think, for the last decade of this century.

As we enter this holiday season, the Bar Rag wishes to extend its very best to all of you and its hope that the coming year will bring excitement, satisfaction, and prosperity.

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Happy Holidays!!!

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The Alaska Bar Rag

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Alaska Bar Association
1989-1990

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

January 19 and 20, 1990
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IN THE MAIL

Bring back Samantha

Upon receipt of the July-August edition of the Alaska Bar Rag. I scanned its pages, looking forward to reading my favorite column, Samantha Slanders. I was distressed to discover you and your staff had chosen not to print Ms. Slanders' column in that issue.

I am the only member of the Alaska Bar Association in my firm, and many of my colleagues look forward to reading the Alaska Bar Rag with their monthly dose of Ms. Slanders. I say bust the budget and bring back Ms. Slanders at any cost.

Holly R. McLean

Ed. Note: You ask, we deliver. (See page 10)

New policy needed

Michael Schneider's article in the September-October 1989 issue of the "Bar Rag" ("Insurance Carriers Gut Medical Pay Coverage") is aimed specifically at State Farm Insurance Company, which is a client of several members of the Alaska Bar. The article suggests ways in which State Farm could be sued, and does so in terms that are clearly derogatory of that company.

While Mr. Schneider's article is informative, it is a recipe for suing a client of part of the bar membership and is, therefore, not the kind of article which the state bar association should be publishing. I find it offensive that bar dues, which are mandated by state law, should be used to publicize and distribute materials which promote litigation against clients of those who must pay the dues. In effect, Alaska attorneys who represent State Farm are being forced by state law to financially support the publication and dissemination of materials which encourage litigation against their client. This is unfair and improper. A change in editorial policy is needed.

My suggestion is that "The Alaska Bar Rag" adopt an editorial policy which encourages informative and educational articles and avoid the sort of "how to" articles that promote litigation. Further, I suggest a policy which avoids articles that single out and deride a company or individual. A mandatory association of attorneys should studiously avoid taking "pro-plaintiff" or "pro-defendant" positions, and certainly should avoid allocating any resources to promote such positions.

Rod Sisson
Lynch, Crosby & Sisson

Schneider replies

Dear Rod:

I have been provided with a copy of your October 15, 1989, letter to Ralph Beistline. Since you took the time to express your concerns on this matter, I thought I owed you the courtesy of a response.

I don't view the Bar Rag as a "pro-plaintiff" or a "pro-defendant" publication. Furthermore, I can't imagine that anyone would take the material in my columns to express the view of anyone other than myself. In all due respect, I just don't think that there is a perceived identity between what I say and anything other than my own personal point of view.

Given the business that we are all in, it's very difficult to be informative and educational regarding the practice of law without providing information that, at the same time, assists the clients of certain groups of attorneys and works to the detriment of clients of another group of attorneys.

You are completely accurate that my article was critical of State Farm and focused directly at State Farm. In defense of Mr. Beistline, let me point out that the original title of my article was "Like a Good Neighbor, State Farm Guts Medical-Pay Coverage." The somewhat more general title was Ralph's idea on the so-far unsubstantiated premise that State Farm was not the only carrier that had an endorsement identical or substantially identical to the one that I complained about in the article.

Regarding that specific endorsement, let me point out the following:

1. I contacted my own insurance agent before writing the article. That agent obviously did not see the reduction in coverage aspect of the endorsement, nor appreciate his own exposure for failing to advise his policyholders.

2. The State Farm claims office was given a copy of my letter complaining about this endorsement and asking for the option of "buying around" the endorsement or otherwise having it removed from my policy. This letter was provided before the article came out, but to date I have received absolutely no response.

3. While my criticism of State Farm may have made State Farm and certain others uncomfortable, I keep waiting for someone to point out to me how my analysis of this endorsement or the legal issues surrounding it is incorrect.

It seems to me that the attorneys representing State Farm would be thankful that someone pointed out to State Farm the problems with this endorsement. After all, if any one individual or entity is to benefit from the criticism contained in my article, it is clearly State Farm. State Farm can easily maintain its endorsement and comply with Alaska law by simply advising its policyholders of the truth:that under certain limited circumstances, their coverage will be reduced. It could also solve the problem by rewording the endorsement if that is not the corporate intent. State Farm could further offer people the chance to buy around the endorsement. State Farm seems to be taking none of these creative options.

Contrary to your suggestion, I truly believe that my criticism of State Farm has a potential of reducing, as opposed to increasing, litigation in this area. I can't imagine that I said anything in that article that you or any other competent practitioner in this area would not have figured out if confronted with a client who lost the medical-pay benefits they thought they had paid for under circumstances that I outlined. I simply gave State Farm a chance to fix the situation before the supreme court did.

While you and I probably won't agree on this, I do want to let you know that I appreciate that I have at least one reader among the members of the Bar, and I also want to let you know that the editorial staff of the Bar Rag seeks exactly the sort of input that your letter provided. Finally, I can unqualifiedly assure you that space is available in the Bar Rag for attorneys (and others, for that matter) who wish to write on almost any topic. I suspect that your letter to the editor will be in the next issue of the Bar Rag, and I suspect that you would be readily given equal time if you want it.

Best personal regards.

Michael J. Schneider

Again we get kudos

I look forward to reading the *Bar Rag* whenever it comes. You may be able to appreciate the quality of your publication by comparing it to the enclosed monthly publication of the County Bar Association I have moved into. Keep up the good work!

James R. Peterson

National Fuel Buffalo, N.Y.

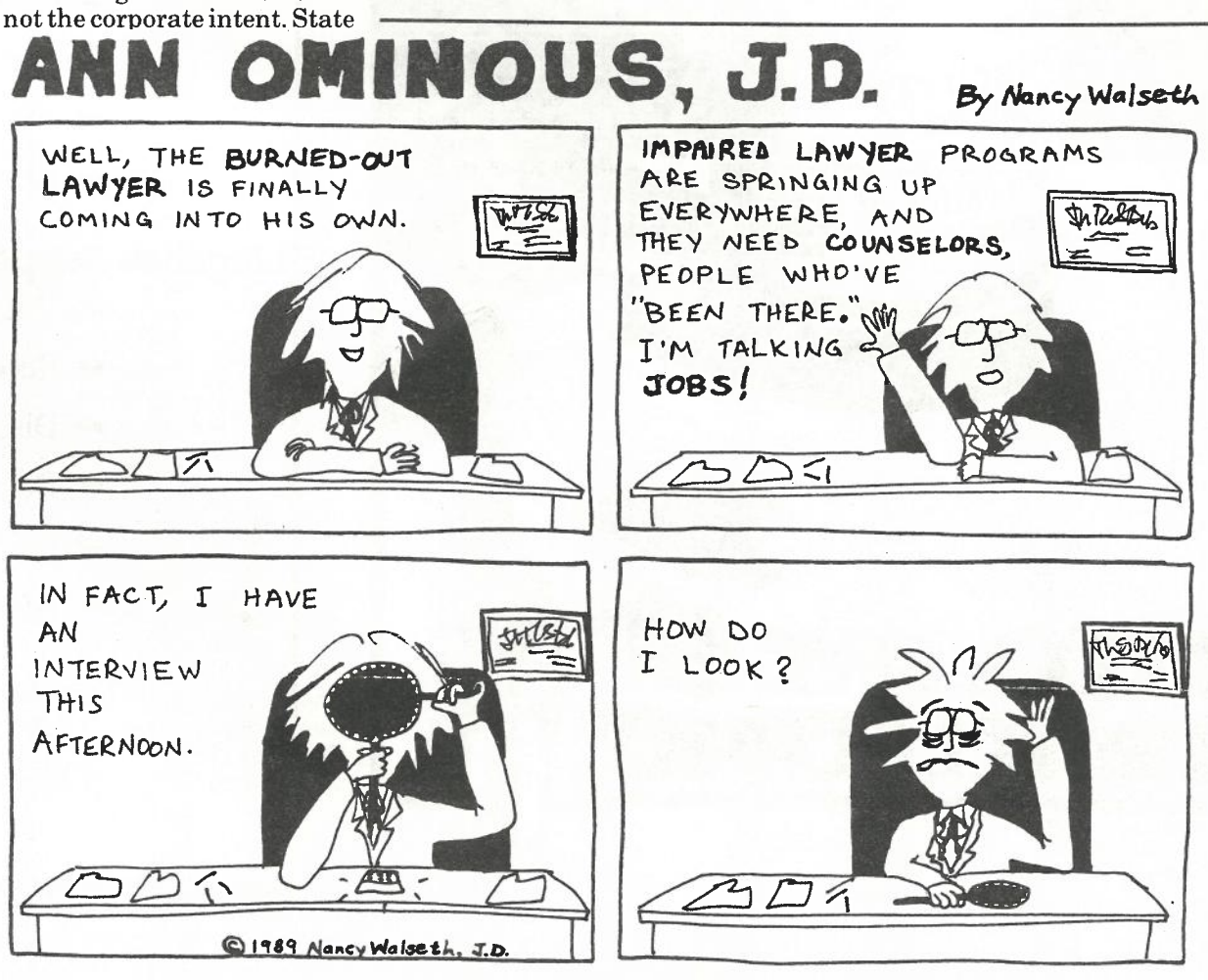
Jan. 1 is deadline for inactive status transfer

The Board of Governors amended the bylaws of the Bar Association to require members to make the election to go on inactive status by *January 1* of the applicable year in which they want to be inactive.

To transfer to inactive status, members must submit an affidavit which states 1) the last date they have practiced law in Alaska; 2) that they are not the attorney of record in any case currently pending before any court in Alaska; 3) that they are not representing, counseling or advising any client in Alaska; 4) that they will not practice law in Alaska until they request transfer back to active status and; 5) that they will associate with counsel admitted to the active practice of law in Alaska if they want to represent a client before any court in Alaska while an inactive member. Affidavit forms are available from the Bar office.

If a member practices law in Alaska at all during a particular year, the member is not eligible to be an inactive member for that year and must pay active dues for the entire year. Similarly, even if a member has not practiced law in Alaska in a particular year, if she has not made the election to transfer to inactive status by January 1, she is not eligible to transfer to inactive status after January 1 of that year.

This bylaw change was published for comment in the July issue of the *Bar Rag* and adopted by the Board of Governors on September 8. For further information contact Deborah O'Regan at the bar office.



TORT LAW

Recent developments in insurance bad-faith litigation

Michael J. Schneider

Our Supreme Court decided *Munn v. Bristol Bay Housing Authority*, 777 P.2d 188, on June 30, 1989. While the facts in *Munn* had nothing to do with the covenant of good faith and fair dealing, the holding in *Munn* has implications of tremendous importance for those involved in first-party, bad-faith litigation.

Plaintiff's counsel in these cases frequently have at least some contact with the underlying claim. In other words, plaintiff's counsel in bad-faith litigation may have represented the claimant in the underlying uninsured motorist case, or the underlying fire loss case, or the underlying health policy case.

After the same counsel on behalf of the same clients files a bad-faith claim, the defense frequently moves to take plaintiff's counsel's deposition and, ultimately, to disqualify plaintiff's counsel from further participation in the case. While this can occur early in the litigation, these efforts are more frequently timed to maximize heartburn and minimize plaintiff's chances of regrouping.

Plaintiff can obtain other counsel early on in the litigation: three months before trial, after volumes of pleadings, tens of thousands of dollars in costs, and years of litigation, it may be a virtual impossibility. *Munn* addressed most of the issues that support this unfortunate tactic. Among other things, the Court in Munn held:

1. An attorney is no more entitled to withhold information than any other potential witness and may be required to testify at a deposition or trial as to material, *non-privileged* matters (*id.* at p. 196).

2. The attorney/client privilege cannot be used to protect communications regarding the commission of a crime or civil fraud occurring during or after the establishment of the attorney/client relationship (*id.* at p. 195).

3. A party cannot disqualify an opponent's attorney by making a mere declaration of an intent to call opposing counsel as a witness, thereby interfering with an opponent's right to counsel of its choice, for mere strategic or tactical reasons (*id.* at p. 197).

4. When an attorney is to be called *other than on behalf of his client*, a motion for disqualification must be supported by a showing that the evidence is *unobtainable* elsewhere. (*id.* at p. 197).

In the garden variety bad-faith case, plaintiff's counsel may get deposed, but unless the defense is able to come up with prima facie evidence of intent to commit a crime or civil fraud during or after the establishment of the attorney/client relationship, the attorney/client privilege will not be invaded. Most importantly, plaintiff's counsel won't be disqualified simply because he or she has possession of some fact that can be duplicated by calling some other witness.

Thanks to the questions answered by *Munn*, everyone in the system should be spending a great deal less time and money fighting about these issues in the future.

Munn was followed on July 21, 1989, by *State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152 (Alaska 1989). In almost every bad-faith case before *Nicholson*, the defense argued that a breach of the covenant of good faith and fair dealing did not necessarily constitute a tort in the state of Alaska, and therefore extra contractual compensatory damages (emotional distress, costs, and attorney's fees) could not be awarded, and neither could punitive damages.

This argument was particularly favored after our Supreme Court's decision in *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1153-54 (Alaska 1988), where the Court held that an employer's breach of the covenant of good faith and fair dealing in an employment contract did not constitute an independent tort. It was always alternatively argued that if a breach of the covenant of good faith and fair dealing was a tort, the regulation of the insurance industry by A.S. 21.36.010 -.420, and the trivial penalties contained in that statutory scheme, pre-empted the area and provided the exclusive basis for punishing an offending insurance carrier.

The *Nicholson* court held:

1. That a first-party insured's cause of action against an insurer for breach of the duty of good faith and fair dealing sounds in tort (*supra* at p. 1156);

2. That, because the claim sounds in tort, punitive damages are available in the face of outrageous conduct or a gross deviation from an acceptable standard of reasonable conduct (*supra* at p. 1157); and

3. That the Alaska Insurance Code does not pre-empt such a punitive-damage award in first-party actions (*supra* at p. 1157).

I've talked to a few people who argue that *State Farm vs. Nicholson* merely states the obvious. While that may be the case, one bad-faith claim that our firm handled required the litigation of approximately fifteen (15) separate motions on the issues disposed of in *Munn* and *Nicholson*. These cases have clarified important issues and will make most bad-faith claims cheaper and easier to litigate.

FAMILY MATTERS

Alternate dispute resolution the big picture

Drew Peterson

Alternative Dispute Resolution (ADR) is one of the growth legal industries of the 1980s and 90s. Parties are increasingly seeking methods of resolving their legal disputes outside of the courtroom. While the biggest expansion of ADR techniques in the past ten years has been in the realm of family law, such techniques are being applied to the broad panoply of civil legal disputes. ADR methods are being applied to disputes ranging all the way from major litigation between multi-national corporations to simple landlord-tenant controversies.

The advantages of non-judicial approaches to dispute resolution are many, and vary from case to case. They include substantial cost savings, speedier resolution of controversies, more input into selection of the dispute resolver, and increased privacy of the proceedings. In my last *Bar Rag* article I described the application of family mediation techniques to areas outside of the normal family mediation arena of divorce and custody mediation, to other disputes involving family and quasi-family relationships. In this article I will address the techniques of alternative dispute resolution in an even broader context, where no family relationships are involved at all.

Arbitration. In a recent ADR overview article in the *Negotiation Journal* (2 N.J. 225, July, 1986), Marcia L. Greenbaum, past President of the Society of Professionals in Dispuute Resolution, distinguished arbitration from mediation by noting that arbitration is primarily a passive profession, more science than art, based upon established principles for interpretation of contract and law. An arbitration proceeding is much akin to a traditional trial in court, except that the proceedings are more informal, and formal rules of evidence are usually not required.

Advantages of arbitration over adjudication which are most commonly claimed are savings of time and money, and the ability to be directly involved in the selection of the arbitrator. Another important advantage of arbitration that is sometimes forgotten is the ability to avoid appellate review. Arbitration awards are not appealable, except as specifically provided for in the Agreement to Arbitrate, and even then only to the extent otherwise allowed by court rule. Certainty and finality at an early stage of a dispute, without years of appellate review, is an end highly desired by many civil litigants.

Rent-A-Judge. A kind of arbitration much in vogue at the present time, especially in other states where civil trial backlogs of the courts can reach five years or longer, is to employ an actual (usually retired) judge as the arbitrator. Using such judges can allow for the full formality of a normal civil trial, if desired, and yet maintain the advantages of arbitration: timely resolution of the dispute, direct input into the selection of the judge, and finality of the decision made.

While not as prominent in Alaska as in states such as California, with their substantial backlog of civil cases, a number of Alaska's retired jurists have hung out their shingle, so to speak, in the ADR business. Thus the concept of Rent-A-Judge is alive and well in Alaska.

Mediation. In contrast to the passive role of the arbitrator, Greenbaum's article analogizes a mediator to "a sparrow caught in a badminton game...If the mediator moves too boldly too fast he frequently gets a hell of a whack in the region of his tail feathers." The mediator's role is active, not passive; more art than science; an informal, free-flowing process without a predictable end. The function of the mediator is to "identify issues, develop doubt, erode expectations, reinforce reality, motivate momentum, keep the parties communicating, and create confidence in reaching a resolution." In the course of mediation the parties are educated about the process and about each other.

The mediator explores different packages for settlement and may even suggest concepts and agreement language. Only rarely does the mediator write a report or issue recommendations Such recommendations often mean the end of the mediator's usefullness, particularly if the recommendations are rejected by one or both parties. The mediator's credibililty is dependent upon gaining the parties' trust and maintaining their perception of his or her impartiality. Giving an opinion as to what the mediator views as a fair settlement impairs the mediator's appearance of impartiality, and often results in a subsequent loss of trust in the mediation process.

Mediation allows the parties to decide the dispute themselves without turning the power to do so over to an outsider. Mediation seems to work best where there is a need for a continued relationship between parties. Such a need motivates all sides to the dispute to search for a solution wherein all can claim a measure of satisfaction. Even without such a continuing relationship, however, mediation can help locate a solution to the controversy whereby the parties can accomplish more together than any of them can do separately. Such solutions are not uncommon if looked for mutual interests between parties can almost always be found. Thus mediation can be an effective ADR technique in a great many cases even where its usefulness might at first appear limited.

Med-Arb. A very different but seemingly similar process is called "med-arb". In this procedure the parties agree in advance that the impartial dispute resolver will first use voluntary mediation to attempt to settle the issues, but that the same dispute resolver will actually serve as an arbitrator to resolve those issues which cannot be otherwide resolved.

The theory behind med-arb is that the parties will so fear the arbitration process that they will endeavor to settle the matter, rather than let the outsider do so. Also it is asserted to be more efficient to use the erstwhile mediator as the arbitrator since the mediator will already be familiar with the issues, the parties, their positions, their personalities, and the like. A form of med-arb is used by some counties in California under their "mandatory mediation" procedure for child custody disputes. If such issues are incapable of being successfully mediated the mediator then becomes the custody evaluator, whose recommendations are filed with the court.

The obvious drawback with such med-arb tactics is that the parties may withhold information or concessions necessary to an effective mediation from an individual who may hold their future in his or her hands, should the mediation fail. There are many who believe that such a procedure compromises those very qualities of neutrality and confidentiality which are most necessary to make the mediation process work. It is nevertheless true that the med-arb procedure has been used successfully in a great many cases.

Mediation of Grievances. A process which is being used increasingly to satisfy the concerns about med-arb discussed above, is a two part amalgam of mediation and arbitration referred to as "Mediation of Grievances." Under this procedure mediation is a step completely separate and apart from an arbitration proceeding. By initial agreement it is provided that when a grievance remains unresolved after exhausting the internal grievance procedure either party may opt to mediate before filing for arbitration. A mediator is chosen, from a list provided, and mediation sessions are held. The parties seek a mutually agreeable settlement through the negotiation process. If the parties are unable to reach an agreement at this stage, the mediator, who is also experienced as an arbitrator, then gives an advisory opinion as to how the grievance would be decided if it went to arbitration. This oral opinion is not binding on the parties but may be used as the basis for further settlement discussions. The theory is that the parties will be so convinced of the outcome that they will accept the advisory opinion and resolve the dispute accordingly. If they do not do so, however, they are then free to arbitrate — but only after they have selected a different arbitrator to resolve the dispute. The arbitrator will know nothing of what happened during the mediation process.

The advantage of the Mediation of Grievance procedure is that the parties know that all conversations with the mediator will be confidential. Thus the tendency of many parties to withhold information from the arbitrator so as not to give away an advantage is avoided. By having arbitration as a final step, the cost and time savings of that ADR technique also remain.

Of some 500 such cases, according to Greenbaum's article, mostly involving labor management disputes in the coal industry, 85% were resolved short of arbitration. Only one quarter required advisory opinions. Of those that did go to arbitration, the mediator successfully predicted the outcome in 80% of the cases. That is a pretty good batting record.

Mini-Trials. A similar procedure which is perhaps more famous, especially in the context of resolving disputes between large corporations, is the Mini-Trial. The name "Mini-Trial" is really a misnomer, because such procedures typically involve neither a real trial nor a judge. Rather the attorney for each side informally presents its best case in the presence of corporate executives from each of the disputants. The executives, in turn, have explicit authority coming in to determine whether to settle the case or continue the litigation.

The Mini-Trial process is intended to give each party a clear view of the strengths and weaknesses of the other's case, so as to be able to make an informed assessment of whether to seek settlement or go on to trial. There is no judge or arbitrator, although a neutral facilitator may be present to chair the meeting. And like the Mediation of Grievance procedure, the facilitator (who could be a Rent-a-Judge) may be called upon to give an advisory opinion as to the likely outcome should the parties go to court. Mini-Trials have been successful in resolving a number of complex corporate disputes in recent years, with a tremendous savings in costs and time to all of the participants.

Conclusion. Many other permutations of negotiation, mediation, arbitration, and litigation are possible, to be tailored to the individual needs of any particular dispute. And with the recent discovery of ADR techniques by Fortune 500 companies, more and more sophisticated ADR providers are becoming available to analyze disputes and assist in setting up the ideal alternative approach to each controversy. Increasingly clients, together with their attorneys, are looking for such alternatives to traditional litigation methods. ADR methods can assist in reaching a cost efficient, timely, final, and fair resolution of disputes outside of the normal litigation process.

FRATIES: His writings & tales reached afar

Continued from page 1

A year or two later, Gail moved to Anchorage and set up a practice exclusively devoted to trial. I ran into him on the street one day. He remembered our last meeting and greeted me warmly. In the course of our conversation, he suggested that we get together later that day at his office where he was hosting a gathering of his friends.

When I first stepped into his office, I couldn't see much of anything. The walls were painted black. The lighting was sparse and concentrated in limited areas. As I looked about me, I could dimly perceive a number of brightly colored and somewhat garish paintings. There were several people seated in the gloom around a desk from behind which I recognized Gail's voice. He had been recounting one of his latest experiences in court when I stumbled into the room. He paused in his narrative long enough to direct me to a small dimly lighted object on my right which turned out to be a chair. I seated myself while he returned to his story.

As I listened to Gail that afternoon, I realized that I was in the presence of a born teller of tales. He obviously was enjoying the muttered sounds of approval from his barely visible audience and was doing his utmost to entertain us. I don't remember the details of the story except that it had to do with an odd client and a bizarre set of circumstances in the courtroom. What I do recall was the way in which he brought his characters to life. As he parroted each of their voices, we heard and could almost visualize them looming out of the shadows of that room: the bored judge, the lying witness, the over-confident lawyer, and his befuddled client. As he spoke, they did. And the words were exactly right.

I didn't realize at the time that Gail could write these scenes at least as well as he could speak them. It wasn't until about a year or so later, when I was a fledgling editor of the Alaska Bar Rag, desperately seeking copy to fill one of the editions, that someone suggested I solicit a contribution from Gail —and I remembered that afternoon in his office. The rest, as they say, is history.

The subject of his first article was the art of cross-examination. The information it contained was informative and useful; but, what was memorable about the piece were the hilarious illustrations from Gail's trials.

When I thanked Gail for his article, I took the opportunity to suggest that he contribute a regular column with more of his "war stories". He thought about it for a few days and then agreed. A couple of weeks later, he sent me his first "All My Trials" column. As promised, it was devoted to combat experiences in the courtroom; and it was very, very funny.

As time passed, and Gail wrote more columns, he began to tell us about other attorneys' experiences in addition to his own. After awhile, his readers reasonably could assume that if anything outrageous happened in a courtroom anywhere in the state, Gail would hear of it and include it in his column.

Editing Gail's work was an interesting challenge. He liked to bring it in at the last minute before we went to press. Frequently, I would receive his piece at the typesetter's office and read it as she was copying it onto the computer screen. His column was always typed, and checked for misspellings, punctuation and grammar before it was submitted. When difficulties arose over one of his articles, they involved substance rather than form.

Gail took great pride in his work; so much so that he insisted on being present when I went over it. He would come to our meetings prepared to do battle over every word if necessary. Occasionally, for both our sakes, I would cut something out of one of his columns because I thought the risk of offending our readers was too great.

Gail had a predilection for stories and dialogue that tended to shock, as well as entertain, his readers. The daily fare of the criminal courts provided him with much of that sort of material. In one of his early columns, Gail described an arraignment at which a marginally intelligent client had to have the words of his indictment for rape and incest broken down into basic Anglo Saxon expletives by his obliging attorney before he was able to enter an acceptable plea of guilty.

Subsequently, a few indignant letters reached the state bar office and a hurried meeting was arranged between the board of governors and the editors to determine whether the column breached the limits of good taste; and if so, what we and they were prepared to do about it.

The membership of several local bar associations from various parts of the state rallied around Gail and the Bar Rag editorial policy as it then existed. At the meeting, it was determined that while some board members might not agree with our policies, all of them recognized the importance of a free press and would not interfere.

Still, there were some self-imposed editorial limits regarding what we would print, which Gail readily found and tested. One area of concern to us was his continuing fascination with crimes involving sexual deviation. I recall one meeting with Gail in which we had the following exchange:

"For God's sake, Gail! This is the third time you have written about some idiot buggering dumb animals. I can't go on printing this stuff!"

"Yeah, man. But it's FUNNY!"

At least one of our readers didn't agree with Gail on this subject and wrote an impassioned letter to the editor defending the rights of the animal kingdom. I published it in the next edition, at least partially in the hope that it would reinforce my concern to Gail. What I didn't expect was the reaction to this letter from some of our other readers. Several members of the Tanana Valley Bar Association wrote back, stoutly defending Gail's First Amendment right to report all of the sheep, horse and cow buggering cases he encountered.

Some of the best pieces he wrote were suitable for general audiences. One anecdote, regarding Judge Ralph Moody and a prisoner about to be sentenced who had "found God" while he was waiting to learn of his doom, was republished in the Readers' Digest and the New Yorker.

One of Gail's articles was a brilliant pastiche of the opinion writing style of two of our Supreme Court justices in a fictitious case. The case was later cited as authority and quoted in an appellate argument by an appreciative and courageous attorney. Excerpts from other columns were reprinted in legal newspapers in Southern California and Texas.

Gail liked to credit his sources, whenever he could. He was also in the habit of describing most of the lawyers and judges he wrote about in complimentary terms. He used to remark, "All of us could use a little favorable recognition, now and then." We were made to look witty and wise in his columns, even when he had to stretch to do it. He felt a great comraderie with his fellow practitioners, particularly those who did the bulk of their work in the courtroom, where he spent his professional life. And, he had a gift for capturing them in print when they were at their wits' end, trying desperately to cope with outrageous situations.

Gail had a wonderful sense of humor. Somehow, he could find something to laugh about in the saddest and most dismal of circumstances, even if it meant laughing at himself. We, his readers, are fortunate that he was so willing to share that laughter with us.

Fraties remembered in Ketchikan

State Superior Court Judge Gail Fraties died of cancer this week in Bethel. Lawyers throughout the state are remembering Fraties with affection and a smile. He was a flamboyant but effective lawyer. He was an accomplished writer, too, and many of his columns were as controversial as the people he prosecuted or defended during his legal career.

Fraties became well known in Ketchikan twenty years ago when he successfully prosecuted a fisherman, the late John Jordan, for attempting to kill the harbormaster by planting on him a bomb disguised as a 5-cell flashlight. The bomb worked but only blew off the man's hand. The case was the biggest in Alaska based on circumstantial evidence until the John Peel trial in Ketchikan several years ago.

In Jordan's first trial in Ketchikan, with Richard Whittaker defending, there was a hung jury. A second trial in Sitka ended with Jordan found guilty. He was sentenced to five years. A new attorney at that time, Clark Stump, defended Jordan. He remembers Fraties as a master of the courtroom, who brought in 37 witnesses, including five FBI agents.

—Lew Williams Jr., in the Ketchikan Daily News, Sept. 2, 1989.

Solid Foundations

Mary Hughes

The Trustees of the Alaska Bar Foundation have approved the underwriting of *Visions of the Constitution*, a three part series which is airing on PBS. Abortion, capital punishment and equality are the issues explored. The programs ran in Juneau in October and were presented on KAKM on Tuesday evenings at 10 in November in Anchorage.

The series is divided into three offerings:

The Judges: Justice Warren Burger discusses the early days of the Supreme Court, former Judge Robert Bork talks about his views on judicial activism, former Justice Arthur Goldberg speaks about the Warren Court decisions, and Sarah Weddington discusses the landmark decision in Roe v. Wade. Darryl Bell, now a successful businessman who spent 12 years of his life on death row, gives his perspective on the death penalty.

The Search for Equality: This episode focuses on minorities and women and their struggles through the years for equal rights.

Crime and the Bill of Rights: The final episode examines the criminal justice system. The famous Christian Burial Case, in which a young girl was kidnapped and murdered, is discussed. The police officer who transported her killer remembers the details of the case, and the girl's brother, now 30, also remembers.

Tom Gerety, Dean of the College of Law at the University of Cincinnati, is legal correspondent, and Andrea Mitchell hosts the programs.

The series comes highly acclaimed and the Trustees are pleased to provide Alaska underwriting.

BOMBER: Engines explode in mid air

Continued from page 1

Pilot Hugh White (second from left front) poses with his nine-man crew (and their canine mascot) in calmer times. Their trusty B-24 Liberator flies above (inset).

by side, flying directly at their bomber with fire and fury blazing and flashing from the front of each. The gunners on the bomber were replying in kind. This was aerial combat at its thrilling best. No relaxed atmosphere now; only the exhilaration of lethal aerial warfare.

Within seconds the right outboard engine began to lose power and the bomber could not maintain its proper place in formation. One of the crew reported over the intercom that heavy oil was streaming from that engine. The tail gunner reported that the bomber flying on the right wing was going down, and that the one on the left had exploded and disintegrated in mid-air.

Hugh ordered the co-pilot to feather the propeller (turn the propeller so that the thin edge was facing the air flow thereby cutting down air resistance) and to shut that engine down. When the co-pilot had completed that procedure and the propeller had come to a standstill, it started to windmill. It was feathered a second time, but again began to windmill immediately. When a third attempt was made, there was no response. The oil in the engine was apparently gone and there was none to hold the propeller in the feathered position.

Control of the propeller was now lost. It sped up; faster and faster it rotated until it was screaming far beyond its maximum engineered speed. It sounded like an air raid siren. Soon the engine began to vibrate, shaking the airplane like the 1964 earthquake. As the engine seized up, Hugh thought that the horrendous vibration of the engine would wrench it right out of the wing. But, it stayed in place and the propellor came to a shuddering standstill with the flat surface of the blades facing the direction of flight causing an enormous drag on the plane.

The bomber was falling farther and farther behind and was now alone. Hugh did not know for sure that the fighters had left the area and was apprehensive that they would return and attack the bomber again. To deceive the German fighters, if they were still around, by appearing to have been shot down, and to maintain flight control of the bomber, it was maneuvered into a diving right turn. A turn to the left would have placed the bomber directly in the path of the on-coming bomber stream. But, in turning to the right one of the cardinal rules of multi-engine flying was violated. "Never turn in the direction of a dead engine for loss of control of the plane is very likely to occur". The maneuver worked. The fighters were gone, and the plane was still under control.

The plane was now headed back toward Italy and was well below the bomber stream. An assessment of the situation revealed that no one on the plane was injured.

The engineer took an inventory of the remaining fuel and informed the navigator how long the bomber could remain in flight on that amount of fuel, considering that only three engines were operating and the fourth was creating an enormous drag.

The navigator forwarded the grim news: it was impossible to return to friendly territory in Southern Italy in that time. A decision was made to fly to Switzerland. But the navigator's map, showed only a small area of Switzerland, and the plane was put on a course which later was found to be the extreme easterly protrusion of that country.

Though the plane could not maintain its altitude with its mechanical problems, the pilots kept the loss of altitude to an absolute minimum. Also, the crew was commanded to throw overboard all unnecessary weighted objects. The bombs were dropped; the huge land camera was jettisoned; the flak suits were thrown overboard; and much of the ammunition met the same fate. When the loss of altitude persisted, Hugh turned the control of the crippled bomber over to the co-pilot and went back along the catwalk in the bomb-bay to the rear of the plane to insure that the crew had thrown every loose item overboard.

He was there when the bomber flew over what appeared to be a small community But, it was a well fortified community. It was Innsbruck, Austria.

As Hugh was inspecting the rear compartment of the bomber, he heard an explosion and, glancing out a window, saw a puff of black smoke right beside the plane. He recognized it as an exploding anti-aircraft shell, a trial shot by the gunners on the ground. He dashed through the bomb bay, headed for his seat. Just as he arrived in the radio room, another shell made a direct hit and exploded right beside the co-pilot's seat, blowing a large hole in the side of the plane.

The co-pilot screamed and bolted out of his seat forcing Hugh back into the radio compartment. Hugh looked past the emerging co-pilot and saw a huge pool of blood in the vacated seat. As the wounded co-pilot passed him. Hugh shouted into his ear to "bail out" for, undoubtedly, his best chance for survival was to get to a German doctor on the ground. Hugh intended that only the co-pilot bail out, so he did not give the general alarm signal.

There was no one at the controls. Hugh re-entered the pilot's seat through the acrid and pungent smoke which filled the cockpit and banked the plane to the right to avoid the next expected barrage.

It came almost instantly, but it was to the left, four side-by-side puffs of black smoke, right where the plane would have been. He banked the plane to the left, right around the four puffs, for he was sure that the gunners on the ground would try again. Sure enough, the bomber would have been blasted from wingtip to wingtip with the next quadruplet of shells had that maneuver not been made. Having been assigned to the anti-aircraft artillery prior to becoming a pilot and suspecting that the anti-aircraft gunners would figure out his "S" maneuvering, he continued his turn this time. Again the four anti-aircraft gunners on the ground had placed their shells right where the plane would have been had it turned back.

Now, the turn back was made, but no more telltale smoke puffs were seen: the bomber must now have been out of range of the gunners.

Hugh had been too busy until now to realize that he, too, had a cut on his forehead from the shrapnel and the blood was streaming down into his eyes and dripping from his chin. But that was a minor matter at this point.

He looked back into the radio compartment to check on the crew and only then discovered that they had followed the co-pilot and bailed out through the opened bomb bay doors.

Hugh was alone in the front part of the plane.

There were mountains close ahead which were higher than the altitude of the plane. Since he was alone, and the bomber was severely damaged and was sure to crash soon, he chose to be a live coward rather than a dead hero.

He was wearing his parachute harness, so he reached for his chest-type parachute pack which had been placed behind his seat before takeoff (two snaps on the pack fastened to corresponding D-rings on the harness). All he retrieved was the largest white silk handkerchief that he had ever seen. His parachute was "popped" and the silk from it was wall to wall on the radio room floor. No other parachute pack was available.

He hurriedly exited his seat, snapped the open pack to his harness, and gathered up the yards and yards of silk, just as a laundress would gather up a huge armful of dirty bed sheets, and jumped down the three-foot step onto the catwalk which ran back along the center of the bomb-bay.

But Hugh didn't realize he didn't have all the silk in his arms. Part of it was hooked on a piece of equipment back up in the radio room. Back up he went to free it. While there he looked into the cockpit to insure that the plane was still flying straight and level, but it was nosing up. So he turned the trim tab a bit to again level the bomber and jumped back down onto the catwalk with the regathered silk. As he sat down on the catwalk ready to roll out head-first, the small pilot chute, which usually pulls the rest of the silk from the pack, dropped out of the plane into the slipstream, shot up into the rear bomb bay, and snarled on a piece of equipment. Hugh could not pull it loose. He looked down and saw the ground coming closer as the plane flew into the mountains, so he rolled out hoping that his weight would jerk the chute loose. It did.

In the snap of a finger, everything was quiet.

Hugh saw the community off to one side and could hear the sounds of the city as they drifted up to him. It was so peaceful there alone in the sky after all the excitement of the past few moments. He felt suspended in the sky. What a beautiful view of the Tyrolean Alps. There was no falling sensation., But, common sense and the wind blasting up past him told him that he was falling. He looked up and saw that his parachute had not blossomed and that it was trailing and fluttering above him like a rag in the wind; the shrouds were tangled in a spiral. He reached up and attempted to untwist them and send a loop up the shrouds by snapping his arms far apart and back together again. Numerous unsuccessful attempts made the scenery much less attractive. Yet, it was the only alternative to keep from making a little dimple in Mother Earth. He continued his efforts with much more determination as the ground grew ever nearer and less inviting. Finally, in quick succession, the chute's folds blossomed and he hit the ground. But the ground was neither level nor bare. It was a steep mountainside covered with about two feet of snow. He went bobsledding down the mountain, through some low brush, until he came to a stop as his parachute snagged on the brush.

Hugh stood up and took stock of himself. He was unhurt other than the cut on his forehead, and the fingers of both hands were hurting because they had become entwined in the shrouds when the chute opened, forcing the blood out through his finger tips. He washed the dried blood from his face with snow.

Now he must plan an escape out of the country. From a map that was in the escape kit (it was fastened inside the parachute pack) he found that he was on the west side of a valley leading south to Brenner Pass. It was

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ABA: Agenda holds something for all

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that "the American Bar Association deplores any desecration of the flag and declares its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens."

The House also approved a resolution submitted by the North Carolina Bar Association which lends ABA support for Senate Concurrent Resolution 92, encouraging state and local governments to include among the requirements for secondary school graduation a knowledge and understanding of the United State Constitution, the Declaration of Independence and the Federalist Papers.

MASS TORTS

Thirteen recommendations placed before the House addressed the problems of adjudicating individual tort claims arising from a single incident such as a plane crash, including the determination that "mass tort litigation" existed; consolidation of such cases before one court; and regulation of punitive damages awards.

While lengthy debate indicated general acceptance of most of the recommendations, concern was expressed that the impact on the state court system had not been adequately considered. Therefore, at the reque t of the Conference of State Court Judges of the Judicial Administration Division, the matter was deferred. It is expected that the topic will be once again placed before the House at its mid-winter meeting scheduled for February of 1990 in Los Angeles.

PUBLIC RELATIONS

The Task Force on Outreach to the Public, created as a result of a resolution approved at the 1988 Annual Meeting to make recommendations for a national education program on the justice system and the role of lawyers in society, presented its report. As a result of that report, a Coordinating Committee on Outreach was formed with a National Conference on Outreach to the Public to be held at the 1990 Midyear Meeting.

In addition, the House approved recommendations that there be created a multi-year, national program to strengthen and/or form new partnerships with the legal community and the public to improve the justice system; how lawyers regard themselves and are regarded by others; the public's understanding of the justice system and the role lawyers play in it; and the communities — local, state and national —in which lawyers work and live. Not approved, was the development of a national advertising campaign.

JUDICIAL ETHICS

The inclusion of the federal judiciary in H.R. 2337, the proposed Government-Wide Ethics Act of 1989, was opposed by the House. That action was taken upon the recommendation of the National Conference of Federal Trial Judges.

The decision to oppose was based on the fact that the federal judiciary is already governed by a Code of Judicial Conduct containing most of the provisions proposed in the legislation and the Code has consistently assured high standards of federal judicial conduct.

STATE BAR PARTICIPATION

In an effort to improve state and local bar participation in the House of Delegates, a Select Committee made its report and recommendations, adopted unanimously, as follows:

> BE IT RESOLVED, That the American Bar Association urges each state and local bar association represented in the House of Delegates to invite its State Delegate or, alternatively, to designate one of the bar association delegates, to serve on its governing board as an ex officio member with or without vote. Such a representative should at a minimum be invited to attend such meetings of the governing board as an observer.
>
> BE IT FURTHER RESOLVED, That the American Bar Association urges state and local bar associations to present for consideration by the House of Delegates, policy recommendations on issues which concern those associations, particularly those affecting the professional life of lawyers and the practice of law.
>
> BE IT FURTHER RESOLVED, That it is the responsibility of each State Delegate and each state and local bar association delegate to encourage and assist their constituencies in presenting matters of interest for consideration by the House, and to report fully on the actions taken at each meeting of the House.

As the Select Committee reported, there are perceptions which may cause state and local bar associations to hesitate before presenting professional issues which impact the administration of justice and the practice of the profession as a whole and that these perceptions can be eradicated by improved communication with House members' constituencies. The resolution set forth above is the initial attempt to do so.

OTHER ACTION

Among other matters addressed by the House, which may be of interest to Alaska lawyers were the following:

- The Model Joint Custody Statute, making joint custody an explicit option for families which have experienced separation or divorce, was approved;
- A recommendation supporting legislation which incorporates the concept of "family support," together with amendments to the Internal Revenue Code of 1986 and the Child Support Enforcement Act, was adopted;
- State Bars were encouraged to develop minimum quality standards for all lawyer referral services, with seven client protection features being recommended;
- The United States Department of Veterans' Affairs was urged to administer its debt collection and forfeiture proceedings in a manner that allows veterans to hire attorneys without regard to the attorney fee limitations set forth in 38 U.S.C. $$3404 and 3405;
- The ABA was placed on record as supporting development and promulgation of local, state and federal policies that insure that loan proceeds from home equity conversion mechanisms are disregarded in determining the eligibility of elders for the benefits of public assistance programs;
- The House approved a resolution encouraging the use and recognition of durable powers of attorney for delegating health care decision making authority and suggesting five steps for accomplishing this goal;
- The ABA is to urge the American Law Institute to consider a restatement of the existing state and federal case law of the dignitary tort of discrimination when Restatement, Third, of Torts is prepared;
- The House approved a series of resolutions dealing with the recent events in China including a condemnation of the actions of the Government of the People's Republic connected with the violent suppression of peaceful demonstrations this past summer;
- A recommendation supporting the continued use of and experimentation with "alternative" dispute resolution techniques, both before and after suit is filed. was approved. These dispute resolution techniques include, early neutral evaluation, mediation, arbitration, summary jury trials and minitrials;
- The Model Rules of Lawyer Disciplinary Enforcement, dated August, 1989, were adopted, replacing the Standards for Lawyer Discipline and Disability Proceedings and the Model Rules of Lawyer Disciplinary Enforcement previously adopted July 1985; and
- The Model Rules for Lawyers' Funds for Client Protection were adopted, replacing the Model Rules for Client's Security Funds.

If you have any questions about any of the foregoing, or if you wish to discuss any other matter which came before the House, please do not hesitate to contact Alaska's representatives, Keith Brown and Donna Willard.

BOMBER: Falling into POW camp

Continued from page 7

now about midday. He decided to go down the mountain a short distance and then walk south to Italy.

Walking down the mountain at timberline, Hugh he heard a click behind him. He turned and found himself looking down the barrel of a rifle, "%&##$%$#&#*#" and he observed that it had a nicely polished bore. The Hitler Youth Corps boys had been taught, evidently, to keep their rifles polished and clean.

Hugh had been forcefully invited, with nary a request for an R. S. V. P., and was now an involuntary guest of the Third Reich where he remained for the worst part of the next year. Such were the experiences of this future lawyer on the 15th day of the 7th month of his 24th year.

How to do holiday cards

By Nancy Koran

To greet, or not to greet, that is the question. Although most law firms have already lost count of the Christmas card catalogs they've received this year to date, opinions vary widely on the effectiveness of sending Christmas/Chanukah cards (hereafter referred to as holiday cards) to clients, potential clients, and business contacts.

Speaking for Scrooge comes consultant Joan Stern with Hildebrandt, Inc., Somerville, NJ, to challenge the very concept of sending holiday cards.

"I don't think it's effective," she notes. "What you are trying to do is get your name in front of the client. As a marketing tool, I put it way down on the list.

"It's better to write on a change in the law or on some other personal basis," she says. Holiday cards? Bah, humbug.

Speaking for Santa comes George Brust, marketing administrator for Robins Zelle Larson & Kaplan, Minneapolis. Brust puts holiday cards "pretty high on the list "of effective marketing activities.

It's hard to say what the return is," Brust admits, because sending cards is time-consuming if lawyers pen a personal message, yet it's a marketing activity that all attorneys can engage in. "You have to look at it from your own vantage point. I like to get cards that someone took the time to write."

Yet another legal marketer calls time out. Holiday cards don't really fall under the heading of "marketing," this expert notes. They're more a custom or courtesy.

"When you get a holiday card, you don't think anything of it. When you don't, you notice. It's almost done to avoid the negative effect.

"Put yourself in the client's shoes," the marketer urges. "We give you $150,000 a year in legal fees, can't you find $1.50 for a Christmas card for us?"

15 Tips for Sending Greetings

If you've decided to spread some holiday cheer with greeting cards, the following tips can help keep your ho-ho's from becomming ho-hums.

- *Send a double message* by selecting cards with civic or charitable significance. Robins Zelle Larson & Kaplan buys its cards from "Courage House," a local organization that rehabilitates the disabled. The card whispers to clients that *this* firm gives back to the community. Many charitable groups offer cards that include designs appropriate for businesses.

Nationally, catalogs with cards suitable for businesses are available from

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THE MOVIE MOUTHPIECE

Edward Reasor

I first met Bobbie Ann Mason at Chautauqua Institution near Jamestown, New York. She was lecturing on the fine art of short story writing and had just completed the wonderful book "Shiloh and Other Stories," a collection that won the PEN/Ernest Hemingway award that year for First Fiction.

She was then a shy, soft, attractive woman in her early 30's with a quaint southern accent that I found warm and friendly. In 1985 her yet unpublished manuscript "In County," dealing not so much with combat but rather how the children of Viet Nam veterans were faring in the rural south, was read by producer Richard Roth ("Julia"). He thought it would make a warm, family film so he bought the movie rights.

Although he attended law school, Roth did not like lawyers. They smothered creativity. Looking for a live wire for his product, Roth teamed up with director Norman Jewison ("The Cincinnati Kid" and "In the Heat of the Night") to turn Mason's short book into a 115 minute film. Bruce Willis, of "Moonlighting," fame and Emily Lloyd, the young English actress who was a sexual stimulant in "Wish You Were Here" just before her 18th birthday, came aboard to put the words of the screenplay into moving images.

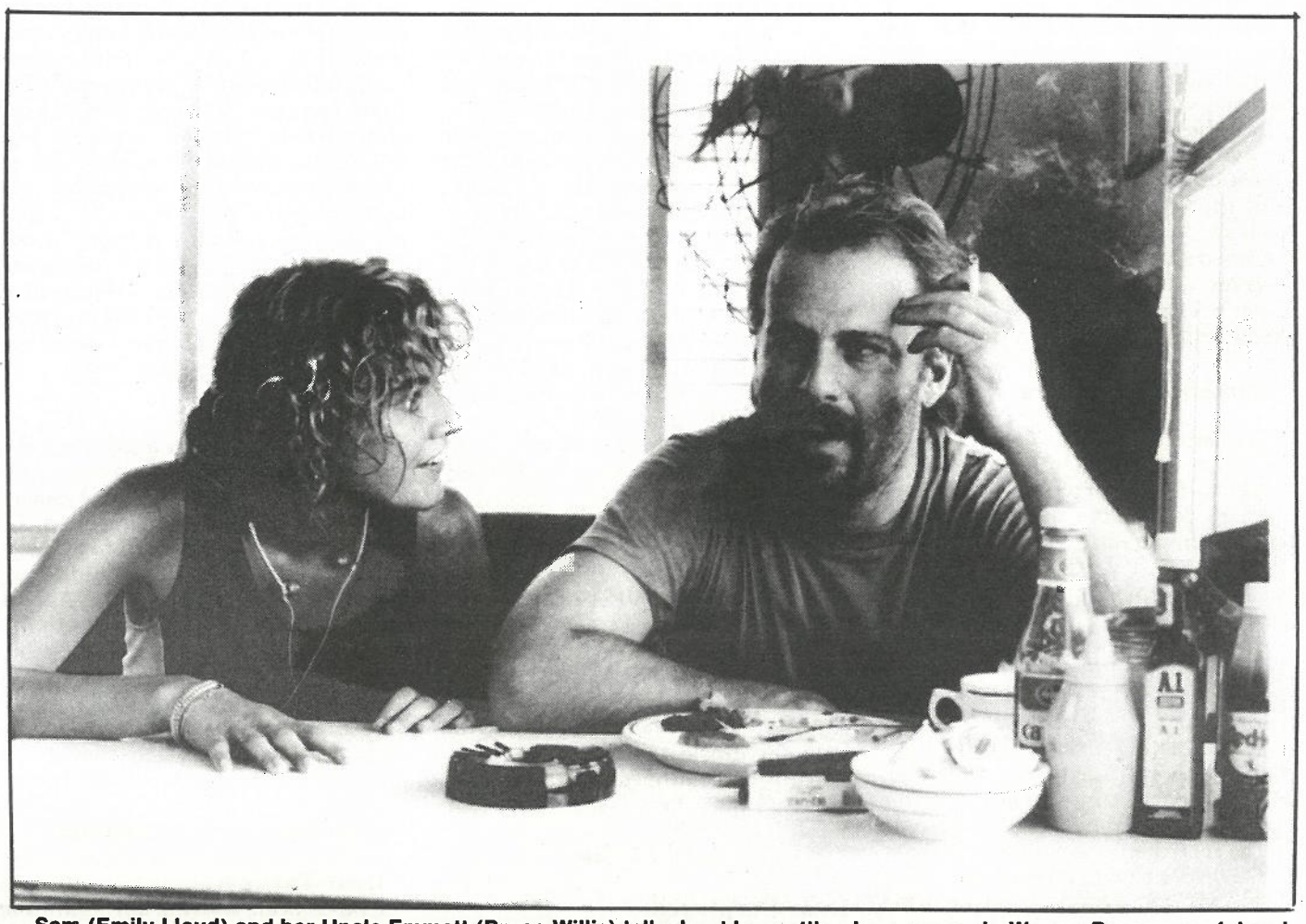
Bobby Ann Mason did not do the screenplay. Perhaps it's just as well, as her down home descriptions of rural southern America read vividly in print but are difficult to portray on a large screen. Frank Pierson and Cynthia Cidre teamed up for this chore. Pierson won an Oscar nomination for "Cat Ballou," and earlier had been a writer for *Time* magazine. He didn't like lawyers all that much, either. Cidre, a Cuban refugee had early success with a TV script "I Saw What You Did." She presently writes full time for Columbia releases.

So the team gets together and "In Country" is released. What's it like?

It's different from any Viet Nam movie you have seen to date. There is little combat and then only in flashbacks as Emmett (Willis) remembers the carnage, the destruction, the inevitable death of young men: raw, middle class farmboys who traditionally fight our unpopular wars.

I have never met Willis, but friends of mine who have, say he went out of his way to acquire this role. It said something for him that he wanted to say, himself.

Willis' role as Emmett is that of the reclusive, unshaven, cynical Viet Nam veteran back home in Kentucky who is just surviving. He won't work in a tire factory and prefers to spend hours hanging around the local diner with other Vets talking not about the war, but about jobs, lack of jobs, cars and how expensive everything has become.



Sam (Emily Lloyd) and her Uncle Emmett (Bruce Willis) talk about her getting her own car in Warner Bros. powerful and touching drama about the current generation's coming to terms with Vietnam in "In Country."

There are several scenes where Willis does what most rural folks do — water his pet rabbits, tend to the yard, secure the foundation under old dilapidated houses, drink lots and lots of cold beer and stare at young teenage girls wiggling down country streets. Emmett the vet is not dead, he's just seen it all and doesn t get quite that excited anymore over ordinary little things such as a good job, money, nice cars or position in life.

Emmett's niece Sam (Emily Lloyd) has just graduated from high school and it is a big deal (as are all high school graduations.) When her father graduated from high school, he married his high school sweetheart, a month later went to Viet Nam, fought, died, and now lies in Washington D.C. Her graduation pales beside the memory of her father's. She never even saw him.

As Sam graduates, she finds his old letters to her mother, a mother who has remarried a wealthy young man and now has a baby again. In the letters she seeks solace from the isolation of the small Kentucky village. It s time to grow up, find herself, and discover what it is she is to do her life. Only the letters were written by an 18-year-old, a boy much like the one Sam now dates (Kevin Anderson). Her father writes of coming home, hoping the child his young bride is carrying is a boy and his plans of farming it with his own father. It sounds drab.

Later, when Sam acquires her father's diary from her grandmother, she is shocked to learn that her father and other young soldiers shot and killed entire families. She tells Emmett that she doesn't like her father anymore.

In one of the best sequences of the film, shot in the swamps of Kentucky, Willis as Emmett explains that Sam cannot make a decision to like or not like a veteran, because she was not there. She had pestered him to tell her of Nam and now he does. Nothing he tells her is new. You and I have seen it televised, read it, and a few of us even experienced it. It is not nice. "In Country" is the name of the film, but it's a GI statement too —GIs in Nam said "in country" meaning combat fatigues in the jungles of Nam as opposed to "the world" which meant middle America, law school, and back-home civilian life.

If you live in a one-theatre movie town and it is raining, I would go see "In Country." If the sun is shining, or there are other films playing, then pass —the purpose and intent of "In County" is admirable, but the film is too long, too confusing; the pacing is at times so slow that it agitates. But, if you are one of those Nam vets, run to it! It's better than the therapy you can ill afford. For the non-vets (don't modern day law students go into the military at all anymore?) here are a few true but useless tidbits that pass through screenwriter-reviewer's eye camera while watching "In Country."

• The opening shot of a full blown American flag with all the glorious colors slapping is a copycat idea from "Patton." Even the voiceover is reminescent:"You are chosen because you are the best" —spoken to a sharp-looking column of young khaki-dressed troops. In real life these columns of men are members of the 118th Tactical Air Wing Tennessee National Guard.

• The small town streets, local vet dance hall meeting, and August colors are real. Bobby Sue Mason did not write the screenplay but she had enough pull to make the producers film in the Kentucky towns of Mayfield and Paducah, an isolated region where she grew up, close to the TVA lakes.

• The swamp scenes —used both for the Viet Nam flashback combat sequences and those of the modern daughter by the campfire park —were filmed in the cypress swamps of Ballard County Wildlife Management, an 800 acre protected area open to the general public.

Samantha Slanders

Advice from the Heart

Dear Readers,

It is just so nice to know that you care. Since my absence from this publication the letters seeking my return have been overwhelming, and I have been deeply moved. Although I have had to double my fee, I will be able to write periodically in the paper and therefore enthusiastically look forward to receiving more cards and letters from you. I do look forward to helping all of you in the future, and want to express again my thanks for those who wrote demanding my return.

Samantha Slanders

Dear Samantha:

I have been a member of Alaska Supreme Court for a number of years and, in fact, have long considered myself the most intelligent member of the court. Even justices, though, have problems and I find myself writing to you.

Recently, I developed an embarrassing and somewhat foolish phobia. I cannot go to the bathroom on airplanes. Actually, I can go. I just cannot flush. This generally upsets those that follow me. Last week was especially embarrassing. I was returning to Anchorage from Juneau. My visit to the restroom was followed by that of Governor Cowper. He glared at me as he exited and has not spoken to me since.

I am certain that this phobia stems from my general compassion for mankind, for I am prevented from flushing by fear that it will land on someone below. I need your advice soon or I am concerned that constipation may be the next phase.

Constipated passenger

Dear Constipated:

Let me say, initially, that I admire your candor and concern for your fellow man. Your phobia, though, can be easily resolved and education is the answer. Simply stated, airplane waste in Alaska never reaches the ground. As you know Alaska planes generally fly in excess of 30,000 feet. Waste in this environment disintegrates at 20,000 feet. That is why the seatbelt light remains on while the plane is ascending and descending. And that is why there have been no reports in the history of Alaskan aviation of airplane waste striking anyone on the ground.

This knowledge should ease your concerns and allow you to flush freely in the future.

Samantha Slanders

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Dear Samantha:

I am a single mother of three and have generally lived a very happy life. Last week, though, my oldest daughter turned fourteen. She has taken on a "new look" and I literally can't understand her. I can't stand the way she dresses, talks, walks, eats, and thinks. I cannot stand her friends. Just last year she was my best friend. What happened?

Perplexed in Palmer

Dear Perplexed:

I know "the look" and understand the desire it creates in the mind of parents to destroy. In fact, I invented that look' The wide-eyed condescending glare with the slightly open mouth, they were mine. The arrogance, self-rightousness, and contempt, they were mine! I practiced it for hours in front of my bedroom mirror as a teenager in Kansas. I could disrupt the most peaceful family evening with that look and found it especially effective when my parents were tired. I passed "the look" down to my sister when I turned nineteen. She gave it to a friend when she reached the same age, and it has spread like wildfire since. For what it is worth, my parents endured both my sister and I and even invited us to Thanksgiving dinner this year. The moral of this, of course, is to avoid doing anything rash for this too will pass

Samantha Slanders

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Dear Samantha:

Like yourself, I am a professional woman practicing law in Alaska and active in the American Bar Association. I have smoked cigarettes for many years. I do not want to quit but my doctor tells me I should. Last week while watching a rerun of Abbott and Costello I noticed a fellow in the background with a cigarette in his ear. It really struck me as appealing and I am sure that it is a far more healthier way of smoking. I am uncertain, though, as to whether or not it would be acceptable. I need your advice.

Cold Turkey in Anchorage

Dear Turkey:

I have been waiting for years for this question. As a young girl growing up in Kansas, I also found cigarette smoking very attractive. My father, however, the local doctor, had me believing that my lungs would immediately disintegrate if I smoked at all. That is what gave me the idea of using my ear to smoke. It allowed me to enjoy the social prestige of cigarette smoking while saving both my breath and my lungs. I had to give this habit up, though, when our family got a telephone. Now, with speakerphones, it would seem to be a reasonably safe and practical means of smoking. I would certainly endorse it with the additional caution that a gas mask be worn to avoid inhalation of any secondary smoke. Enjoy.

Samantha Slanders

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Dear Samantha:

I want to begin by expressing my appreciation for the great work that you do. I look forward eagerly to your column and follow your advice religiously. Now I have a problem.

Last week my husband returned from a deposition trip to California. He announced that he had fallen in love with a stewardess and was leaving me. As it turned out, the stewardess had the same size feet as I have and, believe it or not, my husband wants to give her a pair of my shoes. What do you recommend?

Puzzled and Fuming

Dear Puzzled:

I uderstand your dilemma and always have found it difficult to select appropriate gifts for people I do not know well. I think, though, that tennis shoes would be a safe bet.

Samantha Slanders

— Need some help from Samantha? Write her in care of the Alaska Bar Association; 310 K St., Suite 602; Anchorage, AK 99501.

Candid Classifieds

BY J. B. DELL

SECRETARY

Aging attorney seeks shapely young secretary to wear tight clothing and walk suggestively around the office. Must have long legs. Some typing preferred. Salary depends on bust size. Write Bar Rag Box 340.

ASSOCIATE

Large law firm seeks associate attorney to bill 9 hours a day on cases provided by older lawyers so that older lawyers will make more money and drive expensive cars. Candidates must believe there are 90 minutes in an hour. Salary includes pension plan designed to benefit partners only Write Bar Rag Box 275.

JUDGESHIP

A vacancy has recently arisen for a Superior Court judgeship. Applicants must be willing to submit to humiliating questioning by the Judicial Council. expose themselves to an unfair bar poll, and face blatant political favoritism in the ultimate selection by the Governor. Benefits include a substantial reduction in earnings potential, periodic excoriation by the Daily News, and permanently cloistered private life. Write Bar Rag Box 110.

PUBLIC DEFENDER

Idealistic young lawyer sought for position of Assistant Public Defender. Must be willing to work long hours defending hundreds of guilty people who don't use deodorant. The qualified applicant will have experinece in handling bar complaints and terrorist threats. Salary depends on whims of angry voters. Pension plan doesn't matter since nobody lasts that long. Write Bar Rag Box 150.

GOVERNMENT JOB

A white collar state employee desires to hire a friend for a cushy job that is required to be publicly advertized. Therefore, the applicant must have these credentials: Bachelor degree in Sociology from a midwestern women's college beginning with the letter 'W', one year of graduate work in Medieval Literature, three years teaching in an elementary school, some knowledge of French. Applicant must also figure out who and where to apply to.

LAW BOOKS

National publishing company wishes to sell large volume of serialized law books at low-ball prices with generous financing terms available. Thereafter, purchaser will discover that the books are virtually worthless without the semi-annual pocket parts which are outrageously priced. This hostage situation is highlighted by periodic unannounced visits by a well-dressed salesman who will attempt to sell more useless books now that you've proven to be an easy mark. (These books also available for free at the law library). No need to write—we will contact you shortly.

PERSONAL INJURY

Have you been injured? Do you know your rights? Facing disability? I am a lawyer in general practice who would like to take your case on a one third contingency basis. I will try to settle your case with a few letters and a half dozen phone calls (I have never really tried one of these cases). If it can't be settled quickly. I will refer it to one of the few plaintiff's lawyers who knows how to handle these cases and I will 'associate' with that lawyer I will get a fee for doing this too. Won't you please help me. Write Bar Rag Box 440.

CONDO FOR SALE

This 1500 sq ft 'Gulag' style is just the thing for a young couple looking for an asset that will depreciate rapidly; a fresh paint job and new drapes will almost make you forget that two Bulgarian Wolfhounds have peed on the carpet for over three years. Also includes cardboard-rock fireplace, low energy sauna (has never worked), carcinogenic vinyl, imitation levelor blinds, and a view of a dog kennel. This fixer-upper is a "steal" for $45.000. which precisely describes the victim status of anyone who buys it. Write Bar Rag Box 410.

EXPERT ECONOMIST

I have a PhD in economics and some software. If you pay me $2500 I will run a ten minute program. For $4500 I will talk about it. Thank you. Write Bar Rag Box 330.

Board of Governors proposes Bar rule changes once again

The Board of Governors proposes the following amendments to the Alaska Bar Rules:

PART III. RULES OF ATTORNEY FEE DISPUTE RESOLUTION

Rule 34. General Principles and Jurisdiction.

(c) **Fee Disputes Subject to Arbitration.**

All disputes concerning fees charged for professional services *or costs incurred* by an attorney are subject to arbitration under these rules except for: . . .

Rule 36. **Bar Counsel of the Alaska Bar Association.**

(a) **Powers and Duties.** [THE BOARD WILL APPOINT AN ATTORNEY ADMITTED TO THE PRACTICE OF LAW IN ALASKA TO BE THE] Bar Counsel for the Alaska Bar Association [(HEREINAFTER "BAR COUNSEL") WHO WILL SERVE AT THE PLEASURE OF THE BOARD.] *will have certain powers and duties related to the Fee Dispute Resolution Program. Bar Counsel will: . . .*

PART V. CLIENT SECURITY FUND

Rule 45. Definitions.

(g) "Notice" means the delivery of a written notice personally to the addressee or by mail to the most recent address which the addressee has provided to the Alaska Bar Association. Written notice shall be presumed to be received by the addressee five (5) days after the postmark date of certified or registered mail sent to the most current address which the addressee has provided to the Alaska Bar Association.

Rule 52. Consideration by Committee.

(a) Upon receipt of an application the Committee shall conduct such investigations and hold such hearings as it determines necessary to establish whether the application should be granted. Hearings will be conducted informally. Both the applicant and the lawyer shall be afforded opportunities to present argument and evidence, and to cross-examine opposing witnesses. The Committee may request the attorney selected pursuant to Rule 47(a) to present argument and evidence, if the Committee believes this will assist it in reaching its decision. *The Committee shall provide a copy of the application to the lawyer complained of and shall notify the lawyer and the applicant of the date and time for a hearing on the application.*

Questions or comments should be directed to Executive Director Deborah O'Regan at the Alaska Bar Association office, 310 K Street, Suite 602, Anchorage, Alaska 99501, 272-7469.

Book review

Bored jurors cook up their own lawbook

By Dan Branch

No one enjoys jury duty.

Oh, maybe when first empaneled the good citizens called to serve might be full of energy. After a morning of *voir dire,* their enthusiasm starts to fade. By late in the afternoon some might even begin telling trial counsel things designed to support a challenge for cause. Somehow, the panel sticks it out and a jury is sworn in for service. The citizens that actually sit on the jury are the ones who work hardest to avoid future service.

Having never served on a jury I often wondered how jurors survive the process. After all, they have to drop everything and come down to the courthouse to participate in the justice lottery. Most of the panel sits in the audience watching the trial attorneys inquire into the reading habits and TV tastes of the 12 people initially selected by lots to sit on the jury. Once the actual jury is selected, most of the panel gets to go home. Those actually selected have to listen to lawyer argument, evidence and judicial instruction. Only then may they go off by themselves and do justice. None of this can be much fun but that's not the real reason why people tend to hate jury service.

It's all the waiting that drives them to despair.

Juries are always being packed off into the deliberation room so that lawyers can argue about stuff. Plaintiff's lawyer shouts, "Objection," and the jury is ordered out of the courtroom. Defendant's representative wishes to make an offer of proof and back the jury goes to the room. It could twist an honest man.

All this sets the stage for one of the most remarkable cook books I've ever seen. It's entitled "Recess Recipes or What Happens When the Jury Is Left Alone For Periods of Time With Nothing To Do But Eat!".

"Recess Recipes" began over cookies in the Ketchikan jury deliberation room. About halfway through a three-week civil trial, the citizen jurists were waiting out a two-hour evidentiary argument. One juror was passing around homemade goodies when someone asked for the recipe. One recipe lead to another and soon the foreman was handing out assignments.

The finished product contains 14 recipes, one for each juror, alternate, and the bailiff. They are presented in the order one might serve dinner to guests.

"Recess Recipes" kicks in with a guide for making hot artichoke and crab dip and ends with the secret for making oatmeal cookies. In between are recipes for cherry pie and fish cakes. Each recipe is carefully illustrated and spiced up with a little jury humor.

In the middle of the wild rice casserol guide, readers will find the following "opening statement:" "Saute sausage; remove meat, drain and break into small pieces. Using some of the sausage fat (just what the jury that has been sitting on their duffs needs more of!) saute mushrooms and onions. Return sausage to pan."

Another recipe is labled, "Stuffed Zucchini" (or what the jury felt like after a day of eating in the jury room). On closing argument, the person submitting "Bailiff's Luscious Cherry Pie," wrote, "This may not be low cal— but use the stairs instead of the elevator."

"Recess Recipe" art.

The wording of the cookbook makes it clear that the jurors were paying attention during the trial. For example, the recipe for fish cakes directs that the cook "grind the witness (oops we mean fish)" and notes that, "Counsel objects, stating that more salt may be needed. It is up to the jury to determine the validity of that statement."

After listing the items required for following the oatmeal cookies recipe the cook book states:"The above exhibits were admitted and the judge ordered them creamed."

I doubt if "Recess Recipes" will make the best seller list. The problem is not with the recipes, themselves, or the illustrations. The problem is that many of the recipes cannot be followed without prior jury service. Just look at the page for cabbage salad. It tells the reader to "roast (kind of like a witness)" the ingredients. Although the page addressing tofu with veggies claims that "one does not have to wear Birkenstocks to enjoy," a cautionary note says that "counsel approached the bench and discussed the possibility of admitting more veggies into evidence. The judge left it up the jury as to what veggies to give more weight."

Only a veteran of jury service could follow this instruction.

One of these days, the citizens of America are going to rise up and refuse the call to jury duty. There is just too much dead time involved. As more and more people conveniently ignore their jury summons, the court system will have to find a way to take the pain out of jury duty. Requests for proposals will be issued and money will pour out to consultants who avow a secret—understanding of the Alaskan psyche.

Before spending the money. I hope someone up in Anchorage looks at "Recess Recipes." It could contain the solution to this whole jury duty problem. I'd send them my copy but I've grown quite found of the poppy seed cake recipe.

HISTORICAL BAR

Alaska's floating court found unusual cases

By Russ Arnett

Lincoln was in his words "following the circuit" for six months each year during much of his twenty-five year law practice. The judge, lawyers, and sometimes litigants would travel together between the circuit courts of the neighboring counties. The lawyers slept two in a bed. All, including some of the defendants in criminal cases, ate together. In the evening the lawyers would joke and tell stories.

Lincoln and his youthful partner, Herndon, were journeying with two prostitutes to a circuit court. One of the prostitutes later said that Lincoln had them laughing the whole time, though he said nothing off color. She added "which is more than I can say for Billy Herndon".

The group would arrive at the court and a litigant would come forward and retain a lawyer. They would converse and proceed to trial. I personally would prefer this procedure to the way law is presently practiced. Litigation would be more fun, less costly, more promptly resolved, and probably no less just in result than under present methods.

The Alaskan version of "following the circuit" was our "floating court". This term was coined during the period when the District Judge with a clerk, U.S. Marshal, court reporter. U.S. Attorney and defense counsel would travel aboard a Coast Guard cutter from Kodiak through the Aleutians, either dispensing justice or dispensing with justice, depending on the imprtance one gives to procedural norms.

Probably the last true floating court occurred in 1949 when the Coast Guard cutter Northwind departed Kodiak for the Aleutians. Aboard were Territorial District Judge Kehoe and his wife, Assistant U.S. Attorney Ralph Moody and his wife, a court clerk, and defense counsel. There was an auspicious beginning when the slot machine at the Kodiak Naval Base stuck and would pay off without inserting a coin. Judge Kehoe, whose paintings are excellent, would paint from the bridge. A Japanese sailor who killed another sailor was arraigned. Perhaps the end of the floating court was forecast when the group on completing their work decided to fly back instead of staying with the vessel. Later the District Judge would travel from Anchorage to Kodiak two or three times a year by air with a "floating court".

I first arrived at Kodiak in 1956 with the floating court. Kodiak's legal needs were then served by one lawyer plus a disbarred lawyer from back East. Because the disbarred lawyer was not permitted to actually try cases, he introduced himself to me when I arrived at the airport. He was Irish and would take a drink. He told me he had a case set for trial and asked me to associate with him. He had filed an answer. I suppose he planned to split the fee and sit with me at counsel table and feed me questions. I showed proper outrage to his proposal. Later his client came to me and retained me directly. The trial was to start that afternoon.

Judge McCarrey was the Territorial District Judge. The action was on a promissory note for legal services. One of the lawyer plaintiffs had left town and I did not realize how bad his local reputation was until later. It was said that he owned or operated a B-joint and may have had B-girls living with him. Judge McCarrey allowed me to amend the answer to allege that the legal services were negligently performed. I do not remember how we typed the amended answer if we did.

Kodiak had no courtroom so we tried the case at the Elks club. They shut down the bar while court was in session. We spread out the jury instructions on the bar to go over them. Incidentally, a bar is an ideal piece of furniture for this process. Judge McCarrey was a Mormon but he expressed no objection to this use of the bar.

The jury interrupted their deliberations to ask if they could find a verdict for damages *against* the attorneys. This is what the jury did. The jurors knew the litigants far better than I. Perhaps they wished to right old wrongs. To have a jury trial with no pretrial preparation concluded the same day one is retained with so favorable an outcome causes one to think well of the floating court system.

As a point of interest, after the disbarred lawyer died his widow came to me with his will. It did not conform to the Statute of Wills and could not be probated. He had assured her there would be no problems.

The chief of police of Kodiak was as far as I know completely honest. He was from the mid-Atlantic area and retained what sounded to me like a New Jersey accent. He was an Archie Bunker look-alike as well as think-alike. Because there was no city prosecutor, he would often present the charges himself to the court The offense of driving while intoxicated was always referred to by him as "driving underneat the influence." Nobody could cure him of this.

One of the court clerks told me that once when she was in Kodiak with the floating court she encountered a woman at the top of the stairs in the hotel talking to a man. The woman was stark naked. The thing which surprised the court clerk most was that neither man nor woman showed the slightest interest when she walked by.

Alaska being a territory at the time, order was maintained by U.S. Marshals and Deputy Marshals as well as by city police. No weak or timid Deputy Marshal would survive long in Kodiak. The fishermen drank a lot and fought a lot. The Deputy Marshal in Kodiak. also my friend. not only survived but flourished. When one knock on the head would have adequately subdued the errant fisherman, he would knock twice or three times. One night when he was in a fishermen's bar someone turned out the lights and the fun began. The Deputy Marshal soon was on the floor, and the fishermen returned the kicks and punches they had received from him through the years. in spades.

Life along the mommy track

What it means to "see God and12 apostles"

BY JAMILIA A. GEORGE

When it comes to management skills and executive capabilities, it may not be a juris doctor degree that earmarks success, but rather a natural ability to conquer fear and stave off panic in the face of certain disaster.

No, I am not talking about what it means to be lead counsel representing Exxon.

What I am talking about is the Mommy Track. That certain alarm which when it rings, causes even the most mellow of us to drop all deadlines and clients for the sweet smell of babies and midnight forays into the feeding and care of sometimes-small-enough-to-put-into-your-parka-pocket replicas of big people.

Concepts of negligence and product liability loom ominously when you hear your own voice explaining to an emergency-room physician how your infant son managed single-handedly to Super-Glue his eye shut. Panic sets in as you realize there is no "cure" for un-glueing the tiny eye and the ambulance attendant who so caringly transported you and your precious cargo to the hospital comments acidly that they have seen a rise in child abuse cases involving children of your son's age.

Of course the infant is able to verbalize only the most necessary of things, the type of which you pray will mean the guys in white coats will believe your sorry tale, such as "eye drops" and "daddy drops."

You furiously stumble to explain that your husband wears contact lenses and uses eye drops as you explore your pockets for the offending glue bottle. Sure enough, as it is produced, the "ahs" and "ah-hahs" fill the silent void between yourself and what must surely be the end of the world. The physician takes the sticky weapon which looks more like a bottle of Visine then cyanoacrylate ester.

Somewhere out of the abyss that once was your intellect comes a stranger's voice. "Please try to calm yourself and tell us again what happened...."

A strange noise pierces the room. It is not your son. He is lying strangely quiet as you reach for his tiny wrist to find that reassuring beat-beat-beat. You find it. That is not the voice you hear. You know that voice. Of course, it is your own. An unbelieveable tale evolves. Something about changing the sheets on your bed when the world's most precious 2 1/2 year old insists that only the Mickey Mouse pillow cases will do. Off he goes to retrieve them, not more than 15 feet from you, just as far as the hall closet, so you think.....then the cry.

Everything you have ever read about a parent knowing instinctively the difference between a cry of pain and one of any other nature reverberates through your very being.

You, too, know the difference: You have somehow always known the difference. With the speed of a powerful explosion you race to him. He is standing practically behind you. Standing perfectly still, with a small plastic bottle dangling from his tiny hand and eyes that are closed more tightly than the vault at Fort Knox at midnight. As you reach for him, only with the most herculean effort are you able to pin back his arms to prevent him from rubbing the injured eye. You turn to the phone next to the bed. That wonderful invention from Ma Bell lets Ma George test instant recall—didn't the brochure from American Express state this thing had a speaker phone feature?

You find the apppropriate button and the numbers 911 take forever to dial. The other end of the speaker brings you someone you once heard of in a bad joke asking you your child's age and condition. You scream for an ambulance because you are incapable of operating a motor vehicle and keeping your child's hands from his eyes. But you first have to explain the incredable tale to the operator. You will soon find that there is a most typical reaction to this bizarre tale. It is the same reaction that your insurer will exhibit when witholding processing of the claim to obtain what it calls "Come on lady, give us the real story...".

Now what is so unbelieveable about any of this, I ask you?

Does not every child of tender age pour glue into his eye in imitation of a much-loved parent's quest to rid the lack of sleep from his? Apparently not.

For surely just as the emergency room physician states that there is nothing which can be done "the eye will just have to open on its own as the epidermis of the eyelid is replaced naturally over time" only the most hearty advocate of us would insist that a REAL doctor be summoned.

Voila, more people in white and just as voila as before, no help.

Seems that not one of these experts has ever seen a similar case. Just let the eye open on its own, they say. (The snickers are unmistakeable at this point.)

Three weeks later, the eye opens. "Bonds Instantly" George is once again a wide-eyed, pre-schooler. No more bad jokes at day care and friends are finally letting the story rest at dinner parties. You have discovered that eight years of college and graduate school have little in common with the skills you will require to deal with a natural phenomena.

All the interest in finding your route through a maze of obscure legal theories will never match the curiosity of a 32-pound 2 1/2 year old.

And no amount of careful strategy coupled with discovery will ever equal the sudden rush of adrenaline when you realize that instinct must prevail over all else. But it's worth it. My once again wide-eyed son has forgiven me for nearly failing the "mommy track".

Jamilia and husband Richard are expecting their second child in November.

Newsletter to evaluate computer products for lawyers

Law Office Technology Review, a new monthly newsletter, will feature hands-on reviews of computer software, add-ons, and systems for law office computer users.

Each issue of *Law Office Technology Review* will include four or five detailed reviews of specific computer products, plus additional news and features articles. The newsletter is written for attorneys and law office staff members who currently use computers or are making current buying decisions. The monthly publication won't include general articles about "How Law Firm X Computerized Its Practice."

Law Office Technology Review is written and edited by Barry D. Bayer and Mark J. Welch. Bayer and Welch also co-author *Lawyers' PC Review*, a nationally syndicated column of computer reviews which has appeared weekly in local and regional legal newspapers since November 1987. Their weekly column is widely respected for its hard-hitting focused reviews of computer products from the perspective of the law office computer user. Bayer and Welch aren't afraid to condemn products which aren't appropriate for law offices, and always provide explicit reasons for their opinions —often including reasons why some readers may disagree.

Starting in October 1989, the same review columns will appear in both the weekly column and the monthly newsletter. Additional news and feature articles will be included in the newsletter.

A free sample copy of *Law Office Technology Review* will be sent to any attorney who requests it, without cost or obligation, by writing Law Office Technology Review, P.O. Box 24032, Oakland, CA 94623-1032, or call (415) 444-6141.

Barry D. Bayer has practiced law in the Chicago area since 1969, and has used computers in his practice since 1980. His columns, articles, and reviews have appeared in many legal and computer magazines and books. He moderates the "Law" conference on BIX, an on-line computer service. Bayer received his J.D. from the College of Law, University of Illinois, where he was a member of the school's law review, and the Order of the Coif.

Mark J. Welch was formerly a reporter for InfoWorld and associate news editor for BYTE magazine, and has written articles for dozens of other publications. He moderates two conferences on BIX. Welch received his J.D. from the Boalt Hall School of Law, University of California at Berkeley, and his B.A. in Journalism/-Computer Science from the University of Massachusetts in Amherst.

BAR PEOPLE

Kim Dunn is transferring to the Anchorage office of Birch, Horton, Bittner & Cherot.....**Jonathan Ealy** and **John Raforth** have joined the firm of Heller, Ehrman, White & McAuliffe.....**Mary Ellen Flaherty,** formerly with Kemppel, Huffman & Ginder, is now with Kay, Saville, Coffey, Hopwood & Schmidt.

Vanessa Karns, who was with Guess & Rudd, is now with Tugman, Clark & Ray.....**Averil Lerman** is now with the law firm of Preston, Thorgrimson, Ellis & Holman..... **Nancy Meade,** formerly with the A.G.'s office, is now working at the University of California, Boalt Hall .....**Richard Monkman** is now the Deputy Commissioner for the Department of Commerce & Economic Development.....**Monte Engle** has relocated from Barrow to Homer..... **Sarah E.F. (Liza) McCracken** has returned from Eugene, Oregon to Anchorage.....**Edward Noonan** has relocated from Fairbanks to Williamston, Michigan.

Patrick Ross, previously with Ross, Gingras, Bailey & Miner, has now opened his own law office in Anchorage.....**Raymond Royce** and **Michael Brain** are now partners in the law firm of Royce & Brain.....**Ella Stebing** is now associated with Lynch, Crosby & Sisson.....**Diane T. Smith,** previously with the A.G.'s office, is now with Copeland, Landye, Bennett & Wolf.

Sen Tan, formerly with the P.D. s office, is now with the A.G.'s office, section of Oil, Gas & Mining.....**Venable Vermont,** previously an assistant P.D., is now with the A.G.'s office.....**Gina Zadra** has transferred to the Seattle office of Davis, Wright & Jones.....**John Gissberg** has joined Faulkner, Banfield, et al as special counsel.

James R. Peterson, formerly of Burr Pease and Kurtz is now a senior attorney with National Fuel Gas Supply Corp. in Buffalo, N.Y.

Erik LeRoy has opened his own law office in Anchorage.....Wedding bells for **Doug Barker** and his Japanese fiance are set to ring in Anchorage in the spring of 1990.....**Don McClintock** and his wife had a 7 lb., 9 oz. baby boy, Daniel Patrick on November 13, 1989.

Stephanie Cole and **Mark Ashburn** had a baby boy, Christopher Mark Ashbrun, born March 28, at 7 lbs. 14 ozs... .**David Zwink** and **Lynnette Carrier** had a 6 lb. 9 ozs. baby boy, Andrew Lee.... **Sharon Gleason** and **Bill Cotton** had a 7 lb. 14 ozs. baby girl, Chloe Elizabeth on Halloween.....**Barclay Jones-Kopchak** and **R.J. Kopchak** had a baby boy, Zebon, on Halloween.....**Linda Cerro** and **Bob Landau** had a baby girl, Aurora, on Oct. 27.....**Ayse Gilbert** (Bar Rag staff) and **Chuck** had a baby boy, Otto.

McElhaney to speak in Kona

James McElhaney, one of the country's premier lecturers on evidence and trial practice, will be the guest faculty at the 1990 Mid-Winter CLE in Kona, March 13 and 14.

Professor McElhaney, a perennial favorite, will speak on "Evidence for Advocates: The Law You Need to Prove Your Case." Program topics and highlights include The Open Door Theory of Relevance, Character Evidence and Impeachment, Foundations and Objections, Making and Meeting Objections, Privileges, Hearsay, and Expert Witnesses.

Details regarding registration, hotel, airfare, car rental, and condo availability will be sent to members in December. Call Executive Travel, the Bar Association's travel agent for this CLE, at 276-2434 (Anchorage) or toll-free 800-478-2343 to make travel and lodging reservations.

Please note that this year's program coincides with the spring vacation schedule for the Anchorage and Fairbanks School Districts.

Call Barbara Armstrong, CLE Director, at the Bar Office, 272-7469, for further information. Mahalo!

CLE Seminar
Video replay schedule
1989 — 1990

REPLAY LOCATIONS:

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

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

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

REPLAY DATES:

***Adoption Issues** (Anch. 9/7/89)
Juneau: 10/28/89 9AM - 12 Noon
Kodiak: 11/4/89 Beginning at 10AM
Fairbanks: 11/10/89 9AM-Noon

***Maritime Personal Injury** (Anch. 10/27/89)
Juneau: 11/4/89 9AM - 12 Noon
Kodiak: 11/11/89 Beginning at 10AM
Fairbanks: 11/17/89 9AM - 12 Noon

***Federal and State Sentencing Guidelines** (Anch. 10/31 & 11/2/89)
Juneau: cancelled
Kodiak: 12/2 Beginning at 10AM
Fairbanks: 12/1 9AM-5PM

***Malpractice Survival** (Anch. 11/8/89)
Juneau: 11/18/89 9AM - 12 Noon
Kodiak: None scheduled
Fairbanks: 2/9/90 9AM - 12 Noon

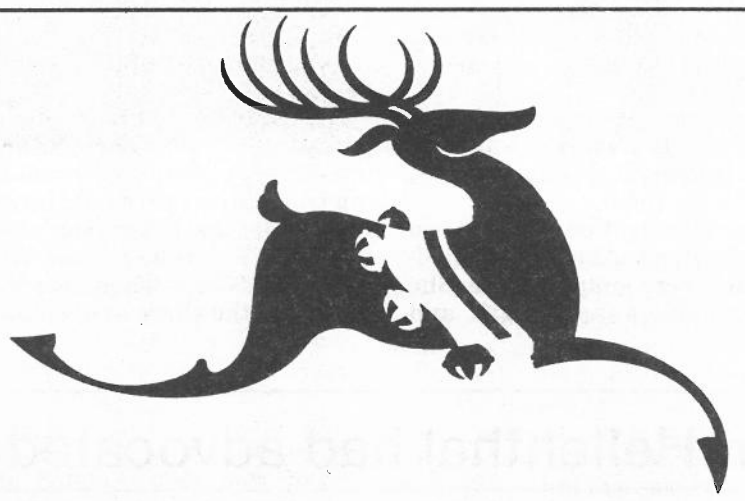
***2nd Annual Alaska Native Law Conference** (Anch. 11/16/89)
Juneau: 12/2 9AM - 5PM
Kodiak: 12/16 Beginning at 10AM
Fairbanks: 12/8 9AM-5PM

***Basic Nuts and Bolts of Foreclosures** (Anch. 12/5/89)
Juneau: 12/16 9AM-12 Noon
Kodiak: 1/13/90 Beginning at 10AM
Fairbanks: 1/12/90 9AM - 12 Noon

***Appeals from Agency Decisions** (Anch. 1/18-19/90)
Juneau: 1/27/90 9AM-5PM
Kodiak: 2/3/90 Beginning at 10AM
Fairbanks: 2/2/90 9AM-5PM

***A Primer on Alaska Lands** (Anch. 1/23/90)
Juneau: 2/10/90 9AM-5PM
Kodiak: None scheduled
Fairbanks: TBA

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



Have A Safe Holiday

CLE Calendar

Programs are full day unless otherwise noted.

1989

#19 Nov 16	2nd Annual Ak Native Law Conference	Hotel Captain Cook
#28 Nov 29 AM Mini-Seminar	Off the Record - Anchorage	Hotel Captain Cook
#22 Dec 5 AM Mini-Seminar	Basic Nuts & Bolts of Foreclosures	Hotel Captain Cook

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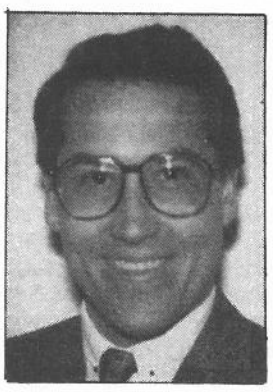
1990

#30 January 11 6 pm - 9 pm	Off the Record - Juneau	Centennial Hall Juneau
#23 Jan 18 & 19 Two Half Days	Appeals from Agency Decisions	Hotel Captain Cook
#24 Jan 23	A Primer on Alaska Lands	Hotel Captain Cook
#31a Jan 30 & 31 - AM Mini-Seminar	Civil Rule 90.3 - Child Support	Hotel Captain Cook
#26 Feb 16 1:30 - 4 p.m.	Off the Record - Fairbanks	Regency Hotel Fairbanks
#31f March 2 Half-Day	Civil Rule 90.3 - Child Support - LIVE REPEAT	Regency Hotel Fairbanks
#20 Mar 13-14 Two half-days	Evidence for Advocates: The Law You Need To Know To Prove Your Case -- James McElhaney	Kona Hilton Hawaii
#27 March 30	Basic Estate Planning	Egan Convention Center
#31j April 10 Half-Day	Civil Rule 90.3 - Child Support - LIVE REPEAT	Centennial Hall Juneau
#29 Apr 18 Half Day Apr 20 Full Day	A Lawyer's Guide to Writing Clearly and Persuasively LIVE REPEAT IN ANCHORAGE	Centennial Hall Juneau Hotel Captain Cook, Anchorage
#21 June 7-9	1990 Northern Justice Conference & Annual Bar Convention	Anchorage, Hotel Captain Cook
#14 Oct 2 & 4 AM Mini-Seminar	Making & Meeting Objections	Hotel Captain Cook



ESTATE PLANNING CORNER

There's a major disadvantage to gifting

Steven T. O'Hara

Although most are familiar with the term "basis," its meaning bears mentioning for purposes of the following discussion. "Basis" is used in determining gain or loss from the sale or other disposition of property (I.R.C. Sec. 1001 & 1011).

For example, if a client purchases stock for $100,000.00, her basis in that stock is $100,000.00 (I.R.C. Sec. 1012). If she then sells the stock for $600,000.00, her taxable gain is $500,000.00, which is the consideration received in excess of her basis.

When a lifetime gift is made, the donee takes, in general, a carryover basis in the gifted property (I.R.C. Sec. 1015). Depending on the circumstances, this can be a major disadvantage of gifting.

By contrast, a so-called "stepped-up basis" (to fair market value) is obtained, in general, on a death transfer (I.R.C. Sec. 1014).

By way of illustration, suppose you have a client, an Alaskan domiciliary, with a very simple estate. She has never made a taxable gift, and her only asset is a share of stock.

Although she purchased that share for $100,000.00, it is now worth $600,000.00. So if she sold the share today, her gain would be $500,000.00 (I.R.C. Sec. 1001).

Suppose further that the client is on her death bed. To avoid probate, she transfers the share to her son (which she can do under current law at no gift-tax cost) and then dies.

The bad news that the son will soon learn is that his basis in his newly-acquired share is the same as his mother's —$100,000.00. So if he then sells the share, he would have $500,000.00 of gain, which could generate a 1989 federal income tax liability of as much as $140,000.00 (I.R.C. Sec. 1).

By contrast, if the mother had passed the share to her son by will, intestate succession, or revocable living trust, there still would have been no transfer tax, but the son's basis in the stock would have been stepped-up to $600,000.00. Then the son could have sold the share at absolutely no tax cost, a saving of as mush as $140,000.00 in income tax.

Accordingly, clients should be cautioned about gifting low-basis, highly-appreciated property.

An important exception to the stepped-up basis rule is that a donor will not receive a step-up in basis on the return of gifted property to him or his spouse, unless the donee lives a year and a day after the gift (I.R.C. Sec. 1014(e)).

For example, suppose after learning her husband may die soon, the client (a U.S. citizen) gives low-basis, appreciated property to her husband (also a U.S. citizen). The husband then dies and, through his will, gives the property back to his wife.

Under such circumstances, the wife would not receive a step-up in basis on the return of the property unless the husband lived a year and a day after the gift.

An important exception to the carryover basis rule is that it applies only in determining gain. The rule cannot be used to carryover a loss position to the donee (I.R.C. Sec. 1015(a)).

For example, consider a client who currently owns Anchorage real estate. Suppose she purchased the property for $100,000.00, but it is worth only $50,000.00 today.

If the client gifts the property, the donee's basis for purposes of determining loss would be $50,000.00, the fair market value of the property at the time of the gift.

For purposes of determining gain, however, the donee's basis would be $100,000.00 (I.R.C. Sec. 1015(a)). So the donee would not have any income-tax exposure until the property's value exceeds $100,000.00.

In other words, a donor wastes any loss deduction (I.R.C. Sec. 165 & 1211) by gifting depreciated property. A greater waste, however, would occur if the gift is not made, the property continues to depreciate, and then its owner dies before disposing of the property. This is because a loss position pending at death does not carryover to the decedent's estate (I.R.C. Sec. 1014).

John Hellenthal had advocated such a move — info solicited

Committee asks for preservation of Bar history

The Historians Committee of the Alaska Bar Association had its most recent meeting on September 19, 1989. Discussion at the meeting focused initially upon the recent passing of one of our colleagues, John Hellenthal. John regularly attended our meetings and had advocated at our most recent one that the Committee undertake a comprehensive history of the Alaska bar. Apparently John had been working on the project himself at the time of his death, writing down his own recollections and interviewing others. At the Committee meeting we shared what we knew about his efforts and considered what we could do to locate and preserve his work for the benefit of future historians of the Alaska bar, as John would have wanted.

During the course of our conversation a number of similar projects were discussed. We realized that in some cases we did not know what had become of the materials, and that they might well be lost if not collected and preserved. We then considered which members of the Alaska bar would be likely to be aware of such projects, or to otherwise have access to materials about the history of the bench and bar in Alaska which might be lost if not identified and preserved.

As a result of our meeting some of you who have been in Alaska for a substantial period of time, or are related to someone who has, may recently have received a letter from the Historians Committee. In the letter we have requested information about the location of any historical materials concerning the Alaska bar of which you might be aware. In addition to those few individuals to whom we have written — who we identified as being those most likely to be aware of information about such materials — we would like to solicit information from any other members of the bar or the public who might be aware of significant information about the history of the Alaska bar.

Examples of the type of materials which we are seeking include historical memoiors and research notes, such as those on which John was working; official bar histories or directories, previously prepared; descriptions of local bar associations; books and articles about the legal system in Alaska; media accounts of important legal proceedings; and the like. Particularly useful to future historians could be any sort of anecdotal materials, giving an authentic flavor to the retelling of old legal war stories.

Anyone who is aware of the existance of such materials should bring them to the attention of one of our members, advise our new Chairperson, Loni Levy, or contact Deborah O'Regan of the Alaska Bar Association, preferably by January 1, 1990. The Historians Committee is attempting to not only identify and locate such historical materials but also to find a central depository for them. Such materials can then be stored, preserved and used by any future historians researching the colorful past of the Alaska Bar Association.

Eight attorneys receive disciplinary measures from Bar

Attorney A received a written private admonition for expressing an opinion in the press as to the merits of a criminal case prior to trial. Attorney A was one of the attorneys in the case.

Attorney B received a written private admonition for communicating with an opposing party represented by counsel, a violation of DR 7-104(A)(1). Attorney B, who represented a medical malpractice claimant, sent a letter to the insured's lawyer demanding that the lawyer withdraw for conflict of interest, discussing liability and procedural issues and threatening sanctions. Attorney B improperly sent a copy of this letter to the insurance adjuster, who is deemed to be a client under Ethics Opinion 78-4.

Attorney C received a written private admonition for neglecting to file documents pursuant to a pretrial order, contributing to dismissal of the client's complaint. Bar counsel found a violation of DR 6-101(A)(3). The admonition was imposed with conditions that Attorney C participate in Alcoholics Anonymous and submit to the supervision of two monitoring lawyers.

Attorney D received a written private admonition for directly soliciting a client by recommending employment of his firm in person to someone who had not sought his advice.

Attorney E received a written private admonition threatening to notify an opposing lawyer's employer of claimed (but groundless) misdeeds by the lawyer unless the lawyer withdrew as counsel. Attorney E also threatened court action against an opposing witness who refused to speak with the attorney privately. Attorney E's effort to deprive the opposing party of counsel of choice was conduct prejudicial to the administration of justice, a violation of DR 1-102(A)(5). The threats against the opposing lawyer and witness were harassment in violation of DR 7-102(A)(1).

Attorney F received a written private admonition for communicating with an adverse party represented by counsel, a violation of DR 7-104(A)(1). While conducting court-ordered discovery at the opposing party's office, at the party's request Attorney F discussed discovery and litigation issues. Attorney F later accepted a telephone call from the opposing party and negotiated settlement terms. Both acts occurred while the opposing party's lawyer was out of town.

Attorney G received a private reprimand for conflict of interest and failure to advise an unrepresented party to secure counsel. Client A invested in a business owned by Attorney G and operated by the attorney's relative. The relative defrauded the client, who notified Attorney G. Attorney G discouraged Client A from seeing another lawyer, a violation of DR 7-104(A)(2). Attorney G attempted to resolve the problem privately but did not disclose any conflicts with the attorney's own interests, a violation of DR 5-101(A), and did not disclose conflicts with the attorney's other clients, including the relative, a violation of DR 5-105(A).

Attorney H received a written private admonition for neglecting a legal matter entrusted to him. Attorney H did not schedule depositions in a timely manner, did not provide records of costs and fees to his client, and did not release case materials to new counsel within a reasonable time.

Proper sequencing improves practice profits

By Stuart S. Nagel

The purpose of this article is to describe how the methods of optimum sequencing can improve the efficiency and profits of law practice. Optimum sequencing refers to the order in which cases or other jobs are handled so as to maximize benefits minus costs or income minus expenses. Different arrangements of the cases or jobs can have different degrees of benefits, costs and profitability.

Table 1 shows an example of optimum sequencing applied to law cases. The illustrative problem is, "What is the best order in which to handle three cases that involve an estimated 10, 20, and 30 hours and that are predicted to generate $21, $61, and $80 in billing?"

To make the problem more exciting, consider each billing as being measured in $1,000 units, although we will see that optimum sequencing works with any monetary units and any set of hypothetical or real cases. For the sake of simplicity, assume we have a one-lawyer firm who works a 40-hour week. With three cases labeled A, B, and C, there are six ways in which they can be ordered consisting of ABC, ACB, BAC, BCA, CAB, and CBA. Which is the best order?

The Alternatives and the Criteria

A more general way to view the problem is in terms of five different methods that are frequently proposed for ordering cases in a law firm, a government agency, or elsewhere. Those alternative methods arranged randomly are:

1. Take the cases in the order of the highest benefits first. That means CBA.

2. Look to the cases with the lowest costs first. That means ABC.

3. Take them first come, first served. That also means ABC.

4. Prefer the most profitable first, meaning the ones with the highest benefits minus costs. That means C ($80-30), B ($61-20), and then A ($21-10).

5. Take them in the order of their benefit/cost ratios. That means B ($61/20, or 3.05), C (80/30, or 2.67), and then A ($21/10, or 2.10)

We want to pick the best ordering criterion in terms of maximizing the profits of the law firm, while operating within ethical constraints. At first glance, one might think the order of the cases will make no difference in the profit that can be made from these three cases. The cases are going to consume a total of 60 hours regardless of the order in which they are handled. Likewise, the order will not affect the fact that they will collectively bring in $162 in billings. If we assume that one hour is worth $1 or one monetary unit, then their net profit will be $162 minus $60, or $102 regardless of the order in which they are processed.

At second glance, however, we realize that one method may bring in more money earlier than another method. The method that brings in the most money as early as possible is the most profitable because that early money can be invested in the firm or elsewhere, thereby drawing interest which might otherwise be a missed opportunity.

The criterion for judging these methods should be how much profit they generate in the first week, the second week, and so on, with more weight given to the profit of the first week than the second week.

How the Alternatives Compare

Table 1 shows for each method how profitable it is in terms of the separate weekly profits, rather than the overall profit which is the same $102 for all the methods. The winning method is taking the cases in the order of their benefit/cost ratios. That method generates $74.33 in the first week, which is about $4 higher than its nearest competitor. If we assume that these numbers are $1,000 units, then by not taking the cases in their B/C order, the firm may be losing the interest that could have been made on $4,000 invested for one week. If that kind of loss is multiplied by 52 weeks and 30 cases rather than three cases, then a lot of money may be needlessly lost.

The $74.33 is calculated by noting that case B has the highest B/C ratio, and thus comes first. Case B takes 20 hours and generates a net profit of $41. We then go to case C, which has the second best B/C ratio. It takes 30 hours, but we only have 20 hours left in the week. We, therefore, do 2/3 of the case, and thus earn 2/3 of the $50 profit which is $33.33. If we add that to $41, the first week generates $74.33 profit. The second week brings $27.67 in profit, or the remainder of the $102.

One can contrast that optimally profitable sequencing with any of the other less profitable methods. For example, if the cases are processed in terms of their individual profitability, we would take case C first, rather than case B. Doing so would consume 30 hours for a profit of $50. We would then have time for only 10 of 20 shours of case B, which is the next most profitable case. That would earn half of the $41 profit, or $20.50. If we add $50 to $20.50, then we get only $70.50, or $70,500, rather than $74.33, or $74,333.

To be more exact we could time discosunt the profits of the second week using the time-discounting provisions of the P/G% program. That would give a more accurate overall score than giving the first week's profits a weight of 2. The time discounting, however, would not change the rank order as to which is the best sequencing method.

Implications for Computers and Clients

A computer can aid in implementing the B/C sequencing method by questioning the relevant lawyers as the cases come in as to their estimates of the expenses and income for each case. The computer can then arrange the cases each week in the order of the B/C ratios, and then display that order to aid in deciding which case to take next. To prevent cases with a low B/C ratio from being unrreasonably delayed, the computer can flag cases for immediate processing in time to meet the statute of limitations, other deadlines, or an ethical constraint that says no case should have to wait more than a given time to reach a certain stage.

By following such procedures, the law firm administration will not only be maximizing the law firm's profits, but it will also be maximizing the happiness of the clients collectively. This is so if we assume that $1 in billing activity generates the equivalent of one happiness unit. That way the B/C method thus generates more client happiness earlier than the alternative methods do. The estimated total happiness units per week can be calculated by adding 40 to the numbers given in the first column of Table 1C, and adding 20 to the numbers in the second column. The B/C method thus generates 114.33 happiness units, which is higher than any of the other methods. It is pleasing when law-firm administrative methods can be found that maximize both the interests of the law firm and the interests of the clients.[1]

LAW FIRM ADMINISTRATION: SEQUENCING CASES

PROBLEM: WHAT IS THE BEST ORDER TO HANDLE THREE CASES THAT INVOLVE 10, 20, AND 30 HOURS AND THAT GENERATE $21, $61, AND $80 IN BILLING?)

A. THE ALTERNATIVES: FIVE SEQUENCING METHODS

Alternative
1. Highest B's first
2. Lowest C's first
3. 1st come, 1st serve
4. Highest B-C first
5. Highest B/C first

B. THE CRITERIA: TWO WEEKS OF PROFIT

CRITERION	MEAS. UNIT WEIGHT
1. 1st week profit	$2.00
2. 2nd week profit	$1.00

C. PROFIT BY EACH ALTERNATIVE FOR EACH WEEK

ALTERNATIVE/CRITERIA SCORING

	1ST WEEK	2ND WEEK
Highest B's first	70.50	31.50
Lowest C's first	68.67	33.33
1st come, 1st srv.	68.67	33.33
Highest B-C first	70.50	31.50
Highest B/C first	74.33	27.67

D. THE OVERALL SCORE FOR EACH SEQUENCING METHOD

Alternative	Combined Rawscores
1. Highest B's first	172.50
2. Lowest C's first	170.67
3. 1st come, 1st serv.	170.67
4. Highest B-C first	172.50
5. Highest B/C first	176.33

NOTES:

1. The above computer print out shows that by taking the first three cases in the order of the highest benefit/cost ratio first, one thereby maximizes overall benefits minus costs.

2. This is so because the B/C order results in more profit being earned earlier, and that profit is thus available to draw interest or to be reinvested more so than if it is earned later.

3. In the above example profit from the first week is given twice the weight or importance as profit of the second week. Al alternative approach would be to weigh the weeks equally, but to time-discosunt the second week more so than the first week.

4. The reasonable assumption is that the 60 hours of awork involved in doing the first three cases means 40 hours in the first week and 20 hours in the second week. The assumption is also that there is billing every waeek, not just at the end of the cases, and that the bills are paid promptlly.

FOOTNOTES

1. On computer-aided sequencing (CAS) of law firm cases and other jobs see S. Nagel "Sequencing and Allocating Attorney Time to Cases," 13 *Pepperdine Law Review* 1021-1039 (1986); and S. Nagel, Mark Beeman, and John Reed. "Optimum Sequencing of Court Cases to Reduce Delay," *Alabama Law Review* (1986). Also see the more general literature on efficient sequencing, such as Richard Conway, et al., *Theory of Scheduling* (Addison-Wesley, 1967). On allocating time per case regardless of the order of the cases, see S. Nagel, "Attorney Time Per Case: Finding an Optimum Level," 32 *University of Florida Law Review* 424-441 (1980). For general materials on computer-aided law decisions (CALD), see S. Nagel, *Using Personal Computers for Decision-Making in Law Practice* (Greenwood-Quorum Press, 1986). An earlier version is available from the Committee on Continuing Professional Education of the American Law Institute and the American Bar Association.

Court amends child support rules

IN THE SUPREME COURT FOR THE STATE OF ALASKA
ORDER NO. 1008
Amending Civil Rule 90.3 concerning child support guidelines.

IT IS ORDERED:

1. Civil Rule 90.3 is amended to provide:

(a) Guidelines — Sole or Primary Physical Custody. A child support award in a case in which one parent is awarded sole or primary physical custody as defined by paragraph (f) will be calculated as an amount equal to the adjusted annual income of the non-custodial parent multiplied by a percentage specified in subparagraph (a)(2).

(1) Adjusted annual income as used in this rule means the parent's total income from all sources minus:

(A) mandatory deductions such as federal income tax, social security tax, mandatory retirement deductions and mandatory union dues;

(B) child support and alimony payments arising from prior relationships which are required by other court or administrative proceedings and actually paid; and

(C) work related child care expenses for the children who are the subject of the child support order.

(2) The percentage by which the non-custodial parent's adjusted income must be multiplied in order to calculate the child support award is:

(A) 20% (.20) for one child;

(B) 27% (.27) for two children;

(C) 33% (.33) for three children; and

(D) an extra 3% (.03) for each additional child.

(3) The court may allow the obligor parent to reduce child support payments up to 50% for any period in which that parent has extended visitation of over 27 consecutive days. The order must specify the amount of the reduction which is allowable if the extended visitation is exercised.

(b) Shared Physical Custody. A child support award in a case in which the parents are awarded shared physical custody as defined by paragraph (f) will be calculated by:

(1) Calculating the annual amount each parent would pay to the other parent under paragraph (a) assuming the other parent had primary custody.

(2) Multiplying this amount for each parent by the percentagae of time the other parent will have physical custody of the children. However, if the court finds that the percentage of time each parent will have physical custody will not accurately reflect the ratio of funds each parent will directly spend on supporting the children, the court shall vary this percentage to reflect its findings.

(3) The parent waith the larger figure calculated in the preceding subparagraph is the obligor parent and the annual award is equal to the difference between the two figures multiplied by 1.5 However, if this figure is higher than the amount of support which would be calculated under paragraph (a) assuming sole or primary custody, the annual support is the amount calculated under paragraph (a).

(4) The child support award is to be paid in 12 equal monthly installments unless shared custody is based on the obligor parent having physical custody for periods of 30 consecutive days or more. In that case, the total annual award will be paid in equal installments over those months in which the obligor parent does not have physical custody. The order must provide that if this physical custody is not exercised, the obligor parent must pay additional child support in an amount equal to what must be paid in months in which the obligor parent is not entitled to physical custody.

(c) **Exceptions.**

(1) The court may vary the child support award as calculated under the other provisions of this rule for good cause upon proof by clear and convincing evidence that manifest injustice would result if the support award were not varied. The court must specify in writing the reason for the variation, the amount of support which would have been required but for the variation, and the estimated value of any property conveyed instead of support calculated under the other provisions of this rule. Good cause may include a finding:

(A) that unusual circumstances, such as especially large family size, significant income of a child, health or other extraordinary expenses, or unusually low expenses, exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children. The court shall consider the custodial parent's income in this determination; or

(B) a finding that the parent with the child support obligation has a gross income which is below the proverty level as set forth in the Federal Register. However, a parent who would be required to pay child support pursuant to paragraph (a) or (b) must be ordered to pay a minimum child support amount of no less than $50.00 per month except as provided in paragraphs (a) (3) and (b).

(2) Paragraphs (a) and (b) do not apply to the extent that the parent has an adjusted annual income of over $60,000. In such a case, the court may make an additional award only if it is just and proper, taking into account the needs of the children, the standard of living of the children and the extent to which that standard should be reflective of the supporting parent's ability to pay.

(d) **Health Insurance —Credits.** The court shall address coverage of the children's health care needs and require health insurance if insurance is available to either parent at a reasonable cost. In calculating a child support award, credit will be given for medical and dental insurance, or educational payments for the children which are required by the court or administrative order and actually paid.

(e) **Child Support Affidavit and Documentation.** Each parent in a court proceeding at which child support is involved must file a pleading under oath which states the parent's adjusted annual income and the components of this income as provided in subparagraph (a) (1). This statement must be accompanied by documentation verifying the income.

(f) **Definitions.** A parent has shared physical custody of children for purposes of this rule if the children reside with that parent for a period specified in writing of at least 30 percent of the year, regardless of the status of legal custody. A parent has sole or primary physical custody of children for purposes of this rule when the other parent has physical custody of the children less than 30 percent of the year.

(g) **Travel Expenses.** After determining an award of child support under this rule, the court may allocate reasonable travel expenses which are necessary to exercise visitation between the parties as may be just and proper for them to contribute.

(h) **Modification.**

(1) A final child support award may be modified if allowed by federal law or upon a showing of a material change of circumstances as provided by state law. A material change of circumstances will be presumed if support as calculated under this rule is more than 15 percent greater or less than the outstanding support order.

(2) Child support arrearages may not be modified retroactively. A modification which is effective on or after the date that a motion for modification is served on the opposing party is not considered a retroactive modification.

NOTE: This rule is adopted under the supreme court's interpretive authority pursuant to Article IV, Section I of the Alaska Constitution. Thus, it may be superseded by legislation even if the legislation does not meet the procedural requirements for changing rules promulgated under Article IV, Section 15.

2. The attached commentary to Civil Rule 90.3 which was prepared by the Child Support Guidelines Committee will be published in the Rules of Court immediately following Civil Rule 90.3. The commentary has not been adopted or approved by the Supreme Court, but is published for informational purposes and to assist users of Rule 90.3.

DATED: October 5, 1989

EFFECTIVE DATE: January 15, 1990

Woman Times Three

I
ALICE

Oh Alice, how effortlessly you passed
Between the rooms, across the glass.
You couldn't know, of course, my dear,
The space you left was filled with air
Composed of elements so new —
We couldn't have them analyzed
Before the old house blew.

So now, I wonder what you see
Above the mantle on the wall.
A mirror? Or a shattered dream?
Or do you care to look at all?

II
OLYMPIA

My appetite remembers
What a feast you were!
I had not known that
I was starving,
Until I saw you
Stretched out across
That long, white,
Cloth covering.
Offering more
Than even a man,
Hungry as I was,
Could consume

III
MARGRETHA

I will tell you something
That you don't want to know.
I will take you someplace
Where you don't want to go.
I will show you someday
What you can't bear to see.
I am DEATH, your mother.
You will come to me.

—Harry Branson

Pension plans exempt or excluded — maybe

BY: THOMAS J. YERBICH

I. Exemption

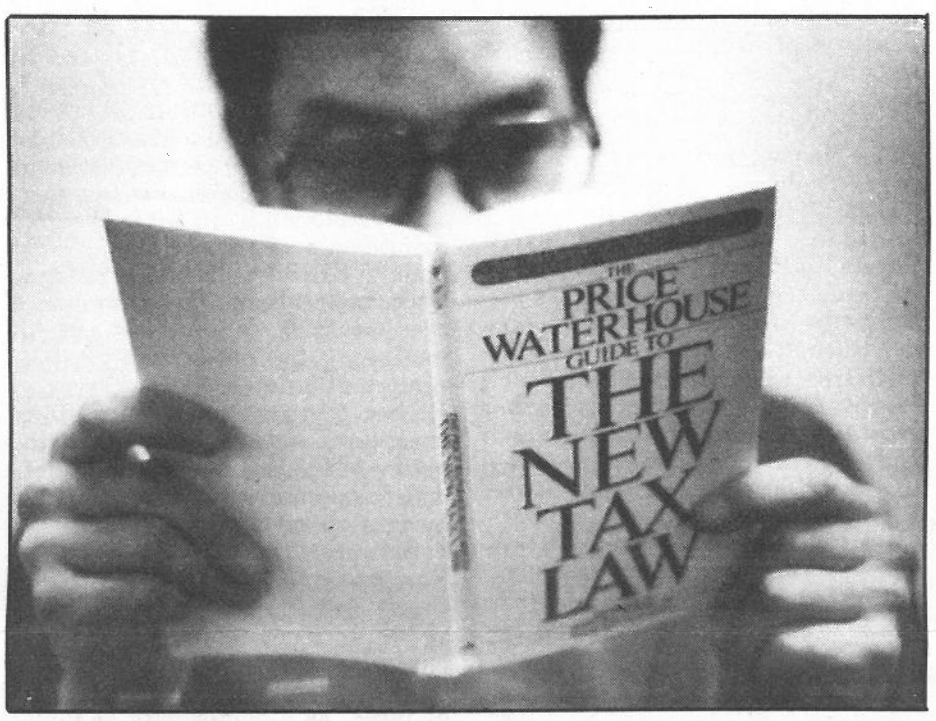
Chapter 135, SLA 1988 added new AS Sec. 09.38.017 exempting from claims of an individual's creditors the interest of the individual in and the money or other assets payable to the individual from a retirement plan. As defined in AS Sec. 09.38.017(e)(3) a retirement plan is one which is qualified under Sec. 401(a) [qualified pension, profit-sharing and stock bonus plans], 403(b) [certain qualified annuities provided by charitable and educational institutions], 408 [individual retirement accounts], and 409 [tax credit employee stock ownership plans] of the Internal Revenue Code. Barely had the ink dried on the Governor's signature on chapter 135, SLA 1988 when the U.S. Supreme Court effectively, for the the most part, invalidated it.

The problem arises as a result of Sec. 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") which provides, in relevant part, that "the provisions of this title and title IV shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." ERISA $ 4(a) extends ERISA coverage to all employee benefit plans established or maintained by either an employer or employee organization.

Mackey v. *Lanier Collections Agency & Service* [486 U.S. , 108 S.Ct. 2182, 100 L.Ed.2d 836] decided June 17, 1988, invalidated a Georgia statute exempting from garnishment employee benefit programs holding: (1) state laws specifically designed to affect employee benefit plans are pre-empted by ERISA Sec. 514(a); and (2) pre-emption extends to those laws which are consistent with ERISA's substantive requirements [108 S.Ct. at 2185]. The holding and result in *Mackey* are applicable to AS Sec. 09.38.017. That is, to the extent AS Sec. 09.38.017 "makes reference to ERISA plans" it is a statute within the meaning of Sec. 514(a). That AS Sec. 09.38.017, at least in part, makes specific reference to ERISA plans is plainly and patently clear. By reference to retirement plans "qualified" under Sec. 401, 403, and 409 of the Internal Revenue Code ("IRC"), AS Sec. 09.38.017 is referring specifically to ERISA covered plans because those sections are contained in ERISA Title II and also fall within the ERISA Sec. 4(a) description. This was the approach initially taken (correctly, in the opinion of this author) in *In re Komet,* 93 B.R. 498 (Bkrtcy.W.D.Tex. 1988) [opinion withdrawn and rehearing granted] in invalidating a Texas exemption statute substantially similar to AS Sec. 09.38.017. Under this interpretation, ERISA Sec. 514(a) —*Mackey* pre-empts AS Sec. 09.-38.017 to the extent it applies to retirement plans qualified under IRC Sec. 401, 403 and 409. [Note that public pension plans, exempt under AS Sec. 09.38.015(b), 14.25.200 and 39.35.500, remain unaffected as ERISA $ Sec.(b)(1) excludes such plans from coverage under ERISA.]

On the other hand, the Chief Bankruptcy Judge of the Western District of Texas has held that ERISA Sec. 514(a) —*Mackey* does not pre-empt the Texas exemption statute [*In re Volpe,* 1989 Bankr. LEXIS 739 (decided 4/28/89)]. The *Volpe* opinion is quite lengthy, and to fully analyze it would require nearly as many pages as the opinion itself consumes. However, an abbreviated critical analysis is in order.

It is very evident that the court in *Volpe,* in narrowly construing the impact of *Mackey,* in reality disagrees with *Mackey's* result and the breadth. Unfortunately for debtors, *Volpe* is at odds with the clear and unmistakable language of *Mackey* that "[t]he state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach," making *Volpe* somewhat dubious authority. This is particularly true in light of the broader view of the pre-emptive impact of ERISA Sec. 514(a) taken by the Ninth Circuit [E.g., *Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust for So. Calif.,* 679 F.2d 1307 (9th Cir. 1982) rev'd on other grounds 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed2d 420 (1983); *Russell v. Massachusetts-Mutual Life Insurance Co.,* 722 F.2d 482 (9th Cir. 1983) rev'd on other grounds 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed2d 96 (1985); *Scott v. Gulf Oil Corp.,* 754 F.2d 1499 (9th Cir. 1985); *Misic v. Building Service Employees Health & Welfare Trust,* 789 F.2d 1374 (9th Cir. 1986)]. A careful reading of those decisions indicates the Ninth Circuit would most likely not adopt the *Volpe* narrow construction.



Furthermore, *Volpe* overlooks the clear impact of invalidating the Georgia antigarnishment statute. First, any distinction between an antigarnishment statute and an exemption statute is one one without a difference both serve the goal of protecting assets from the claims of creditors. Second, adopting as correct the *Volpe* distinction between "plans" and "benefits" (which is difficult inasmuch as benefits are an integral part of a pension plan), it does not necessarily follow, as *Volpe* holds, that state exemption of pension plan benefits is not pre-empted. The case for pre-emption of state statutes protective of pension plans is even stronger than that for welfare plans in that Congress in ERISA [Sec. 206(d)(1)] expressly addressed the question of protection to be accorded pension plan benefits; thus, having spoken on the subject, effectively foreclosed state law application in the same area. Finally, it is evident that applying the *Volpe* rationale, substituting the Georgia antigarnishment statute for the Texas exemption statute, the conclusion would be opposite to that reached in *AMackey.* This simply cannot be.

But what about Individual Retirement Accounts or Individual Retirement Annuities ("IRA") under IRC 408? AS Sec. 09.38.017 also exempts IRAs. An IRA is established and maintained by the individual, not by the employer or an employee organization; therefore, IRAs [not falling within the ERISA Sec. 4(a) description] are not covered by ERISA and ERISA Sec. 514(a) does not pre-empt that part of AS Sec. 09.38.017, unless the court should determine that the law is not severable. [This author, having enough on his plate for the moment, will leave severability to others.] The initial *Komet* decision took the position (by way of dicta referring to "ERISA-qualified individual retirement accounts") that exemption of IRAs was also pre-empted; this author respectfully disagrees with the court on this point because, as noted, IRAs are not covered by ERISA. However, some IRAs are maintained and/or partially funded by employer contributions. If an IRA involves employer participation, Lab.Reg. Sec. 2510.3-2(d) should be examined to determine ERISA coverage. Also, the issue is not as clear with respect to IRC Sec. 408(k) Simplified Employee Pensions. These are excluded from ERISA coverage by regulation if certain conditions enumerated therein are met [Lab.Reg. Sec. 2520.104-48].

Where does this leave Alaskans with respect to exemption of private retirement plans? If a debtor elects to use the Federal exemptions, Sec. 522(d)(10)(E) of the Bankruptcy Code ("BC") exempts such plans to the extent "reasonably necessary for the support of the debtor and any dependant of the debtor." If a debtor elects to use the state law exemptions alternative under BC Sec. 522(b)(2), an IRC Sec. 408 qualified IRA is probably exempt under AS Sec. 09.38.—017 but IRC Sec. 401, 403, and 409 qualified plans are not exempt under either the pre-empted AS Sec. 09.38.017 or under other Federal law pursuant to BC 522(b)(2)(A) [*In re Daniel* 771 F.2d 1352 (9th Cir. 1985) *cert den.* 475 U.S. 1016, 106 S.Ct. 1199, 89 L.Ed.2d 313 (1986)].

II. Excludability

In the bankruptcy context, a more complex question is presented by the issue of whether or not a qualified retirement plan is excluded from the estate of a bankrupt as a "spendthrift trust," under BC Sec. 541(c)(2). Conventional wisdom has been that BC Sec. 541(c)(2) does not exclude pension plans despite the ERISA Sec. 206(d)(1) requirement that qualified pension plans include a provision restricting alienation or assignment of benefits [See *In re Daniel, supra,* 771 F.2d at 1360]. Upon what may be euphemistically referred to as "more mature reflection," this author has concluded that "it ain't necessarily so." [A caveat is in order: if the following appears somewhat convoluted, circular and confusing it is only because it probably is. The state of the law in this area is somewhat convoluted, circular and confusing as is often the case when multiple Congressional acts having differing public policy considerations apply to a particular issue. Those who have delved into qualified pension plans and foolhardily made an excursion into the realm of ERISA and its regulations (Labor and Treasury) with their often-times confusing and occasionally contradictory provisions can only too well attest to this point.]

The Ninth Circuit in *Daniel* specifically held [771 F.2d at 1360] that:

> "[T]his Court holds that the phrase *'applicable non-bankruptcy law'* in 11 USC Sec. 541(c)(2) was intended to be a narrow reference to *state* 'spendthrift trust' law and not a broad reference to *all* other laws, including ERISA and the IRC which prohibt alienation. Therefore, the ERISA and IRC aanti-alienation provisions in debtor's pension and profit-sharing plan does not create a Federal non-bankruptcy exclusion under 11 USC Sec. 541(c)(2)." (Emphasis by the court).

The Ninth Circuit Bankruptcy Appellate Panel has held that *Mackey* did not undermine *Daniel* and BC Sec. 541(c)(2) may, therefore, be applied [*In re Kaplan,* 97 B.R. 572, 576 (BAP9 1989)]. Thus, the precise issue of whether or not an ERISA covered pension plan is a spendthrift trust excluded under BC Sec. 541(c)(2) must be determined by reference to the law of Alaska. Unfortunately, there is a paucity of either Alaska decisional or statutory law on the subject. Before one leaps with great exuberance and joy on the language contained in AS Sec. 09.38.017(d) conclusively presuming retirement plans to be spendthrift trusts, consider that that provision (specifically applicable to ERISA covered plans), as well as the exemption of ERISA covered retirement plans, may be pre-empted by ERISA Sec. 514(a) *Mackey.*

One may ask where are we going if ERISA Sec. 514(a) *Mackey* pre-empts application of state law to ERISA pension plans and *Daniel* denies the existence of a Federal law exclusion under either BC Sec. 522(b)(2)(A) or BC Sec. 541(c)(2). Fortunately, part III of the *Mackey* decision, sanctioning application of general state law where it does not conflict with a specific provision of ERISA, left a loop-hole through which we may squeeze.

We start our analysis with *Daniel* and the three Court of Appeals decisions it followed: *Matter of Goff* 706 F2d 574 (5th Cir. 1983), *In re Graham* 726 F2d 1268 (8th Cir. 1984) and *In re Lichstrahl* 750 F2d 1488 (llth Cir. 1985). All four decisions, applying state law to determine that the pension plan before the court was not a spendthrift trust, held that BC Sec. 541(c)(2) did not exclude the ERISA covered pension plan from the bankruptcy estate. All applied the generally accepted principle of trust law that a settlor may not create a spendthrift trust in the settlor's own favor [See generally Bogert, *Trusts* Sec. 40 (6th ed. 1987); Bogert, *Trusts and Trustees* Sec. 223 (2d ed.Rev. 1979); IIA Fratcher, *Scott on Trusts* Sec. 156 (4th ed. 1987); Restatement 2d, 2Trusts Sec. 156]. *Goff* involved a Keough self-employed pension plan while *Graham, Lichstrahl* and *Daniel* involved pension and profit sharing plans established by a professional corporation of which the debtor was the (1) sole shareholder, (2) trustee and (3) principal beneficiary. *Lichstrahl* analyzed and applied Florida law to determine that it was the equivalent of a settlor creating a spendthrift trust in the settlor's favor

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PENSION: State doesn't illuminate issue

Continued from page 17

(disregarding the corporate form because of the broad control debtor had) while *Graham* and *Daniel* implicitly determined similar pension plans were not spendthrift trusts under Iowa and California law, respectively. Similar facts would most likely produce the same results applying Alaska law, whether Alaska adheres to Bogert, Scott or the Restatement.

We now turn to the average employee who neither controls the employer-settlor nor is a trustee under the plan. Is such a plan excluded under BC Sec. 541(c)(2)? Under *Daniel* yes, provided the plan is an enforceable spendthrift trust under Alaska law [See *In re West*, 81 B.R. 22 (BAP9 1987)]. Unfortunately, neither Alaska decisional nor statutory law [except the ill-fated AS Sec. 09.38.017(d)] illuminates this issue. It may even be questionable whether spendthrift trusts are recognized at all in Alaska. AS Sec. 06.05.180 and 06.25.140 refer to spendthrift trusts in relation to the duties of a trustee: however, neither defines or otherwise explicates on what is a spendthrift trust under Alaska law, nor is there any reported decision on the question. These sections, with AS Sec. 09.30.017(d), are, however, indicative that Alaska recognizes the general validity of spendthrift trusts, following the majority rule in the United States rather than the English and minority U.S. rule that such trusts are invalid or void as against public policy (an unreasonable restraint on alienation). The ultimate answer will be determined by the persuasiveness of counsels' arguments based on one or all of the three principal general authorities (Bogert, Scott or Restatement) and principal cases from other jurisdictions. [*Matter of Brooks*, 844 F.2d 258 (5th Cir 1988) contains an excellent example of the analytical and factual problems involved with this alternative; see also *In re Rabo*, 97 B.R. 827 (Bkrtcy.W.D.PA 1989).]

Coming full circle, let us consider a seemingly convoluted theory that AS Sec. 09.38.017(d) is not pre-empted. ERISA Sec. 514(a) only pre-empts state law, not other Federal law. Keeping this in mind, one might argue that BC Sec. 541(c)(2) (a federal statute) expressly incorporates by reference the applicable non-bankruptcy state law of debtor's domicile, thereby making it an integral part of BC 541(c)(2). Strange as it may sound, this theory finds support in the very rationale underpinning *Daniel* and the cases it follows [BC Sec. 541(c)(2) preserved restrictions on the debtor to alienate, enforceable under otherwise applicable state non-bankruptcy law, excluding such nonalienable interests from the estate]. If, as noted, BC Sec. 541(c)(2) incorporates otherwise applicable non-bankruptcy *state* law, it is the Federal statute incorporating the state law, not the state law incorporated, being applied. It follows, *a fortiori*, that ERISA Sec. 514(a), because it does not pre-empt BC sec. 541(c)(2), does not pre-empt AS Sec. 09.38.017(d) to the extent it is incorporated into BC Sec. 541(c)-(2). Therefore, BC 541(c)(2), which incorporates AS Sec. 09.38.017(d), conclusively presumes the ERISA 206(d)(1) mandated anti-alienation clause creates a spendthrift trust excluded from the debtor's estate. In all candor, this author must note the one case found which addresses this issue, the court rejected this very argument [*In re Volpe*, supra].

III. Congressional Inconsistency

To add to the confusion, consider the potential disparate effects between filing and not filing bankruptcy. If a debtor remains outside bankruptcy, the ERISA Sec. 206(d)(1) mandated anti-alienation clause protects an ERISA covered retirement plan from creditors. This clearly reflects Congressional intent to protect ERISA retirement plans from individuals' creditors. On the other hand, if a debtor files for bankruptcy protection under title 11, *Goff -Graham -Lichstrahl -Daniel* either eliminate or sharply curtail protection of retirement plans. This result appears to be consistent with Congressional intent, expressed in BC Sec. 522(d)(10)(E), to only provide partial or limited protection to retirement plans. Thus, we are faced with two not entirely consistent Congressional expressions of intent. It is no small wonder that we mere mortals are somewhat confused and uncertain in determining which controls.

Goff -Graham -Lichstrahl -Daniel take the position that BC Sec. 522(d)(10)(E) controls. The reasoning of those courts, in light of customarily applied rules of statutory interpretation, is both logical and persuasive. However, the courts manifestly fail to reconcile the difference in treatment and fundamental conflict in Congressionally expressed public policy. Why should ERISA-qualified retirement plans be totally beyond the reach of creditors if a debtor does not file bankruptcy but, at best, only partially protected if a debtor files bankruptcy? BC Sec. 522, provides either uniform exceptions under BC 522(d) or, at the option of a debtor if it is more beneficial, the same exemptions that would be available if the debtor did not file bankruptcy. Does this not indicate a Congressional policy determination that a debtor by filing bankruptcy should be in no worse a position in terms of the assets a debtor retains? In other words, a debtor should not be faced, as a debtor may be under existing judicial interpretations, with the unpalatable choice of preserving a qualified retirement plan and foregoing a fresh start, or getting a fresh start and possibly foregoing retirement benefits.

Perhaps, as more than one court has observed, only Congress can resolve this dichotomy. On the other hand, the courts could re-examine *Goff-Graham-Lichstrahl-Daniel* and determine, as the Court did in *In re Hinshaw* [23 B.R. 233 (Bkrtcy.D.KN. 1982)], that an ERISA covered pension plan is exempt under BC Sec. 522(b)(2)(A).

It is also interesting to note that an Alaskan teacher or public employee does not face such a dilemma. Not only are such pension plans exempt, but also probably excluded as spendthrift trusts under BC Sec. 541(c)(2) by AS Sec. 14.25.200 (teachers) and 39.35.500 (PERS). [But see *In re Goldberg*, 98 B.R. 353 (Bkrtcy. N.D.IL (1989) for potential problems when the employee makes voluntary contributions to the plan.]

A related question is whether the Alaska Legislature can amend AS Sec. 09.38.017(e)(3) to delete the specific reference to ERISA plans and simply adopt definitional language similar to that contained in ERISA Sec. 3(2)(A), thereby avoiding pre-emption by ERISA Sec. 514(a). The answer is probably not because of the language in *Mackey* that state laws "'specifically designed to affect employee benefit plans' are pre-empted under Sec. 514(a)." [108 S.Ct. at 2185] Footnote 4 in *Mackey* may be interpreted in a manner giving hope, albeit slim, that a statute exempting all pension plans, whether or not ERISA covered might be sufficiently general to avoid pre-emption by ERISA 514(a). It appears, however, that only Congress can legislate in a manner which would specifically exempt private retirement plans, except for the plan established or maintained by that extremely rare, if not extinct, employer engaged in a business not affecting interstate commerce.

The legislature might consider enacting a new statute as part of AS 13.36 (dealing with trusts in general) defining enforceable spendthrift trusts in a manner to include pension plans. This alternative, unfortunately, raises significant public policy questions because such a statute could inadvertently extend to attempts by settlors to create spendthrift trusts in their own favor, which is not particularly sound from a public policy standpoint.

IV. Summary

In summary, with respect to private retirement plans, the conclusion is that a debtor has a choice of several alternatives, any of which may or may not be satisfactory.

1. Remain outside bankruptcy, relying on ERISA Sec. 206(d)(1) to protect qualified pension plan benefits (other than IRAs) [Part IIIA of *Mackey* indicates that state garnishment statutes may not be used to reach pension plan benefits] and AS Sec. 09.38.-017 to protect an IRA.

2. File bankruptcy and elect the Federal exemptions using BC Sec. 522(d)(10)(E) to protect part of a qualified pension plan.

3. File bankruptcy and elect the state exemptions using AS Sec. 09.38.017 to protect an IRA.

4. File bankruptcy and hope that, to the extent not exempt, a pension plan is excluded under BC Sec. 541(c)(2) if the "trust" qualifies as a spendthrift trust under Alaska law. [Note BC Sec. 541(c)(2) is applicable, if at all, irrespective of whether Federal or state exemptions are elected.]

5. Terminate participation in the ERISA covered retirement plan in a manner permitting withdrawal of vested contributions and "roll-over" the funds into an IRA under IRC Sec. 408(a)(1) thereby bringing the funds within that part of AS Sec. 09.38.017 which is perhaps not pre-empted by ERISA Sec. 514(a).

Not one of the alternatives can be considered an iron-clad, fool-proof method of preserving a private retirement plan. Until either Congress deems it appropriate to legislate a resolution or the Ninth Circuit reverses it's decision interpreting BC Sec. 522-(b)(2)(A) as not exempting pension plans, counsel for debtors (and debtors) will have to proceed using whichever alternative, or combination, which, under the particular facts and circumstances, will most probably preserve the maximum amount ofdebtor's assets. Debtors and debtors' counsel may find solace of sorts in the fact that trustees and trustees' counsel face the same uncertain status of the law. Furthermore, there are serious additional problems faced by trustees in "cashing-out" a qualified retirement plan not distributable until the debtor terminates employment. Given the two-sided nature of the problem, it is possible most of the controversies which may arise will be resolved by a negotiated settlement rather that litigated. A point which Judge Ross will undoubtedly welcome, particularly since little else written here provides his Honor much assistance.

Counsel should carefully review all the private pension plan documents (not just the Summary Plan Description furnished employees) and the IRS qualification determination letter. The particular language used in a given plan or the trust instrument

Continued on page 19

GREETINGS: Bet you didn't know this

Continued from page 8

The American Cancer Society (202) 483-2600, *The National Wildlife Federation,* 703-790-4000, and many others.

• *Mail early or late.* Cards sent at the end of December can get lost in the crowd. To set your message apart, send a "New Year's" card to thank clients for their past year's business and to wish them well in the coming year. Or send a thank-you at Thanksgiving. One lawyer sends his cards in July, explaining that he does it to prove that his greetings are not mechanical. Mechanical, no, but perhaps too gimmicky for most.

• *Make it stand out.* For two years running, Los Angeles attorney and author Jay Foonberg (who is Jewish) delighted clients and friends with a holiday card picturing him with the Pope. "A card has to be unique, otherwise it gets lost," he explains, "That's why I use photos and humor."

• *Be aware of ethnic and religious overtones* in holiday cards, decorations and activities—notwithstanding the previous tip. Best intentions could boomerang offending clients, associates and staff.

One lawyer found himself in hot water after sending a card bearing the message: "Thy will be done. Is yours?" Still, the purpose of holiday cards is to let clients know you exist. And better they know you exist and be offended than not know you exist at all, one lawyer argues.

• *Avoid overly serious messages.* The cards should remind people that you exist and bring a smile.

• *Draw on humor.* The Drawing Board, a greeting card firm in Dallas, offers holiday cards designed just for lawyers. Some are humorous, some serious. For a catalog, call 1-800-527-9530 or (214) 263-9296.

• *Your firm's style and image* should be projected by the cards you select. A firm catering to high-tech clients likely will select a far different theme than a firm serving an elderly clientele.

• *Consider incorporating your firm's design* or logo elements, or perhaps a key color, into your holiday card. You can do this without designing a custom card.

• *Holiday cards can generate divorce work.* Because couples with children often decide to keep a marriage intact through the holidays, 60 percent to 70 percent of divorce cases are initiated in the first three months of the year, says one lawyer.

• *While cards printed* with the firm's name are easiest, classiest, and for large firms, the most professional approach, they are cold and generally make the least impact unless signed by an individual lawyer. At their worst, they look as if the firm administrator picked them out and sent them to a computerized mailing list without a firm member touching them.

• *Pen a personalized message* to the client, even if it means taking the cards home on a weekend and writing them on the kitchen table. Encourage every lawyer in your firm to do this. Without personal messages, the cards have little impact.

• *If a team handles a client's business,* have everybody sign the card. It conveys a cozy, cooperative spirit.

• *Address the card* to the person at the client's firm that deals directly with the lawyer. If there are several persons, send several cards, each with a different personal message.

• *Only send cards to persons you know.* There must be some relationship between you and the recipient, even if it's not a close relationship. If you serve on the board of directors of an organization, it's fine to send cards to people in the organization.

• *Check your ethics rules.* In some areas, lawyers may not send holiday cards over the firm name, but it's okay if they bear the names of the individual lawyers. This may pose problems for large firms.

Many Happy Returns

Commercialized, mechanical, yes. But holiday cards sometimes pack more impact than we imagine.

Beverly Hills attorney and author Jay Foonberg tells of a Austin lawyer who sent a card to a little old lady for whom she had written a will. The card was forwarded to the woman at an old-age home.

The client called the lawyer and confided that her card was the *only* card she had received, and she was grateful that *someone* had remembered her. The revelation made the lawyer cry. The client's gratitude alone made the gesture worthwhile.

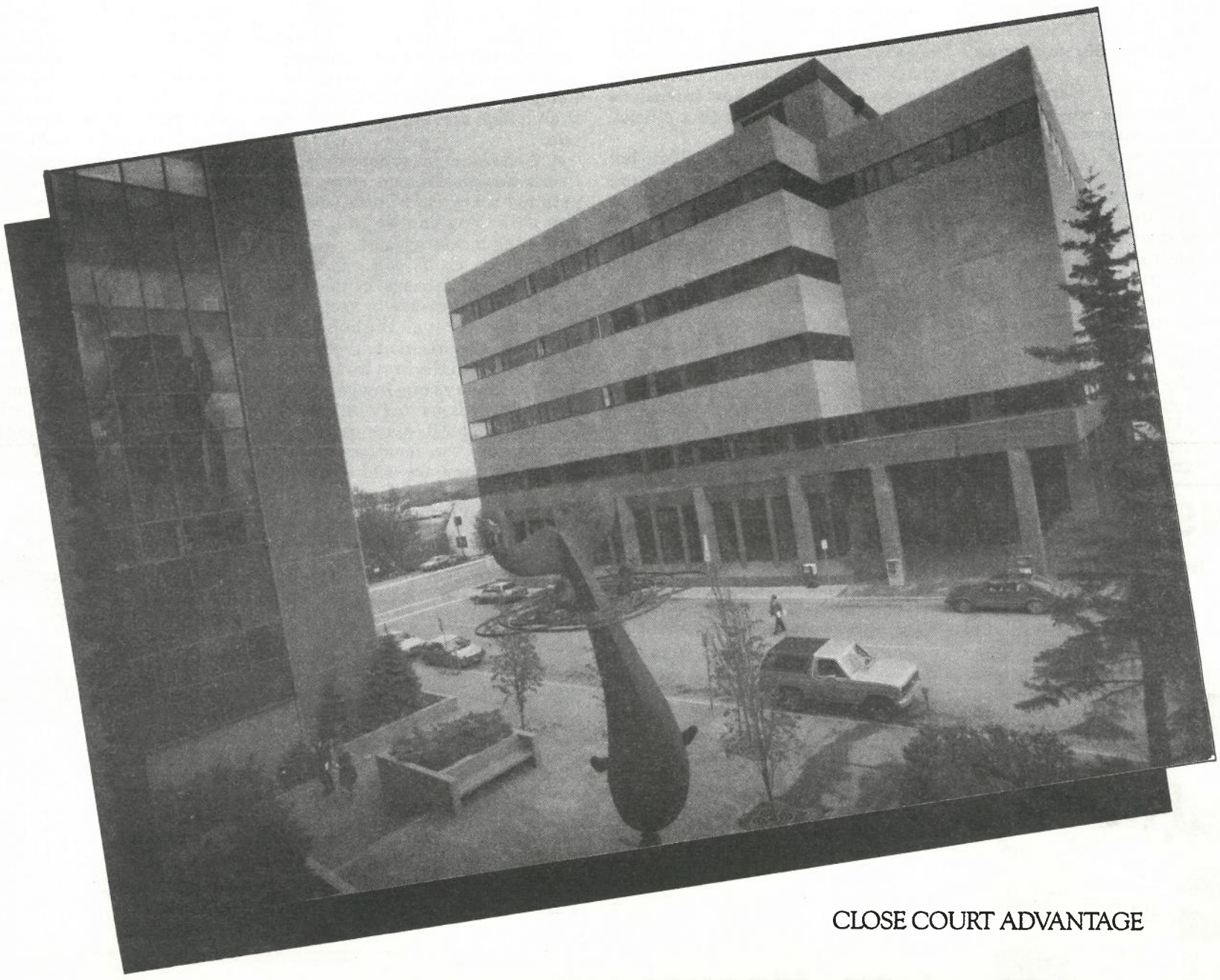
But wait. The client then had her will updated and recommended the attorney to three other residents. In addition to the emotional life, "I made four good fees from that card," the attorney noted.

PENSION: Review plans

Continued from page 18

may be crucial to a final determination as to whether such plan is excluded under BC Sec. 541(c)(2).

It would also be advisable for counsel to review each case cited in this article and the cases cited in those cases to glean other arguments which may be advanced in support of whichever position is advantageous to counsel's client. Until some court renders a controlling decision, it is "open season."



CLOSE COURT ADVANTAGE

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

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

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