Foreign concerns
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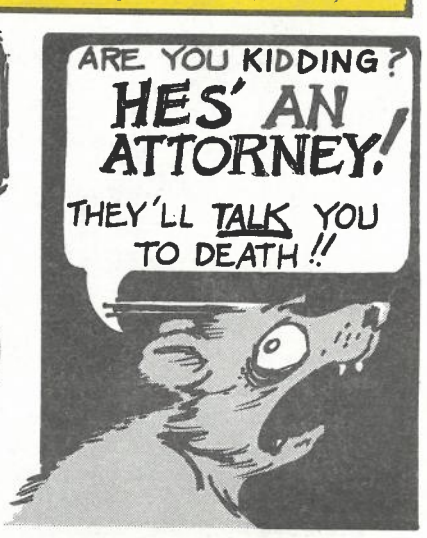
**Humorous Bar...
J.B. Dell, Arnett,
the TVBA, Branch,
and the President**

— Inside

$2.00

The Alaska BAR RAG

Volume 13, Number 5 — *Dignitas, semper dignitas* — September/October, 1989



An oldie but a goodie

"Reaper" stalks bears and blueberries

"There's a land where the mountains are nameless
And the rivers all run God knows where.
There are lives that are erring and aimless
And death that just hangs by a hair."

BY HENRY TAYLOR, JR.

The "Grim Reaper" was stalking me as I stalked the bear. Just as the bear had no suspicion danger was anywhere around, I was not aware that the "Ol' Guy With the Sickle" was breathing down my neck as I loosed the most important arrow in my life. At that moment, for both of us, death WAS "just hanging by a hair."

The blackie was picking blueberries by the mouthful, bush and all. As soon as his black, waddlling hind-end disappeared from view into a ravine I leaped to my feet from the wet grass and, in a half-crouched position, hurried to the spot where he had gone down out of sight. With bow at the ready, and a razor sharp broadhead in place, I eased up to the edge of the ravine with a stiff wind blowing from the bear to me. I peeked over the edge, and there he stood...a pug-nosed boar, black as the inside of a cat. He was stil picking berries...his head bobbing up and down as he bit off the tops of the blueberry bushes. My eyes automatically focused on the spot where his rib cage ended on his right side. Rapid calculations indicated that if I drove my arrow in there at the slight angle the bear was facing away from me, full penetration would get both lungs without the danger of striking bone on the way in. It is hard to concentrate on just a "Silver Dollar Size" spot on a big chunk of bear at 20 feet, but that spot was all I saw as I drew, anchored at the corner of my mouth, hesitated for just an instant to make sure, and then let fly.

Sixty pounds of bow snapped the white arrow toward its black target. I didn't know it at the time, but my life depended on that arrow taking his.

It all started when I decided to spend the last few days of my vacation from adjusting insurance claims for a living, in giving a look-see in an area where, Jack, a friend of mine, thought he might have gotten a hit on a big bull moose.

I went to four friends looking for a companion for a couple of days, but business commitments and other pre-arranged hunting plans eliminated the possibility of help. It came down to a case of go by myself or not go at all. I preferred company, but if necessary I'd go it alone.

The weather was wonderful, sky was blue, no clouds and the temperature normal, up in the 50s. I am intimately familiar with every foot of the country so there was n o possibility of getting lost. Walt Whitman, bush pilot extraordinaire, and I sat down with a topographical map and outlined my proposed route so that he would know exactly where and at what times I expected to be at various places. This was a safety precaution (the same as filing a flight plan) so that should I become disabled, it wouldn't be necessary to look for me over a 100 square miles of territory.

The plan was for Walt to fly me into Lake Donna on Sunday morning and pick me up at the same place Monday at Sunset. I was well equipped for any expected weather, having complete rain gear, enough food for a week, sleeping bag, and clear plastic tarp for a tent. Cold weather and snow was not expected at that relatively low elevation (2500 to 3000 feet) for at least another month to six weeks. During 11 years in that country Walt had never seen heavy snow during August, and Greg Brown hadn't seen a snowfall at that low elevation for over 20 years. The previous year while I was in there the weather had been perfect all during the month of September. Little did any of us dream that the unexpected was about to happen and of the consequences which would result.

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Continued on page 4

Ed. note: Hank Taylor was admitted to the Alaska Bar in April of 1970. Hank spends most of his time keeping the world safe for plaintiffs in personal injury litigation. He is renowned for the investigative effort he puts into developing his cases, for his creative use of demonstrative evidence, and for his extensive use of video technology in the preparation, settlement, and trial of his cases. This is a tale about Taylor's youth.

Link breathes life into painted horse

BY SALLY J. SUDDOCK

Attorneys like John Link in Fairbanks can quench their Socratic thirst on inspired flights of fancy.

Link is probably a showman deep down, and is the force behind Alaska's one and only genuine merry-go-round of historical importance. "I bought it as a toy for the kids of Fairbanks," says Link, and it's found a home at the Alaskaland theme park.

Bar Rag Editor Emeritus Harry Branson tells the story that Link bought the carousel so that his daughter, Lydia, would not grow up in Fairbanks without the experience of going around in circles on a brightly-painted horse. Not completely true, says Link—it was all the kids of Fairbanks who needed a merry-go-round in summer.

Until four years ago, Link also owned the Palace Saloon in Alaskaland, each summer producing a vaudvillian extravaganza rewritten in its entirety annually by Jim "Bluebell" Bell, a long-time friend and musi-

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FROM THE PRESIDENT

Jeffrey Feldman

My column in the last edition of the Bar Rag triggered several complaints and letters. Some took me to task for some of the bar association's activities. Some found the column dull. And others disliked my picture. I have taken efforts to cure the objections to my photograph (which was, admittedly, pretty somber) and I thought I would share with you some of the incisive observations and letters I received from my brothers and sisters at the bar.

Dear Jeffrey,

I read your column in the last Bar Rag. How come it was so serious and lacking in humor? Lighten up, big guy. Show a little levity. This isn't brain surgery, you know. It's the Bar Rag.

N.G.
Anchorage

Dear Jeff,

What's with that picture of you in the Bar Rag? You look like you either just got out of 8 years in a Gulag or 4 hours of depositions at Hughes, Thorsness. I think you must really need a vacation.

S.W.
Anchorage

* * *

Dear Mr. President,

I don't understand all this concern about Sunset. What's the big deal? We get one a day. So what? Why is the Bar Association mucking around in things like sunrises and sunsets? How about putting the Bar to work on issues that are important,...like lowering bar dues for those of us out here on the street trying to scrape by and barely making it. Get on the stick.

E.T. Sanders
Anchorage

* * *

Dear Mr. Feldman,

I recently heard that the Bar is considering some program that would make it mandatory that we all See Ellie. Hey, I know Ellie. She lives in Wrangell. She's a nice person, but I am opposed to making it mandatory that we all have to go see her. Please give this some thought. I really think that this Mandatory See Ellie notion is a bad idea.

Buddy
Juneau

* * *

Dear Bar Nerd,

I think this idea to have Russians come to the bar convention is dumb. I think the Bar Association is dumb. I think you are dumb.

Respectfully yours,
R.S.
Fairbanks

* * *

I apppreciate the effort extended by those of you who expressed your thoughtful opinions in these letters. Having given the matter careful consideration, however, I have concluded that the president's column should be dedicated to substantive matters that are of importance to the bar and not be merely a forum for lame attempts at humor. So, having disposed of the complaints, let me move on to a quick look at what's happening with the bar.

Fee Arbitration Committee

Now that John Reese has ascended to the Superior Court bench, there is a vacancy on the Fee Arbitration Committee. Those seeking appointment to the committee must be familiar with the fee arbitration procedures, must be over 6 feet tall, must have a moustache and must be bald. A slight Oklahoma accent is also helpful. Those interested, contact Deborah O'Regan.

Media and The Law Seminar

Assistant District Attorney Bob Linton will be holding a seminar on the relationship between the media and the bar in October. Bob will discuss important areas such as how to effectively manage and manipulate the press. Sign-up forms are available at the bar office.

Bar-Bench Forum

As a follow-up to the Media and the Law Seminar, a special Bar-Bench Forum, focusing on improving relations between counsel and the court, will feature presentations by Superior Court Judge Karl Johnstone, defense attorney Phillip Weidner and Assistant District Attorney Elizabeth Sheley. Registration fee of $45 includes course materials and protective helmets and face guards.

1990 Northern Justice Conference

Bob ("Jr.") Wagstaff is looking for attorneys to serve as translators at the 1990 Conference with lawyers from the Soviet Union and Canada. Any bar members who speak Canadian and want to help out should contact Jr. Wagstaff.

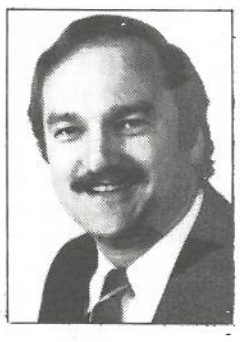
Ninth Circuit News

The Ninth Circuit Court of Appeals has announced a revision in the way in which oral arguments will henceforth be scheduled. As has been the court's longstanding custom, counsel still will not be notified of the starting time of their argument. In addition, beginning next month, counsel will no longer even be notified of the specific day on which their case will be heard. Counsel will be expected to show up on Monday morning and wait out the week until their case is called. The court has rejected the suggestion that arguments be held during evening "night court" sessions and, therefore, counsel will be able to make good use of the sleeping bags they are encouraged to bring with them.

TVBA News

Finally, there was an error in the last Bar Rag's publication of the minutes of the Tanana Valley Bar Association. It was incorrectly reported that Dick Madson had noted, at a recent meeting attended by Mary Hughes, how nice Mary looked in basic black with appropriate pumps. Actually, at the meeting, Dick noted how nice Mary looked and asked her if he could borrow her black dress and patent pumps. Sorry for the error.

That's all the news from the front. Keep the cards and letters coming.



THE EDITOR'S DESK

Ralph Beistline

There have been five editors of the Bar Rag. Gail Roy Fraties was one of the best. At 11:00 a.m. on August 30, 1989, I received word that Gail had passed away several hours before at his home in Bethel, Alaska. I put the phone down, gazed out my window, and recalled the man.

I first met Gail at the airport in Sitka, Alaska. I was arriving to take part in my first Board of Governors meeting. Gail was beginning his last year as a member of the Board. I recall seeing him, sharply attired, carrying a cane, and walking confidently off the airplane. Somehow, I ended up riding with both Gail and Harry Branson to our hotel. Harry had a bad cold. I offered him an Alka Seltzer Plus. Harry complained that he had no water. Gail suggested that real men take it without water. Harry deferred.

During the next year, as I worked with Gail on the Board of Governors, I came to appreciate the many unique qualities he had. Certainly he had an excellent sense of humor. He was opinionated, but possessed extreme compassion. He was articulate and an excellent writer. More than anything else, though, I was struck by how totally dedicated he was to his profession and to the Alaska Bar Association.

As a columnist for the Bar Rag, Gail was without equal. His columns were quoted nationally and always stimulated interest. Gail reluctantly quit writing for the Bar Rag when he became a Superior Court Judge, commenting that the nature of the job prevented him the freedom he needed to write. That attitude very much reflected the manner in which he viewed both his judgeship and his writing.

About two years ago, I had the opportunity to travel to China and was seated on a bus in Peking preparing to tour a local prison. An American attorney sat down next to me and, after learning that I was from Alaska, asked if I knew Gail Fraties. The irony of the situation was striking. Here I was on the other side of the World, seated in a bus enroute to a Chinese prison, and talking with a total stranger about the writings of Gail Fraties. Certainly he had a following.

More recently, I was talking with Gail in an effort to persuade him to write again for the paper. He was tempted and even sent me some of his prior columns, but felt that his writings would have to wait. Gail was not a man to compromise and, although he expected to write again one day for the Bar Rag, he was then intent on devoting all his energies to his judgeship. Unfortunately, Gail's time ran out before he was able to tell us about his Bethel years. I am sure, though, there are many stories and I can imagine how they would be told. In fact, I can see Gail now, seated in the center of a group of spellbound listeners, an Alka Seltzer Plus dissolving in his mouth, and his eyes sparkling as he continues to do what he has done so well before: educate, entertain, and inspire those around him.

I am proud to have known and worked with Gail Fraties. We are **grateful for the service he rendered and the invaluable contributions he made both to the paper and the Bar Association. This issue of the Bar Rag is dedicated with great respect and admiration to the memory of Gail Roy Fraties.**

PHOTO BY JAMES H. BARKER, BETHEL

Gail Roy Fraties

The Alaska Bar Rag

Board of Governors
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.

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

Editor in Chief: Ralph R. Beistline
Editor Emeritus: Harry Branson
Contributing Writers:
Mickale Carter
Mary K. Hughes
Edward Reasor
Michael J. Schneider
Donna C. Willard
James T. Stanley
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Ballou fills in with gossamer style

Minutes of the Tanana Valley Bar Association July 14, 1989

July 14, 1989, was a beautiful day in Fairbanks, Alaska. The sun shone bright. There were no clouds. It was hot. With the exception of 15 attorneys, the local population had retired to beaches, streams, and river banks. These remaining 15 hearty souls met in the partially air conditioned basement of the Regency Hotel for the regularly scheduled meeting of the Tanana Valley Bar Association.

The President of the Association was gone. The Vice President was not there. But the beautiful Gail Ballou, was there, in all her splendor and glory. (Afternote: this was before disaster struck the Golden Heart City in the imminent departure of Nordstrom).

At precisely 12:33 p.m., the gorgeous Ms. Ballou rose from her chair and called the meeting to order. She was stunning in her paisley blouse. A renegade tuft of raven hair danced daintily upon her left shoulder, highlighting her flawless features, her rosy complexion, and the sweet purity of her eternal smile. The temperature in the room rose.

In a voice as smooth as silk and fresh as a summer's evening, the lovely Ms. Ballou welcomed the assemblage, introduced guests, and asked if Judge Savell was there.

Savell was there; standing on his chair next to Ms. Ballou. She saw him and he spoke. He spoke in a determined but stammering manner. He used nouns and adjectives and one prepositional phrase. He then, in an act of full disclosure, read a letter he had received from an esteemed member of the Bar, who had heroically saved Savell's summer mansion from the ravages of a summer storm. (See attached letter.)

There were other things that occurred at this meeting. Madson spoke. Noreen spoke. Groseclose said something as did Robson and Judge Steinkruger. The highlight of the meeting, however, came when Richard Burke presented his report on behalf of the National Security & Christmas Party Committees. Much of what Mr. Burke disclosed on this occasion involved national security matters and cannot be revealed in these minutes. Suffice it to say that at the conclusion of his report, Burke received a standing ovation from the members in attendance for his selfless service to the organization. He also received a provocative wink from the luscious Gail Ballou.

That provocative wink sent the meeting into turmoil, with each member claiming to be its recipient. Chairs flew and tables were turned, but the carnage was short term and the meeting was quickly adjourned when it was discovered that Burke and Ballou had departed out the rear door of the building.

July 14, 1989, was a beautiful summer day in Fairbanks, Alaska. There were no clouds. It was hot, very hot.

RESPECTFULLY SUBMITTED this 15 day of July, 1989.

Ralph R. Beistline
SECRETARY PRO TEM

Correction

July 26, 1989
To: Ralph R. Beistline
From: Gail M. Ballou

Re: TVBA minutes, 7/14/89

Geez—can't you boys ever get any thing right? It wasn't a paisley blouse-it was a cream-colored silk blouse, sheer as gossamer, shimmering sexily as the sun shone past the sill.

And that provocative wink was for the busboy, who, as it turned out, found Burke more to his liking. As for my departure, all I can say is that I am unable to confirm or deny the rumor about Tom Selleck and tne gorgeous brunette.

Savell's home saved by good fortune

July 11, 1989
Richard Savell
P.O. Box 2683
Fairbanks, AK99707

Dear Dick:

This is just a note to let you know that last Sunday, my brother and I were able to remove that tree that was resting on your power line at your cabin at the lake. It went very smoothly, with no significant problems, and your house was saved.

I actually enjoyed the entire afternoon and, in fact, have for many years looked forward to an opportunity to use a chain saw to cut branches overhead while standing on the top of a metal ladder next to a hot electrical line in a rain storm

Things probably would not have gone as smoothly as they did if it wasn't for the fact that I was so lucky, and last Sunday just seemed to be my lucky day. After the tree fell, a hornet's nest, which apparently was attached to the top of it, landed on my shoulder. I was lucky that I had my rain gear on, for the stings were limited to my neck and facial areas. I must confess to reacting a little too quickly after the initial stings and running into the woods. I was really lucky, though, for I stumbled into your old outhouse hole which you had covered with rotten timbers. The ensuing smell chased all the hornets away. Lucky for me there were some bushes growing right next to the hole and I was able to extract myself within a matter of minutes. By then, the bee stings had started to swell, which fortunately masked the fact that the bushes I had used to extract myself from the outhouse hole were sticker bushes. Fortunately, I didn't begin to really feel the pain in my hands until I had gotten back to our cabin where my wife was doing some sewing. Lucky for me she had a number of needles and was able to extract most of the slivers from my hands within the next 90 minutes or so. This actually also turned out lucky for me for it caused me to stay at the lake longer than I had planned. As a result, I was able to help my daughter bail out our boat after she ran it into our dock.

I won't be going out to the lake again for awhile, but just wanted to let you know that everything went smoothly last Sunday.

Sincerely,

Ralph R. Beistline

Speaking in code, the Fairbanks bar adjourns

Minutes of the Tanana Valley Bar Association August 25, 1989

August 25, 1989 was a cool day in Fairbanks, Alaska. A soft layer of cumulus clouds covered the sky and geese moved quickly through Alaska's golden heart. The spacecraft Voyager was now streaking past Neptune and its moon, Triton, and the American Stock Exchange was stabilizing after significant gains the previous day. Of equal importance, the Tanana Valley Bar Association met for its regularly scheduled meeting in the basement of the Regency Hotel.

President of the association, Fleur Roberts, appropriately attired in a soft gray sweater and matching pink turtleneck, took charge of the meeting and called it to order at 12:35 a.m. Ms. Roberts had recently returned from an East Coast vacation and strategy session that was interrupted only by calls from local attorneys offering her encouragement as she single-handedly positioned herself for a confrontation with the State Bar Association.

Despite the radonic energy that permeated incandescently throughout the room, the attorneys were not incontinent, nor was the President's resolve indeterminable. Although on the surface it was business as usual, the sentiment of the assemblage was indefeasible, and the President was clearly indefatigable. No one doubted the resolve of this lady.

Dick Burke, Chairman of the Foreign Relations Committee, spoke not a word! This was a clear message to those in attendance that there was a possible spy in our midst. As a result, the membership followed his lead and spoke thereafter of the upcoming confrontation between the TVBA and the Alaska Bar Association only in code.

Guests were introduced, which included three superior court law clerks. It was also noted that five and possibly six judges were in attendance, depending on whether or not the gentleman at the southeast table was Larry Zervos or Mark Andrews.

The minutes of the last meeting were read and approved with numerous, unrecorded corrections.

President Roberts then gave what on the surface appeared to be a movie report. In reality, however, it was direct communication with Burke and a coded outline of her revolutionary plans.

Paul Barrett sang Happy Birthday to Roger Brunner and mentioned the number "39." This was a clear indication that the revolution would be born on the 39th parallel or at the 39th latitude or in the 39th state or on the 39th day of the month.

Will Schendel next deliberately confused any spies in attendance by announcing that there would be a meeting of the Alaska Legal Services in Anchorage next week. TVBA members, of course, were well aware that that organization had long since been abolished.

Dick Madson then moved that the Tanana Valley Bar Association adopt a minimum fee schedule in a discretionary amount depending on the attorneys involved and the work to be done. The motion was seconded and unanimously approved.

Bob Beconovich, who had recently completed jury service himself, then presented the day's practice tips:(1) never let a lawyer sit on your jury; (2) never practice in a town where you grew up; and (3) don't presume that an old girlfriend with whom you were "casually intimate" has any recollection whatsoever of you.

It was then noted with great suspicion that Barry Jackson was not in attendance at the meeting. This generated extensive speculation as to his whereabouts and suspicion as to his recent conduct.

Discussion concluded abruptly, however, when Burke put his finger to his lips. He then moved quickly to the door and out. The membership followed and the meeting was over.

RESPECTFULLY SUBMITTED this 1st day of September, 1989.

Ralph R. Beistline
Secretary Pro Temp

Kona Hilton, Hawaii

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.

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 early Fall. 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!

Fitzgerald honored

A dinner for the Honorable James M. Fitzgerald, Senior Judge, United States District Court for the District of Alaska, commemorating thirty years of service on the bench will be held on Saturday, October 21, 1989.

The dinner will be held at the Howard Rock Ballroom at the Sheraton Anchorage Hotel. No-host cocktails will be from 6:00 p.m. until 7:00 p.m. The dinner will be from 7:00 p.m. until 9:00 p.m.

The event is being sponsored by the Anchorage Bar Association, the Alaska Academy of Trial Lawyers, and the Defense Counsel of Alaska, Inc. An invitation along with a response card will be mailed to each member of the Alaska Bar Association. Please indicate on the response card if you plan to attend and if you will bring a guest. Reservations will be made on a first come, first serve basis. The cost will be $37.00 per person.

• A real case of go by myself, sez Taylor

Continued from page 1

Sunday morning, August 30th, at daybreak, Walt and I took off in "bluebird weather"--the kind duck hunters dislike to see. We landed on Lake Donna, and I struck out for nearby Wolf Creek bidding goodbye to Walt with the understanding that we would rendezvous the following afternoon. I worked slowly up Wolf Creek for about four miles to the spot where Jack reported having shot at the moose, taking my time and keeping away from any likely place for an ambush by a brownie. I had seen a big bow-legged brownie in the same area four days previously, and there was a good chance the old boy might still be around. That being the case it would be very unhealthy to stumble upon him at close quarters. I had no intention of blundering into a brownie if it could be helped. The 10' brownie who glares up at me from the living room floor as I write this, once made it unforgetably clear to me that brownies and alder thickets can be a combination like dynamite and matches.

I worked slowly up the leeward side of Wolf Creek Gorge, stopping every few yards to carefully scan the creek bottom down below and up ahead. I made camp at the head of Caribou Creek, where I would spend the night.

Night fell, and there at the 3,000-foot level a cold rain began. At dusk I had the pleasure of having a ringside seat as two half-grown blackies squared off in a wrestling match about 200 yards from camp. They biffed and banged each other around, roared, pawed and clinched like two fat wrestlers on TV. When the match started getting dull, I, as the only referee available shouted across to the, "It's a draw," and turned in. Two astonished blackies walked slowly away from the scene with the larger one stopping every few steps to look back at the "referee" as if to question the decision. I wondered if he were trying to say, "I wuz robbed!"

The next morning, Monday, August 31st, rain was still falling and the sky was overcast. The nearby peaks were not visible as I arose and ate a breakfast of Spam with chocolate bars for dessert. Several bears were visible from camp. I noticed they were all moving down toward timber about three miles away, stopping at each berry patch. By their actions they seemed to be nervous and were feeding along faster than usual. "Must be a brownie up here somewhere," I thought, but my guess was wrong. They were moving out of the high country for another reason, but I didn't know it at the time.

All together I saw 16 blackies that morning, and all of them were moving down towad timberline. I broke camp, made up my pack, and decided to take a close look at those blackies. I moved down a ridge overlooking the canyon which is Caribou Creek, and hadn't gone more than 15 minutes when I spotted an unusually large black bear about 500 yards below me and feeding undisturbed. I checked my mental map of the country and estimated he was about nine miles from Lake Donna. From a standpoint of time, I figured I could easily kill the bear, skin him and pack back to Lake Donna in half a day, and at that time it was about 6:00 a.m.

o

As all archers know, it is exceedingly difficult to stalk any big game animal close enough to be effective with bow and arrow. To make such a stalk I could not casually stroll up to within a couple hundred yards, take a good position and expect my shot to run true like a rifle.

The archer must begin his stalk where the rifleman ends his. It takes a lot of figuring to put a stick into a big game animal--figuring the wind--eddies of air currents which might betray the archer--what the animal is doing--where he is going--and perhaps even what he is "thinking." But above all, it requires a lot of crawling on your stomach (when you would rather be standing up walking) working hundreds of yards down to a matter of feet. Even then the chances are heavy that the shot will have to be made from some "gosh awful contorted position" which would give an Indian rubber-man the cramps.

It's next to impossible for me to be effective with the bow while hampered by a 30-pound pack on my back. Accordingly, I slipped out of my pack, cached it near the crest of the ridge, circled to my right to play the wind just right, and started by 300-yard stalk downhill.

During all of the stalk and kill I expected to be within sight of my pack. After sliding through mud, grass and wet berry bushes, I finally worked by way to within long bow range of the bear (about 50 yards). I was still trying to work in closer for a sure kill shot when the old boy quit feeding and started moving off down the hill. That first stalk had taken some time, and it was a disgusted archer who lay there flat on my face in a puddle of water, wet to the skin, as he ambled away on his "bear business."

I followed bruin on downhill, getting farther and farther away from my pack. That was a mistake. After about a quarter of a mile the bear stopped again and started feeding round and round in a particularly luscious patch of buckshot-size blueberries which apparently was too good for him to pass up.

"So, Mr. Bear," I thought, "Your gluttony may be your undoing," and once again I eagerly started a snake-like stalk. Just as I worked in to about 30 steps, the old rascal pulls up stakes and moves out again. I didn't curse out loud, but I sure thought some thoughts as dark as his rippling black fur. By that time I had become determined to get that bear after the soggy chase he had led me, so I continued to dog his steps. Three more times I attempted to move in, and three more times the same thing happened, with the bear moving away without detecting me. When the chase had led me a fateful mile or so down the mountain from my pack, ol' blackie finally made his mistake and dropped over the edge of a ravine referred to in the beginning of this narrative. At this point I moved in quickly, and sent my arrow on its way.

o

The first Taylor my family from South Carolina has been able to find any record of was an archer for William The Conqueror at the Battle of Hastings in 1066. On that day, so the story goes, Ol' Grandpappy Taylor feathered into a guy who was just about to ram a spear through William the Conqueror. In expression of his appreciation for such a favor, Bill knighted Sir Taylor on the spot and later gave him a big chunk of Wales for his trouble.

Ol' Grandpappy Taylor wasn't any happier than I was when I saw and heard my arrow strike home, feather deep. The broadhead caught the bear just behind the right rear ribs, angling forward into both llungs. With a bellow and a snort, he whirled and bolted down the draw. He ran steadily for about 75 yeards, then slowed to a walk. As I watched, he began to stagger like a Marine in Norfolk on pay-day night, lost his balance and keeled over in the grass. He roared once, kicked, then lay still. He was dead.

I sat down, waited for 15 minutes, then cautiously approached. He was a nice fat boar, about six feet long and in excess of 450 pounds. His fur was long and thick in preparation for the coming winter. I left him where he lay, and started the mile climb back to get my pack before tackling the skinning job. By this time the wind had risen and the temperature was dropping. Icy rain was falling fast as I struggled up the mountain. Suddenly, the wind stopped blowing, and an eerie calm fell over the mountains as the sky darkened even more than before.

Half-way up the mountain the wind shifted to the north and with a roar came swooping down from the high mountain passes which lead to the mammoth Harding Ice Field (which encompasses an area approximately one-half the size of Rhode Island).

The snow storm struck with breath-taking fury. Snow flakes rained down like somebody upstairs had ripped open a mattress full of goose feathers. Within a matter of minutes visibility was reduced to less than 50 feet. The wind continued to rise, and the swirling snow began blanketing the ground. By the time I reached the crest of the ridge, it was all I could do to stand up against the gale. Sometimes forced to crawl, and all the time having to bend into the wind, I fought my way back up to the ridge where I had cached my pack. A cold fear bean to gnaw at my insides when I reached the crest and couldn't locate my pack. One time I was almost certain I had reached the spot, however, with the snow and wind blowing and blinding me, almost taking my breath away, I could have walked within a few feet of my pack without seeing it.

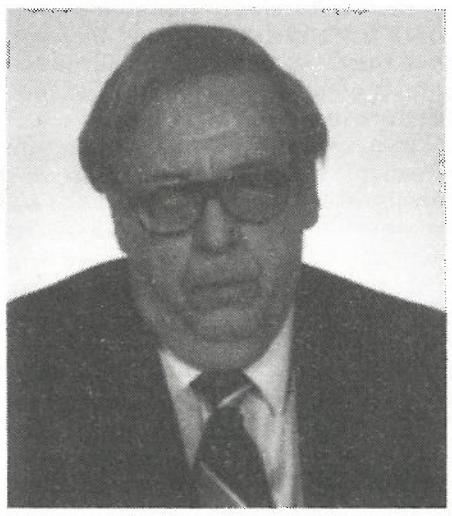
During an hour of searching, the heavy snowflakes had covered the mossy ground with a blanket of white. During the next hour, the snow piled up deeper and deeper, and I was still no closer to finding my previous pack with its matches, food, plastic tarp and sleeping bag.

During the third hour of the storm, I dropped down into a semi-sheltered crevasse to catch my breath and take stock of my situation. That was the first time I noticed I was extremely cold. Crawling through the wet grass and lying in water while stalking the bear had soaked me to the skin. My matches were wet and my emergency matches, sealed in waterproof plastic were in my pack. My hands had already turned blue with cold, and my face felt strangely numb. I needed my pack desperately, but as I sat there and watched the snow piling up, I realized it might be spring before I could find it, for the storm gave no indication of slackening; if anything, it was still growing in intensity. I cursed my foolishness for ever letting the bear lead me so far away from the safety of my provisions and for the "cheechako" predicament I had gotten myself into. My wet clothing began to freeze, and when this was noticed, I made a decision to give up my search and hurry back down the mountain to the only warmth available--the dead bear.

I retraced my steps, and at the lower elevation was able to find my way back to the bear, since the wind was not as bad as it was up on the mountain where the driving snow all but blotted out visibility. I hurried down to the blackie, took out my hunting knife, and was surprised to

Continued on page 5

Modest Taylor says story's true



Henry Taylor, 1989

The "Bar Rag" wanted a "mug shot" showing what has happened to this young man in 30 years. So, I dug one out and "Boy, oh Boy!" "Ugh!". Thirty years in Alaska and I'm not "the man I used to be". (The photos prove beyond all reasonable doubt and to a moral certainty, that Hank Taylor just *"ain't"* "the man he used to be." But, then again, come to think about it, maybe I never *was* the man I used to be!

I was very surprised that others, not me, wanted to reprint this hoary old story about the time when I as a cheechako, was short on brains and long on brawn. The story keeps popping up in some publication or other every decade or so.

The story is true, but I didn't put such a flambouyant "handle" on it. The editors did. They named it 'An Arrow Saved My Life." What I was trying to do by writing the article was win a contest for a whole $100! They lost my article and nearly two years later, found it, printed it and said was great! (But, I never did get the "honey bee," the hundred dollar bill and my young family sure needed it.)

To reread this article brings a surge of nostalgia. Of another day, another time, of old friends dead and gone but not forgotten. To reprint it in this illustrious journal is not Hank Taylor's idea. It seems more appropriately told to grandchildren (than to modern day lawyers). It is not well-written: I was just trying to make a quick buck...and didn't.

As I read the story now today and look back upon that ordeal, it causes me to recall the poet's words:

"As I smoke my pipe and meditate in the land of the midnight sun, Sometimes I get to wondering if they *was,* some of the awful things I've *done!"* (Emphasis supplied)

Well, folks, they "was" and I "done" 'em. So, if you can't find anything worth watching on the tube, you have my consent to read it and waste your time that-a-way, instead.

Young Henry Taylor was grateful for his crutches.

ARCHERY MAGAZINE 1961

• "I realized my strength was fading

Continued from page 4

find I could not grip the handle of the knife hard enough to skin him. I took the butt of my knife, held it between the heels of my two numb hands, ripped open the bear's belly and thrust my whole forearms into the wonderful warmth which was still in his body. In a few minutes I was able to begin the job of skinning.

In spite of convulsive shivers which made my skinning job torturous, in time I had his naked carcass laying in the snow. He looked for all the world like some big fag sun-bather on a Florida beach--except for the snow, of course — but so do all bears when they are freshly skinned. After punching some small holes for "eyelets" I used part of a conveniently over-long leather boot string to lace the hide together across my chest forming a crude parka with the fur side turned in.

The next few hours of the storm were spent huddled under a bush for what protection there was. That fresh, greasy bear skin didn't smell like magnolia blossoms in the moonlight, but I thanked heaven I had it, for it was a pretty good robe under the circumstances. I am six feet tall, weigh about 190 pounds, and regrettably there wasn't enough bear to cover all of me, so my feet were left sticking out in the snow. I remember wishing he had been a brownie--big as a tent.

Along in the afternoon the wind seemed to die down, but the snow continued to fall steadily. All thought of a fire was out of the question. The nearest cabin was about 15 miles away in the opposite direction from Lake Donna. I contemplated making my way down to timberline and on to the cabin--then I thought that if the storm did not let up and I should be unable to make it, I would be in a worse fix than I was already in since nobody would know which direction I had taken. As it was, my whereabouts were known, and sooner or later (providing I lasted long enough) I would either make it out, or help would come by helicopter once the storm let up. The safest bet seemed to be to stick to my original plan and try to get back to Lake Donna where I had an emergency cache of food and a heavy plastic tarp for a tent.

With several hours of semi-daylight remaining, I left the bear's carcass and headed back up and over the mountain toward Lake Donna. Before nightfall the snow was already knee deep on top of the mountain. Fate dealt me one from the bottom of the deck as I stumbled along through the muskeg and tripped over the sharp prongs of a shed moose antler which was hidden by the snow. One of the points ripped a hole in the shoe pac on my left foot. After that I had to stop all along, wringing out my heavy wool and light cotton socks, then massage some feeling back into the exposed left foot.

Night came with me still about five miles from the lake, and pretty well worn out. I figured it was best to conserve my strength for there was no telling how long I might have to stay up there. Rather than go stumbling on in the dark, I crawled under a low scrubby clump of bushes which were "home" for the night.

Nausea and vomiting began, and I was getting a bit weak. The possibility that I might freeze up and/or pass out during the night was present, so I stomped a big marker in the snow which might be seen from the air should I not be able to get up the following morning, providing the new snow didn't cover it up.

During the night, while curled up in my smelly "sleeping bag," I noticed that somewhere along the way I had sprung a leak in my right boot and had two wet feet to contend with instead of one. Sleep was impossible--I couldn't stop shivering long enough. Before morning what little was in my stomach was gone, and unlike the guy in a certain obnoxious commercial--I did not feel "GREAT"!

Morning finally came, with overcast sky and light snow still falling. Visibility was about 200 yards--not exactly flying weather--but the wind, thank heaven had died down somewhat as I rose and began trudging on toward Lake Donna. Carrying a bow, and with a ragged bear skin draped around me I must have looked rather prehistoric. Had some scientist observed this little tabloid, Alaska might now be credited with having its own local Abominable Snowman.

Soon I realized that my strength was fading from so much vomiting, and I was measuring my progress through the snow in yards instead of miles. Frequent stops were made to try to take care of my numb feet with brisk massage. By so doing I was able to keep moving them, just barely, although all feeling had long since departed from below my ankles. As the day wore on, I could see that the weather showed no signs of clearing, and even if I were able to make Lake Donna, Walt would be unable to fly through that white soup to get me out. I went as far as I could without exhausting all my waning strength, then curled up under another bush about two hours before nightfall. I estimated that I had less than two miles to cover to get to Lake Donna, but the way I felt, it might as well have been 200.

Just before nightfall the wind died down and, as if in a dream, the buzzing in my ears turned into the drone of Walt's little ship circling in the clouds overhead. On one of his circles a rift appeared in the clouds just over me giving Walt a glimpse of my marker in the snow! He dipped his wings just once, then the clouds closed in again. I was glad he did not try to come any closer as I stood there listening to the drone of his engine fading away. The white of the sky blended with white of the surrounding hills and low flying in such a "white out" bordered on suicide.

Well, back into the bear, and back under the bush I went for the most miserable night I ever spent.

During that night, I remember looking out across the snow and seeing (or thinking I saw) an Eskimo boy

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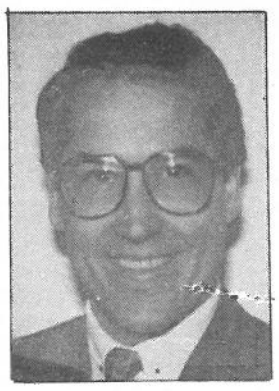


ESTATE PLANNING CORNER

Understanding the gift tax exclusion

Steven T. O'Hara

Federal gift tax law currently provides an exclusion from taxability for the first $10,000 given to any donee in any year (I.R.C. Sec. 2503 (b)). This exclusion enables an individual to make annual gifts of up to $10,000 to each of any number of persons, without any gift tax on the transfers.

If the donor is married, she and her spouse may each use their separate annual exclusion by either using their separate funds to make gifts or using one spouse's funds and consenting to treat gifts made by one spouse as being made one-half by each (I.R.C. Sec. 2513(a)(1)).

If the annual gift tax exclusion is not exceeded and no gift-splitting is used, the donor is not required to file a gift tax return (I.R.C. Sec. 6019(a)(1)). If gift-splitting is used, a gift tax return must be filed to show the spouse's consent to the gift-splitting (I.R.C. Sec. 2513(a)(2)).

Estate tax benefits may also be obtained by making annual exolusion gifts. Appreciation on gifted property subsequent to the time of transfer generally escapes the estate tax at the donor's generation level.

If the objective is to get substantial property out of the donor's gross estate, sole reliance on the annual exclusion may be misplaced, depending on the value of the property, the rate of appreciation, the number of donees, and the number of years the donor is likely to be able to make gifts. Accordingly, the donor may want to use some or all of her unified credit. The unified credit equivalent is currently $600,000 (I.R.C. Sec. 2505).

The 1988 Tax Act provided that gifts made within the annual exclusion are no longer automatically exempt from generation-skipping transfer tax. In general, a gift that qualifies for the annual exclusion will be exempt from generation-skipping tax only if the donor files a return allocating part of her GST exemption to the property or, alternatively, the gift itself is a so-called direct skip (I.R.C. Sec. 2642(c), 2612, 2613, & 2631).

In addition to the transfer tax savings of making annual exclusion gifts, income tax benefits may also be obtained. If the donee or the trust is in a lower income tax bracket than the donor, the gift may cause the income on the gifted property to be taxed at lower rates than it would have been in the hands of the donor.

The annual exclusion is available only for gifts of "present interest" and does not shelter gifts of "future interest" (I.R.C. Sec. 2503(b)).

As the name implies, a future interest is generally one in which the enjoyment of the property is postponed and not currently available to the donee. The donee does not have an immediate and unrestricted right to the use and enjoyment of the property or its income.

Gifts in trust are often future interests, as trustees are typically empowered with the discretion to accumulate income and add it to principal for ultimate distribution when needed or when the beneficiary attains a mature age. Thus, the annual exclusion is best suited for outright gifts.

Since people are generally reluctant to put too much property in the direct control of children, it is more difficult to persuade clients to consider making annual exclusion gifts to minors than to persuade them to consider making such gifts to adults. Nevertheless, several vehicles for transferring property to minors are available.

Although these vehicles generally retain possession of the gifted property until the donee attains a more or less mature age, they qualify for the annual exclusion as gifts of present interest.

Perhaps the most common way of rendering a gift made in trust a present interest is to give the beneficiary a so-called Crummey power. Crummey powers are a name, rather than a description, and are named after the case that affirmed their effectiveness: *Crummey v. C.I.R.*, 397 F.2d 82 (9th Cir. 1968).

A Crummey power is a demand right with a limited life. For example, donor transfers $10,000 to trustee to hold for the benefit of beneficiary, giving beneficiary the right to withdraw that $10,000 by written demand delivered to trustee within 30 days after the gift. If beneficiary does not make the demand by that deadline, the Crummey power lapses and the property stays in trust until the beneficiary is, say, age 30.

It does not matter if the beneficiary is an infant or otherwise incapable of personally exercising the Crummey power, at least if under the trust instrument a guardian may exercise the power. The donee of a gift made through a Crummey trust may be any age.

Another exception to the future interest rule appears in the Internal Revenue Code under Section 2503(c), and thus the name Section 2503(c) trust. If a gift is made under a Section 2503(c) trust, the gift will be deemed to be a gift of a present interest.

To qualify as a Section 2503(c) trust, the beneficiary must be under 21-years old on the date of the gift. The trustee must have the discretion to distribute the trust income and principal for the beneficiary's benefit while the beneficiary is under age 21 and, to the extent not expended, trust principal and accumulated income must pass to the beneficiary when he or she attains age 21.

If the beneficiary dies before attaining age 21, principal and income must be payable to the beneficiary's estate or as the beneficiary directs under a general power of appointment.

The Crummey power has assisted many donors who want to use a Section 2503(c) trust, but who do not want the beneficiary to receive automatically large sums at age 21. These donors give the beneficiary under the Section 2503(c) trust a Crummey power over the trust principal and accumulated income (Treas. Reg. Sec. 25.2503-4(b)(2)).

The Crummey power becomes effective as the beneficiary attains age 21 and remains open for as long as the donor provides in the instrument, generally 30 to 60 days. If the beneficiary does not exercise the Crummey power by the deadline, the property stays in trust until distribution is called for in the instrument.

As mentioned, under a Section 2503(c) trust, if the beneficiary dies before attaining age 21, the trust principal and accumulated income must be payable to the beneficiary's estate or as the beneficiary directs under a general power of appointment.

The donor may require a *testamentary* power of appointment, even though the beneficiary cannot, under local law, execute a will (Treas. Reg. Sec. 25.2503-4(b)). In Alaska, for example, a person under age 18 may not execute a will (A.S. 13.11.150).

In default of effective appointment, the trust principal and accumulated income may pass as the donor has directed in the trust instrument.

Another available vehicle is the Uniform Gifts to Minors Act (A.S. 45.60.011 et seq.). If a transfer is made to a custodisn of a child under the Minor's Act, the gift is considered a present interest gift to the child (Rev. Rul. 59-357, 1959-2 C.B. 212).

The donee of a gift made through the Minor's Act, must, of course, be a minor under local law. Under the Alaska Minor's Act, the child is entitled to receive the property on obtaining the age of 18 (A.S. 45.60-.031(d)). This is considered by most clients to be the greatest drawback of the Minor's Act.

Another problem is the prospect of probating the child's intestate estate, should he die before reaching age 18. Under such circumstances, the donor may find property returning to her and, if a qualified disclaimer is made, the decedent's minor siblings may require court-appointed conservators.

REVERIE

Beneath the dappled mirror surface fall
Monofilament, shot and herring bait
To disappear behind a thickening wall
Of jewelled sediment; while we wait

For fish that flash in watery memories
Of days when we were fortunate, and knew
No end to time; and sensed our boundaries
Stretched much further than our view.

No clever bait, no hooks were evident.
No shadowy hulls above us lay.
So when the others suddenly went,
We did not think to bless our days

As we do now, while we watch the skies
For signs that signal summer's end
And listen to the petrels cry
For vessels lost and drowned men.

By Harry Branson

• "I'm really looney... for sure"

Continued

walking toward me. He walked right up to me, big as life, grinned a snaggled-tooth grin exposing a shiny good tooth and said, "My you are wet and cold. Here, take my clothes; they are dry and warm."

He then proceeded to strip naked in the snow and handed me his fur-lined britches and parka as I sat there speechless. I reached out and took the clothes, then thanked him profusely, and told him I was sorry I had nothing to give him in return since all of my clothes were wet.

"Here," said I. "Take my leather cap" (which was new, and of which I was proud).

He grinned broadly at that, accepted my cap and, with it cocked jauntily on his head, went walking his naked way back across the hill to wherever it was he came from. I still haven't figured out what happened to his clothes--for the next morning I was still wet an cold--but you know what--my cap was gone!

Sometime during the wee small hours of that second miserable night I stood up to stomp my feet and heave some more bitter bile. As I stood there I thought I felt the very earth shaking under me.

"Man" I thought, "I'm really looney for sure. Not only do I see Eskimos prancing around in the snow, but now it feels like I'm in an earthquake!" (I later learned that there was one thing I did not imagine--we had a minor earthquake on the Kenai that night.)

The next morning, Wednesday, September 2, 1959, miracle of miracles, the overhead began to lift and visibility was extendd to several miles. I struggled to my numb feet and, still wrapped in my bear skin, plodded on toward Lake Donna, and home. I hadn't walked but about 15 minutes when I heard the drone of Walt's "Heavenly Champ." In he came, circled me then went on up ahead to check the terrain and set his plane down on the lake. Walt, bless his heart, came out to meet me half way and offered to help me in. In a little while we were airborne and winging back to Walt and Laura's place on Moose River.

When we landed, my wife, Donna, who had been biting her nails and praying the whole time, met us at the dock, took one look at me and lit out for the nearest doctor. I thought I was doing pretty good and was surprised when Donna returned in a fast four-place chartered airplane with doctor's orders to rush me to the hospital in Anchorage.

After that, things really happened fast. Before I knew it, I was flat on my back in a hospital bed, being punctured from all sides by monstrous needles and fed through the veins (of all places to feed a hunry man). My protestations seemed hollow indeed when the nurse told me to stop complaining and lift my head for a pillow. To my surprise I found I couldn't make it. That shut me up, but good, and from then on I gladly followed doctor's orders.

Excellent care from two of the finest doctors in the Northwest and splendid treatment from the staff of the Providence Hospital soon had me howling for food and feeling pretty chipper.

Four days later, I was released as an outpatient with the assurance that the danger of pneumonia was remote, and I would not lose any feet or toes--just a little meat and toenails from frostbite. I still had several weeks of bed and crutches facing me, and long nights of excrutiating pain, but at least I had made it.

And thank God for the bear skin. If I had missed that shot and not had the bear skin for shelter, I very well might never have made it out.

As the neighbors all came and helpfully carried me bodily into the house and to bed, I had the most delicious feeling of being home. From college days at the University of South Carolina, a half forgotten line of poetry came back to me from over the years with a new and fuller meaning:

"For at last I was home! Home is the sailor home from the sea--and the hunter home from the hill."

Henry L. "Hank" Taylor, ex-bowhunter who still has sore feet from freezing, but through the untimely death of a magnificent bear has had an additional 30 years of Alaskana. (He acknowledges there are some members of the bar who would opine that it shoulda-oughta been the 'Tother way around.)

Reprinted from "Archery," January, 1961 issue, published by the National Field Archery Association, 31407 Outer I-10; Redlands, Calif. 92373

• A restored carnival treat

Continued from page 1

cian. Visitors to Fairbanks love the show, and it still goes on. Link's wife Millie is the feature performer (Miss Millie and Bluebell perform throughout the city year-round), and even the lawyer-owner got himself on stage.

"I felt the owner of the saloon ought to have part in the review," said Link. "Just for me, Bluebell created Fern Gernberger, the Lonely Lady Ranger from Lower Tierra del Fuego, who falls in love with Bigfoot," said Link. "I got to be Bigfoot, the story ends with a happily ever after, and we have a family of Littlefeet."

Link still appears on stage once or twice a year in his original Bigfoot role. "I've been doing this for eight years. My lines in the song are 'Big Foot, Me Bigfoot'," and it took me a year to get my timing right," said Link. "I get standing ovations."

Link's law practice has focused on trial work, criminal law and a general practitioners' range of civil litigation over the 16 years he's practiced in Alaska, but his avocation is history.

Back to the Lydie-Lou Carousel Co. he formed with restaurant-owner Jack Williams (the Slouvaki Shop of mouth-watering Greek fare at Alaskaland in summer and downtown across from the Chamber of Commerce year-round).

"We didn't do this tomake a profit, exactly," says Link. "Profits will be put back into the carousel" to replace the 23 horse replicas with authentic-style Alaska animals with a 1900s flavor. As near as anyone can figure out, the Allen Herschel Carousel Co. original that twirls at Alaskaland was built in 1913 or 1915, and Link stumbled upon it from a client who'd stored it in a garage in Peoria, Ill. for 10 years. He was a retired American Airlines pilot who moved to Fairbanks. "We put a $5,500 postage stamp on it and SeaLand Services had to dismantle it to ship it here," Link said.

President Harding didn't bring a puppy aboard the Denali railcar, but Fairbanks kids do. SALLY J. SUDDOCK PHOTO

With the carousel was the original manual, Link said, "and it said 'a team of horses and three to four able hands can conveniently erect it in four to five hours'," said Link. "It took four of us, four from the borough (which owns the theme park) and a forklift three days."

The carousel company will lose $14,000 during this first year of full operation, says Link, but most of that is one-time cost. If it generates more revenue than it consumes, Link and Williams next want to add an old Byrne Band Organ (complete with original music rolls) and add the brass ring. Some 238 of the organs were built earlier in the century, and only 70 remain, virtually all of them in museums or private collections. The antique organ has been located for purchase, (complete with 100 rolls of music) but adding an authentic brass ring will bring obstacles. "Liability insurance," said Link.

Link and Williams also are active with the Fairbanks Historic Preservation Foundation, a private non-profit group that is having a great time restoring other finds in Fairbanks.

Restoration of the railcar Denali was completed last year, and this year visitors to Alaskaland can observe first-hand how President Warren G. Harding travelled when he drove the Alaska Railroad's Golden Spike at Nenana in 1923.

The foundation also is restoring the sternwheeler riverboat *Nenana*, which also rests at Alaskaland. It's the second largest wooden-hulled vessel in the world, and the only restorable old sternboat in the U.S. It plied the Upper Yukon as an extension to the railroad in 1935, "and there are so many stories about this riverboat that it would take days to tell them all," said Link. "It looks like we'll make a summer of 1992 date for finishing it up."

An Anchorage visitor, Ariel Jones, rides the carousel at Alaskaland in Fairbanks. The ride has become quite popular. PHOTO BY SALLY J. SUDDOCK

So far, the foundation has been able to work its restoration magic with impressive frugality. "We had estimates that it would take $180,000 to restore the Denali, but we did it for $40,000," said Link. "We're just a group of private businessmen with no grant restrictions (from government). "If we need plumbing, we go to Leon the Plumber and ask him to donate." There are seven on the board in addition to Link and Williams, and a 30-member advisory board lends specialized skills. "It's one of the few community projects I've been involved in that everyone has stayed with," said Link "...with nudging from Jack Williams."

As far as the practice of law goes in Fairbanks these days, said Link, "business is booming but the pay is slow."

Model Rules: Errata, other corrections noted

The proposed Alaska Rules of Professional Conduct were distributed with the July/August Bar Rag to the membership for comment prior to final consideration by the Board of Governors at its September 8-9, 1989 meeting. Unfortunately, incorrect versions of several of the rules and comments were published instead of the version proposed by the Board. The correct versions of proposed Model Rules 3.3, 3.4 and comments follow. Comments concerning the proposed rules and comments should be directed to Deborah O'Regan, Executive Director, Alaska Bar Association, P.0. Box 100279, Anchorage, Alaska 99501.

Rule 3.3CANDOR TOWARD THE TRIBUNAL

(a)A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. [IF A LAWYER HAS OFFERED MATERIAL EVIDENCE AND COMES TO KNOW OF ITS FALSITY, THE LAWYER SHALL TAKE REASONABLE REMEDIAL MEASURES.]

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(c) [(b)] The duties stated in paragraphs (a) *and b* [CONTINUE TO THE CONCLUSION OF THE PROCEEDING, AND] apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d)[(c)] A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(e)[(d)] In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, including facts adverse to the lawyer's position. [WILL ENABLE THE TRIBUNAL TO MAKE AN INFORMED DECISION, WHETHER OR NOT THE FACTS ARE ADVERSE.]

(f)"Knowingly," or "known," or "knows." when used in relation to conduct by a lawyer or to a circumstance described by a provision of these rules, means a situation in which the lawyer is aware that the conduct is of that nature or that the ircumstance exists.

ALASKA COMMENT:

(The Alaska Comment appearing in the July/August Bar Rag should be deleted.)

COMMENT:

(The ABA Comment is included in its entirety. In the July/August Bar Rag, the first paragraph of the ABA Comment had been erroneously deleted.)

Rule 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

[A LAWYER SHALL NOT:]

(a)*A lawyer shall not* unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value,[.] *nor shall a lawyer* [A LAWYER SHALL NOT] counsel or assist another person to do any *of these actions.* [SUCH ACT;]

(b) *A lawyer shall not* falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.[;]

(c) *A lawyer shall not* knowingly disobey *an order of a tribunal or* an obligation under the rules of a tribunal except for an open refusal based on an assertion that *the order is invalid or that* no valid obligation exists.[;]

[(d) IN PRE-TRIAL PROCEDURE, MAKE A FRIVOLOUS DISCOVERY REQUEST OR FAIL TO MAKE REASONABLY DILIGENT EFFORT TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST BY AN OPPOSING PARTY;]

(d)[(e)] *A lawyer shall not, at a trial or other hearing* [IN TRIAL], allude to any matter that the lawyer does not reasonably believe [IS RELEVANT OR THAT] will [NOT) be supported by admissible evidence. [,] *A lawyer shall not* assert personal knowledge of facts in issue except when testifying as a witness, *nor* [OR] state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused. [; OR]

(e)[(f)] *A lawyer shall not* request a person other than a client to refrain from voluntarily giving relevant information to another party unless[:(1)] the person is a relative or an employee or other agent of a client [;] and [(2)] the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving *the* [SUCH] information.

ALASKA COMMENT

The Committee made substantive changes in subsections (c) and (d) of ABA Model Rule 3.4. The Committee amended subsection (c) to make clear that the rule prevents knowingly disobedience of a specific order of a court as well as the general rules of procedure.

The Committee amended subsection (d) to make clear that the lawyer's duty of candor applies in all court proceedings, not just trials.

•

The Board also proposes the following version of Rule 1.15 which incorporates the Supreme Court's IOLTA (Interest on Lawyer s Trust Accounts) rules currently found in Disciplinary Rule 9-102(C) and (D):

Rule 1.15SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [FIVE YEARS] *six years* after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c)When in the course of representation a lawyer is possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) [(C)] *Unless an election not to participate is submitted in accordance with the procedure set forth in paragraph (e)* [(D)], *a lawyer or law firm shall establish and maintain an interest bearing insured depository account into which must be deposited funds of clients which are nominal in amount or are expected to be held for a short peirod of time, but only in compliance with the following provisions:*

(1) No earnings from such account shall be made available to the lawyer or law firm and the lawyer or law firm shall have no right or claim to such earnings.

(2) Only funds of clients which are nominal in amount or are expected to be held for a short peirod of time may be deposited in such account. Funds which reasonably may be expected to generate in excess of one hundred dollars interest may not be deposited in such account.

(3) The depository institution shall be directed by the lawyer or law firm establishing such account:

(a) To remit earnings from such account, net of any service charges or fees, as computed in accordance with the institution's standard accounting practice to the Alaska Bar Foundation, Inc., at least quarter-annually; and

(b) To transmit with each remittance of earnings a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to such lawyer or law firm.

(4) The lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances required further action with respect to the funds of any client.

(e) [(D)] *A lawyer or law firm who elects not to maintain the account described in paragraph (d)*((C)] *shall make such election on or before September 1, 1989 on a Notice of Election form provided by the Alaska Bar Association. If a Notice of Election is not submitted, the lawyer or law firm shall maintain the account described in paragraph (d)* [(C)]. *A lawyer or law firm who wishes to change a previous election may do so at any time by notifying the Alaska Bar Association.*

COMMENT

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed por-

Continued on page 9

Supreme Court Case Notes

By Ron Flansburg

THE CRAZY HORSE SHUTS OUT HELL'S ANGELS

The owner of a business establishment has the right to prohibit a patron from wearing a custom-made leather patch emblem of a skull with wings stating "Hell's Angels" without running afoul of the free speech provisions of the Alaska Constitution Article I, Section 5.

The Alaska Supreme Court distinguished cases allowing restriction of free speech in the context of small company towns and large shopping centers by stating "(w)e do not believe that the framers intended Article I, Section 5 to extend a doctrine which began in the streets of a company town inside the doors of a privately owned tavern. *Jeanette Johnson d/b/a The Crazy Horse v. Anthony Tait,* Op. No. 3433, May 12, 1989.

DAUGHTER ENTITLED TO PUNITIVE DAMAGES AGAINST FATHER OVER MARINA SALES PURCHASE DISPUTE

A daughter and son-in-law can recover punitive damages for intentional interference with economic relations and intentional infliction of emotional distress when the father's conduct was intentional and outrageous following disagreement regarding sale of his marina business even though only nominal damages were awarded for intentional interference with economic relations.

While holding otherwise, the Alaska Supreme Court adopted the same elements required to establish intentional emotional interference with contractual relationships for establishing intereference with prospective business or contractual relationship which, absent interference, would culminate in pecuniary benefit. *Oaksmith III. v. Brusich,* Op. No. 3434, May 12, 1989.

JUROR WITH KNOWLEDGE OF FACTS SHOULD BE EXCUSED

A city building inspector with knowledge of the facts in a real estate dispute serving as a juror should be excused for cause unless it is beyond question that the juror can try the case and return a verdict only on the evidenced introduced in the courtroom.

The Alaska Supreme Court reasoned that even though Civil Rule 47(c) does not expressly list juror's knowledge of the case as grounds for a challenge for cause, a trial court judge should excuse a juror with knowledge of the facts to assure an impartial verdict. *Dalkoviski v. Glad,* Op. No. 3436, May 12, 1989.

WORKER UNDER TREATMENT FOR CANCER ENTITLED FOR COMPENSATION FOR BACK INJURY

A workman is entitled to total temporary disability payments for a disabling back injury even though undergoing cancer treatment.

The Supreme Court based its decision on the Alaska Workers' Compensation Act's liberal, remedial policy and concluded that providing compensation for temporary total disabilities even when a concurrent unrelated medical condition has also rendered the worker unable to earn normal wages was in furtherance of the remedial scheme fo the act. *Ensley v. Anglo Alaska Construction, Inc.,* Op. No. 3432, May 12, 1989.

DIVORCED SPOUSE RESPONSIBLE FOR SUPPORT OF HANDICAPPED ADULT CHILD

In a case of first impression, the Supreme Court opinioned that a parent's duty of support for a mentally or physically disabled adult child continues after the child reaches majority.

While remanding for an evidentiary determination of amount, the Court also held that the divorce court has the authority to award continuing support payments for a handicapped adult child. *Strev v. Strev,* Op. No. 3443, May 19, 1989.

Solid Foundations

By Mary Hughes

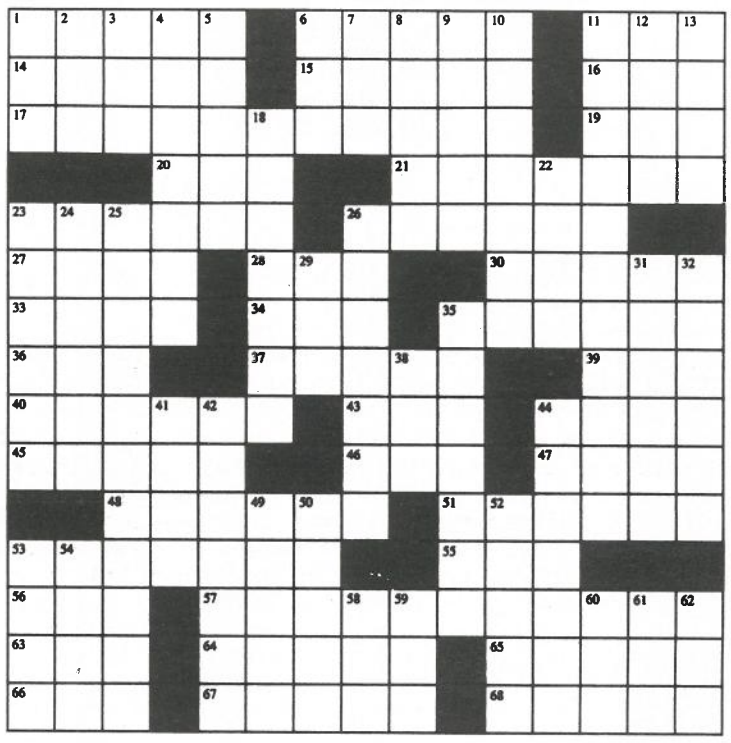
The Alaska Bar Foundation began its existence in 1972 with a $5,000 gift from the George F. Boney heirs. That sum precipitated the formation of the Foundation and was the catalyst for years of non-profit works amongst members of the Alaska Bar Association. Seventeen years later, the Boney funds are still the Foundation's capital.

What of other lawyers honored by heirs and fellow members of the Bar? The Foundation has accepted funds and segregated them for future use for several now deceased Alaskan lawyers. The names of Justice John Dimond and Wendell Kay come immediately to mind. The Foundation wishes to continue to assist in lawyers' memoriam. Funds will be accepted by the Foundation. The heirs or lawyers group sponsoring the memorial donations are responsible however for continued fund raising and final disbursement of the funds. The Foundation requests that such a group be formed formally prior to the initial donation in order that some documentation with respect to contributed funds exists.

Additional information relative to endowments and gifts may be obtained through the trustees of the Alaska Bar Foundation.

HAPPY HALLOWEEN

BAR-CROSSED



ACROSS

1. liberated
6. STOP _____
11. _____ and flow (adm.)
14. _____ American
15. Orthodox Muslims
16. actress, JoAnne
17. gridiron justice: poss.
19. our flag _____ still there
20. American architect
21. burglar
23. detain
26. more chi chi
27. admiral grade
28. Carson City is the cap.
30. lode
33. fellows: informal
34. before
35. defend by demurrer, e.g.
36. _____ stand before you today . . .
37. more competent
39. garden tool
40. physicians and pharmacists
43. H.S. equivalency
44. _____ of attainder
45. cave
46. carbon compound: suff.
47. by hwys. D & F
48. certain entertainers
51. maintain
53. edam or brie
55. portion
56. _____ Beta Kappa
57. Mann Act "contraband"
63. before her: an option
64. hot crime
65. w/lance in hand
66. Hwy.
67. crippled
68. prepared

DOWN

1. Washington & Lincoln mo.
2. King's assassin
3. misapply fact or law
4. secret marriage partners
5. AEC force unit
6. evidence in 64A trial
7. in-common holders in Hawaii
8. become a partaker
9. concerning
10. regulated beverage process
11. 1910 Chief Justice
12. seed piece
13. police raid
18. observer
22. appointed after Black, J.
23. warship fleet
24. motive
25. Klan member?
26. punishes wrong
29. failed 27th A.
31. warden
32. loophole
35. ancient trials
38. poet's fully
41. border Lake
42. repeat obligation
44. former Eng. colony
49. physician in Iran
50. belief in doing over
52. demesne: Sp. law
53. plagiarizer
54. IOU
58. pedal digit
59. verdict or judgment
60. road: Lat
61. old age
62. nuisance in piggery litigation

Answers on page 19

• Model rules

Continued from page 8

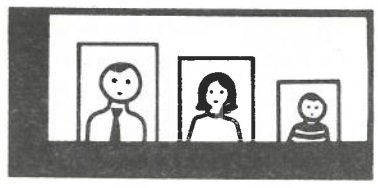
tion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

BAR PEOPLE



John McGee has left the firm of Kay, Saville, et.al. and opened his own law office in Anchorage.....and **Sarah McCracken** has moved back from Oregon to the A.G.'s office in Anchorage.

The firm of Dennis & Moss has been dissolved. **Dan Dennis** has opened his own law practice in Anchorage and **Milton Moss** has relocated to Alabama.....**Brian McNally,** formerly with Perkins Coie, is now staff attorney and law clerk for the U.S. Bankruptcy Court.....**Richard Pennington,** previously with Aglietti, Pennington & Rodey, has opened the firm of Richard D. Pennington & Associates.....**Ken Roosa** has moved from the D.A.'s office in Fairbanks to the Office of Special Prosecutions & Appeals in Anchorage..... **Norman Resnick,** formerly with the Law Offices of Gordon F. Schadt, is now with the FDIC.....**George Skladal** has become associated with the firm of Fortier & Mikko.....and **Renee Wright** has moved from Anchorage to Denver.

Sharon Gleason was recently made a partner in the law firm of Rice, Volland & Gleason.....**Ardith Lynch** is the new Deputy Director of the Child Support Enforcement Division, Department of Revenue.....**Jim Cannon** is back as an assistant public defender in Fairbanks.....**Marlis Heinemann** has moved from the Law Offices of Birch, Horton, Bittner and Cherot to the Alaska Public Defender Agency.....**Don Bauermeister,** who was with the Law Offices of Laurel J. Peterson, is now an assistant attorney general in Anchorage.... **Michelle Boutin,** formerly with the Law Office of Diane F. Vallentine, is now with the FDIC Legal Department.

Frank Cahill, previously with Guess & Rudd is now with Bradbury, Bliss & Riordan.....**Jack Clark** has closed his office in Anchorage and relocated to Washington state.....**Kimberly & Joseph Crnich** have moved to Arlington, VA. **Ray Gillespie** has moved from Juneau to Hope.....**Steve Hutchings,** formerly with the A.G. s office, is now with Birch, Horton, et.al.....and **Hal Brown, Jerry Melcher, Jonathan Rubini** and **John Tindall** are with the Anchorage office of Heller, Ehrman, White & McAuliffe.

Roger Holl has opened his law office in Anchorage.....**Stephen Routh, Richard Crabtree** and **Francine Harbour** have formed the firm of Routh, Crabtree & Harbour.....**Marvin Hamilton,** who was with the P.D. in Barrow is now with the Anchorage office.....**John Holmes,** who was with the P.D. in Anchorage, is now with the Barrow office.....and **Karen Loeffler,** formerly with the D.A.'s office, is now with the U.S. Attorney's office in Anchorage.

Anthony Lombardo, who was with the Ketchikan firm of Keene & Currall, is now with the FDIC Legal Department in Anchorage.....**Doris Loennig,** formerly of Aschenbrenner & Brooks, is now with Bradbury, Bliss & Riordan.....**Sue Urig** and **Jim Kubitz** had a baby boy, Max, on August 5.....**Mike** and **Katie Wolverton** had their second child, Scott, in April.....**Susan Daniels** and **Ken Legacki** had a baby boy, Matthew, in July.....**Nancy Shaw** had a baby daughter, Claire, in June.....**Kathleen McGuire** is visiting Costa Rica and Belize.....**Donna Willard** and **Doug Jones** spent three weeks in Australia in August.....**Pat Kennedy** and **Diane Rebecca Myres** announce the formalization of their mother-daughter relationship on August 10. The daughter's new name is Rebecka Page Kennedy.....**Seth** and **Sandy Eames** had a baby girl, Katherine Antoinette, on July 16, 1989.

Council elected to society

William T. Council, a partner with the Juneau law firm of Council and Crosby, was recently re-elected to the American Judicature Society Board of Directors at the society's annual meeting in Honolulu. Both U.S. Supreme Court Justice Byron R. White and Solicitor General Kenneth Starr were featured speakers at the meeting.

A graduate of the University of North Carolina Law School, Council is a member of the Alaska Judicial Council. He received his undergraduate degree from Davidson College.

Also elected at the meeting were the Society's officers, consisting of AJS President Robert S. Banks, of Latham & Watkins, New York; Chair of the Board Honorable Diana E. Murphy, U.S. District Court for Minnesota; Vice Presidents Honorable Robert F. Utter, Washington Supreme Court, Honorable Shirley Abrahamson, Wisconsin Supreme Court and Honorable Judith C. Chirlin, Superior Court of California Los Angeles County; Secretary Honorable Henry E. Frye, North Carolina Supreme Court; and Treasurer Edwin F. Hendricks, of Meyer, Hendricks, Victor, Osborn & Maledon, Phoenix.

Founded in 1913, the American Judicature Society is a national independent organization of more than 20,000 members working to improve the nation's justice system.

Among its goals are creating greater public understanding of the role of the courts, selecting judges for their professional qualifications, protecting judicial independence while maintaining the highest standards of judicial ethics and improving court systems. AJS publishes newsletters, monographs and the journal, *Judicature,* holds conferences and seminars, maintains an information and consultation service, conducts empirical research and operates the Center for Judicial Conduct Organizations.

Jerry Melcher (left) and Hal Brown pose with their lawbooks.

Melcher, Brown start new office

Curtis Caton, managing partner of the law firm of Heller, Ehrman, White & McAuliffe announced today the opening of its office in Anchorage.

Partners in the Anchorage office will be Jerry E. Melcher and Harold M. Brown, both long-time Alaskan attorneys. Jerry E. Melcher, former partner in the Anchorage firm of Hughes, Thorsness, Gantz, Powell and Brundin, is a 1970 graduate of Willamette University College of Law where he was a member of the Willamette Law Journal Editorial Board. Melcher has been practicing in Alaska for 19 years and is widely regarded as one of Alaska's foremost commercial litigators.

Harold M. Brown was a partner in the Ketchikan, Alaska firm of Ziegler, Cloudy, King, (Brown) and Peterson until appointment in 1985 as attorney general for the State of Alaska. Brown was president of the Alaska Bar Association from June of 1984 through May of 1985 and until recently served as the executive director of the Alaska Judicial Council. He is a graduate of Boston University School of Law and has a Master of Laws degree in taxation. He has practiced in Alaska since 1971.

Heller, Ehrman, White & McAuliffe is a west coast law firm with offices in Seattle, Portland, San Francisco, Palo Alto, Los Angeles and now Anchorage. Founded in 1890, the firm has nearly 300 attorneys providing legal services in the corporate, commercial, real estate, tax, litigation, bankruptcy, environmental, labor, energy, international trade and estate planning areas.

"This is a great opportunity and challenge for us," said Brown and Melcher. "We believe in Alaska, and it is exciting to be practicing with a firm of the caliber of Heller, Ehrman. The Anchorage office will have a great deal of depth in both skill and experience from the day we open the door. We will shortly be joined by other resident Alaskan attorneys, and together we represent over 50 years of diversified legal experience. Heller, Ehrman's strength in handling major litigation and environmental matters fits in well with our practice and the needs of clients in Alaska."

The offices of Heller, Ehrman, White & McAuliffe will be located on the 19th floor of the Enserch Building. Because extensive renovations of that space will not be completed before October, the firm will be operating out of temporary quarters on the 18th floor of the same building. The address of the Anchorage office is 1900 Enserch Center, 550 West 7th Avenue, Anchorage, Alaska 99501-3571. The telephone number is (907) 277-1900.

Four lawyers hired

David Burglin, Vicki Bussard, Melinda Miles, and Edward Sniffen were recently admitted to the Alaska Bar. They are associated with Hughes Thorsness Gantz Powell & Brundin, the largest and one of the oldest law firms in Alaska. Richard Musick, most recently a judge advocate in the Air Force, has also joined the firm.

Burglin is a graduate of the University of Puget Sound School of Law. He holds a degree in business administration, and served as legal extern in the Alaska Supreme Court.

Bussard was graduated from the University of Denver College of Law and works in tort litigation.

Miles practiced law in Texas before moving to Alaska. She practices commercial law.

Sniffen was graduated from Willamette University College of Law. Originally in the tour guide industry in Alaska, his practice emphasizes natural resources.

Musick was raised in an Air Force family and served 10 years in the Army. He was graduated cum laude from Brigham Young University Law School. He also practices tort litigation.

From left, Rhonda Scott, Shirley Strusz, Anchorage Attorney Lee Holen and Valerie Baffone sail the Caribbean.

In Memorium

Gail Roy Fraties
1928 — 1989

Michael L. Sebulsky
1960 — 1989

Lawyers cope with rights

By Barbara Hood

Most of us practicing law in Alaska don't have to worry much about governmental persecution for doing our job.

Throughout the world, however, lawyers are targets of human rights abuses for no greater "crime" than representing clients out of favor with authorities. Since 1978, the Lawyers Committee for Human Rights, based in New York, has worked to protect fundamental human rights under international law.

The committee seeks "to promote the core group of rights that guarantee the integrity of the person; the right to be free from torture, summary execution, abduction or disappearance; the right to be free from arbitrary arrest, imprisonment without charge or trial, and indefinite incommunicado detention; and the right to due process and a fair trial before an impartial judiciary."

Because lawyers seeking to secure basic human rights for their clients may place themselves at serious risk the Lawyers Committee has established the "Lawyer to Lawyer Network".

The LLN generates monthly appeals on behalf of lawyers who face persecution because of their defense of politically active clients or their activities as human rights monitors. LLN participants are asked to write or telegram designated foreign officials on behalf of individual lawyers, requesting that they be permitted to carry out their professional duties without fear of reprisal.

The Lawyers Committee is nonpartisan, and seeks to hold each government accountable to international human rights standards. Consequently, LLN appeals are directed to many different governments throughout the world, regardless of their political orientation.

Persons interested in joining the Lawyer to Lawyer Network, or in finding out more about the activities of the Lawyers Committee for Human Rights, should write to: Lawyers Committee for Human Rights, 330 Seventh Avenue, 10th Floor, New York, New York 10001, (212)629-6170.

Committee issues appeal

The Lawyers Committee has issued an appeal to the government of Sri Lanka as a result of the recent killings of two human rights lawyers who had been active in filing habeas corpus petitions on behalf of persons alleged to be illegally detained and "disappeared".

On July 7, 1989, Sri Lankan human rights lawyer Charitha Lankapura was killed under circumstances that indicated the possible involvement of government security forces. He had filed hundreds of petitions for habeas corpus for people in southern Sri Lanka who had disappeared after being detained by security forces. Increasing numbers of such detentions and "disappearances" by government security forces have been reported in recent years in the context of the Tamil and Sinhalese ethnic insurgencies. Mr. Lankapura had been active in the organization Students for Human Rights and was known for his human rights work.

An anonymous caller who claimed responsibility for Mr. Lankapura's death made death threats against two other human rights lawyers who were active in filing habeas corpus petitions for detained or "disappeared" persons. One of these men, human rights lawyer Kanchana Abhayapala, was killed by a gunman at his home on August 28, 1989. The other, Prins Gunasekara, continues to receive death threats.

In an article printed in the New York Times on August 1, 1989, Mr. Gunasekara said habeas corpus petitions in Sri Lanka had increased dramatically in recent years, from 42 in all of 1984 to 508 in 1988 and 367 through July 1989. He indicated his belief that the Sri Lankan government was trying to combat certain elements of the insurgency with state-sponsored terror. On August 18, an anonymous caller told him that human rights lawyers were "getting members of the army and police killed", accused him of defending criminals, and warned him that his activities would not be allowed to continue.

In the current LLN appeal, the Lawyers Committee states its concern "that the rule of law and the independence of the legal profession cannot exist unless lawyers are able to carry out their responsibilities without fear of being killed." The committee requests that politely worded letters or telegrams be sent to Sri Lankan officials, urging them to take all possible measures to protect Mr. Gunasekara and other human rights lawyers and to ensure that they are able to perform their duties independently and without fear. The committee also requests that the officials be urged to immediately investigate the killings of Mr. Lankapura and Mr. Abhayapala and to bring those persons responsible to justice.

Appeals should be sent to:

President Ranasinghe Premadasa, Presidential Secretariat, Republic Square, Colombo 1, Sri Lanka.

The Hon. Ranjan Wijeratne, Minister of Foreign Affairs, P.O. Box 583, Republic Building, Colombo 1, Sri Lanka.

Copies should be sent to:

Ambassador Susanta de Alwis, Embassy of Sri Lanka, 2148 Wyoming Avenue, N.W., Washington, D.C. 20008.

Mr. Edward Marks, Charge d'Affaires, American Embassy, 210 Galle Road, Colombo 3, Sri Lanka.

Please contact Pamela Price at the LCHR if sending appeals after October 15, 1989. Also, please send copies of any appeals to Ms. Price.

Lawyers Committee for Human Rights, 330 Seventh Avenue, 10th Floor, New York, New York 10001, (212)629-6170.

Willard is ABA delegate

Donna C. Willard, a partner in the Anchorage law firm of Willoughby & Willard, became Alaska State Delegate to the American Bar Association Aug. 9.

As state delegate, she heads the Alaska contingent in the 450-member House of Delegates, the policy-making body of the ABA, and casts the state's vote in nominating association officers. The House meets twice each year, in February and August. Willard has been a member of the House since 1980, previously representing the state bar. Willard also chaired the House Tellers Committee, and is a member of the House Committee on Rules and Calendar. She has been Alaska Membership Chairman of the ABA since 1985, and was a member of the association's Standing Committee on Bar Activities and Services from 1983 until this year.

Willard also is a past member of the executive council of the National Conference of Bar Presidents and immediate past president, vice president and secretary of the National Conference of Bar Foundations.

Willard served as president-elect and as president of the Alaska Bar Association in 1978-80. She presided over the Western States Bar Conference in 1983-84. She has been chair of the Alaska State Officers Compensation Commission since 1986 and became chair of the Anchorage Port Commission in 1989. She is a past chair of the Anchorage Transportation Commission and a past vice-chair of the Alaska Code Revision Commission.

Willard received her bachelors degree from, and attended her first year of law school at, the University of British Columbia. She received her law degree from the University of Oregon. She is a member of Delta Sigma Pi Honorary Sorority.

J.B. Dell is back

Solve the oil spill? Take the parties to Vegas

By J. B. Dell

Over 70 law firms have been retained thus far in the oil spill litigation, with suits having been commenced in several layers of state and federal courts.

There are so many lawyers, in fact, that the lawyers have formed committees to represent the other lawyers.

It's true that several plaintiffs have cheated by filing suits without hiring lawyers, but this constitutes the rare exception. Soon the ecological damage to the shores of Prince William Sound will be dwarfed by the senseless loss of thousands of acres of prime forests necessitated by hundreds of thousands of pounds of paper needed for briefs, complaints, notepads, and paper airplanes used by the lawyers. Who knows what further wanton waste accompanies the millions of gallons of copier toner, white-out fluid, and ordinary ink. Moreover, estimates are that it will take at least 10 years to bring these cases to conclusion.

A strong case can be made that both the plaintiffs and the oil companies would come out ahead by turning the whole thing over to one of the casinos in Las Vegas.

Let's assume that these cases represent total damage equal to about $10 billion (the actual amount doesn't matter--any figure can be used to illustrate the principle).

Here's why.

Let's assume that these cases represent total damage equal to about $10 billion (the actual amount doesn't matter--any figure can be used to illustrate the principle).

If $10 billion is eventually recovered by the plaintiffs, then one third, or $3.3 billion will go to the plaintiffs' lawyers under the usual contingency fee agreement. This means that the plaintiffs only get $6.7 billion.

However, out of this amount must be deducted the 'costs' of litigation such as depositions, copy costs (remember those trees?), travel, hotels, wine, dinner, movies, stamps, more wine, experts, and so forth. This leaves about $6 billion for the plaintiffs.

Now, the oil companies will also hire lawyers. The defense lawyers, who bill by the hour, will have to mount a war equal to the effort of the plaintiffs' lawyers (who have to put on a $3.3 billion show!). So we can safely assume that their tab will also be $3.3 billion, plus the same amount for 'costs' as the plaintiffs' lawyers.

So here's what we have so far:

Amount Spent by the oil companies:
Payment to plaintiffs--$10 billion
Lawyer fees--$4 billion
Total----$14 billion

Amount Received by plaintiffs:
($10 billion less lawyer fees)
Total----$6 billion

Let's compare this result with my Las Vegas approach.

First, the plaintiffs and the oil companies agree to fire their lawyers and hire a Las Vegas casino for one weekend. The stakes will be $10 billion (half way between the $6 billion and the $14 billion). They agree to share the cost of hiring the casino. This comes to about $250,000, which includes a Sinatra and Wayne Newton show, hotel, first class air fare, meals and day-care for the kids.

The oil companies hand out $6 billion worth of chips. At that point, the conservative plaintiffs can just go home, and they will have done as well as 10 years of litigation.

For those who stay, the oil companies offer a variety of family-oriented games such as Parchesee, bean-bag toss, Old Maid, and Scrabble. Traditional gambling activities are also offered for the more risk-prone. The risk associated with the gambling would be calibrated by experts so as to roughly equal the risks of litigation and jury trial (a new form of "house odds").

The plaintiffs have a good time, make more money than through litigation, and get the money faster. The oil companies save $4 billion.

The down side? This approach to litigation could catch on. If people stopped using our lawyers, then Anchorage's restaurants, clothing stores, saloons, and travel agencies would collapse--sending our economy into an irreversible tailspin.

On second thought...just leave everything as it is.

Supreme Court rules on Burrell case

THE SUPREME COURT OF THE STATE OF ALASKA

HOMER L. BURRELL,

Appellant,

v.

DISCIPLINARY BOARD OF THE TION,)

Appellee.)

Alaska Bar Association
File Nos. 85-048 and 85.221

Supreme Court File
No. S-2682

OPINION

Appeal from the Disciplinary Board of the Alaska Bar Association.

Appearances: Homer L. Burrell, pro se, Anchorage. Stephen J. Van Goor, Discipline Counsel for the Alaska Bar Association, Anchorage.

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

PER CURIAM.

I. INTRODUCTION

This case presents two charges by the Disciplinary Board of the Alaska Bar Association ("Bar Association") against appellant Homer L. Burrell ("Burrell"). The first issue presented is whether the Bar Association correctly found that Burrell had violated DR 7-105(A), which prohibits an attorney from threatening to present criminal charges solely to obtain an advantage in a civil case. The second issue is whether Burrell violated Alaska Bar Rules 15(7) and 28(d) by practicing law while suspended from the practice of law by order of the Alaska Supreme Court.

II. FACTS AND PROCEEDINGS

On August 25, 1986, the Bar Association filed the instant action against Burrell before the Bar Association's Hearing Committee. Tne Bar Association alleged two counts.

Count one alleqed that Burrell had violated DR 7-105(A) by threatening to present criminal charges solely to obtain an advantage in a civil case. The charge was based on a letter that Burrell wrote on or about March 11, 1985, as attorney in a civil matter, to Fairbanks attorney Charles D. Silvey.

The letter at issue concerned the sale by Silvey's client of a sluice box which allegedly belonged to Burrell's client. In the letter, Burrell outlined his efforts over the course of two weeks to obtain some response from Silvey as to the matter. The letter then stated:

> My client has informed me that it will file a complaint for conversion with the District Attorney's office unless I provide it with some response from you, in addition to civil action which it wants me to bring.

Burrell ended the letter with an explanation of why the sluice box is crucial to his client's business, and a request that Silvey contact him.

Count two alleged that Burrell violated Alaska Bar Rules 15(7) and 28(d) by practicing law while suspended from the practice of law by order of the Alaska Supreme Court. [1] This charge is also based on a letter written by Burrell, this time to Anchorage attorney Judith J. Bazeley.

This letter, dated August 27, 1985, concerned the civil case of Stenehjem v. Stenehjem, 3AN-84-231 CI. Neither the letterhead nor any other part of the letter stated that Burrell was an attorney. The letter stated, in pertinent part:

> Stephanie has suffered substantial damages as a result of the Stenehjems' actions and inactions, and when I am able to, I plan to file an action for damages against them.
>
> ....
>
> In the meantime, Stephanie will deny the Stenehjems any visitation with their granddaughter.

In an affidavit, Burrell's client in the civil matter, Stephanie La Plante, stated that Burrell had represented her for the preceding four years without charging for his services. Ms. La Plante stated that she had asked Burrell to take action concerning the above-referenced civil case, but that Burrell had explained to her that he was suspended from practicing law. Although he could "take no action in that case, because he was suspended," he felt that he could write a letter threatening to file suit after he was reinstated, and that writing such a letter would not constitute the practice of law.

The Bar Association filed a motion for summary judgment with the Hearing Committee. Burrell filed a cross-motion for summary judgment. The Committee subsequently granted the Bar Association's motion, finding Burrell guilty on both counts, and denied Burrell's motion. On October 2, 1987, the Committee issued its findings of fact, conclusions of law, and recommendation. As a sanction the Committee recommended that Burrell be suspended from the practice of law for nine months, followed by two years of probation.

Burrell appealed the decision to the Disciplinary Board of the Bar Association, which upheld and adopted the decision of the Hearing Committee. For reasons not relevant to the instant appeal, the Disciplinary Board reconsidered its opinion, and again upheld and adopted the decision of the Hearing Committee. The Board did, however, reject the Hearing Committee's recommendation as to sanctions. It held that Burrell should be privately reprimanded for count one and suspended for sixty days for count two.

Burrell appeals the Disciplinary Board's decision to this court.

III. DISCUSSION

A. Arguments Based on Freedom of Speech

Burrell argues that both of the letters which form the basis of the Bar Association's case are "privileged" under article I, section 5 of the Alaska Constitution. The Bar Association, he maintains, is attempting to punish him for exercising his constitutionally protected right to free speech.

This court has expressly rejected Burrell's position. In *In re Vollintine,* 673 P.2d 755, 757 (Alaska 1983), we adopted the view of Justice Stewart in his concurring opinion in *In re Sawyer,* 360 U.S. 622, 646-47 (1959):

> (A) lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

Burrell's constitutional argument therefore fails.

B. Burrell Violated DR 7-105(A)

Disciplinary Rule 7-105(A) provides that "[a] lawyer shall not ... threaten to present criminal charges solely to obtain an advantage in a civil matter." The question presented in the instant case is whether Burrell violated the rule by writing the letter of March 11, 1985. We conclude that he did.

In determining whether an attorney's conduct violates DR 7-105(A), courts look to the extent to which the threat is intended to gain an advantage in a civil matter. [2] In *In re Vollintine,* 673 P.2d 755 (Alaska 1983), this court held that where an attorney had threatened criminal charges in a civil matter he had violated the rule. *Id. at 758. In that case the attorney had warned that various officials of the Bureau of Land Management ("BLM") might find themselves "criminally liable" and stated: "If you ... think you are going to walk away from this ... matter unscathed, you are wrong." Id.* at 756. The court held that the sole purpose of the letter was to influence the BLM's handling of a civil matter, and thus violated the rule. *Id.* at 758. *See also In re Charles,* 618 P.2d 1281, 1282 (Or. 1980) (threat of criminal charges made in the context of settlement negotiations violated the rule); *People ex rel. Gallagher v. Hertz,* 608 P.2d 335, 338 (Colo. 1979) (direct threats of criminal prosecution made with the intent to force settlement of civil matter violated the rule).

In the instant case Burrell sought recovery of the sluice box plus damages for his client. He specifically stated this objective in his letter to attorney Silvey. He followed this statement immediately in the letter with a threat of criminal action. Despite the fact that the letter's only specific request was that Silvey contact Burrell, the clear implication was that Burrell would file criminal charges if his client's claim was not vindicated. The Board, therefore, correctly found that Burrell threatened criminal prosecution solely to obtain an advantage in a civil matter.

C. Unauthorized Practice of Law

The Bar Association argues that Burrell's letter of August 27, 1985 to Judith J. Bazeley constituted the practice of law, at a time when Burrell was suspended from practice. Burrell disagrees, arguing that the mere writing of a letter such as the instant one does not constitute the practice of law.

Alaska Bar Rule 15(b) defines the unauthorized practice of law. That rule, however, has no application to the instant case because Burrell wrote the letter at issue before Rule 15(b) took effect on January 15, 1989. We must analyze Burrell's conduct under the standards in existence when the conduct occurred.

Prior to the enactment of Bar Rule 15(b), there was no rule in Alaska defining the practice of law. However, we considered this issue in *In re Robson,* 575 P.2d 771 (Alaska 1978). In that case we listed various activities which are within the definition of that term:

A. Representation of a client
B. Giving legal advice
C. Preparation of legal instruments
D. Holding ones self out as qualified to practice law.
E. Aiding and abetting the unauthorized practice of law.

Id. at 780-81 (footnotes omitted). We also noted that an attorney who is suspended from practice must be particularly prudent to avoid even the appearance of practicing law. *Id.* at 781.

Applying this rule, we hold that Burrell's conduct did constitute the unauthorized practice of law. It is obvious from the face of the letter at issue that Burrell was both representing his client and giving legal advice to her. Thus, Burrell has engaged in two of the five activities listed in Robson as the practice of law. Moreover, these acts occurred at a time when Burrell, as an attorney suspended from practice, had a heightened duty to avoid even appearing to practice law. Taken together, these factors support the Board's finding that Burrell's conduct constituted the unauthorized practice of law.

D. Sanctions

The Board recommended a private reprimand for count one (threat of criminal prosecution) and sixty days' suspension for count two (unauthorized practice of law). We must now determine whether to impose these sanctions. In so doing, we need not accept the Board's recommendation but may exercise our own independent judgment. Alaska Bar R. 22(r); *In re Minor,* 658 P.2d 781, 783 (Alaska 1983); *In re Simpson,* 645 P.2d 1223, 1226 (Alaska 1982). Further, although the Board's findings of fact are entitled to great weight, this court has "the authority, if not the obligation, to independently review the entire record in disciplinary proceedings ... ." *Simpson,* 645 P.2d at 1228.

We determine the appropriate sanction to impose for attorney misconduct on a case-by-case basis, "grounded upon a 'balanced consideration of [all] relevant factors.'" *In re Buckalew,* 731 P.2d 48, 51 (Alaska 1987) (quoting *In re Minor,* 658 P.2d 781, 784 (Alaska 1983)). We are guided by the ABA Standards for Imposing Lawyer Sanctions (1986) [3](hereinafter "ABA Standards for Imposing Lawyer Standards"). *Buckalew,* 731 P.2d at 52.

1. Count One Threatening Criminal Prosecution

We have already determined that Burrell violated DR 7-105(A). The ABA Standards classify this as a violation of the attorney's duty to the legal system. Thus, violations of DR 7-105(A) are covered by Standard 6.2, entitled "Abuse of the Legal Process." ABA Standards, App. 2.

The appropriate sanction to be applied under Standard 6.2 depends on whether Burrell violated DR 7-105(A) knowingly or negligently. ABA Standard 6.21 provides:

> Disbarment is generally appropriate when a lawyer knowlingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

Standard 6.22 provides:

> Suspension is appropriate when a lawyer knows that he is violating a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Finally, Standard 6.23 provides:

> Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

The Hearing Committee applied Standard 6.22, finding that Burrell knowingly violated DR 7-105(A). We disagree. Alaska Bar Rule 22(e) places on the Bar Association the burden to prove Burrell's guilt by clear and convincing evidence. There is no clear and convincing evidence in the record to show that Burrell knew that his letter to Mr. Silvey violated DR 7-105(A). Indeed, conduct similar to Burrell's conduct in the instant case has been held by other courts not to violate the Rule. *See, e.g., In re McCurdy,* 681 P.2d 131 (Or. 1984); *Decato's Case,* 3/9 A.2d 825 (N.H. 1977). Thus, the mere fact that Burrell wrote the letter does not show that he knew that he thereby violated the Rule. Burrell's state of mind in violating the Rule is best described as negligent. We therefore apply Standard 6.23 to determine Burrell's punishment. Standard 6.23 provides that

• Burrell suspended; no dishonest motive found

Continued from page 18

reprimand is appropriate for negligent violation of DR 7-105(A).

Our analysis would normally turn next to a consideration of aggravating and mitigating factors. However, because many of these factors are the same for counts one and two, we defer this analysis until after we determine the presumptive punishment warranted under count two.

2. Count Two Unauthorized Practice of Law Wnile Uncer Suspension

As discussed above, we find that Burrell's conduct constituted the practice of law at a time when he was suspended from practice. This conduct violated Burrell's duty to the legal profession, the public, and his client. ABA Standard 7.0. Because he violated the express terms of a prior disciplinary order, Burrell's punishment is governed by ABA Standard 8.0. Standard 8.1(a) provides:

> Disbarment is generally appropriate when a lawyer . . . intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession.

Standard 8.3 provides:

> Reprimand is generally appropriate where a lawyer . . . negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession.

The Hearing Committee found that Burrell's intent in writing the letter at issue was to get as close to the line as possible without actually practicing law. This conclusion is supported by Burrell's explanation of his position to his client, and by the letter itself, which stated that Burrell planned to file suit "when I am able to." Taken together, these facts lead to the conclusion that Burrell did not knowingly or intentionally practice law. His conduct was negligent. Thus, Burrell's conduct fits within ABA Standard 8.3(a), which calls for reprimand.

3. Aggravating and Mitigating Factors

Having established the nature of Burrell's violations and their presumptive punishments, we turn to aggravating[4] and mitigating[5] factors.

Of the mitigating factors listed in Standard 9.32, the only one present in the instant case is 9.32(b), absence of a dishonest or selfish motive. It appears that Burrell wrote both of the letters at issue in an honest attempt to help his clients.

On the other side of the balance, a number of aggravating factors exist in the instant case. First, this is not Burrell's first disciplinary offense. *See Burrell v. Disciplinary Bd. of the Alaska Bar Ass'n,* 702 P.2d 240 (Alaska 1985). Second, Burrell refuses to acknowledge the wrongful nature of his conduct. Indeed, in his brief he requests a published apology from the Bar, and "an opinion castigating the Bar for having prosecuted this matter." Such requests hardly constitute an acknowledgement of the wrongful nature of his conduct. We also note that Burrell has had substantial experience in the practice of law. He has been practicing law for seventeen years.

In addition to these factors, we find Burrell's attempt to "walk the line" between practice and non-practice of law highly improper. This is especially so given our statement in *Robson* that an attorney who is suspended from practice must be particularly prudent to avoid even the appearance of practicing law. *Robson,* 575 P.2d at 781. Although Burrell did not knowingly or intentionally violate a prior discipline order by practicing law, his conduct demonstrates a troubling lack of concern for following the spirit of his prior disciplinary order.

Considering these factors, we find that a punishment of reprimand is not severe enough in this case. Burrell has made it clear, moreover, that such a punishment would have little effect on him. Accordingly, we find that Burrell should be suspended from the practice of law for one month for count one and two months for count two, the terms of the suspension to be consecutive.

Footnotes

1.In Burrell vs. Disciplinary Board of the Alaska Bar Ass'n, 702 P.2d 240 (Alaska 1985), this court ordered that Burrell be suspended from the active practice of law for 90 days. The 90-day period of suspension began on August 19, 1985.

2. See generally Annotation, Initiating, or Threatening to Initiate, Criminal Prosecution as Grounds for Disciplining Counsel, 42 A.L.R. 4th 1000 (1985).

3. Reprinted in ABA/BNA Lawyer's Manual on Professional Conduct. 01:801-01:851 (1986).

4. ABA Standard 9.22 provides for consideration of the following aggravating factors:

(a) prior disciplinary offenses; (b) dishonest or selfish motive: (c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules and orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution.

5. ABA Standard 9.32 provides for consideration of the following mitigating factors:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical or mental disability or impairment;
(i) delay in disciplinary proceedings;
(j) interim rehabilitation;
(k)imposition of other penalties or sanctions;
(1) remorse;
(m) remoteness of prior offenses.

The court issued Opinion No. 3467 on July 21, 1989. In light of the holding in that opinion,

IT IS ORDERED:

1. The ninety-day period of suspension from the practice of law shall take effect as of August 21, 1989.

2. Homer L. Burrell shall comply with the requirements of Alaska Bar Rule 28.

3. Any application for reinstatement shall comply with the requirements of Bar Rule 29.

Entered by direction of the court at Anchorage, Alaska
on July 21, 1989.

Clerk of the Supreme Court

ALASKA BAR ASSOCIATION 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: 11/89 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)
Juneau: 11/11 9AM-5PM
Kodiak: 12/2 Beginning at 10AM
Fairbanks: 12/1 9AM-5PM

• **2nd Annual Alaska Native Law Conference** (Anch. 11/16)
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)
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

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.

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Soviets, Canadians attend 1990 conference

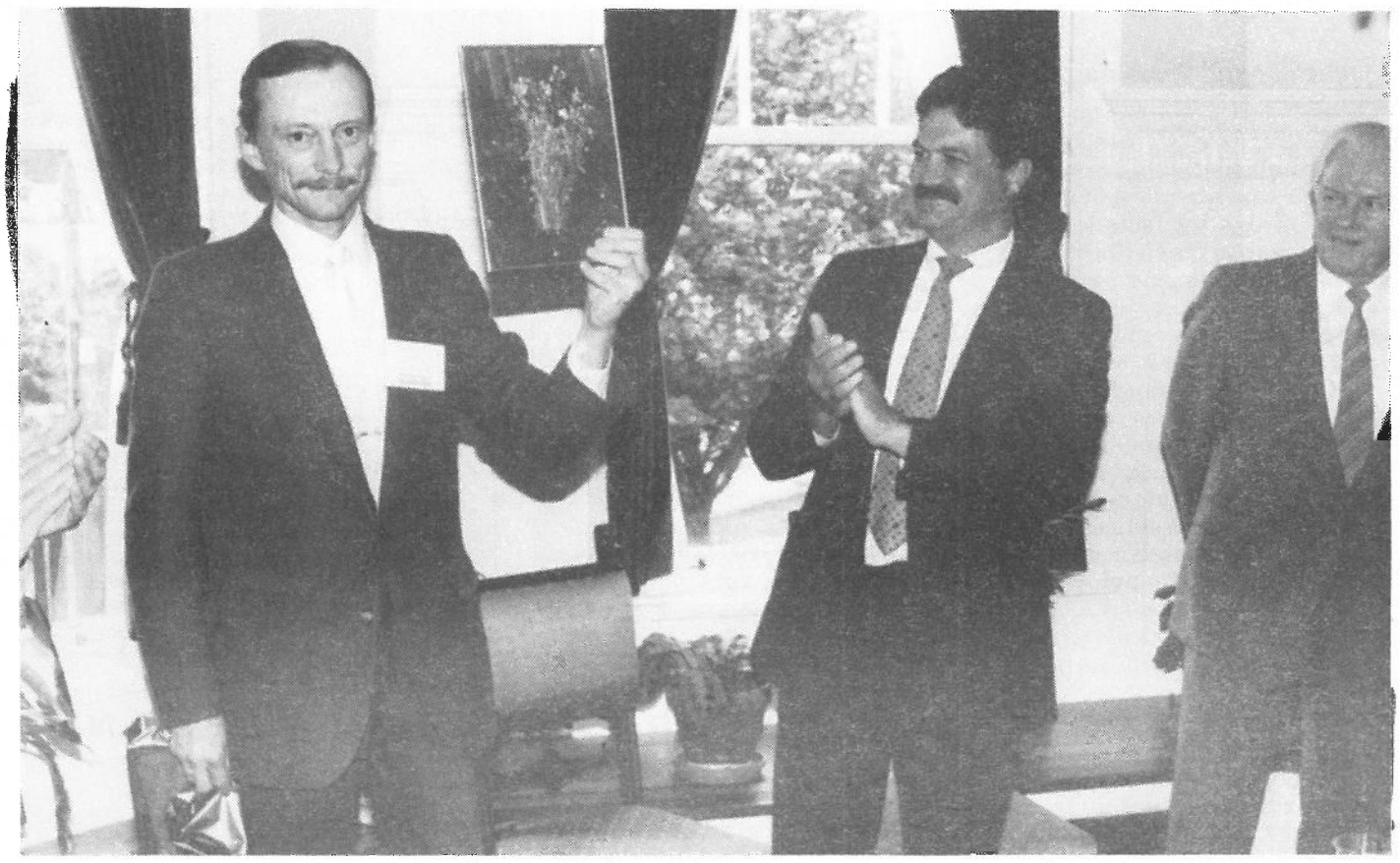
BY ROBERT H. WAGSTAFF

June 7, 1989, was a special day for the Alaska Bar Association. The long awaited Planning Conference between the Alaska Board of Governors, the 1990 Joint Justice Conference Committee, five Canadian Delegates and two Soviet Delegates was accomplished. In attendance in addition to the Board of Governors, were the Soviet Delegates Vladimir Krutskijh, Chief of Legal Policy, Department of the Council of Ministers of the Russian Federation, and Vasiliy Vlasihin, Head of Legal Studies at the Institute of U.S. and Canadian Studies of the U.S.S.R. Academy of Sciences. The Canadian Delegates were Brian Morris, Yukon Law Society; Robert Kilpatrick, Yukon Law Society; Robert Guile, Law Society of British Columbia; Jack Huberman, C.L.E. Society of British Columbia; and Judge Hank Maddison, Yukon Law Society.

The Alaska Bar Association and the Alaska Judiciary are planning to host a Joint Northern Justice Conference in June of 1990. This conference will feature invited Soviet lawyers and judges, Northern Canadian lawyers and judges, and Alaskan lawyers and judges.

The purpose of the conference is to share and to compare experiences, problems, and procedures of common experience and to make a general contribution to knowledge. The subject matter and a format of the conference will be geared so that it will have maximum interest for lawyers and judges, and the public at large.

The conference will be held at the Captain Cook Hotel June 7-9, 1990, coincident with the Alaska Bar Convention.



Soviet attorneys Vasiliy Vlasihin and Vladimir Krutskijh present Governor's aide Bob Evans with "forget-me-nots" from Russia during the June convention. PHOTO BY STEVE VAN GOOR

Everyone in attendance at the planning session was encouraged by the enthusiasm of the Soviet and Canadian Delegates. Both delegations came prepared with very comprehensive plans for both program and format. Both countries are prepared to commit to this project.

The Soviets stayed for the convention, spoke at a luncheon and entertained with a kazoo (This Land is Your Land...). All were impressed with the energy and enthusiasm of the participants. We have a unique and timely opportunity to produce a program of lasting importance in which we can all share. Special thanks goes to Alaska Bar member Weyman Lundquist of San Francisco for arranging for the Soviet Delegation.

Partial list of attendees

SOVIETS:
Vladimir Krutskijh, Chief of Legal Policy Department of the Council of Ministers of the Russian Federation.
Vasiliy Vlasihin, Head of Legal Studies at the Institute of U.S. and Canadian Studies of the USSR Academy of Sciences.

CANADIANS:
Brian Morris, Yukon Law Society.
Robert Kilpatrick, Yukon Law Society.
Robert Guile, Law Society of British Columbia.
Jack Huberman, C.L.E. Society of British Columbia.
Judge Hank Maddison, Yukon Law Society.

TORT LAW

Insurance carriers gut medical pay coverage

Michael J. Schneider

I. *SCOPE.*

This article will explain why many of you who believe you have medical payments coverage under your automobile insurance policy, or represent clients who believe they have such coverage in place, may end up whistling in the wind under the right (wrong) set of circumstances.

In particular, my concern is with State Farm's automobile policy. I am unaware to what extent other carriers have changed their medical pay coverage.

II. *ENDORSEMENT NO. 6025BB.*

If you or any of your clients have an auto policy with State Farm Insurance Company, you may soon be blessed with a copy of Amendatory Endorsement No. 6025BB (subrogation with a vengeance).

This endorsement purports to reduce the medical payments coverage by One Dollar for each One Dollar received by plaintiff from a liable third-party defendant. Does it make any difference to State Farm that, in many scenarios, their insured would be left with absolutely nothing, or grossly undercompensated, or with virtually no medical payments benefits in exchange for the premium that was paid? Apparently not. Here is an example. Assume that a person insured by State Farm, and with medical payments coverage limits of One Hundred Thousand Dollars ($100,000), is struck, while operating their insured vehicle, by a judgment-proof defendant. Assume that the defendant has a liability policy with a $100,000 liability limit. Assume that the plaintiff is rendered permanently disabled in some manner or other. Under State Farm's endorsement, there would be *no medical payaments coverage.* It can be expected that the defendant's insurance carrier would promptly tender its liability limits. None of this money would go to do anything but pay medical expenses (and possibly attorney's fees and costs). State Farm, despite charging and retaining a premium for medical payments coverage, would be completely absolved from making any payments to its insured. Why would a "Good Neighbor" like State Farm do this?

What follows is purely speculation.

It's my recollection that State Farm medical payment coverage did not subrogate against third-party recoveries until the last few years. The original thinking was apparently that medical payments coverage was provided automatically to those people injured inside an insured vehicle and without regard to fault. Little litigation and few disputes arose surrounding this coverage and, presumably, the premium charged by State Farm and other carriers was adequate to secure what were, in essence, health-care-coverage benefits. A plaintiff that recovered against a third party for the injury would not have to pay the insurance carrier back, even if their recovery included (as it usually did) sums associated with the cost of medical care.

Like a lot of "Good Neighbors," State Farm probably decided that it could squeeze a few more dollars out of its insureds and do little or no work and spend little or no money in the process. It would simply add a policy provision that provided State Farm with a right of subrogation against any third-party recovery. State Farm policies have contained such a provision for a few years at least.

The trouble with subrogation is that it is an equitable and imperfect right. The general rule as to those insureds *who have been fully compensated,* has been expressed by our supreme court in *Cooper v. Argonaut Insurance Companies.*, 556 P.2d 525, 527 (AK 1976). Our supreme court joined a majority of other courts that reasoned that it was unfair and would unjustly enrich the carrier to leave the entire burden of litigation to an injured claimant, and that a party claiming subrogation should, at a minimum, suffer a pro rata reduction in the subrogation claim by the amount of fees and costs paid by the plaintiff to generate the fund out of which the subrogation interest was satisfied. Stated simply, in a case where a plaintiff pays a one-third contingency fee to his or her attorney, the case settles with no costs expended, and the subrogated interest of a medical care provider equals Nine Thousand Dollars ($9,000.00), that provider would receive Six Thousand Dollars ($6,000.00) at the time of settlement. If the plaintiff had to pay a third to generate the fund, why shouldn't the carrier pay a third to benefit from the plaintiff's efforts?

Subrogation has always been viewed as an equitable concept, even if subrogation provisions are contained within a formal contract. Therefore, it has long been the rule in most states that the right to subrogation does not even arise until the injured party is fully compensated:

> "Although the court is persuaded that Allstate was not a 'volunteer' in making the medical payments to plaintiffs, the court is nevertheless persuaded that Allstate's subrogation claim is invalid. It is undisputed that payment of the State Farm liability policy's limits to Mr. and Mrs. Greenland will not provide them with sufficient funds to compensate them fully for the injuries they have sustained, and this court is persuaded by various decisions from other states holding that public policy bars subrogation against a source of funds which otherwise would be available to insufficiently compensated parties. *See e.g. Transamerica Insurance Co. v. Barnes,* 505 P.2d 783 (Utah 1972) and *Mattson v. Stone,* 648 P.2d 929 (Wash. 1982)."

Gary Greenland, etal., plaintiffs, v. Dan Jones, et al., defendants. Superior Court Case No. 3AN-85-15642 Civil, Order Partially Granting and Partially Denying Cross Motions for Summary Judgment, dated May 20, 1988.

So, there you have it. Subrogated insurance carriers have to pay attorney's fees and costs, even when their insureds end up fully compensated. Under the first hypothetical in this article, the injured plaintiff would receive the $100,000 policy limits from the third-party defendant and get the benefit of the medical payment policy limit of $100,000. The "Good Neighbor" people have apparently found all these equitable considerations entirely too tedious to deal with. State Farm's response is Endorsement No. 6025BB. This may place State Farm in the position of being able to argue a "coverage" question instead of a "subrogation"question.

III. *ATTACKS AND CAUSES OF ACTION RELATED TO AMENDATORY ENDORSEMENT NO. 6025BB.*

Take a look at A.S. 21.36.235 and .260. These sections apply to policies entered into or renewed on or after August 28, 1987. These sections require that notice of a reduction in coverage must be mailed to the insured twenty (20) days before expiration of a personal insurance policy, or forty-five (45) days before expiration of a business or commercial policy, and that the mailing must be by first class mail and the insurer must obtain a certificate of mailing from the U.S. Postal Service. Is mailing of a copy of the endorsement enough where its terms may not adequately communicate the manner in which coverage has been reduced? Even if your client received, read, and understood the endorsement, does the insurance carrier have the required certificate of mailing from the U.S. Postal Service? May this failure to give notice, coupled with the reasonable expectations doctrine (see various cases collected at 6 *West's Alaska Digest, Second Edition,* Insurance, Key Number 146.3[1]), provide a defense to the onerous provisions of this endorsement?

The insurance agent or broker may provide the best target for recovery where an insured has been surprised and disadvantaged by this endorsement or some similar endorsement. It is my opinion that most insurance agents and brokers do not appreciate the extent to which this endorsement guts coverage otherwise obtainable under the MPC policy. It is also my opinion that few brokers or agents have described the possible impact of this endorsement to their customers. The argument can easily be made that it is exactly this sort of professional knowledge and advice that agents and brokers have a duty to provide to their insureds, and that the failure to provide such advice is negligent. This is particularly so in face of the fact that a number of other competing insurance carriers do not impose these sorts of restrictions on their medical payments coverage.

For those of you who have not yet suffered a loss, the best remedy may simply be to vote with your feet and secure coverage from a carrier without a subrogation provision in its MPC coverage, or who, at a minimum, is willing to live with the equitable limitations imposed upon the subrogation process.

IV. *INSURANCE REFORM.*

The legislature began considering insurance reform last session. Insurance reform is likely to be an important issue in sessions to come. It might be a good idea to express your concern about insurance practices like this to members of the legislature and to suggest that mandatory medical payments coverage be made a part of Alaska's mandatory insurance law. Endorsements such as referred to above could be legislatively voided.

V. *POTENTIAL BAD-FAITH CLAIMS.*

The afore-said endorsement applies where "the injured person *has been paid* damages"(emphasis added) of any kind by the defendant. Medical payments coverage is usually paid out before third-party cases are resolved. This is particularly true in major-injury cases where there is an adequate source of recovery for plaintiff's injuries. Where liability is strong, where medical expenses are significant, but where no settlement has yet ben made, will the carrier have the courage to deny or slow pay medical payments benefits on the theory that there is "no coverage," or that coverage will be reduced if it stalls the process pending plaintiff's receipt of money from the defendant? Is it an act of bad faith (recently confirmed by our supreme court to be a tort and the possible subject of a punitive-damage award:*see State Farm Fire and Casualty Co. v. Nicholson,* Opinion No. 3465, July 22, 1989) to refuse to promptly honor a med-pay claim pending resolution of a third-party action? Will the carrier be found to have shot itself in its corporate foot without medical payments coverage to handle the hospital bills? Time will tell.

VI: *SUMMARY AND CONCLUSION.*

If your client is damaged because of a restrictive medical payments endorsement like the one discussed in this article, consider attacking the endorsement under the reasonable expectations doctrine and statutory notice provisions. Consider causes of action against the agent/broker for negligent failure to advise of the reduction in coverage and consider bad-faith and punitive-damage claims against the carrier, should the carrier refuse to provide medical payments pending the outcome of underlying third-party litigation. If you haven't suffered a loss, consider securing coverage from a company that does not impose such a restrictive endorsement upon medical payments benefits.

CLE Calendar

#15 October 27 Half Day	**Maritime Personal Injury**	**Hotel Captain Cook**
#18 Oct 31 & Nov 2 Afternoons	**Fed. & State Sentencing Guidelines**	**Anchorage Hilton**
#19 Nov 16	**2nd Annual Ak Native Law Conference**	**Hotel Captain Cook**
#22 Dec 5 AM Mini-Seminar	**Basic Nuts & Bolts of Foreclosures**	**Hotel Captain Cook**
1990		
#23 Jan 18 & 19 Two Half Days	**Appeals from Agency Decisions**	**Hotel Captain Cook**

Part III

FDIC has role as state bank receivor

BY TOM YERBICH

In the first two parts of this series, the author discussed the overall role of the F.D.I.C. and its role as receiver of insolvent national banks.

When acting as a receiver of a state-chartered bank, the FDIC has "all the rights, powers and privileges granted by State law to a receiver of a State bank. [61] Accordingly, state law determines which creditors are entitled to priority and the extent of such priority. [62] Even cursory review of the laws of the several states reveals a wide disparity in treatment of creditors among them. [63] Comprehensive treatment of the laws of each state would result in an unduly engthy dissertation. The author has limited coverage to the laws of Alaska.

Alaska Receivership

A receiver of a failed bank in Alaska: [64]

> "(I)s vested with the full and exclusive power of management and control, including the power to assess outstanding capital stock * * *, to continue or discontinue the business, to stop or limit the payments of its obligations, to employ the necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate its possession by restoring the bank to its board of directors, and to reorganize or liquidate the bank * * *."

The otherwise applicable period of limitation, whether by statute or agreement, or upon which an appeal must be taken or a pleading or other document filed in any pending action or proceeding, is extended until six months after the date the bank is placed in receivership. [65]

The receiver may borrow money in the name of the bank and pledge its assets as security for a loan. [66] In liquidating, the receiver may exercise any power incidental to the liquidation process, but may not, without approval of the superior court, [67] sell any asset having a value exceeding $10,000 or compromise any claim which exceeds $10,000. [68] The receiver must also, as soon as practicable, take the steps necessary to terminate all fiduciary positions held by the bank and surrender all property held by the bank as a fiduciary and settle the fiduciary accounts. [69]

In the event the receiver decides to reorganize the bank, after a hearing accorded to all interested parties, the receiver may propose a reorganization plan, a copy of which is sent to each depositor and creditor who will not be paid in full. Unless the plan is disapproved within 30 days by persons holding one-third or more of the aggregate amount of such claims, the plan of reorganization will be placed in effect. [70] However, a plan may not be prescribed unless, inter alia: (1) it is fair to all classes of creditors and depositors; and (2) the face amount of the interest to be accorded any class does not exceed the value of the assets upon liquidation less the full amount of the claims of prior classes. [71] These provisions are very similar to the "cram down" provisions of the Bankruptcy Code in that the fairness standard and "absolute priority" rule are incorporated.

Creditors and Priorities - Alaska State Banks

a. Claims Procedure

In Alaska, notice is sent by mail to the last known address of each depositor and creditor and published in newspapers as the receiver shall determine is appropriate. With the notice is sent a statement of the amount shown on the books of the insolvent bank as due the depositor or creditor and setting forth the last date to file a claim, which date is not less than 60 days after the first publication. [72] Within six months after the claim filing cutoff date, the receiver is required to prepare a schedule of the amount and priority of each known creditor and publish in newspapers once a week for three successive weeks a notice of the times and places the schedule will be available for public inspection. The schedule is filed in the Superior Court no sooner than 30 days after the first publication, [73] and objections to any determination by the receiver must be filed with the court within 30 days after the schedule is filed. [74] After filing the schedule, the receiver may make a partial distribution to holders of allowed claims provided a sufficient reserve to pay disputed claims is retained. As soon as practicable after the determination of all objections, final distribution is made. [75]

In Alaska, any other interested persons (e.g., creditor, depositor, or shareholder) may object to any claim. [76]

b. Preferences and Priorities

Alaska and California have a statute invalidating preferential transfers; no judgment, lien or attachment may be executed on the bank during the receivership, and liens or attachments occurring within four months of commencement of the receivership proceedings and transfers made after insolvency to effect a preference are invalidated. [77] Also, Alaska severely restricts the power of state banks to incur secured indebtedness, limiting the grant of security interests to the Federal and State government and agencies, and those of political subdivisions, and as to certain real property used by the bank in the conduct of its business. [78] As a consequence, the problems of recognition and priority of secured claims is practically eliminated and any remaining priority problem would be resolved by reference to the familiar principles of the Uniform Commercial Code as adopted by the Alaska legislature.

In Alaska, priority is provided, in the order given, to: (1) expenses incurred by the receiver in liquidation; (2) wages and salaries of officers and employees during the preceding three-month period, not to exceed $3,000 for each person; (3) fees and assessments due the Department of Commerce and Economic Development; and (4) deposits. [79]

Certain claims are provided "special" treatment. Within six months of the date the failed bank is placed in receivership in Alaska, the receiver may terminate any executory contract for services or advertising or a lease. A lessor receiving 60 days' notice of the decision to terminate the lease has no claim for rent, other than rent accrued to the date of termination and no claim for damages accruing by reason of the termination. [80]

Several states have judicially recognized that assets held by the bank, either as trustee or for special deposits/escrows, to which title has not passed to the bank, are not part of the receivership estate and the return thereof is entitled to preference. Although there is no Alaska authority directly in point, application of common law rules adopted by the Alaska Supreme Court would doubtlessly reach the same result.

In addition, Alaska has adopted Uniform Commercial Code 4-214 providing preference to the owners of certain settled but unpaid items presented to collecting and payor banks. [81]

Alaska also provides for the payment of interest on claims, [82] and that any remaining funds, after all creditor claims have been paid, be paid over to the shareholders. [83]

It should also be noted that in Alaska, unlike a national bank receivership where it stands in line with other general creditors, the FDIC as corporation, being subrogated to the rights of depositors whose insured deposits it has paid, is entitled to the same priority in distribution. As a consequence, in the case of a deposit payoff, the general creditors of an insolvent national bank have not only a substantially greater likelihood of receiving a dividend distribution at all, but, also, a larger dividend. While Alaska does not specifically define deposit, presumably, the Federal Deposit Insurance Act definition applies. Creditors of insolvent banks should not confuse the term "deposits" with "insured deposits." Whether a deposit is insured is determined by reference to 12 USC 1813(m); accordingly, the preference given to deposits under the Alaska statute is not limited to the $100,000 "insured deposit" of the Federal Deposit Insurance Act. Also, in Alaska any "short-fall" in a distribution to a class is made pro rata among the members of the class. [84] In state bank receiverships, like national bank receiverships, where a purchase and assumption transaction is used the FDIC bears the risk that where only certain liabilities are assumed by acquiring bank, if insufficient assets remain in the receivership to satisfy the remaining unassumed obligations, the FDIC may have to supplement the receivership estate. [85]

Debtors of a failed bank

When a bank fails, the major portion of its assets is contained in its loan portfolio which the FDIC as receiver liquidates either by sale or collection of the individual loans. In a purchase and assumption transaction, the acquiring bank does not necessarily purchase the entire loan portfolio, usually excluding delinquent or troubled loans. In a deposit payoff situation, the FDIC attempts to sell the loan portfolio in a package or, perhaps even several packages, to various lending and/or investor groups. If the FDIC as receiver is unable to package and sell the troubled loans, it is, of course, required to collect them. In many situations, delinquent or troubled loans that cannot otherwise be sold off by the FDIC as receiver to an outside investor group are sold to the FDIC as corporation.

To the extent that individual loans are sold, either as a package or individually, to a lending institution or investor group, the acquiring institution or investor group, of course, "stands in the shoes" of the insolvent bank as the successor in interest in the same manner as the bank had sold the loan other than in the ordinary course of business. In most instances in this situation the provisions of Article 3, Uniform Commercial Code are applicable and govern the rights, duties and obligations as between the borrower and the acquirer (holder [86]) of the loan.

Where, however, the loan is not sold as part of a purchase and assumption transaction or to an investor group but retained by the FDIC, federal law applies. The FDIC may, as receiver, liquidate the loan portfolio by collection, compromise or discount. However, it may also sell the remaining loan portfolio to the FDIC as corporation on such terms and conditions as the FDIC as corporation may determine. [87] In its capacity as receiver, however, the terms are subject to approval by the court supervising liquidation of the insolvent bank.

Secret Agreements

The major weapon in the arsenal of the FDIC, whether as receiver or corporation, is the so-called "secret agreement" provision. There are two separate branches of the "secret agreement" rule: one judicially created [88] and the other codified. [89] Section 1823(e) applies when the FDIC is acting in its corporate capacity, [90] while the judicial rule applies whether the FDIC is acting as either a receiver or corporation. It is thus, necessary to understand the differences between two somewhat similar rules. The Supreme Court held in D'Oench that a secret agreement designed to deceive creditors or the public authority or tending to have that effect would not be a defense against the FDIC on its collection of a note, at least to the extent that the debtor seeking to assert the agreement as a defense participated in it and made it possible. This holding is generally, though, perhaps, erroneously, considered to have been codified in section 1823(e) which reads:

> "No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for aloan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be refflected in the minutes of

Continued on page 17

• Supreme Court ends legal conflicts

Continued from page 16

said board or committee, and (4) shall have been, continously, from the time of its execution, an official record of the bank."

In 1987 the Supreme Court ended an apparent conflict among the circuits in a ruling that portends an expanded scope of section 1823(e) in favor of the FDIC and firmly entrenches the concept that it more than merely creates a quasi holder in due course status.[91] The Supreme Court enunciated three significant rules: (1) that an "agreement" includes not only express promises but also includes the parties' bargain as reflected in implied and express conditions upon its performance; (2) neither fraud in the inducement nor nowledge of the FDIC is relevant to application of section 1823(e); and (3) sharply distinguished between defenses that render a transaction merely voidable (defeasible) and which are not available as against the FDIC under section 1823(e) as opposed to those defenses which render a transaction void ab initio.[92] As a result, representations in the nature of promises, conditions, or covenants must be expressed in the loan transaction documents and meet the strict requirements of section 1823(e). Fraud in the inducement is not a defense unless the fraudulent representation is contained in the loan document, although, presumptively, parole or extrinsic evidence could be adduced to establish falsity.

A Court of Appeals decision held that: (1) application of section 1823(e) is not dependent upon the FDIC being a "holder" (the statute specifically refers to "any asset"); (2) the FDIC does not have to purchase directly from the insolvent bank, as long as the asset was acquired under its incidental powers necessary to carry out specific powers of the FDIC; and (3) that the possibility that a defense (e.g., usury) might exist is evident from the "four corners of the document" is insufficient to defeat the rights of the FDIC.[93] It has been held, however, that section 1823(e) does not apply to a claim that there was no agreement and no consideration for the note.[94] It has also been held that waiver, estoppel, and unjust enrichment defenses, while not totally barred by section 1823(e), were not available as against the FDIC as a matter of federal common law where the FDIC took the asset in good faith and without knowledge.[95]

It is necessary to explore one final major area: the extent to which the federal common law applicable to section 1823(e) may incorporate the law of the state in which the insolvent bank is headquartered. It has been held in extremely well reasoned opinions that the necessity for a uniform federal rule (excluding any consideration or application of the law of the several states) determining defenses available as against the FDIC in its corporate capacity far outweigh any putative disruption of the reasonable commercial expectations of the parties under state law.[96]

A distillation of the relevant controlling authorities reveals some relatively simple rules with respect to the operation of section 1823(e).

1. The FDIC becomes ipso facto the equivalent of a holder in due course notwithstanding that the FDIC does not otherwise meet the requirements of UCC 3-302;

2. The only defenses, other than those specifically meeting the requirements specified in section 1823(e), that may be asserted against the FDIC are those which would render the obligation, under federal common law, void; and

3. The federal common law, as applied to transactions governed by section 1823(e) includes UCC 3-305 as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, not as adopted by the several states or any variations, amendments, modifications, additions or deletions enacted by the several states, or any of them.

It should also be noted that section 1823(e) is strictly construed in favor of the FDIC and against the debtor.

What does the debtor do about a valid claim, particularly in the fraud situation. Do the public policy considerations underlying the Federal Deposit Insurance Act override all notions of fundamental fair play and substantial justice? Happily, they do not. Two avenues are open to the debtor who is required to pay the FDIC on an obligation to which a defense might otherwise be asserted. First, the debtor may offset against the claim of the FDIC any debt owed to the debtor by the insolvent bank.[97] Second, to the extent the debtor holds either no or an insufficient offsetting debt, the debtor may file a claim in the receivership proceedings and, to the estent the claim is established, share with other general creditors in the receivership estate. While this may, at first blush, seem inadequate and unfair, it nevertheless prevents the debtor from acquiring, albeit indirectly, a preference in the distribution of the assets of the receivership estate. The claim against the insolvent bank is accorded no greater or lesser treatment than the claim of any other person.

Now that we have rendered debtors of insolvent banks nearly defenseless against the FDIC as corporation, let our attention be turned to the FDIC as receiver, where section 1823(e) is unavailable. The FDIC as receiver can, however, rely on D'Oench. For those who have read D'Oench, it is readily apparent that section 1823(e) goes well beyond D'Oench, an estoppel case, i.e., the party was estopped by his willing and knowing participation in the transaction from asserting it as a defense. It has been held, however, that D'Oench did not estop a purchaser of bank stock, unaware that the stock order had been improperly executed, from avoiding the note for failure of consideration after the bank had failed and gone into receivership.[98] It has also been held that D'Oench did not prevent the assertion of a breach of contract or failure of consideration defense against the FDIC.[99]

Although there is scant authority, it appears that the FDIC as receiver is merely a holder or simple contract assignee.[100] There is no question that would be the case where the FDIC is receiver for a state bank as state law is expressly applicable. In the case of a national bank, where the federal common law applies, the result should be identical because in the absence of section 1823(e) there is neither a federal statutory rule of decision nor any apparent compelling reason preventing application of the Uniform Commercial Code, at least as promulgated by the American Law Institute - National Conference of Commissioners on Uniform State Law. As such it does not have available the awesome defenses available under section 1823(e) and all defenses permitted under the Uniform Commercial Code[101] as promulgated by the American Law Institute - National Conference of Commissioners on Uniform State Laws would apply in the case of a national bank and the version adopted by the state would apply in cases involving state-chartered banks.

Footnotes

[61] 12 USC 1821(e)

[62] Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538 (9th Cir. 1987)

[63] Treatment accorded insured depositors by FDIC the corporation, being a matter of federal law, is uniform throughout the several states. As with national banks, deposits in excess of the insurance limits are treated as general creditors of the receivership estate.

[64] AS 06.05.470(b)

[65] AS 06.05.470(c)

[66] AS 06.05.470(h)

[67] Receivership actions are brought in the judicial district in which the bank is located. AS 06.05.470(b)

[68] AS 06.05.470(l)

[69] AS 06.05.470(n)

[70] AS 06.05.470(f)

[71] AS 06.05.470(j) There are other restrictions and conditions on a plan contained in this subsection.

[72] AS 06.05.470(o), 06.05.465(c), (d)

[73] AS 06.05.470(q)

[74] AS 06.05.470(r)

[75] AS 06.05.470(s)

[76] AS 06.05.470(r)

[77] AS 06.05.470(g), 06.05.495

[78] AS 06.05.260

[79] AS 06.05.470(t)

[80] AS 06.05.470(m)

[81] AS 45.04.215

[82] AS 06.05.470(u)

[83] AS 06.04.470(w)

[84] AS 06.05.470(v)

[85] Woodbridge Plaza v. Bank of Irvine, supra.

[86] Under UCC 3-302(3), the acquiring bank would not have the status of a holder in due course. See Official Comment 3.

[87] 12 USC 1813(d)

[88] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676, 86 L.Ed 956 (1942)

[89] 12 USC 1823(e)

[90] First Empire Bank - New York v. FDIC, 572 F.2d 1361 (9th Cir. 1978)

[91] Langley v. FDIC, 491 U.S. , 108 S.Ct. 396, 98 L.Ed. 2d 340 (1987)

[92] See also FDIC v. Wood, 758 F.2d 156 (6th Cir. 1985) cert. den. 474 U.S. 944, 106 S.Ct. 308, 68 L.Ed. 2d 286 (holding that the FDIC takes a note free of all defenses that would not prevail against a holder in due course).

[93] Chatham Ventures, Inc. v. FDIC, 651 F.2d 355 (5th Cir. 1981), reh. den. en banc 657 F.2d 1251, cert. den. 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed. 2d 845. The FDIC acquired 97.45% of an overdue note from the insolvent bank who had aquired it from a related third party, and the FDIC acquired the remaining 2.55% from the bankruptcy trustee of the initial transferor.

[94] FDIC v. Leach, 772 F.2d 1262 (6th Cir. 1985)

[95] FDIC v. Gulf Life Insurance Co., 737 F.2d 1513 (11th Cir. 1984) reh. den. en banc 749 F.2d 733

[96] FDIC v. Wood; supra; Gunter v. Hutcheson, 674 F.2d 862 (11th Cir. 1982), cert. den. 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed. 2d 63 (Note that the initial rule of Gunter that section 1823(e) did not ipso facto bar the fraud in the inducement defense which, in turn, made it necessary for the court to examine the federal common law issue, was effectively "overruled" by the Supreme Court in Langley.)

[97] Scott v. Armstrong, 146 U.S. 499, 13 S.Ct. 148, 36 L.Ed. 1059 (1892); Interfirst Bank Abilene v. FDIC, 777 F.2d 1092 (5th Cir. 1985); First Empire Bank - New York; v. FDIC, supra;

[98] FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974)

[99] Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981)

[100] See UCC 3-302(3) and Official Comment 3 thereto.

[101] E.g., UCC 3-306

Progress report

Committee to draft mandatory CLE rule

By Margie MacNeille

The Bar convention in June, the membership directed the Statues, Bylaws and Rules Committee to draft proposed Bar rules on mandatory continuing legal education, to be voted on by referendum. President Jeff Feldman appointed Margie MacNeille, Rick Brown and Craig Stowers to a subcommittee to prepare the draft. After reviewing the American Bar Association's model rule and rules from other states, we have begun the drafting process.

The committee's aim is to produce draft MCLE rules which would be workable if adopted. We are trying to keep the rules as simple to follow and as simple to administer as possible. On the other hand, we want the rules to encourage educational activities beyond the classroom. We hope to find the correct balance between ease (cost) of administration and flexibility in giving credit hours for non-course activities.

Although the rule will probably undergo additional major changes, the present draft gives a good idea of the committee's thinking. Each active member of the Bar would be required to take at least 24 hours of approved CLE activity every two years. Thirty-three other states have mandatory CLE; of these the majority require either 12 or 15 hours per year. We chose the lower number. The only exemption under consideration is for sitting judges. A one-year deferral for those who have taken the Alaska Bar has also been proposed. Members would report CLE activity by affidavits, filed on their birthdays every other year. Affidavit reporting is the simplest and cheapest for the bar association; staggering the reporting by birthdays should spread the administrative workload. A member who failed to report to get an extension, or to comply with the requirement within a grace period would be subject to suspension.

CLE credit would be given for courses (both public and in-house), for watching videos of approved courses (individually or in a group setting), for teaching CLE courses, for writing published legal articles, and for other educational activities approved on a case by case basis. Course sponsors would apply to the Bar for advance approval of CLE hours; members seeking credit for non-course activities would petition for approval of CLE hours. The CLE Committee and the CLE Director would be responsible for approving these applications and petitions.

The present draft provides for a phased implementation of the rule once adopted. Six months after Supreme Court approval, the CLE credit hour approval process would start. Eighteen months after Supreme Court approval, the 2 year reporting periods would start as members' birthdays came up. The first member's affidavit would not be due until 3½ years after initial approval. This timing should allow ample start-up preparation. The draft also includes a sunset provision, repealing the Rule 7½ years after adoption, unless it is re-approved.

The Committee has chosen not to include certain provisions. There is no requirement that ethics or any other topic make up a certain number of hours in any period. There is no requirement that attentive viewing of videos or live CLE programs be verified by testing or other types of supervision. No separate fee structure has been proposed. The committee believes that the additional administrative costs should be collected through the dues process, since all active members are affected. The amount of additional administrative cost is not yet known, of course, but the rules seek to minimize it.

The committee will present its draft to the Board in January. In the meanwhile, any comments, questions of suggestions are welcome. You can write or call the committee members directly or through the Bar office.

Kuskokwim wedding blues

At the nuptials, no fish scales tainted the robes

By Dan Branch

Magistrates in bush Alaska are called upon to fill many needs in their communities.

The bush jurist must be judge, coroner, marriage commissioner, and voter registrar. They also serve as lands record librarian and vital statistics registrar. Magistrates even act as U.S. Passport Agents. Sometimes they are asked to combine these jobs. Once while serving as magistrate in Aniak I conducted a marriage ceremony one day and arraigned half the wedding party on alcohol related charges the next.

I carried out an informal poll of magistrates to discover the favorite chore assigned them by the court system. Almost everyone said they really enjoyed conducting weddings. I am not sure I agree with that. There is nothing wrong with the wedding ceremony itself. The problem I had was with where people wanted me to hold the ceremony. Let me explain.

On a rather breezy New Year's Day a few years ago, I was flipping channels from one football game to another when the phone rang. A pilot friend of mine decided to get married and wanted to get it done that day. After determining that he was hangover free, and that he really wanted to make the big commitment, I agreed to meet him at the airport.

On the way to the terminal I briefly considered and then rejected the idea that he wanted to get married in the air. After all, there was a 35 mile-an-hour crosswind blowing and we couldn't fit the whole wedding party into a Cessna 185.

Confident that they simply wanted to season their wedding ceremony with aviation fuel fumes, I arrived and started setting up in the hanger.

No sooner had I donned my robe of office, than I found myself being escorted to the middle seat of a small prop plane. Soon we were taxiing down the runway and then bouncing through turbulence on our way to a spot 500 hundred feet over White Fish Lake.

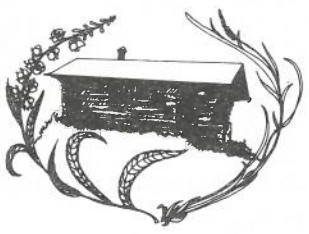
Counting bodies in the plane I demanded to return to the ground. There was no one, except the pilot, to witness the event.

"No problem," they said, the witnesses were flying next to us in another plane.

Sure enough, I looked out to see the two witnesses bouncing around in a Piper Supercub. Feeling a bit under the weather already, I gave them the special "on the way to the maternity ward ceremony" and soon found myself on the ground.

Word got out that I could be talked into holding wedding ceremonies just about anywhere a bride and groom wanted them to be held. People traveled from as far away as Bethel to tie the knot in our village. My favourite wedding took place in a fishing skiff upriver from Aniak. After the ceremony, I went fishing with the best man, catching two nice silver before the reception.

Reading the foregoing paragraph may cause the court system property manfolks some alarm. I'd like to take this opportunity to calm their fears. Rest assured that I left my robe hanging up in the courthouse. No fish slime ever touched the garment.



HISTORICAL BAR

On the Emerald Isle, Hawaiians perplexed

By Russ Arnett

There was no small boat harbor at Kodiak when I first went there in 1956. Storms did considerable damage to vessels tied up there, often washing them ashore.

Fishing was the main industry, but the industry was not nearly as prosperous as in recent years. Some salmon years were terrible as there was no 200 mile limit and fishing practice was controlled by the canneries and the Federal government in a short-sighted and selfish fashion. The king crab fishery was just being developed and there was no bottom fishery.

Fishermen often hung out at the Belmont Bar where the coffee was really strong. During the daytime the mood of those present tended to be somber. A couple of the other bars were out of town B-joints.

A woman cook on a fishing boat was dispatched to purchase food in preparation for an early departure. When she did not return, the skipper became worried and went into town to look for her. The skipper located her in the back seat of a taxi, nude and in the company of two men. Anger replaced concern, and the skipper left and returned with a gun.

The taxi took off fast with the skipper in a car in hot pursuit. They passed the police station and soon a patrol car joined the chase. Kodiak had a limited road system, and as the taxi neared the end of the road, the driver pulled into a bar.

The regulars sitting at the bar were startled to see a naked woman run in the door and head for the ladies room. When the bartender returned from the basement storage room, the regulars told him that a naked lady just ran through the bar. Deciding they were drunk again, the bartender threw them out.

Public officials of the time either had very high ethical standards or very low. Personal character in Kodiak was not at that time shaded by nuance. As in other Alaskan towns, there was the bar crowd and the church crowd. One man might risk his own life to save a man's life, or in anger might take another man's life. Character often was modified by the infusion of alcohol. Sexual practices were a shifting aspect of personal behavior.

A visiting territorial judge from Hawaii presided in a trial I had in Kodiak in the mid '50's. An attractive housewife had entered a meretricious relationship with a bartender.

Local architectural practices were beyond the experience and comprehension of the judge. The adulterous couple was conducting its affair in a "skid shack," and it took repeated questions by the judge and helpful pronunciations and explanations by counsel before he could understand what was being said well enough to write it in his notes. More questions were required by the judge before he was able to perceive how a society could be so transient and impermanent that even its shacks were portable.

Adultery in a skid shack, though not remarkable in Kodiak, was found by the Hawaiian judge to be disgusting. Adultery in a skid shack really does nothing to ennoble the human spirit.

A "snake ranch" was described to me by the Kodiak city manager. It was an abandoned house occupied by inebriates. They used one room for human waste. I was asked by him if the City could burn it down. I do not remember whether they had the owner's consent, but I told him "Burn away." Perhaps the inebriates were as interesting as those portrayed in John Steinbeck's novels. I can visualize them watching the fire and commenting to each other with humor or sadness as their old home went up in flames.

I was the Kodiak city attorney even though I lived in Anchorage. The Kodiak people thought I had a duty to find an attorney to set up practice there. At the first convention of the Alaska Bar Association, which was at Ketchikan, I met Charlie Hughes who was practicing there. I told him of the sweet deal I had in Kodiak. I even encouraged him to move there. He did and immediately became city attorney in my place. The only criticism I ever heard of him was that he would regularly sit with his feet on the table at City Council meetings.

I have not been back to Kodiak since.

THE MOVIE MOUTHPIECE

Edward Reason

In last month's column, I described for you the huge amount of money that "Indiana Jones & the Last Crusade" made at the box office. That was for the tax boys.

This week I want to confess that my blood is as red as any young attorney's who spends the better part of a day answering meaningless interrogatories and producing documents the insurance company already has five copies of.

In short, I would run off in a heartbeat with Kim Bassinger. Kim Bassinger, however is not Kim Bassinger in "Batman," and that's the only disappointment in the whole wonderful, dark, inventive film that will make even more money than Indy's last adventure.

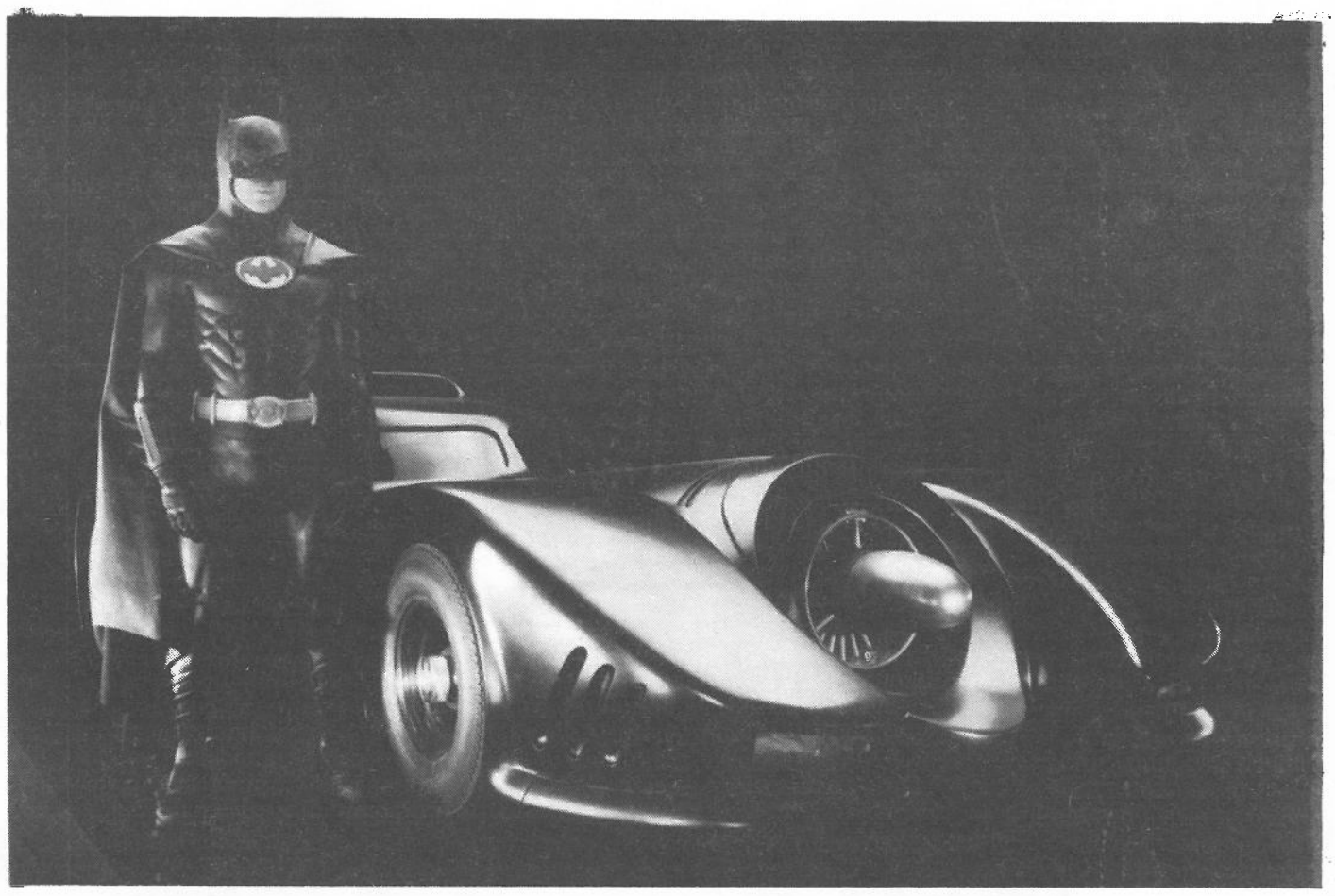
I think young director Tim Burton, at 30, whose earlier background was working in animation for the Walt Disney studios, was just too spellbound by Bassinger's beauty and world reputation. She's misdirected. She doesn't even show a modicum of surprise in the Cave when she learns for the first time that the guy she has been dating, Bruce Wayne (Michael Keaton) is really Batman. She plays the role of the modern woman professional photographer who develops an interest in Batman, but she never seems to understand that this is a comic book being filmed for a wide screen.

This is a dark, sinister treatment of Gotham City (New York City at its worst) and Bruce Wayne-Batman has problems. Why does he let his troubled childhood (orphaned when his parents are killed in a robbery) dominate his whole life? Why must he be the one to dress up like a Bat seeking to rid the city of baddies?

In one of the best acted scenes of the film, Keaton attempts to tell Bassinger about his unusual life as a rich New Yorker and Batman, but all she can do is misunderstand his shyness for unmanly fraud. "Oh my God, you're married!" she squeals.

"Batman" the movie has Jack Nicholson and Jack Nicholson and Jack Nicholson. Certainly Keaton is athletic, arrogant, sincere and yet lost, all wonderfully difficult things to do, but Nicholson is THE JOKER. He doesn't even have to act it that's what he is, man, the joker in the flesh. He's a wise-cracking cruel, slightly insane, romantic mobster who wants Gotham City, the boss' (Jack Palance) job and his moll (Jerry Hall) as well as Bassinger.

Nicholson is needed because the film is dark, moody, intense and moves along at a very subtle pace. This is not a film for the very young.



Michael Keaton as Batman stands next to his powerful Batmobile in Warner Bros.' epic action-adventure film "Batman," which also features Jack Nicholson as the Joker and Kim Basinger as the love interest.

Director Burton made it for middle aged teenagers, not bobby sockers. One comes away from the theatre appreciating that Batman is good, but wondering nonetheless, is he sane?

Nicholson causes one to wonder if the Joker's admitted twisted view of life (caused in part by Batman's assistance in his tragic fall into a large cauldron of lethal toxic waste) in killing off his rivals so he can take control of Gotham City is any different than the real world in South America today.

In brief, Batman mixes large scale action, humor and romance in an epic blockbuster of a film featuring the caped crusader, a man with just ordinary powers, against the Joker, a gangster who mixes clownish humor and chilling evil. Both in their own way are likeable. Both are more alike than different. Both draw our attention to the screen and keep it there. The confrontation between the two becomes so overwhelming that other characters (Billy Dee Williams as the DA and Pat Hingle as Police Commissioner) are needed to relieve the tension. See "Batman" alone, not with your family

Some of the better features of the film are:

• Nicholson's wonderful acting which transcends everyone in the film. He is in almost every scene (expanded from an original three-week shooting contract.) Watch his eyebrows raise, his eyes convey hours of messages, the slight pursing of the lips and quick easy laughter -all done while improvising some of the best lines of the film.

• Nicholson's dance sequence during the massacre at City Hall is worth the price of the movie itself.

• Some of the Joker's best lines:(1) "Can somebody tell me, what kind of a world we live in where a man dressed up as a bat gets all of my press?"; (2) "Decent people shouldn't live here," said to a TV set when a newscaster is bemoaning the crime in Gotham City; (3) "Where does he get those wonderful toys?" referring to Batman's gallery of gadgets which include smoke bombs, a spring-action device that shoots grappling hooks, Paralyzing gas, gauntlets that repel bullets, and of course, the Batmobile; (4) "You set me up for a woman," the Joker accuses his mob boss after climbing out of toxic death, "A woman!" (now shouting) "A woman! You must be insane!"

Batman himself is trapped in his dedication. Nicholson as the Joker is required to vanquish the knight of good. You'll be compelled to see the film more than once, and might I venture, even to buy the video. It's that good!

Crossword answers

F	R	E	E	D	■	A	H	E	A	D	■	E	B	B
E	A	R	L	Y	■	S	U	N	N	I	■	D	R	U
B	Y	R	O	N	W	H	I	T	E	S	■	W	A	S
■	■	■	P	E	I	■	■	E	N	T	R	A	N	T
A	R	R	E	S	T	■	A	R	T	I	E	R	■	■
R	E	A	R	■	N	E	V	■	■	L	E	D	G	E
M	A	C	S	■	E	R	E	■	O	L	D	W	A	Y
A	S	I	■	■	S	A	N	E	R	■	■	H	O	E
D	O	S	E	R	S	■	G	E	D	■	B	I	L	L
A	N	T	R	E	■	■	E	N	E	■	R	T	E	E
■	■	W	I	N	E	R	S	■	A	S	S	E	R	T
A	C	H	E	E	S	E	■	■	L	O	T	■	■	■
P	H	I	■	W	H	I	T	E	S	L	A	V	E	S
E	I	T	■	A	R	S	O	N	■	A	T	I	L	T
R	T	E	■	L	A	M	E	D	■	R	E	A	D	Y

Governors amend election bylaws

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 Sept. 8. For further information contact Deborah O'Regan at the bar office.