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The Alaska BAR RAG

Dignitas, semper dignitas

VOLUME 14, NO. 5 SEPTEMBER-OCTOBER, 1990

4 years later, fast-track jury's out

BY STEVE BURSETH

Civil Rule 16.1, otherwise known as "Special Procedures for Reducing Litigation Delay, "or "fast-track" was instituted in 1986 by Supreme Court order, under authority granted by the state constitution in Article IV, Sec 15.[1]

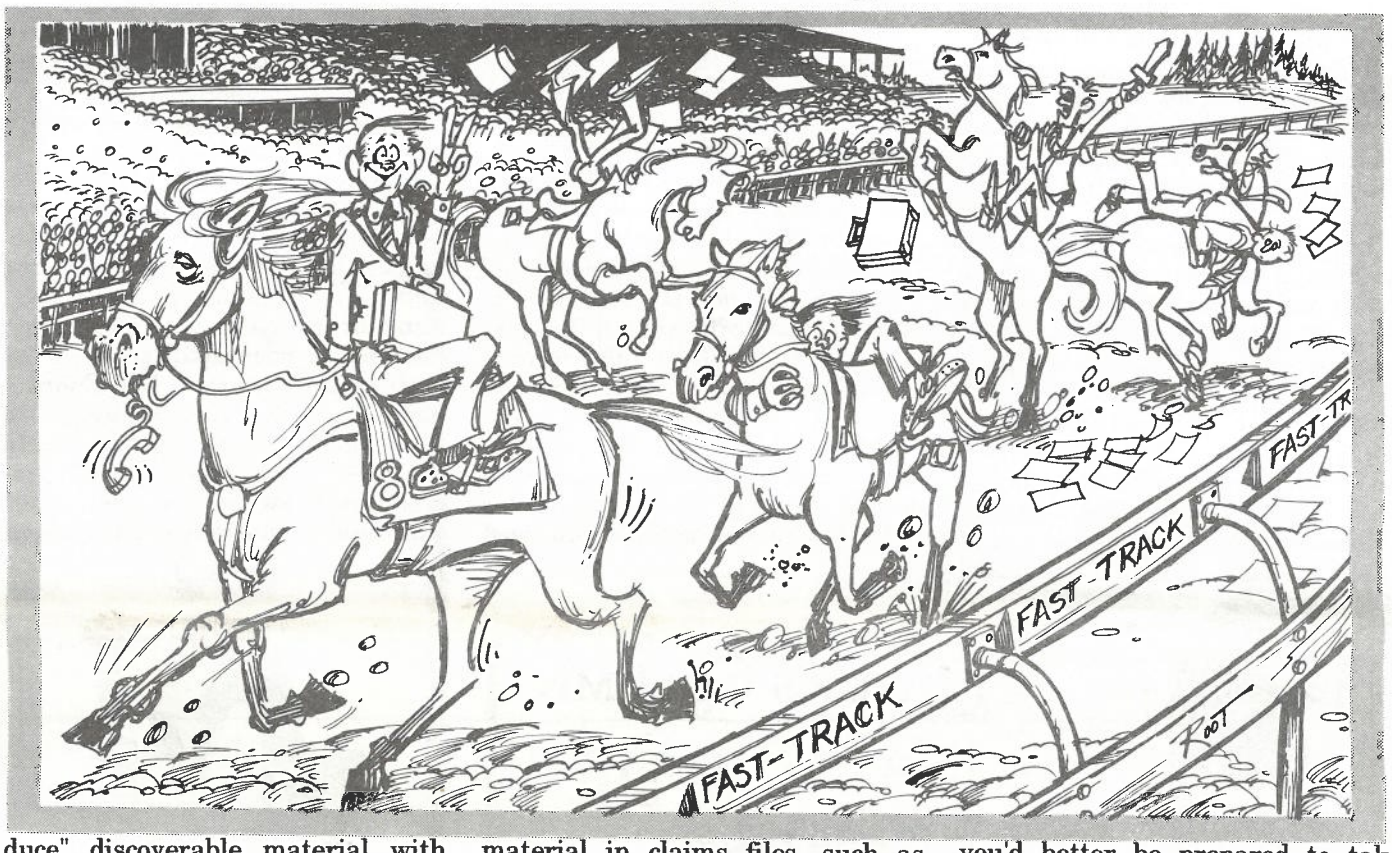
Since then, the reaction of the bar in the Third Judicial District, (which is the only one of four districts in the state to adopt it, and in the third, only in Anchorage[2]) has been varied among plaintiffs and defense lawyers, large firms and sole practitioners, with the following general views emerging:

Lawyers think judges are in love with it; the court system is strongly *in favor of it; most plaintiffs'* lawyers praise it, with some qualifications; and the defense bar has taken vigorous exception to some of its key provisions.[3]

So What's Right and Wrong with "Fast-track"?

The discovery provisions of the rule, §16.1(k), are not followed by either side, and the court is reluctant to impose sanctions.

Although the discovery provisions in fast-track cases require all parties "without formal request or motion or court order" to supply other parties with all discoverable material specified in §16.1(k) "not less than 75 days after service of the summons and complaint," most lawyers agree they file as a matter of course a formal "request to produce" discoverable material with every fast-track case as if Rule 26, the formal discovery rule applied — principally, say plaintiffs' lawyers, because defense firms will not produce discovery material voluntarily as the rule requires.



One irate plaintiffs' lawyer, who wished to remain anonymous, bitterly criticized the defense bar — mainly law firms representing insurance companies in personal injury litigation — for witholding material in claims files, such as witnesses' statements, photographs and medical records, all discoverable under §16.1(k), often until a formal 'request to produce or motion to compel is filed.

"The defense will have an entire file from the insurance company or the adjuster and will withhold it, often under some claim of privilege, even though they know none of it is privileged," he said. "Judges get pissed at motions to compel, so you'd better be prepared to take some shit if you file one in either a fast-track or nonfast-track case. The view from the bench is, 'don't come into my court and refuse to comply with discovery,' but sometimes we have no choice if we want this material."

Most attorneys agree with Donald Ellis, a partner at Kemppel, Huffman and Ginder, that neither plaintiffs nor defendants consistently comply with fast-track's dis-

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Leader of the homeless influenced Alaska attorney

BY PHYLLIS SHEPHERD

I recall the first time I met Mitch Snyder approximately 10 years ago.

It was in a small church assembly hall on a sunny day. There were a few folding chairs around and people were starting to gather to discuss the issues of homelessness.

Mitch was introduced to me by a mutual friend. The next thing I knew, I was telling him how people should help themselves and I believe I made a remark about where there's a will, there's a way. As Mitch confronted my smugness within seconds, the serene church hall echoed with our louder and louder conversation.

Mitch was reminding me about how good I had it. He had just finished a fast and was filled with unusual zeal, and not long after that first encounter, I reflected on our argument in a more dispassionate fashion. He was right. I grew up with more opportunities than some people; now it was up to me to make a return contribution.

I later attended an open house at the home of the Community for Creative Non-Violence (CCNV), where Mitch lived. I was starting to see his community's commitment to homelessness. On the fireplace mantel were plastic rectangular containers with the cremated remains of some of the homeless persons, John and Jane Does, who had

Continued on page 18

The Bar Polls Committee counted and certified the results of the Minimum Continuing Legal Education referendum on August 29. A total of 1,278 ballots were returned, which is 55% of the active membership of 2,342.

The results are: No — 720 (56%)
Yes— 558 (44%)

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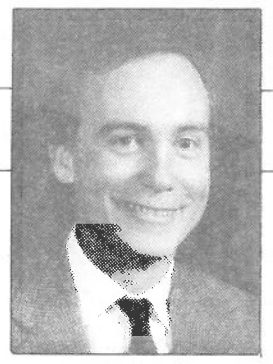

President's Column

By Daniel Cooper

You are all probably tired of hearing about conventions and Russians, particularly when both words are used in the same sentence. However, it turns out that the rumor about "Magadan in '92" was wrong. The Alaska Bar Association and its members have been invited to attend a conference in Magadan in 1991. My information is that the conference would be held in September of that year. If any of you are interested in spending some portion of September in southern Siberia you will need to do two things:

1. Write me a letter expressing your interest in attending; and

2. Search your soul and ask yourself the question whether you would like to organize or help organize such a trip. If so, include a comment to that effect in your letter.

Any attendance by Alaska lawyers at the conference would be pretty much on their own, but the Bar Association will give limited support to organizing such a trip.

* * * *

People have been asking me what I intend to do in the coming year. To borrow a phrase from the President of the Wyoming Bar, I intend to hook my spurs in the bellyband and just hang on. From my perspective, the most important and pressing issue facing the bar is professionalism, to include both perceived and actual improper conduct by lawyers. The Board of Governors will attempt to address this issue in the following ways.

First, the proposed model rules for professional conduct have been sent to the Supreme Court. As you will recall from reading your booklet on the proposed model rules when they were published, the proposed rules are a comprehensive re-write of the rules that scribe the line between proper and improper conduct. It took the Board of Governors a substantial period of time to review and agree upon these new rules. We can expect that, given the importance
Supreme Court will likewise take the necessary time to review and pass on them. We have promised the Supreme Court the support and resources of the Bar Association, and the committees and lawyers who worked on these rules to ease the administrative burden on the court. It is anticipated that the Supreme Court will take up another review on their October 5 agenda. The adoption of these rules is important because the proposed rules define permissible and impermissible conduct more clearly than do the current rules. We hope that, if the standards of conduct are clearer, fewer lawyers will fail to meet them.

Second, at the meeting of the House of Delegates of the American Bar Association in August, the Proposed Model Code of Judicial Conduct was adopted. This new model code is likewise a major revision of the rules which govern the conduct of judicial officers. Since the proposed rules, if adopted, will affect the way lawyers practice before judges, we have asked the Supreme Court that the Alaska Bar Association have representation on any committee which reviews these proposed rules with a view towards their adoption.

Finally, the disciplining of lawyers for misconduct is never a pleasant task. There are approximately 150 discipline files either under investigation, pending discipline, or for which a determination has not yet been made to accept or decline the grievance. Bar Counsel has identified approximately 40 files which concern approximately 24 lawyers for whom formal proceedings must be initiated. That will require, in essence, 24 trials in the forthcoming year. These cases simply must be resolved, and they will be. The only question is if they can all be resolved by June 9, 1991.

The Board of Governors is concerned about this. The Board of Governors, along with Bar Counsel, have instituted procedures in the last six months with a view towards reducing the time from the filing of a grievance to the ultimate disposition of the grievance. We will monitor the success of those procedures and alter them if appropriate. In the meantime, lawyers who walk close to the line of impermissible conduct are more likely now than ever to find themselves involved in a formal procedure. Bar Counsel has been instructed to get those cases before area hearing committees, where appropriate, and let the area hearing committee make the decision whether there is clear and convincing evidence of improper conduct. In essence, Bar Counsel has been asked to err on the side of protection of the public.

If, in the coming year, we can reduce the outstanding backlog of discipline cases through disposition of these claims it will be a major accomplishment. And, since the work will be largely done by Bar Counsel and those of you who serve on the discipline committees, you will be entitled to the credit. I'll just get the ride.

Editor's Column

By Ralph Beistline

I note, with interest, that members of the Bar, in the recent advisory poll conducted by the Alaska Bar Association, opposed adoption of mandatory continuing legal education in Alaska. In the final analysis, though, it is up to the Supreme Court to determine if this program is instituted. While I understand the arguments, both pro and con, I am not sure that mandatory CLE will solve the problems it seeks to address.

I spent much of this summer teaching my six year old son how to swim. Then, last weekend, he and his older sister fell off the end of our dock at the cabin we are building on the Steese Highway outside of Fairbanks. He floundered for a few seconds in the cold water until his sister pushed him back to the dock. Later, after he had received a change of clothes, I asked him what the problem was. "I thought you knew how to swim?" His response was interesting. "I do know how to swim, Dad, I just forgot when I hit the water."

I was thinking about this response while reviewing the Board of Governors' recent disciplinary rulings, and it occurred to me that most of those who find themselves with disciplinary problems are aware of the appropriate standards of conduct. They just forget them when it counts.

The same seems to be true of lawyering skills. Last month I observed a young attorney completely foul up an argument before a local judge. He had prepared extensively, but simply blanked out when the judge questioned him.

The key to our success as attorneys, both in terms of competency and ethics, is not how much we know, but how well we apply it when the occasion arises. The important point is whether we remember how to swim when we hit the water.

Mandatory continuing legal education may have some virtue, but it will not ensure competency or ethics among practitioners. In fact, it strikes me that those really needing additional skills and who are not currently inclined to seek them, will not really benefit from a mandatory program. At least, to coin a phrase from Fairbanks attorney Ed Merdes, that's the way I see it.

Alaska Bar Association Membership
As of Sept. 10, 1990

Entire Membership: 2,820
Men: 2,147 Women: 673

Active Alaska Only: 1,997
Men: 1,523 Women: 474

Active, By Region

District 1: 258	District 2: 25
District 3: 1,503	District 4: 211

Anchorage Only: 1,393
Men: 1,064 Women: 329

(Note: Women comprise 24% of entire, active, and Anchorage membership compared to the 1989 entering class of law students nationwide, of which 42.7% per women).

The Alaska BAR RAG

President Cooper 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, Alaska 99501 (272-7469) or your Board representatives at least three weeks before the Board meeting.

Oct. 26 & 27, 1990
Jan. 18 & 19, 1991
March 22 & 23, 1991
June 3-5, 1991, Fairbanks
June 6-8, 1991, Fairbanks

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

Military spouses have benefit rights

BY EDWIN SCHILLING III

From 1987 until 1989, I was the Assistant Staff Judge Advocate of the Air Force Accounting and Finance Center in Denver, CO. One of my responsibilities was acting as the approval/denial authority for over 6,000 cases under the Uniformed Services former Spouses' Protection Act (FSPA). (See 10 U.S.C. Section 1408.) In addition to possessing a working knowledge of the Act and regulation, the practitioner must assimilate a surprising amount of information about the military retired pay system to thoroughly protect a client's rights. When I saw how few attorneys understood this legislation, I decided to retire and open a practice as a consultant.

In the course of dealing with members, former spouses and their attorneys, questions were frequently raised as to what military benefits, if any, the former spouse might be entitled to. The FSPA, in addition to authorizing direct payment of a portion of a military retirees pay to the former spouse, extended some base privileges to certain former spouses. The extent of the privileges is found in the FSPA and subsequent amendments.

In the hundreds of calls I received from attorneys, none had thought to interject the benefits issue into the negotiation process. While there is no objective method by which a value can be placed on each benefit, attorneys representing the member could urge the court to recognize the nature and extent of the benefits in setting an equitable award. Counsel for the non-member spouse could argue, of course, that the benefits are a matter of right under the Act, and should not be considered by the court.

It is important to realize that the nature of the entitlements cannot be extended by agreement or court order, and orders which purport to grant the former spouse a list of benefits that extend beyond the Act are unenforceable and only serve to confuse the issue.

This article now summarizes the privileges granted and the criteria for entitlement to them, and is current as of September, 1990. Throughout the article, "divorce" refers to dissolution, and annulment actions. Several amendments to the FSPA are pending before Congress, and one would expand the benefits of "20/20/15" former spouses (as defined below).

Full Privileges — the "20/20/20" former spouse

Full benefits (medical, commissary, base exchange and theater) are extended to an unremarried former spouse when:

1. the parties had been married for at least 20 years;

2. the member performed at least 20 years of service creditable for retired pay; and

3. there was at least a 20 year overlap of the marriage and the military service.

Concerning medical care, if the former spouse is covered by an employer-sponsored health care plan, medical care is not authorized. However, when the former spouse is no longer covered by the employer-sponsored plan, military medical care benefits may be reinstated upon application by the former spouse.

If a 20/20/20 former spouse remarries, eligibility for the benefits is terminated. If the subsequent marriage is ended by divorce or death, commissary, base exchange and theater privileges may be reinstated. Medical care cannot be reinstated. This is important to know in the event the former spouse asks you about the effect of remarriage. One former spouse recently told me that her attorney did not know of the irrevocable loss of medical care upon remarriage and that, had she known about it she would not have remarried.

Limited privileges: the "20/20/15" former spouse.

A four year renewable identification card authorizing medical benefits (no commissary, base exchange, or theater privileges) is awarded to an unremarried former spouse when:

1. the parties had been married for at least 20 years;

2. the member performed at least 20 years of service creditable for retired pay; and

3. there was at least a 15 year overlap of the marriage and the military service.

Concerning medical care, if the former spouse is covered by an employer-sponsored health care plan, medical care is not authorized. However, when the former spouse is no longer covered by the employer-sponsored plan, military medical care benefits may be reinstated.

Divorces on or after April 1, 1985 and before September 30, 1988

These 20/20/15 former spouses qualify for medical benefits for two years from the date of the divorce, dissolution, or annulment or December 31, 1988, whichever is later. If the former spouse is covered by an employer-sponsored health care plan, medical care is not authorized. When the former spouse is no longer covered by the employer-sponsored plan, military medical care benefits may be reinstated. However, any reinstatement may not extend beyond the original two year entitlement.

Divorces on or after September 30, 1988

These 20/20/15 former spouses qualify for medical benefits for one year from the date of the divorce, dissolution or annulment. If the former spouse is covered by an employer-sponsored health care plan, medical care is not authorized. When the former spouse is no longer covered by the employer-sponsored plan, military medical care benefits may be reinstated. However, any reinstatement cannot extend beyond the original one year entitlement.

Former Spouses who were not at least "20/20/15" spouses do not qualify for any entitlements.

Private Health Insurance

Because it was recognized that many former spouses would be left without medical care, Congress mandated that the Department of Defense negotiate with the insurance industry to develop a plan that would provide continued coverage for former spouses who had been entitled to health care but were no longer eligible. The plan was designed to provide temporary coverage until he/she becomes eligible to participate in some other health plan.

As a result, Mutual of Omaha has created the Uniformed Services Voluntary Insurance Plan (VIP). The government does not pay any part of the cost of the insurance, so coverage is higher and more restrictive than government care. Nevertheless it should be considered as an alternative to other available coverage because it is a group plan and may be less expensive, and, more importantly in some cases, the qualified party who submits a timely application will be insured regardless of current health.

It is important to realize that the guaranteed insurability provision is in effect only if the former spouse applies within 90 days of the date the military health care terminates.

When representing the non-military spouse who is not in the "20/20/20" category, assistance in the payment of the premiums by the military member should be considered as part of the negotiation for support. And those representing the military member should require that any obligation to pay all or part of the premiums terminate as soon as the spouse becomes eligible for alternative coverage, for example through an employer or upon remarriage.

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Rules may be inconsistently applied

Continued from page 1

covery requirements, either voluntarily or within 75 days of service of process, and judges are reluctant to impose sanctions for noncompliance. Ellis believes judicial reticence to impose sanctions is in part a reflection of the traditional rule that courts are lax on rules before trial, but strict after trial. Other lawyers agree, saying judges hesitate to penalize parties for the recalcitrance or neglect of their counsel, a concession which ensures each litigant will have his "day in court."

Longtime plaintiffs' lawyer Millard Ingraham thinks the voluntary discovery rule in §16.1(k) is too broad. "I don't see the point in requiring parties to supply material known to be already in the possession of the other party," he said. In construction and other contract cases, where both parties already have most or all of the relevant documents, voluntary discovery is duplicative, wasteful and unnecessary, he said. "The rule should be amended to delete discovery of material already in the possession of both parties," he said.

Greg Grebe, a sole practitioner whose work is almost exclusively automobile personal injury contingency litigation and mostly fast-track, speaks highly of the discovery rule, even where its voluntary provisions produce what he acknowledges is some "unnecessary discovery. It avoids discovery battles and forces you to know your own case."

Grebe said he believes the discovery provisions of fast-track compel early settlements in most cases. "By the time I file a suit, I have already evaluated the case and I'm ready for trial," he said. In fact, Grebe says he settles about half of his caseload even before the complaint is filed.

"I send a copy of the complaint and the other documents to the insurance company of the defendant even before I file the complaint," he said. "Insurance companies are tighter these days, sometimes even unreasonable, but they are evaluating cases and making offers up front, simply because its not economic to try some cases." He and other lawyers agree the discovery and other time limits of fast-track are primarily responsible for these early settlements.

"Discovery delayed is discovery never done," said Ken Legacki, another plaintiff's lawyer who believes fast-track has actually forced insurance companies to take a hard line in some cases, choosing to try cases instead of settling them.

"The tort reform movement has skewed juries against plaintiffs," said Legacki, who believes defense firms are trying and winning more cases than they used to.

"Defendants don't comply with the discovery rule and sanctions should be imposed when they are not," he said. "If fast-track's rules were strictly enforced we might have more and quicker settlements."

Plaintiffs' lawyers complain defense firms don't comply with §16.1(d), requiring production of witnesses and exhibits lists, and the court is reluctant to impose sanctions.

The rule allows service of a list of witnesses, including experts, and exhibits no earlier than 90 days after service of the summons and complaint, and for all other parties to follow suit within 15 days.

"We get screwed all the time," said one plaintiffs' lawyer off the record. "Defendants typically file a categorical list of potential experts without actually naming any of them after we have named ours. Then they depose our witnesses and experts, examine our exhibits, 'piggybacking'on our case. Then they go out and find their own experts to rebut ours, file supplemental lists after the time limits specified in the rule have passed, telling the judge we're not prejudiced by this so it should be allowed, and amazingly, the court generally declines to exclude any of these witnesses or impose other sanctions."

He said there is prejudice to his case in this "free ride" by the defense on plaintiff's case, and it should not be allowed.

"The rule is unambiguous as written, but it's not enforced consistently, if at all. These witnesses should be excluded by the court if they are not disclosed within 15 days, as the rule requires. There is no reason why Rule 11 sanctions should not be imposed more in fast-track."

He acknowledged the rule does allow for extension of the 15-day time period "for good cause shown."

"They always have some good reason why they can't comply," he said. "The problem is, their excuses don't outweigh the harm to our case.

Most attorneys agree that the one part of the rule that is rigidly adhered to and the main reason the system works at all is §16.1(h), which requires a trial date within 120 days of the tril setting conference.

Inflexible application of the "four month rule," however, is precisely the major flaw in the system, according to the premier trial counsel at one of Anchorage's major defense firms, who wished to remain anonymous but bitterly criticized this provision which often resulted in the scheduling of two, three and four trials in the same week.

"Fast-track's unyielding adherence to the four month rule is administratively attractive and works well within the four corners of the courthouse," he said, "but it is significantly more expensive to our clients (principally insurance companies) because it forces us to prepare for trial and do the discovery for many cases which will never go to trial."

This prominent trial lawyer also took conspicuous issue with §16.1(i), which provides that once a case is set for trial, no continuance shall be granted except for "extraordinary good cause."

"I don't mind being double-scheduled in one week, but three and four trials set in the same week is just unreasonable," he said. "Why do we have to have a trial in 120 days? There should be a more flexible policy allowing continuances or trial dates within six or eight months instead of four." He felt fast-track's rigidity in trial dates was actually boomeranging, forcing more trials than settlements. "Most defense firms have a heavier caseload than plaintiffs' firms, so the rule operates unfairly on us and actually forces us to trial on cases that ordinarily might settle. This result really disserves plaintiffs' interests too — they make money in settlements, not at trial."

Other attorneys, however, did not concur. Grebe's response to these criticisms was that defense firms should spend more time on fewer cases. "If one lawyer has four trials in the same week, that firm should spread the workload around — these big firms have lots of lawyers. It takes too long to get to court now; the system can't be delayed to accomodate a law firm's caseload." Grebe claimed virtually all his cases in fast-track end in settlement. "I tried just three cases in 1988, none in 1989 and I haven't been to trial once so far this year," he said.

Ingraham agreed. "Most insurance defense won't settle until they see a trial date, so the four-month rule is okay in that it forces resolution of the case."

Plaintiffs lawyer Eric Sanders concurred. "If a case is going to settle, it will settle. Fast-track just speeds up the process. I don't think it produces more trials than settlements."

In fact, Sanders is in favor of a two year time limit on nonfast-track cases. "There is no reason for extraordinary delay in nonfast-track cases, either. Look, if we told parties in nonfast-track cases, 'you get two years to go to trial or you're dismissed,' those cases would move too." He cited the familiar five-to seven-year delay in getting to trial in some California courts. "That's no way to run a business," he said.

Plaintiffs' attorney Paul Cossman offered an interesting perspective on the effect of fast-track on the caseload at Kelly, Cossman and Associates, which primarily handles nonfast-track cases. "We have a difficult time scheduling our few fast-track cases into our other caseload because of the rigid time limits. A more flexible system would be less of a burden on us." As a result he said, many lawyers try to steer cases out of fast-track, although under §16.1(b)(3) and the implementing order, *supra*, the presiding judge can fast-track a case even where neither plaintiff nor defendant so requests.

Some cases are improperly excluded from or included in fast track by the implementing order. Also, most lawyers feel the case characterization under §16.1(b)(3) should be appealable.

According to the implementing order,[2] professional malpractice, class actions, derivative shareholder and securities law suits, products liability, complex civil cases, reappointment and election cases, union disputes, condemnation actions, and other cases determined by the presiding judge to be "unsuitable for expeditious resolution," are expressly excluded," from the fast track.

"The court system drew a line in the sand and decided some cases should be excluded," said Sanders. "I personally think some medical malpractice cases are simple enough to be fast tracked, but they are excluded by category." Other lawyers feel an evaluation of the case based on its complexity is a more appropriate standard for fast track characterization than by category. The consensus is that fast track is only as good as the cases subjected to it.

"If judges give undue favor to fast-track, it may be administratively convenient but a disservice to both parties," said Jim Wright, a partner at Crosby, Lynch and Sisson. "In general, I think they have applied fast-track fairly."

The court system itself is lax or inconsistent in enforcement of fast-track time limits, which results in further delay or unpredictable processing of cases.

"Fast-track ain't very fast," said one attorney. "I've had cases in fast-track which took three years, simply because the rules weren't enforced." For example, even though a case is subject to placement on the inactive calendar 270 days after service of the summons and complaint, and dismissal 60 days later if no motion to set trial or continuance is filed under §16.1(g), the clerk's office is erratic in implementing this provision, say

Continued on page 5

THE FAST-TRACK TIME FRAME

Day 0	Filing of complaint.
Day 20	Service of summons and complaint is presumed to have occurred at this time unless rebutted by a showing of when actual service occurred. ARCP 16.1 (1). The fast-track clock begins.
Day 95	Mandatory discovery under ARCP 16.1 (k) is to have been completed by this time.
Day 110	First opportunity for a party desiring to file a motion to set the case for trial to exchange witness and exhibit lists with the other side. The other side shall file its witness and exhibit lists within 15 days of the initial exchange. ARCP 16.1 (d)(1).
Day 125	First opportunity for a party to file a motion to set the case for trial.
Day 135	A party opposing the setting of the case for trial must file an opposition to the motion by this time. ARCP 16.1 (e)
Day 185	If the opposition to the motion to set is without good cause or there has been no opposition to the motion to set, the fast-track court shall have conducted a trial setting conference by this time. The case will go to trial within 120 days of the trial setting conference. ARCP 16.1 (f).
Day 290	If no motion to set the case for trial has been filed by this time, the case will be transferred to the inactive calendar. If no motion to set or a motion to continue on the inactive calendar has been granted for good cause within 60 days of the passage of this time, then on the 61st day the case will be dismissed. ARCP 16.1 (g)

Court says rule achieving goal

BY STEPHAN A. COLLINS

In 1986, The Alaska Supreme Court issued an order that implemented Alaska Rule of Civil Procedure 16.1 in the Anchorage Court system.

ARCP 16.1, or the "fast-track" rule as it has become known, was designed to give the court greater control over the processing of certain civl cases by requiring mandatory discovery exchanges between parties and imposing a time frame within which the case had to be set for trial or face dismissal. The Alaska Supreme Court and the Superior Court believed that with the adoption of ARCP 16.1 certain types of civil cases could be more swiftly resolved at less expense to the parties involved.

Even though it is believed that a number of Anchorage attorneys actively avoid having their cases tried on the fast-track, the Anchorage Court believes that in the four years that the procedure has been in place it has been accomplishing its goal. Judges Brian Shortell, the current presiding judge, and Milton Souter, one of the original three fast-track judges, are both pleased with the way the it has been working.

Judge Shortell, who sits on non-fast-track cases, (or what have become known as slowtrack cases) has seen the number of cases on the slowtrack decreased while the complexity of these cases has increased. This conjuction of effects has allowed the slowtrack judges the time needed properly decide these type of cases. To help the fast-track work, Judge Shortell actively reviews the cases assigned to both systems to ensure that cases that should not be on the fast-track are transfered to the slowtrack and vice-versa.

When asked if he thought the fast-track system of case management had had any influence on the way Anchorage attorneys were handling their slowtrack cases, Judge Shortell could not say if he has noticed any improvement in the way the slowtrack cases were moving along. He said that while it appears that complaints about the fast-track are down and that Anchorage attorneys have accepted the fast-track, old cases on the fast-track will likely continue to move slowly, more than likely because they are complex cases.

Judge Milton Souter, an ardent advocate of the fast-track, firmly believes that ARCP 16.1 is working to reduce litigation costs and is having an effect on the swift resolution of the cases assigned to the fast-track. Judge Souter even belives that with some modification the fast-track system could be applied to all civil cases. He cites the success that Arizona's Maricopa County achieved when it applied its fast-track system to all civil cases. Alaska's fast-track was modeled after the Maricopa plan.

Judge Souter says that before the fast-track was implemented too much lawyering was going on in relatively non-complex civil cases. He asserts that it was common for 24 months to elapse between the time a party requested a trial setting conference and the preliminary trial date. Trial dates were commonly continued upon any request; for example, trial could be continued if the date conflicted with hunting season. Now, the case is set to go to trial within 120 days of the trial-setting conference; with few exceptions the trial date is virtually set in stone. Otherwise, if the case does not get set for trial within 270 days of the service of the summons and complaint, the court will automatically dismiss the case. The days of the five-year, uncomplicated civil case are over.

Because of the fast-track, Judge Souter believes that the costs of litigation surely are less. With the mandatory discovery rules, the parties do not have to engage in costly discovery practice as much as they once had to do. With a realistic chance of going to trial within a relatively short time after service of the summons and complaint, a litigant will either have to put up by going to trial or shut up by settling.

LeEllen Baker, Chief Clerk of Court in Anchorage, and Mary Ann Dearborn, a legal technician with the Anchorage Court for eight years, would concur that with the implemetation of the fast-track, the Anchorage Court has gained greater control over civil cases which appear to be swiftly processed.

Baker was actively involved in the early days of fast-track with adapting the court to the new system. She says that before the fast-track came into effect the court had less control over the processing of civil cases.

As a legal technician, Dearborn sees how the fast-track cases are processed each day. According to She says the mandatory trial settings and the mandatory discovery rules appear to have aided the fast-track judges in their ability to handle the cases assigned to them. She has seen less motion practice in the fast-track cases because motions to compel discovery are not as common as they are in slowtrack cases. The most complex motions she has seen are summary judgement motions with limited non-complex issues.

While nothing is ever perfect, the Anchorage Court has heard of complaints from the attorneys with cases on the fast-track. The predominant complaint has been that the attorneys are uncertain how to compute the fast-track time requirements, in particular when the fast-track clock begins and how to figure out the time-frame contained in the pretrial order.

Even with the complaints, the Anchorage Court, is happy with the way the fast-track is working and will continue to make improvements to the process.

Fast-track's here to stay

Continued from page 4

many lawyers, and the result is that there is often little difference in the processing time of fast-track and nonfast-track cases.

Sanders, who is also a member of the Supreme Court's civil rules committee and a past president of the Alaska Academy of Trial Lawyers, disagrees.

"For most cases, it's fantastic," he said. "Instead of three years it takes a year...it cuts out all the crap in the meantime. It just shortens the time it takes to get from A to Z."

Sanders compared fast-track to a chess game with time limits. "A lot of defendants would like to be off fast-track. . . things are coming at them awfully fast . . . defendants would like to slow the game down, but in fast-track, you have to make your move."

Ironically, no one really knows just how "fast" fast-track is.

The Judicial Council had considered a study to determine the effectiveness of the program by compiling some statistics, but according to the council's staff attorney, Suzanne DiPietro, the study was never funded by the court system and the statistics currently available are considered suspect if not inaccurate.

Christine Johnson, court rules attorney for the Alaska Court System, declined to release any information from her office, instead deferring any disclosure to Dick McCart, systems analyst for the Anchorage courts. McCart in turn deferred to Dick Delaplane, manager of the technical operations division of the department of court administration. All three of them had the same response to requests for some current statistics on the effectiveness of fast-track. "We have some numbers but we aren't comfortable with them because they include cases which were already in the system before fast-track was implemented in 1986," said Delaplane. "So they may produce more questions than answers." He also acknowledged that the clerk's office had not always cnnsistently segregated fast-track from nonfast-track cases at the time of filing, which casts further suspicion on any data now available.

The consensus at the courthouse, however, is unmistakeable: no one is quite sure *how* effective fast-track is, but court administration officials like it, and as a companion article will illustrate, judges like it too. So it's probably here to stay.

FOOTNOTES

[1]"The Supreme Court shall make and promulgate rules governing the administration of all courts . . ."

[2]Rule 16.1 was given effect by several implementing orders of the Presiding Judge, the latest being AN-AO-90-10, effective April 19, 1990, pursuant to §16.1(b)(1).

[3]The following comments by the local bar parallel somewhat those recently made in a letter from the Los Angeles Trial Lawyers' Association to California Assembly Speaker Willie Brown, under whose speakership Assembly Bill 3300, California's version of "fast-track" became law as the Trial Court Delay Reduction Act in 1986. Criticisms of trial lawyers such as unrealistic discovery cutoff dates, inadequate procedures to screen cases, unreasonable trial dates, arbitrary and exessive sanctions and others are summarized in the Los Angeles Daily Journal, July 23, 1990 at p.6. We tried to interview a broad spectrum of the local bar but found that those most critical of Rule 16.1 either did not want to comment or did so off the record.

WOMEN LAWYERS HOLD FIRST FALL MEETING

The Anchorage Association of Women Lawyers will hold their first meeting for the year on September 26, 1990 from 11:45 a.m. to 1 p.m. at the Kayak Club.

The luncheon topic is "Political Issues for the 90s," with guest speakers Rhonda Roberts, Alaska Democratic Party, Cheri Jacobus, Alaska Republican Party and Ruth Lister, Alaska Womens Commission.

SOCIAL SECURITY DISABILITY LAW TRAINING

OCTOBER 9-10, 1990

All members of the Alaska Bar Association are invited to attend a free training program on Social Security Disability Law, sponsored by the Center for Social Gerontology and Alaska Legal Services. The guest speaker/trainer will be U.S. Magistrate Steve Pepe, former Associate Professor of Law at the University of Michigan Law School. The program will include a basic overview of Social Security law and practice, including an opportunity to participate in a mock-hearing. Training materials will be provided. Pro Bono Attorneys who are interested in or willing to represent Social Security claimants are encouraged to attend. The program will be held at the Anchorage Senior Center. Please call Alaska Legal Services to register or for more information.

272-9431 or 272-6282

The Carter Files

By Mickale Carter

On August 1, 1990 Judge James K. Singleton of the Alaska State Court of Appeals began his appointment as federal district judge for the district of Alaska.

Judge Singleton was in private practice five years before accepting his first appointment in a judicial career that has spanned two decades. He has been a judge in the state court system for 20 years; 10 years as Superior Court judge, and 10 years with the Court of Appeals.

Judge Singleton received his law degree from Boalt Hall in 1964. He came to Anchorage in March of 1965, and was admitted to practice in October of 1965. His first job was working for Gene Wiles and Jim Delaney from 1965-68. Gene Wiles' practice focused on oil and gas/ environmental law while Jim Delaney's, of course, was insurance defense. Singleton went to work for Roger Cremo in 1968, when Cremo's main client was the First National Bank. He worked for Cremo along with John Beard and Dave Lawer until his appointment to the Superior Court bench in 1970.

Judge Singleton served as a Superior Court judge until his appointment to the Court of Appeals, created by the legislature in 1980. The three member court hears appeals of criminal matters, and Singleton joined Alexander Bryner and Robert Coats as the initial appointments to the court.

Although Judge Singleton is reluctant to speculate about his new position, he thinks that attorneys who have appeared before him will find that he has become more flexible since his tenure as a Superior Court judge, when, he says, he was wedded to procedural rules.

Although he continues to believe that the rules of procedure are important, Judge Singleton presently views them more as a means to achieve justice than as an end unto themselves. In his view, the judge, as a public servant, must determine what is necessary to move the litigation along so that a decision can be made within a reasonable time. He recognizes the danger of becoming so technical and rule conscious that one loses track of the forest for the trees. On the other hand, he is sensitive to the need of attorneys to know what is expected of them.

Justice being the ultimate goal of our court system, it is Judge Singleton's philosophy that the judge is obligated to do everything in his or her power to attain that end. Judge Singleton believes that this includes making the courtroom a less threatening place for all who appear there. He believes that the court should endeavor to be more responsive to the needs of jurors. Litigants and witnesses should be treated with dignity and respect.

Also, a judge should not contribute to making the courtroom more stressful for young attorneys, he believes. The court should provide a level playing field by not giving deferential treatment to older attorneys. He states that he "will make an effort not to foster the good ol' boy system." As an example of what he intends to avoid, Judge Singleton described an incident which occurred while he was observing a trial when he was first appointed to the Superior Court bench.

An older attorney represented a manufacturer in a product liability case. A young attorney represented the retailer of the product which was at issue. The (injured consumer) plaintiff was represented by an older attorney. The plaintiff's attorney asked a question of the witness. The retailer's attorney said, "I object," to which the trial judge responded, "Overruled." When the manufacturer's attorney said, "I join in the objection," the trial court promptly sustained him.

Judge Singleton does not intend to make the same "big error" he made when he was first appointed to the state Superior Court. Because he did not want to appear inexperienced, he did not ask for the advice of other Superior Court judges. As a result, virtually everything he did by definition was "innovative." Some of his innovations have passed the test of time. Others, however, served only to upset the delicate equilibrium of the attorneys who appeared before him.

Although he believes that judges should not concern themselves with their reversal rates, it is his understanding that federal district judges are reversed less frequently by the Ninth Circuit Court of Appeals than are Superior Court judges by the Alaska Supreme Court.

On tort cases he thinks that the reversal rate by the Alaska Supreme Court may be as high as 50 percent. Quoting a Second Circuit judge, "either Learned Hand or Judge Friendly", he noted that it is the nature of cases that every trial judge will be faced with many questions of first impression. It is not inconceivable that he will view the issue differently than the collective judgement of the appellate court. Nonetheless, a good judge should not be reversed more than 25 percent of the time in Judge Singleton's view.

It is Judge Singleton's goal to be a good judge, defined, he said, as "one who serves justice."

Verdict and settlement

Bell v. Anchorage School District. Student and his family alleged that his injury (permanently disfigured left hand ring finger) was caused by assault and battery committed upon him by teacher in special education program of Anchorage School District. Teacher claimed self-defense. Plaintiff's demand: Final was $100,000.
Defendant's offer: Final was $45,000.
Verdict amount $-0- (defense)

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"Big Foot" Link is Kenai's new judge

BY ART ROBSON

Just what is it that Kenai is getting when the "soon to be Honorable" Jonathan H. Link is sworn in as the new Superior Court judge?

The author interviewed Link in his Fairbanks office on the basis of a revived commission from some 16 years back, when Jamie Fisher of the Kenai Bar Association made him an undercover agent in Fairbanks.

Certainly, people in Kenai are getting a man of very broad experience, and that's what this article is all about. Jon was born January 22, 1944, which was slightly ahead of the baby boom. He has tried to stay ahead of the parade ever since, although it must be admitted that he hasn't always looked back to see which way the parade was going.

Jon's father was an attorney for the Army who was mostly assigned to strange missions such as the FBI and the IRS. When he ceased all of this sort of endeavor, he lived in the San Francisco Bay area and represented large clients, having for example, put together the financing package for the Aswan High Dam.

Young Jonathan began, at an early age, acquiring the experience that has led him to this position. As a teenager, he worked loading 20 to 40 tons of peaches per day in Empire, California, earning the sum of $1.25 plus room. While doing all this, he became an Eagle Scout, and tried to put aside money so that he could attend Whittier College. The exact reason for attending Whittier (graduating in 1965) apparently does not relate to its most famous alumnus, Richard Milhouse Nixon.

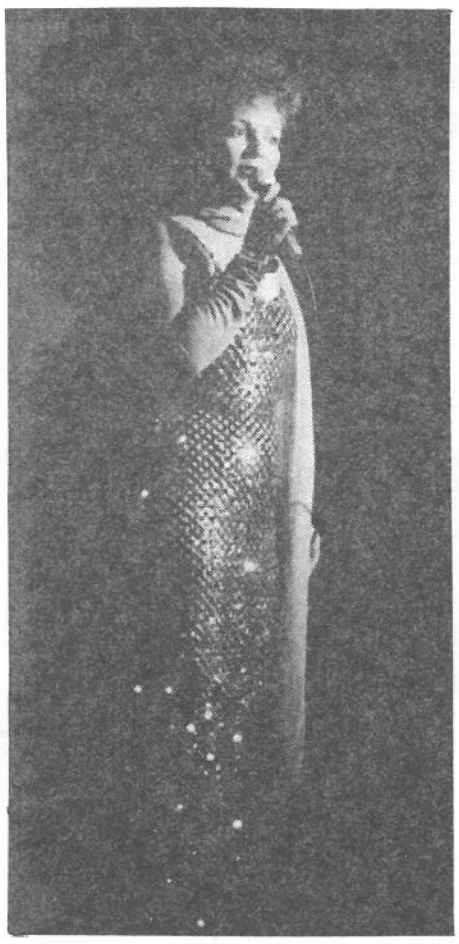
While at Whittier, Jon was editor of the newspaper and, in this capacity, he managed to get Walter Knott of Knott's Berry Farm so enraged that Walter pulled his support out of Whittier College. Rising to the occasion, Jon not only got the Knott's Berry Farm subsidy back for Whittier College, but actually managed to get additional financial support from Mr. Knott for the newspaper.

While attending college and thereafter, Kenai's newest leader managed to work for Seattle First National Bank where he acquired an enviable reputation for prophesy. He did a study which predicted that "Key First" would not be profitable.

All of this was interrupted by a military obligation which brought Jon to Alaska. Ft. Wainwright was his primary duty station in the 2 years, 364 days, 18 hours and 54 minutes that he was the exclusive property of Uncle Sam.

Upon discharge, Jon went to work out of the Teamsters Hall (a connection that was to help him considerably later on) on the DEW Line. There he earned the fabulous sum of $5.32 per hour and put that money aside so that he could go to law school. When his legal education fund "runneth over," Jon attended Hastings College in San Francisco, where his scholarly pursuits earned him a position on the Moot Court board, and his nonscholarly pursuits enhanced the reputation of San Francisco as a party town.

When Link finally passed the Bar and determined that it was time for him to begin to work, he apprenticed himself to Dick Gantz of Hughes, Thorsness, Lowe, Gantz & Clark, in Anchorage. But, having returned to Alaska with a desire to live in the Fairbanks area, Jon returned to Fairbanks after he became a partner. There, he opened his own office. But, the Alaska pipeline beckoned, and Jon leaped into a partnership in Johnson, Christenson, Shamburg & Link. In that position, he represented the Teamsters in their labor negotiations and also represented individual Teamsters under their prepaid legal plan. It was during these days that your author met "The Great White Whale" as he was known, and accumulated several of the memories which constitute a portion of the "broad experiential background" of the Kenai's new judge.



"Miss Milli" Link performs at the Palace Saloon.

(Let me digress. Link was not much of one for packing a suitcase. When we went someplace, I, being a conformist, took a bag with the necessary apparel to stay awhile. Jon, on the other hand, simply looked in the phone book every day or two for the location of a good menswear store and bought new shirts and underwear. To this day, he has over 50 sets of underwear in reserve).

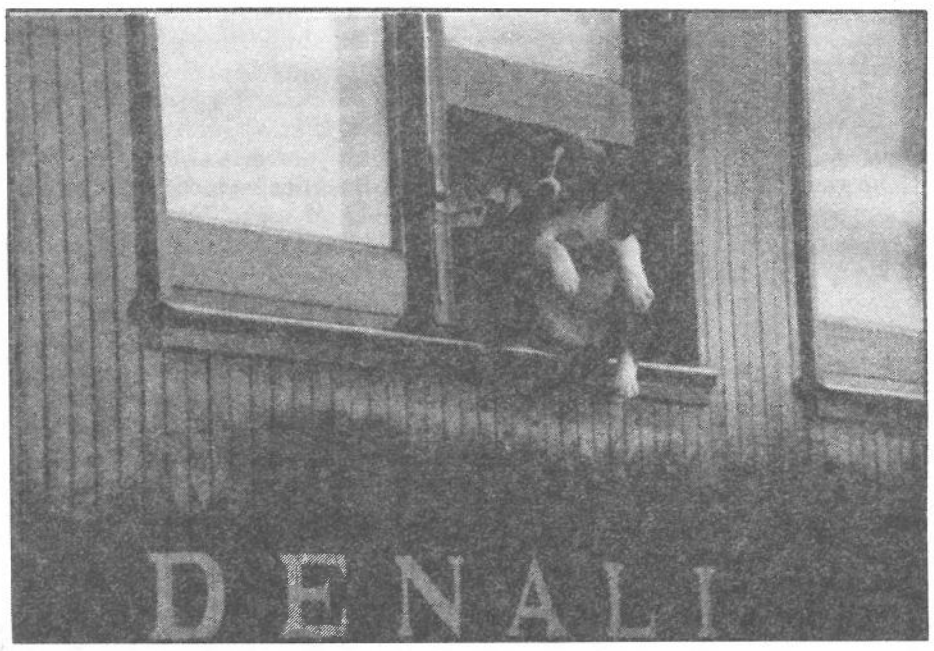
There was also the time that we set out to do a modest version of Magellan's circumnavigation of the globe in San Diego Harbor. Attorneys appearing before Link are best advised not to test his ingenuity, because he managed to find a freight elevator which would place us among the pilings under a hotel on the edge of San Diego Harbor. There, a small party unburdened itself of its accoutrements of this life, slipped silently into the water, and began swimming in what we thought was a westward direction. Thankfully, those in the terrace bar above viewed all this as entertaining, and so didn't call the police. In any event, there were several bouts with yachts in whose anchors we became enmeshed (fortunately, it was after midnight and no yacht owner attempted to harpoon us). We found our way back to our own hotel, replaced our garments of civil acceptability, and the "soon to be Honorable" set about summoning the freight elevator by bashing the control box (it worked).

The pipeline was wearing down, and Jon went back into sole practice. Finding this a trifle boring, in 1979 Jon bought into the Palace Saloon at Alaskaland. His partner was Miss Milli, the Alabama Fillie, who was more or less fresh out of Birmingham, Alabama, and together they turned the Palace into the prime entertainment spot in Fairbanks, celebrating vaudeville with new shows each year. The proof of this success is reflected by Jon's most recent nickname, "Big Foot." Most members of the Bar have seen Jon's "Big Foot" routine, and those who haven't should hang their heads in shame.

There are those too, who fondly remember the Can-Can cuties of the Palace Saloon who at various times have included such memorable beauties as (District Court Judge) Natalie Finn and (then President of the ABA) Donna Willard.

It's difficult to run a law office and a saloon at the same time, and so in 1985, Jon and Milli sold the Palace Saloon, but retained their partnership by virtue of getting married. For those of you who haven't had the pleasure of meeting Miss Milli, there will come a time when you will get all of the introduction anyone could ever need. Currently, in Jack O'Brien's Gold Exchange, there hangs a magnificent portrait painted by Tim Ames. It's one of Fairbanks' more notable artworks, and it is a very nice introduction to a very talented lady.

In private practice, Jon has had almost every kind of case that has arisen in Alaska, and he has been almost everywhere in Alaska to try cases. We haven't, however, run out of the length of his experience yet. One of Link's more recent adventures was the purchase of a carousel. It is a 1913 Allen Herschel, with a 1891 *Berni Band Organ* (which is air-driven). Of 224 of these monsters once manufactured, less than *1 in 25* are still on the road. This may be in part because it uses marsupial pouch leather for bellows. In any event, the Kenai Borough Planning & Zoning Commission need not have a panic attack. Current plans are to leave the carousel at Alaskaland in Fairbanks.



John Link couldn't find a photo of himself, so this is Warren Harding's railcar he helped restore at Alaskaland.

To pry into Jon and Milli's family life is not at all hard. Pictures of Lydia, their daughter, are all over his office, and Milli still performs quite regularly. In fact, just prior to my interview with Jon, she had been awarded the key to the City of Dawson Creek for her singing abilities.

The family intends to give up its cabin in Central, Alaska and their home in Fairbanks. Their riverboat which is thoroughly experienced in the ways of the Porcupine and Upper Yukon Rivers will soon splash through the waves of the Third Judicial District Rivers. They are still househunting, so it's a bit early to predict the exact location of their permanent abode, but if you are looking for their home, just stop for a minute and listen. I'm sure you will hear them wherever they are.

A word about Jon's practice of law. While I was interviewing him, the phone rang, and his secretary called casually "Jon, its Cathy." Without hesitation, he picked up the phone and said "Hi Cathy. What kind of trouble are we in now?" There followed about a minute of explanation from the other end of the line, a couple of pertinent questions to identify the complex legal issues, and then having sized up the picture completely, the decisionmaking machinery went into effect and he said "Well, my advice is f . . . 'em!" The decision, as with most all of the decisions in Link's life, came rapidly; and attorneys practicing in his Court should not have any fear of his falling behind in his judicial opinions. Not that he's a "Mr. Neat Desk." He certainly isn't. But, as a quick study he generally goes through things just once and makes up his mind.

When it comes to community service, he admits that his true love in life is historic restoration. Over the past three years he has spent in excess of 10 hours per week as a director and "hands on participant" in the nearly-completed restoration of the "Harding Car" and the "Riverboat *Nenana*" at Alaskaland. The Harding railcar carried President Warren G. Harding when he drove the golden spike that completed the Alaska Railroad and the riverboat *Nenana* is a rare sternwheeler that plied the Interior at the turn of the century. The *Nenana* is scheduled for completion for the "Rendezvous 92" celebration of the 50th anniversary of the Alaska Highway. (Jon asked me to remind readers that stateroom restoration sponsorships are still available at $1,000 each and

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Public advocate wins grueling race

BY CHARLES BINGHAM

The offer was tempting — very tempting.

Jeff Gedney of Fairbanks and Brant McGee of Anchorage, the co-winners of the Alaska Mountain and Wilderness Classic, a wilderness survival race from Nabesna to McCarthy, had just stumbled across a sheep hunter making breakfast near the end of the roughly 160-mile journey.

"He was frying up a slab of ham and he had a big pile of fried potatoes sitting on the side," McGee said. "He saw us and offered to share his meal with us."

"But that would have been a clear-cut violation of the rules," Gedney added.

One of the few rules in the race is that no outside help can be accepted, although racers were encouraged to team up among themselves. Therefore, Gedney and McGee could just look at the food and drool.

When the two racers came across the hunter Wednesday between Toby Creek and Glacier Creek, the only food left in their backpacks was a few Power Bars.

Gedney and McGee wouldn't experience any real food until they finished the race at 6:42 that evening and celebrated with a dinner of teriyaki chicken at the McCarthy Lodge.

It took Gedney and McGee three days, 8 hours, 42 minutes to complete the trek, well behind the 1988 record of 2:16:28 set by Roman Dial of Fairbanks.

Gedney, 29, and McGee, 40, were among 13 entrants in the race, which would wind its way through the Wrangell-St. Elias Mountains.

Along the way the racers would scale mountains, skirt glacier moraine, follow animal trails, and ride river rapids in tiny inflatable Sherpa pack rafts. Several of the competitors wouldn't finish.

Racers can use any route that isn't a road and can use all forms of transportation except wheeled vehicles and pack animals. They must carry all their own gear, finishing with everything they started with.

The reward for winning this grueling race is self-satisfaction — there is no prize money.

"We're obviously not doing it for fame or fortune," McGee said.

So what prompts a person to risk life and limb in this speed-hike through the Alaska outback?

"It's kind of a personal challenge-type thing," Gedney said.

The race tests outdoor skills that used to be required for survival, but recently have been fading from existence.

McGee (left) and Gedney pass up the gift shop at McCarthy. (Anchorage *Times* photo)

"It's just a real tough cross-country race," said Gordon Burdick, a miner in the McCarthy area for more than 30 years. "They take it as a challenge. They're not doing anything different that the miners didn't do many years ago."

This year's race started innocently enough Aug. 12 when the 13 participants each grasped the white fence in front of the Devils Mountain Lodge in Nabesna. The racers quickly crossed Jack Creek on their way to the Nabesna River.

That was when a few of them realized the importance of choosing the right equipment.

Rob Hirschenberger and Tom Moore, a pair of guides from Bicknell, Utah, weren't able to find any kayak paddles, which are double-ended.

"We both had canoe paddles and we needed kayak paddles," Hirschenberger said. "We got to the river, inflated the rafts, and when I jumped on my raft, I rolled off the side and up to my neck in water.

"After we finally got into our rafts were going all over the place out-of-control and everybody else was zipping past us. We realized it was better to pull out of the race than try and ride the rivers without the right equipment."

Hirschenberger, 26, and Moore, 32, both left the river, bushwhacked their way to the first informal checkpoint of Chisana and caught the Tuesday mail plane to Tok. Both plan on returning next year, when the race moves to the Brooks Range.

"We'd have finished if we had kayak paddles," Moore said as he nursed a severely blistered right heel. "We learned a lot about having the right equipment. I wore Nike Lava Domes and they were worthless. We'll be back next year, and we'll be better prepared."

Howard Markham, 60, of Anaheim, Calif., lost the shaft of his kayak paddle on one of the river crossings and also scratched at Chisana. The three hitchhiked from Tok to Slana to pick up Hirschenberger's car, then drove down to McCarthy for Saturday's post-race banquet.

"I lost some equipment right away in the Copper River," Markham said. "It was downhill the rest of the way. Today I'm 92. In a couple weeks I'll be 60 again."

While the other racers were having their problems, Gedney was grabbing an early lead over McGee.

Gedney, who admits he enjoys the white-water portion of the race, attacked at the Nabesna River and pulled ahead. McGee helped Gedney's lead when he picked the wrong course.

"I made a severe route-finding mistake the first day," McGee said. "I had to backtrack and lost about an hour."

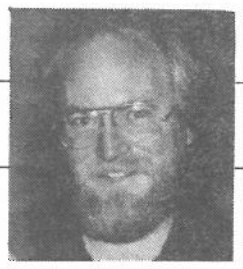
Even though he'd made a mistake, the lawyer with the State Office of Public Advocacy was soon able to close the gap on Gedney, a designer of fire and burglar alarm systems.

They didn't know it at the time, but the two camped about 200 yards apart from each other near the spot where Notch Creek flows into Cross Creek.

"We both woke up about the same time," Gedney said. "He must have found the trail right off because I was following in Brant's footprints."

"As I walked down to Dot Lake, I looked behind me, and there he was," McGee said.

Continued on page 18



Torts

By Michael Schneider

I. A Little History.

For as long as anyone can remember, AS 23.30.015(g) required that employees who received worker's compensation benefits because of an on-the-job injury were required to repay all of those benefits to the worker's comp carrier upon settlement of their third-party litigation (in the event that they were fortunate enough to have a third-party claim) . . . Way back when, it occurred to Bernie Kelly and Michelle Minor that this state of affairs was less than perfectly equitable, so, when the opportunity presented itself, they litigated *Cooper v. Argonaut Insurance Co.* to our Supreme Court. Our Supreme Court's decision, reported at 556 P.2d 525 (Alaska 1976) held, among other things:

1. that subrogation receipts played a trivial role in computing premiums, *id.* at 527, n.9;

2. that a carrier seeking a 100 percent return on monies advanced would be receiving a windfall profit, *id.* at 527;

3. that the windfall profit would result in the unjust enrichment of the carrier, *id.* at 527, n.10; and finally

4. that this inequitable situation could be avoided only by the "proration between the carrier and the employee of litigation costs and attorney's fees incurred by the employee in recovering from a third-party tort feasor," *id.* at 527, n. 11.

While *Cooper v. Argonaut* was, without question, limited to the situation where a worker's compensation carrier was seeking to subrogate against a third-party recovery, the rule laid down in that case quickly became the standard by which subrogated insurance carriers operated, whether or not they had provided benefits under a comp policy.

Carriers providing property-damage and medical-payments coverage apparently saw subrogation receipts for the "gift" horse that they were. It can also be assumed that they read the *Cooper* decision with some care and noted that the Supreme Court cited, with approval, an ALR annotation approving attorney's fee and cost proration in a non-worker's compensation situation, *id.* at 527, n. 11.

In any event, all was peaceful in the valley as, for years, plaintiffs' counsel would dutifully deliver bundles of money to the insurance industry, subtracting only a pro rata percentage for attorney's fees and costs. The insurance folks would smile broadly in the face of this income earned without risk, investment, or significant involvement of any type.

II. Getting tough on subrogation, or "let's see those teeth"

It was the custom and practice of the legal community to resolve these claims in the manner mentioned above for many years. The *Cooper* approach to this problem was, however, too logical, and too reasonable, too easy to last for long.

And so, in the mid to late '80s, the major insurance carriers, instead of sending the typical "thank-you" note that was likely to follow a check for two-thirds of the subrogated amount, caused their counsel to set upon me (and other plaintiffs' lawyers) with letters accusing me of all sorts of nastiness, such as breach of the canon of ethics, breach of fiduciary duty, breach of trust, and violation of the boy scout oath. Sure enough, the carriers wanted *all* of the windfall, never mind little things like the attorney's fees and costs plaintiffs paid to generate the fund (even in the face of a full recovery), or the frequent circumstance that claimant's damages were undercompensated because of an absence of adequate coverage or a questionable liability picture. Never mind that the carrier hired no attorney, had no costs, and incurred no administrative expense; they wanted it *all*.

III. Holt v. State Farm Mutual Automobile Insurance Co., 3AN-89-1778 Civil.

Tiring of this nonsense, and having just settled Mrs. Holt's personal-injury and property-damage claim, I directed a check for two-thirds of State Farm's claimed property damage subrogation amount *and a complaint for declaratory relief* to State Farm Insurance Co. in early 1989. Following cross-motions for summary judgment, the superior court ruled, in a 12 page decision issued in April of 1990, that the Holts were entitled to a "*Cooper* reduction" in amounts owed to State Farm Insurance Co. Judgment was ultimately entered in accordance with this point of view. Though State Farm threatened appeal, no appeal was taken.

IV. The importance of the Holt decision.

In my opinion, *Holt* is important because the superior
court's decision was well reasoned and reflective of probable judicial treatment of this issue at all levels. The rule in *Cooper v. Argonaut* is the rule in and out of the comp context in almost all jurisdictions. State Farm, blessed with good counsel, elected not to appeal the decision. State Farm saw the handwriting on the judicial wall.

Given the outcome in this case, State Farm's knowledge of the outcome, State Farm's election not to seek reversal in a higher court, and State Farm's awareness of the weight of authority, it can certainly be argued that an election to aggressively seek 100 percent of subrogation claims against an insured violates the implied covenant of good faith and fair dealing in every insurance policy. Counsel representing Allstate Insurance Co. and Allstate Insurance Co. itself, have also been made aware of the Court's holding in Holt.

V. Practice pointers and miscellaneous issues.

Cases are often not as simple as they seem, and the Holt
case was no exception. If you are representing a claimant who is likely to owe monies to subrogated carriers, you may wish to consider the following:

1. The subrogated carrier is likely to argue that you are not entitled to a "*Cooper* fee" unless the carrier "ratified" your participation on its behalf. The superior court rejected this argument in *Holt*. *See also USAA v. Hills*, 109 N.W.2d 174 (Neb. 1961) and 2 A.L.R.3d 1441 (1965).

2. The ratification argument can often be disarmed where the carrier made no effort on its own to collect the subrogated amount within the statute of limitations. In other words, it's hard for the carrier to argue that it did not ratify you and your client's efforts to collect its subrogated claim when, absent those efforts, any claim by the carrier would be barred by the statute of limitations. While considering this defense to the "ratification" issue, be sure to realize that considerable authority exists suggesting that the statute of limitations on a cause of action for the negligent injury of property (as opposed to medical expenses or lost wages) may be six (6) years. *See* AS 09.10.055, *Kodiak Electric Association v. DeLaval Turbine. Inc.* 694 P.2d 150, 154, 156 (Alaska 1984) and *Jenkins v. Daniels*, 751 P.2d 19, 20, n. 4 (Alaska 1988).

3. Third-party claimants typically assert *all* claims, generate a fund, and that fund is then participated in by the claimant and its subrogated carriers. *Early in the case,* consider whether or not it would be wise to place all subrogated carriers on written notice of the fact that the plaintiff in the third-party action is asserting all possible claims. The superior court's holding in Holt suggests that such a step is irrelevant. In my opinion, the superior court was correct in this holding. *See USAA v. Hills, supra.*

4. Disburse all funds from trust at the same time. In *Holt*, the superior court held that the Holts would have been liable to State Farm for interest on monies retained by the Holts that should have been paid to State Farm at the time of settlement. Because State Farm was paid at the same time that everyone else was paid, this became a non-issue.

5. Examine the subrogation claim to determine whether any credits or offsets should be applied. In the case in question, State Farm had failed to credit the subrogation claim against the Holts with a significant recovery for salvage value. State Farm was thus asserting over 100 percent of its legitimate subrogation claim at one point in the proceedings.

6. In *Brinkerhoff v. Swearingen Aviation Corp.,* 663 P.2d 937, 942 (Alaska 1983), the Supreme Court stated that an insurer was entitled to its full subrogation claim, plus prejudgment interest. While the tenor of this decision and the better view is that a subrogated party will participate in prejudgment interest *only to the extent prejudgment interest is actually and specifically recovered by plaintiff in the underlying action,* this issue should be evaluated before charging off into a subrogation fight. Has your client received full compensation? Did full compensation include a specified payment of prejudgment interest? Has the carrier waived any claim to prejudgment interest by any action it took (such as asserting a specific subrogation amount that did not include prejudgment interest at a point just prior to settlement and under circumstances where plaintiff relied upon same)?

7. In light of the above, consider documenting plaintiff's reliance on the amount of a stated subrogation claim immediately before finalizing the settlement of the underlying claim.

8. The analysis that applies above deals only with the *fully compensated plaintiff.* If the record is clear that your client is undercompensated after consideration of attorney's fees and costs, then you should take the position that the equitable right of subrogation does not arise. *See*, for example, *Transamerica Insurance Co. v. Barnes*, 505 P.2d 783 (Utah 1972), *Mattson v. Stone,* 648 P.2d 929 (Wash. 1982), and *Greenland v. Jones*, 3AN-85-15642 Civil, Order partially granting and partially denying cross-motions for summary judgment of May 20, 1988.

9. The semantics surrounding the "*Cooper* fee" issue are misleading. In our office, we don't take an "attorney's fee" from a party seeking a recovery from one of our clients. There may be circumstances where such an approach would be appropriate, but it is not our practice, nor, to the best of my knowledge, is it common practice in the legal community. Therefore, the "*Cooper* fee" is a sum of money that goes, not to compensate counsel, but directly into the pockets of our clients. The court should be told early in the litigation that this is not a fight over additional money for the attorneys, but a fight over additional money for the client. You can trust the defense to argue that this is just an attempt by the attorneys to get paid twice. The facts are that it's an attempt by clients to get partially compensated once.

VI. Summary and conclusion.

If you're paying subrogated insurance carriers 100 cents on the dollar, you are paying them too much. Sound analysis supports applying the rationale of *Cooper v. Argonaut Insurance Co.* to all subrogation claims.

Duke U. schedules law conference

The Duke University Canadian Studies Center announces a Conference on U.S./Canadian Constitutional Law to be held April 4-6, 1991. This history-making event will bring together practitioners and senior scholars from Canada and the United States, and will feature Supreme Court Chief Justice Antonio Lamer of Canada and Supreme Court Chief Justice William Rehnquist of the United States, as well as eight other justices from the two countries, and retired Canadian Chief Justice Brian Dickson. The focus of the conference will be the comparative examination of Constitutional issues in both countries. Panel topics will include: Federalism, Amending the Constitution, Freedom of Expression, and Dimensions of Equality.

The Conference is being organized by a joint Canadian/U.S. committee representing Duke University, the Faculty of Law of Ottawa University, the Faculty of Law of the University of British Columbia, and the Supreme Courts of both Canada and the U.S.

For more information, please contact the Duke University Canadian Studies Center (919) 684-4260.

Movie Mouthpiece

By Ed Reasor

What is life after all but tragedy and comedy? Drama and laughter?

Most lawyers are pontificating now on the merits or demerits of the new film "Presumed Innocent." For me, it was adequate, although the book was better. The point local prosecutors are making, however, is what THEY would or would not do, if they were prosecuting a former state district attorney. Spare me, gang; it s a film, you know, make-believe, designed to entertain, not educate; relax, not charge.

There you have it — based on last week's "news" stories, it's patently clear that the district attorneys in Alaska don't go to enough movies. Two they could approach with less than a "it couldn't happen" attitude are the tragedy-drama FLATLINERS, a Columbia Pictures release and the comic MY BLUE HEAVEN from Warner Brothers.

Medical students experimenting with death (FLATLINERS) and a comedy about a government witness who gives suburbia a cultural shock (MY BLUE HEAVEN) are topical movies for the organized Bar, but remember they are movies, not supreme court briefs.

Five medical students decide to peek at afterlife in FLATLINERS. This is a common subject for philosophy and theology students, but is rarely discussed in medical school. Starring Keifer Sutherland, Julia Roberts (and if you didn't fall in love with her in PRETTY WOMAN, please turn in your Bar certificate — you're too old to practice), Kevin Bacon, William Baldwin and Oliver Platt, the film is a chilling thriller of medical students experimenting with death, the afterlife, and immortality.

Sutherland is the manipulative, fame-seeking initiator of the project, Bacon is the pragmatic one who already has been suspended from medical school, and Roberts the self-made expert on death. What they do is take turns stopping their hearts until the monitors

Student Nelson Wright stands by a statue of Hermes.

reading their vital signs show nothing but flat lines, thus the name for the film.

Almost anything more I tell you about this film might ruin it for you, since thrillers do depend a bit on tension, logic, and normal audience fear and surprise. Suffice it to say that the medical students, al-

(L. to R.) Nelson Wright (Kiefer Sutherland), David Labraccio (Kevin Bacon), Rachel Mannus (Julia Roberts) and Randy Steckle (Oliver Platt) revive Joe Hurley (William Baldwin), who had his heart stopped as part of a chilling life-after-death experiment in "FLATLINERS."" Columbia Pictures presents a Stonebridge Entertainment Production of a Joel Schumacher Film directed by Joel Schumacher and produced by Michael Douglas and Rick Bieber.

though they revive each other, find that their return from the dead has caused them to contemplate their past transgressions, thus producing a story about atonement and forgiveness, as well as spirituality and horror.

Watch Sutherland's passion for what he believes is the right thing to do; the private and intense focus on death by Roberts, and the pragmatic, logical voice of reason of Bacon. Do you know people with these qualities? I think you'll find that we all do, which makes the film even more personal and realistic.

Many architectural styles; Greek, Roman, Gothic, as well as Renaissance are seen in the magnificent sets of production designer Eugenio Zanetti. Director of photography Jan De Bont uses them effectively to create a visual world somewhere between a fable and science fiction, all of which enhances the whole concept of man's eternal struggle with death. Campus shots and lake footage will be recognizable by students of Loyola University in Chicago.

MY BLUE HEAVEN which stars Steve Martin as a mobster turned federal witness and Rick Moranis as an FBI agent assigned to guard and produce him at two key trials, is a typical Steve Martin vehicle. Some shots are hilarious, and some of the dialogue is so dumb you find yourself asking out loud again: "Do I, or do I not, like Steve Martin the actor?"

One thing that is great throughout is the music by Ira Newborn. If you think you want to score a movie someday, go see MY BLUE HEAVEN (yes, Fats Domino does sing the title song), as the music definitely adds to the enjoyment of the picture and is placed strategically and carefully instead of just wall to wall. Nora Ephron is an accomplished script writer, if a bit too romantic here, and Herbert Ross knows when a director should move a camera and when he should move the actors.

The opening establishing shot which shows one man leveling wet cement in his driveway, while down the street an Allied truck unloads the furniture the federal government bought for the suburbia house of its key witness, tells us at once that Martin, a city mobster, is in a new environment and someone is going to have to adjust — whether him or the community.

Martin thinks he's still in the city for the longest time; he tries to tip Moranis his assigned agent; does tip an airline stewardess; and continues to act like a big city rip-it-off boy (punching the meat packages with a .39 cent sticker that the store clerk left carelessly.)

Martin's wife, in true Moll fashion, leaves him — she can't stand the quietness of the rural community. Sympathy comes his way from Moranis, because his wife left him too — she couldn't stand his FBI organized thinking — he even had a system for eating his pancakes, so both the top and bottom pancake receive equal syrup. Both recover after long hours at the office (Moranis) and card solitaire (Martin).

Ross is good at contrasts. This and other scenes showing the different lifestyles of a city hood and a government-issue bureaucrat are extremely well done.

And for public defenders, MY BLUE HEAVEN is a godsend. Here a lovely assistant district attorney (Joan Cusack) listens directly to Martin's explanation of why he is driving a stolen car and why the truck has other stolen property in it. You've heard it before, yes. Martin's facial expressions are not overwhelming, but the dialogue is; it's a nice trick that the D.A. has to listen to this pitch, not the trial lawyer.

Speaking of trial lawyers, there is one in-court sequence, during the first trial, where Martin testifies as a murder witness. The government prosecutor has rested and now the defendant's attorney correctly points out that Martin has been given immunity, a house, and a paycheck to testify.

But he doesn't stop there ; he goes on to ask a question too many: "Tell us what else the government has given you to testify?"

And Martin does: "I get not to see my parents," he sobs in the jury's direction, "I get not to go home, etc." I've seen live examples of when not to cross-examine, but this is one of the most poignant film examples. As expected, the jury is swayed by that poor man, Steve Martin.

Any screenwriter will tell you that to sustain comedy for a full 90 minutes, there must be a subplot. Here it's the agent buddy of Moranis who wants to go undercover. I thought the part too large and the cross-cutting to the buddy agent exasperating, but he does do a lovely dance number solo (accompanying Moranis and Cusack, the FBI and the DA) that almost makes up for too much screen time on the subplot.

Which is best FLATLINERS or MY BLUE HEAVEN? Frankly it depends on your mood. If you just won a motion for summary judgment, go see FLATLINERS, it will bring you out of your ego trip and back to reality. On the other hand, if you just lost that same motion for summary judgment, go see MY BLUE HEAVEN. Losing is never fun, but things could be worse. You could be a FBI agent whose high point in life was driving a BMW while under cover.

BOG proposes fee arb rule changes

RULES DEVELOPED FROM MATTERS CURRENTLY CONSIDERED POLICY:

Rule 37(i) Powers and Duties of Arbitrators

(4) *approve written requests for prehearing discovery upon a showing of good cause;*

(renumber following sections accordingly)

Rule 40(f) Notice of Arbitration Hearing

(9) *upon written request to the arbitrator or chair of the panel, and for good cause shown, request prehearing discovery;*

(renumber following sections accordingly)

Rule 40(p) Subpoenas *and Discovery;* Costs

In accordance with Rule 37(i)(3) and Section (f)(8) of this rule, an arbitrator will, for good cause shown, issue subpoenas and/or subpoenas duces tecum (hereinafter "subpoenas") *or authorize prehearing discovery* at the written request of a party. The cost of the service of the subpoena and the transportation of the witness shall be borne by the party requesting the subpoena to be issued. Any person subpoenaed by an arbitrator or the chair of a panel or ordered to appear or produce writings *or respond to discovery* who refuses to appear, give testimony, or produce the matter(s) subpoenaed *or requested* is in contempt of the arbitrator or arbitration panel. The arbitrator or panel chair may report such contempt to the superior court for the judicial district in which the proceeding is being conducted. The court shall treat this in the same manner as any other contempt. The refusal or neglect of a party to respond to a subpoena shall constitute cause for a determination of all issues to which the subpoenaed testimony or the matter is material in favor of the non-offending party, and a final decision of the arbitrator or panel may be based upon such determination of issues.

Rule 40(q) Decision of the Arbitrator or Arbitration Panel.

(5) the award, if any.

The original decision shall be signed by the arbitrator or members of the arbitration panel concurring in the decision. A separate dissent may be filed. *The award may provide for payment over time.* Pre-judgment interest may be awarded. Attorneys fees for arbitration may not be awarded.* The arbitrator or the panel chair will forward the decision, together with the file and the record, to Bar Counsel, who will then serve a copy of the signed decision on each party to the arbitration.

*This addition was previously published and has been sent to the Court.

RULES DEVELOPED FOR "COMPLEX" ARBITRATION:

Rule 34. General Principles and Jurisdiction.

(h) Complex Arbitration

(1) Upon recommendation by Bar Counsel or a panel chair, the Executive Committee may determine that a dispute constitutes a complex arbitration based on any of the following factors:

(a) Complex legal or factual issues are presented:

(b) The hearing is reasonably expected to or does exceed eight (8) hours;

(c) The amount in dispute exceeds $50,000.00.

Such determination may be made at any time after the filing of a petition but before a decision in the matter is final. If the determination is made after the hearing commences, a continuance of the hearing for at least 15 days shall be granted upon the request of a party.

(2) When a case is determined to be complex prior to hearing, the Executive Committee may require payment by one or both parties for reasonable costs of administration and arbitration. The parties will be notified of the estimated costs 15 days prior to hearing.

Rule 40. Procedure.

(q) **Decision of the Arbitrator or Arbitration Panel**. The arbitrator or arbitration panel will [MAKE] *issue* its decision within thirty *(30)* days of the close of the arbitration hearing. *If the matter is determined to be a "complex arbitration" under Alaska Bar Rule 34(h), the decision will be issued within ninety (90) days. If a delay is expected, the panel chair or single arbitrator will submit to Bar Counsel a written explanation of the delay, before expiration of the time allowed for decision. Bar Counsel will forward the explanation to the parties.* The decision will be based upon the standards set forth in these rules and the Alaska Code of Professional Responsibility. The decision will be in writing and need not be in any particular form, *unless a form is approved by the Executive Committee;* however, the decision will include: . . .

RULES RELATED TO TIME FOR FILING:

Rule 39. Notice of Right to Arbitration; Stay of Proceedings; Waiver by Client.

(a) **Notice Requirement by Attorney to Client.** At the time of service of a summons in a civil action against his or her client for the recovery of fees for professional services rendered, an attorney will serve upon the client a written "notice of client's right to arbitrate," which will state that:

You are notified that you have a right to file a Petition for Arbitration of Fee Dispute and stay this civil action by completing the enclosed form and sending it to the Alaska Bar Association, P.O. Box 100279, Anchorage, AK, 99510. If you do not file the Petition for Arbitration of Fee Dispute within [30] *twenty (20)* days after your receipt of this notice, you will waive your right to arbitration.

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

(b) **Stay of Civil Proceedings**. If an attorney, or the attorney's assignee, commences a fee collection action in any court, the client may stay the action by filing notice with the court that the client has requested arbitration of his or her fee dispute by the Bar within [THIRTY] *twenty (20)* days of receiving the notice of the client's right to arbitration. This notice will include proof of service on the attorney or the attorney's assignee.

(c) **Stay of Non-Judicial Collection Actions.** After a client files a petition, the attorney will stay any non judicial collection actions related to the fee in dispute pending the outcome of the arbitration.

(d) **Waiver of Right to Request or Maintain Arbitration.** A client's right to request or maintain an arbitration is waived if:

(1) the attorney files a civil action relating to the fee dispute, and the client does not file a petition for arbitration of a fee dispute within [30] *twenty (20)* days of receiving the "client's notice or right to arbitrate" pursuant to Section (a) of this rule; or

(2) after the client received notice of the fee dispute resolution program, the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute, except an action to compel fee arbitration, or seeking affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct.

RULES RELATED TO THE TIME FOR ISSUING LATER DECISIONS:

Rule 40. Procedure.

(s) **Modification of Decision by the Arbitrator or Panel.** On application to the arbitrator or panel by a party to a fee dispute, the arbitrator or panel may modify or correct a decision if:

(1) there was an error in the computation of figures or a mistake in the description of a person, thing, or property referred to in the decision;

(2) the decision is imperfect in a matter of form not affecting the merits of the proceeding; or

(3) the decision needs clarification.

An application for modification shall be filed with Bar Counsel within twenty days after delivery of the decision to the parties. Written notice of the application for modification will be served promptly on the opposing party, stating that objection to the application must be served within ten days from the receipt of the notice of the application for modification. *A decision on application for modification will be issued within thirty (30) days of time for filing objection.*

(u) **Appeal.** Should either party appeal the decision of an arbitrator or panel to the superior court under the provisions of AS 09.43.120 through AS 09.43.180, the appeal shall be filed with the clerk of the superior court in accordance with Appellate Rules 601 and 609, and notice of such appeal will be filed with Bar Counsel. *If a matter on appeal is remanded to the arbitrator or panel, a decision on remand will be issued within thirty (30) days of remand or further hearing.*

Please send comments on these proposed changes to the Bar office.

Alaska Association of Legal Administrators, Inc.

presents

Richard C. Reed
Editor/Author of

Beyond the Billable Hour:
an Anthology of Alternative Billing Methods

Tuesday, October 16, 1990
Anchorage Museum of History & Art

6:00 p.m. Buffet Dinner
8:00 p.m. Mr. Reed's Presentation

R.S.V.P. by October 8, 1990
(Jan Kassem at 563-8844)

Mead Data Central Gives Bar Scholarship

Mead Data Central (MDC) awarded a $1,000 scholarship to the Alaska Bar Association during the recent American Bar Association meeting in Chicago. MDC is the developer of the computerized legal research program, LEXIS. The Alaska Bar Association is the sponsor of a LEXIS group program through which participating Bar members receive group discounts.

The award honors the Alaska Bar Association for having the largest percentage of participating lawyers in the program for its size bar association. The Bar has sponsored the LEXIS group program since 1986.

The Bar Association donated the $1,000 to the Alaska Bar Foundation for the Foundation's law school scholarship program.

Even judges have a sense of humor

BY JERRY BUCHMEYER

I intended to dispose of Guideline Sentencing in the last column. But I forgot one thing: It is fortunate, indeed, that the Sentencing Guidelines were not in effect during the "trial" of Jesus Christ. I mean:

"Where would Christianity be if Jesus got eight to 15 years, with time off for good behavior? There would be no Christianity if it were not for the death penalty, which gave us the cross and the resurrection."[1]

But, anyway . . .

The Plea for Mercy

JUDGE: That's all you have to say in your client's defense? He's a nice guy, and we'll all miss him if he goes to prison?

DEFENSE ATTORNEY: Judge, it is just one year ago today that we were first blessed by your presence upon the Bench . . . (The attorney continued for several minutes to extol the virtues that had distinguished the judge's first year — especially, his compassion — and concluded by asking for a Large Chunk of that compassion for his client.)

JUDGE: From the bottom of my heart, I thank you for those compliments, which I will always cherish. But the sentence for your client will still be two years in prison.

DEFENSE ATTORNEY: In that event, Your Honor, I withdraw my remarks *in toto*.

The Defendant Speaks

JUDGE: Do you have anything to say to me before I sentence you?

DEFENDANT: Yes, as God is my judge I am innocent.

JUDGE: You're mistaken, He isn't; I am; you aren't; six months.[2]

JUDGE: All right. Any other questions?

DEFENDANT: How can you sentence an innocent man to prison?

JUDGE: *It is part of my job.*

The Sentence

JUDGE: . . . on a date to be hereafter fixed by order of this court, within the State Prison, at which time and place *you shall then and there put to death* the said [defendant] in the manner prescribed by law. [But] . . . the Court finds *you are entitled to credit for 549 days for time served* and 182 days good time and work time, for a total of 731 days . . .

Sentence by Judge William B. Ochiltree, one of the original Republic of Texas Supreme Court Judges:

"The fact is, Jones, that the Court did not intend to order you to be executed before next spring, but the weather is very cold — our jail, unfortunately, is in a very bad condition — much of the glass in the windows is broken — the chimneys are in such a dilapidated state that no fire can be made to render your apartments comfortable; besides, owing to the great number of prisoners, not more than one blanket can be allowed to each; to sleep soundly and comfortably, therefore, will be out of the question. In consideration of these circumstances, and wishing to lessen your sufferings as much as possible, the Court, *in the exercise of its humanity and compassion*, does hereby order you to be executed tomorrow morning, as soon after breakfast as may be convenient to the Sheriff and agreeable to you.[3]

The Defendant Reacts

JUDGE: Charlie, I'm sentencing you to six months in jail.

DEFENDANT: Oh, that's terrible.

JUDGE: Well, I want you to know that if I really thought you were guilty I would have given you six years.

Another approach was taken by the defendant in *United States v. Jones*, 663 F.2d 567 (5th Cir. 1981):

"Yes, sir . . . But now today you bring me down here to pass sentence on me. It's nothing really too much I could do about it. When you can't beat them you join them. So, Judge O'Kelley, U.S. Attorney, Mr. Bostic, I pass sentence on you, the sentence would be death, you and all your relatives. Now you can pass your sentence. It is death to you, you, and you, and all your relatives by gunshot wound. Now do as you please. I don't give a ——— if you throw the whole Empire State building at me, the whole State of Georgia.[4]

Let's Be Particularly Careful Out There!

After sentence was imposed by a Canadian judge, the defendant's mother (*Mrs. Muzzli*) shouted:

"You miserable, rotten, sadistic old bastard! You old bag of ———. You ought to be shot, you . . ."

The judge listened patiently — *perhaps because this was his last day on the Bench* — and then had the bailiff "escort" the defendant's mother from the courtroom.

Following this case, as had been planned earlier, the attorneys began to say a few words in tribute to His Lordship to mark his final day as a judge:

PROSECUTOR: I wish to pay tribute to a fearless and forthright judge who has always had the courage of his convictions. No one can deny that Your Lordship has been a very courageous judge.

ASSISTANT PROSECUTOR: I associate myself with the remarks of my learned friend.

FIRST DEFENSE COUNSEL: I wish to associate myself with the remarks of both of my learned friends.

SECOND DEFENSE COUNSEL: I associate myself with the remarks of all my learned friends.

COURT REPORTER: (As he strolled out of court.) And I associate myself *with the remarks of Mrs. Muggli*.

And, then His Lordship "bowed and left the bench forever."[5]

FOOTNOTES

[1]This is an Actual Quote of remarks made in 1978, by a state senator in New York, to the Council of Churches of the Mohawk Valley because it had opposed the death penalty as a "matter of faith."

[2]Although some may think this story — and others in this sentencing series — is apocryphal. I have *personal knowledge* of this one happening, not only in Texas, but also in 26 other states and Canada. I will confess, however, that this particular story appears in each of the collections cited in *footnote 5*.

[3]First printed in the *Mississippi Free Trader & Natchez Gazette* (Jan. 11, 1843), and preserved in *"The Texas Republic."* by William Ransom Hogan.

[4]Sometimes you just can't win — so the defendant Lloyd Jones was, for these remarks, convicted and sentenced to five years in prison for threatening the lives of the judge and the prosecutor. (663 F.2d at 569.)

[5]Some of the material for this Epic Series in Sentencing is from *Court Jesters* by Peter V. MacDonald, Q. C. (Methven 1985); *It's Legal To Laugh* by Milton D. Green (Vantage Press 1984); *Disorderly Conduct* by Jones, Sevilla and Velmen (W. W. Norton 1987); and *The Howls of Justice* by Shafer and Papadakis (Harcourt Brace 1988).

Solid Foundations

By Mary Hughes

(Upon editorial intervention and request, the following is a brief description of the Alaska IOLTA program for those who are unfamiliar with it.)

Since 1986 the Alaska Interest On Lawyers Trust Accounts (IOLTA) program has distributed grants to further the administration of justice and to provide legal services to those who could not otherwise afford them. The IOLTA concept was created in Florida and now encompasses the entire United States.

The program's viability relies on each attorneys' individual attorney/client trust account. This account contains client funds not yet earned by the attorney. These monies, prior to IOLTA, were placed in a non-interest bearing trust account unless placed in an interest bearing account for the client.

To put the money to a productive use and help further the legal community's involvement in public service, the IOLTA attorney trust accounts earn interest received by the Alaska Bar Foundation (ABF). The ABF is a non-profit 501(c)(3) organization. The trustees of the ABF disburse the IOLTA funds among the grant applicants:

The Alaska Pro Bono Program (APBP), jointly sponsored by Alaska Legal Services Corporation and the Alaska Bar Association, is a statewide, non-profit, direct service program involving private and public sector attorneys in the delivery of free legal services to low income Alaskans. $20,500 was the 1988-89 grant. In 1989-90, the program received $50,000 and in 1990-91, $60,000 was distributed. The grant monies were disbursed throughout its various programs:

> The Elderlaw Project, which services low-income Alaskans over 60 years of age, has benefitted over 200 elderly people at the senior centers in Anchorage alone. Tuesday Night Bar Advice-Only and Pro-Se Clinics provide classes on various legal issues. Information and assistance provided includes advice for clients who wish to obtain uncontested divorces, custody classes for uncontested custody and support orders for unmarried parents, and Chapter 7 bankruptcy classes. Other areas include assistance in the area of wills, estate planning, housing, and consumer matters.

In 1990 the Alaska Bar Association and the Alaska Judiciary provided a forum for Alaskan, Soviet, Yukon Territories and British Columbian lawyers and judges to exchange information and to comment on matters of common legal and judicial experience. The Northern Justice Conference's format was based on a PBS series developed by Fred Friendly. Hypothetical situations relating to Northern judicial issues were addressed gaining various perspectives from all participants. To insure Soviet participation, simultaneous translation was available. The Northern Justice Conference received $20,000 from the ABF for translation of the program.

Anchorage Youth Court (AYC), an alternative program in which youths are tried by their peers without receiving a criminal record received $34,200. The Anchorage Youth Court strives to provide youth with an understanding and awareness of their legal responsibilities to society through AYC bar membership and participation in AYC trials. Those that have committed crimes are given a chance for redress and erasing their criminal record by participating in community service projects. The Anchorage Youth Court Bar Association trains youths in Junior and Senior High School to represent and judge their peers in actual criminal cases.

The Advocacy Services of Alaska received $10,925. The protection and advocacy agency assists the economically disadvantaged clients who also experience developmental disabilities. The agency will distribute the funds in support of publications and distributions of materials on guardianship to economically disadvantaged persons who experience developmental disabilities and secondly to provide statewide outreach on the recent U.S. Supreme court Zebley supplemental security income case.

The Woman's Education and Leadership Forum (WELF) received $1,500 for legal brochures for their conference which was cohosted by Senator Ted Stevens in March of 1990 on the improvement of the administration of justice. WELF caters to all socio-economic backgrounds and to all ages of women. Since 1987, WELF has worked with congressional leaders to host conferences for women across the country and has provided educational information on issues of universal concern. Many of its workshops include such topics as self-esteem, stress management, financial planning, aging, educational opportunities, and entrepreneurship. WELF helps give women the tools they need to enrich their lives.

Alaska IOLTA funds total more than $300,000. Since Alaska's conversion in 1989 from a voluntary program to the current opt-out style, the Alaska IOLTA program has a 43 percent participation rate amongst eligible lawyers.

Family Matters

By Drew Peterson

Surely the saddest part of dealing with families experiencing divorce is in witnessing the terrible emotional costs borne by the children. At best the children have only a limited comprehension of the implications of their parent's breakdown. Often the children will attempt to cope with the divorce through their own behavioral strategies. The parents, as well as the professionals who are assisting the parents through the process of divorcing, are frequently insensitive to these strategies of the children. This can lead to even greater confusion, pain, and suffering for the children.

In his book *Mediating Child Custody Disputes* (Jossey-Boss Publishers, 1985), Donald T. Saposnek describes some of the more common strategies used by children during the process of divorce. An important element of helping children through the painful process of divorce, according to Professor Saposnek, is to recognize such strategies as natural coping mechanisms for the children. The job of the parents and professionals involved with the family at the time of divorce is to focus on meeting the needs of the children. If the childrens' needs are met in caring and compassionate ways there will be no need for them to use such strategies.

Strategies by children, of course, are not limited to families undergoing separation. Even in intact families there are times when a child will willfully provoke conflict between his or her parents. There are also occasions when a child is caught as an innocent victim in a parental dispute. A third and even more common occurrence is when a child is an innocent but functional contributor to a dispute between the parents. In such cases the child's action is neither clearly willful nor clearly innocent, but partly both.

Early theories in the field of developmental psychology believed that dysfunctional marital relationships caused dysfunctional behavior patterns in children. Current theories, however, support a family systems view of a more circular nature of causality. From such a perspective it appears that all family members experience distress during periods of natural family tension, such as adolescence or leaving the home for independent living (leaving the nest). Each family member responds to the responses of the others, in a circular manner.

The extraordinary crisis of divorce brings forth all of the strategies that children normally use, but in an exaggerated form. The studies on the long term effects of divorce upon children (See: Wallenstein and Kelly, *Surviving the Breakup,* Basic Books, 1980) confirm that children of divorce experience long-term effects of behavior and emotional regression, pervasive grief, intense anger, and blaming. Initial reactions tend to subside within 18 months and to diminish significantly within five years of the divorce, as children accept the reality of the situation. Some effects of divorce on children last much longer, however, and may even be permanent.

Reuniting Strategies. The first strategy of children which Saposnek describes is the strategy of attempting to reunite the parents. Such strategies are used by children of all ages, although they often differ with children of different ages.

Often children, especially the younger ones, would rather have their parents fight than separate. "Negative attention is better than no attention" seems to be the underlying assumption. Saposnek gives the example of a three-year-old who returns from a visit regressing to bed-wetting, or thumb-sucking. Such an occurrence could well be the child's attempt to get the parents to stop fighting with each other and concentrate together on the child's behavior, as they have done in the past.

An eight-year-old girl might return from a visit and describe how much her father had changed, how he no longer yells, and takes her nice places and buys her things. The child's desire is for mom to give dad another chance, while the mother's view might well be that father is insincerely attempting to buy daughter's favor.

A thirteen-year-old boy might lay a guilt trip on father, telling him how terrible mom was doing, in hopes of getting dad to come back and help out. The father could take this information as evidence of mother's terrible life and son's desire to live with him, while the son was in fact only trying to encourage his parents to reunite.

Strategies For Reducing Separation Distress. For some time after the marital separation, young children often experience great distress each time they make the transition between one parent and the other. Often this happens with both parents, but children who are less adaptable tend to have a more difficult time dealing with the transition from one parent to the other. Because of the overall stress of the divorce, any lack of adaptability is likely to be exaggerated. Once a sufficient transition period has passed, however, the child appears to be happy while in the care of the second parent. The function of the child's distress is to get the parents to become sensitive to the child's discomfort with the changes. Often, however, the distress gets blown into a reflection by the parents of their own emotional states, thereby increasing the trauma to the child.

Strategies for Detonating Tension. Often the tension between hostile separated parents feels to the children like a volcano waiting to erupt. In intact families such tensions are often reduced by the child's providing an excuse for both parents to yell, thereby providing a release. Children of divorced parents use this strategy as well, and often very effectively. An extreme example Saposnek provides is of a seven-year-old boy telling his father that his mother is having sleep-over boyfriends. The child's fear is that the father's chronic jealousy and anger may result in the mother and the child getting hurt or killed. The function of telling the father is so he will blow up once and for all; to the child the reality would be easier to handle than the fantasies that the child has generated in response to the chronic tension over his father's jealousy.

Strategies for Testing Love. Divorce researchers have pointed out how both parents are frequently emotionally unavailable for their children for about a year following the separation. As a result, the children will often feel emotionally neglected and will test their parents' love for them. An example is of a child who calls his non-primary custodial parent frequently and asks, "Do you still love me?" The child's underlying emotion is fear of rejection by one parent for wanting to live with or feel love for the other. Such motives can frequently be misunderstood, however, by the parents who are in the midst of their own emotional crises.

Strategies of Proving Loyalties. Not infrequently, the emotional unavailability of both parents frightens a child enough to willingly sacrifice a relationship with one parent, at least temporarily. The result is that the child develops a dysfunctionally close bond with one parent to the exclusion of the other. The child often feels that the severed parent will be understanding and will wait for the situation to stabilize, and then reestablish an affectionate relationship.

Fairness Seeking Strategies. Children of almost any age will often attempt to make everything come out exactly even between their parents. They take it upon themselves to monitor fairness for both of their parents. The underlying emotion for the children is that they want both of their parents to love them equally. Thus they feel burdened with the task of keeping parental peace by serving as a balancing referee of all interactions between the parents.

Strategies to Promote Self Esteem. Some parents can become quite insensitive to the feeling of their children. The children can all too often be used as an easy target for the venting of anger which may have nothing to do with them. This problem is complicated by the fact that the children often have difficulty in identifying, let along verbally expressing, the source of their discomfort when around the parent who threatens their self esteem. They will often resort to strategies. Saposnek's example is of a ten-year-old girl who develops psychosomatic illnesses whenever she is supposed to visit her father. The father assumes that the mother put the child up to it, while it is actually the child's own strategy, to protect her self esteem and hopefully to persuade the father to change his style in dealing with her in the future.

Strategies for Protecting the Parent's Self Esteem. Children are also often acutely aware of the fragility of their parent's self esteem after separation. Partly out of empathy and love for the parent, but in large part for their own emotional survival, they will make efforts to protect the self-worth of each parent. Children using these strategies often engage in markably inconsistent behavior, without seeming to be aware of the inconsistency between their actions. An example would be a child who would tell her father that she really wanted to live at his house, while with him, and then say the opposite while with her mother. The underlying emotion of the child is a concern for each parent, but also a substantial fear of being abandoned by either or both of them.

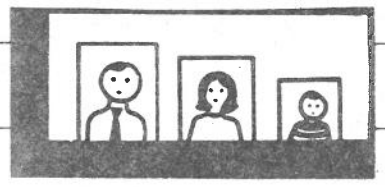
Permissive Living Strategies. Finally there are some occasions when one comes across older children who appear to be dealing with the divorce by manipulating the situation to their own advantage. The motivation may be a lack of a strong bond with either parent, plus an exceptional degree of manipulative skill, self-centeredness or simple withdrawal. In any case, these children appear to push a decision that will work to their own selfish advantage.

Conclusion. These are only some of the strategies which are used by children in divorce. All of such behaviors are open to interpretation, especially by parents who are themselves in the midst of severe emotional distress at the time of divorcing.

It needs to be recognized that the parents' various misinterpretations of the behaviors of their children are often exactly the sort of arguments that can be utilized by their respective attorneys in arguing the case to the courts. Lawyers can build evidence to support each misinterpretation and then construe it as reality. In such a case, the final legal result may have little to do with what is truly in the best interest of the children.

It is thus particularly important that the attorneys involved with custody disputes to be knowledgeable about such strategies of the children. The parents themselves are caught in the middle of what is often the worst emotional crisis of their lives. They are in a very poor position to recognize such strategies. Family therapists of other counsellors involved with the case might be able to recognize such strategies and point them out to the parents. As we know, however, these experts are not involved with many cases. There is often no one in a better position than the family lawyer to recognize such strategies of the children and to bring them to the attention of the parents.

In and of themselves, such strategies by the children are neither good nor bad. What they are is a sign to the parents that something may be going wrong; a sign that they have better take a good long look at their children and their own behavior and where their priorities lie. As attorneys, we can provide a major service to our clients by being able to help recognize and evaluate these common strategies used by the children of divorce.



People

Lu Ann Bailey, who has married and is now Lu Ann Weyrauch, has left Birch, Horton, et.al. and is now with the A.G.'s office.....**Mike Hotchkin** has left the A.G.'s office and returned to school in Albany, NY to obtain a teaching certificate for elementary education.....**Holly McLean** has left Miller, Nash, Weiner, Hayer & Carlson in Portland, OR, and now works with the Office of General Counsel of the U.S. Department of Agriculture. Holly also married Richard E. Caplan on March 11.....**Brendon Doherty** was born to Brian & Leslie Doherty on August 2.....Tyler is the newest addition to the **Larry Cohn** family.

Robert Bassett has left New Mexico to become part of the in-house staff at Cyprus Minerals Company in Englewood, CO.....**Frank Cahill** is now with the Law Office of Wm. McNall.....**Henry Camarot** writes that he has moved to Seattle, WA, and that some may think he's semi-retired ("and maybe I am and maybe I'm not.").....**Susan Downie** has relocated from Wrangell to Fairbanks.....**Michael Heiser**, formerly with the Municipal Attorney's Office in Ketchikan, is now with Keene & Currall.....**Shannon Hanley** has moved from Kenai to Juneau.

Brewster Jamieson has moved from the Seattle office to the Anchorage office of Lane Powell & Barker.....**Calvin Jones** has moved his law office from the partnership of Kellicut & Jones and is now associated with Hoge & Lekisch.....**Joe Kalamarides** & **Tim MacMillan** have formed the firm of Kalamarides & MacMillan.....**Jim Kentch**, formerly with Kentch & Huntington, is now with APOC.

Gerald LaParle is now with the firm of Bradbury, Bliss & Riordan.....**Elizabeth Page "Pat" Kennedy** is retiring from state service with the A.G.'s office and is opening her own law office. She will be sharing space with Nan Thompson.....**Edgar Locke**, formerly with Locke & Shea, has moved into a new partnership with Beaty, Draeger, Locke & Troll.....**Jeffrey Moeller,** former law clerk to Justice Compton, is now with Hicks, Boyd, Chandler & Falconer.....**Brian McNally**, former law clerk for the U.S. Bankruptcy Court, is now with the U.S. Securities & Exchange Commission in D.C.....**Mindy McQueen** is now with the D.A.'s office in Anchorage.

Gary Oba is with the American Consulate General, Sapporo.....**Robert Price**, formerly with Groh, Eggers & Price, is now with the Bristol Bay Native Corp.....**Mitchell Seaver**, former assistant City-Borough attorney, is now with Ziegler, Cloudy, King & Peterson.....**Wm. Ronald Smith**, former Deputy City Attorney in Fairbanks, is now a magistrate with the Alaska Court System.....**Betsy Sheley**, former assistant D.A. in Anchorage, has moved to Mercer Island, WA.

John Sutcliffe has relocated from Kenai to Juneau.....**Daniel Winfree** and **Richard Hompesch** are shareholders of Winfree & Hompesch, a P.C.....**Russell Walker** has relocated from Ketchikan and is now with Preston, Thorgrimson, et.al. in Anchorage.....**Barbara Armstrong**, CLE Director of the Alaska Bar Association, was elected Director-at-Large for the Executive Committee of ACLEA, the Association of Continuing Legal Education Administrators, an international organization of CLE providers. She is the first Alaskan member to be elected to the governing committee.....**Elizabeth Ingraham**, former vice-president/general counsel of Bristol Bay Native Corporation, is now enrolled in the Master of Fine Arts (sculpture) Program at the University of California - Santa Barbara. In addition to being a student, she is now a teaching assistant.

David Baranow has opened his own law office as of July 1.....**Jim Crane** is now working out of the Portland office of Copeland, Landye, Bennett & Wolf at 3500 First Interstate Tower, Portland, OR 97200.....**Karla Forsythe**, formerly the Executive Director of the Alaska Public Offices Commission, is now a Senior Analyst with the Metropolitan Service District, Portland, Oregon.

ALASKA BAR ASSOCIATION CLE SEMINAR
VIDEO REPLAY SCHEDULE
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: Please note there are now TWO locations: Attorney General's Office, Conference Room, 100 Cushman, Ste. 400 -- CLE Video Replay Coordinators, Ray Funk and Mason Damrau, 452-1568 AND Guess & Rudd Conference Room, 100 Cushman St., Ste. 500 -- CLE Video Coordinator, Jim DeWitt, 452-8986. Be sure to check location listed below.

REPLAY DATES:

* **Professional Responsibility and Ethics** (Anch. 9/21/90 & Fbx. 9/20/90)
Juneau: 9/29/90, 9AM - 5PM
Kodiak: 10/6/90, Beginning at 10AM

***Tax Planning for Bankruptcy & Tax Indebtedness** (Anch. 10/12/90)
Juneau: 10/20/90, 9AM-1PM
Kodiak: 10/27/90, Beginning at 10 AM
Fairbanks: 11/2/90, 9AM-1:30PM, GUESS & RUDD

* **Tort Reform in Alaska** (Anch. 10/17/90)
Juneau: 10/27/90, 9AM-1PM
Kodiak: 11/10/90, Beginning at 10 AM
Fairbanks: 10/26/90, 9AM-1PM, ATTORNEY GENERAL'S OFFICE

***3rd Annual Alaska Native Law Conference** (Anch. 10/22/90)
Juneau: 11/3/90, 9AM - 5PM
Kodiak: 12/1/90, Beginning at 10 AM
Fairbanks: 11/9/90, 9AM-5PM, ATTORNEY GENERAL'S OFFICE

***Tax Update & Review** (Anch. 10/30/90)
Juneau: 11/10/90, 9AM-5PM
Kodiak: 12/15/90, Beginning at 10AM
Fairbanks: 11/16/90, 9AM-5PM, GUESS & RUDD

***FDIC And Resolution Trust Corporation** (Anch. 12/4/90)
Juneau: 12/8/90, 9AM-5PM
Kodiak: Not scheduled
Fairbanks: 12/14/90, 9AM-1PM, GUESS & RUDD

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.

N.B. Making and Meeting Objections originally scheduled for Fall 1990 has been postponed.

Cowper names Link to bench

Gov. Steve Cowper, July 20, named Fairbanks attorney Jonathan Link to a newly created Superior Court judgeship in Kenai.

Link, 46, is a 24-year Alaska resident who since 1980 has been in private practice in Fairbanks. He has worked for two other Alaska law firms and specializes in both criminal and civil litigation.

Jon's long tenure in Alaska and travels throughout the state give him a thorough understanding of Alaska values," Cowper said. "He's a top-notch lawyer with experience in both criminal and civil matters and he has the proper judicial temperament for the bench."

Link was one of three candidates nominated by the Alaska Judicial Council for the judgeship, which was created by the legislature this year. Others included Anchorage District Court Judge Michael Wolverton and Kenai attorney Arthur "Chuck" Robinson.

Link is a 1972 graduate of the Hastings College of Law, a 1965 graduate of Whittier College and an Army veteran. He is a member and former officer of the Alaska Bar and Tanana Valley Bar Associations and is a former owner and operator of the Palace Saloon in Fairbanks, a tourist attraction.

Link assumes his new job in early fall and will be paid about $92,000 annually.

—Office of the Governor.

New section formed: ADR

The approval of the creation of a new substantive law section, Alternative Dispute Resolution, was approved by the Board of Governors at their September meeting. If you are interested in joining this section, please call Glenn Cravez, Interim Chair, at 274-7686 in Anchorage. Watch SECTION NEWS for more information on this section or call Barbara Armstrong at the Bar Office at 272-7469.

ELP Section now - Law Practice Management

At the request of the Economics of Law Practice Section, the Board of Governors has approved the change of the section name to the LAW PRACTICE MANAGEMENT Section. The Alaska Bar Association section name will now parallel the American Bar Association committee name. Your 1991 dues notice form has already been printed and will not reflect this name change; however, the 1992 forms will show the amended title.

Link to Kenai

Continued from page 7

any contribution is warmly welcome.)

While community service for historical preservation is Jon's major contribution, he has served on the Bar Association Board of Governors, and was vice-president of the Bar at the time of the great sunset battle with the legislature. He has been a regular attendee at the Tanana Valley Bar Association, and those who read the minutes that are published from time to time have already grasped his sense of humor.

At the conclusion of my interview, I asked Jon how he liked Kenai (he had just returned from house-hunting there), and it turns out that he really does like it. Link was given a chance to make any final quotes or speeches to appropriately insult members of the Tanana Valley Bar, but he declined those opportunities because he says there's not enough space in the Bar Rag.

Ladies and Gentlemen of the Kenai Bar, we give you the Honorable "Big Foot" himself.

Debt forgiveness outside the "B" word

BY THOMAS J. YERBICH

One of the tax areas in which bankruptcy can have a major impact is in the recognition and treatment of income realized as a result of debt foregiveness; whether through a foreclosure or repossession, lapse of legal liability by the running of the statute of limitations, or the creditor simply forgoing collection for any reason.

To better understand the impact of bankruptcy on debt forgiveness, it is first necessary to review the tax rules governing debt forgiveness income outside the bankruptcy context. That is the purpose of this article.

As a general rule, gross income includes economic gain realized from the forgiveness of indebtedness [IRC § 61(a)(12)]. Debt forgiveness may arise in a variety of ways. Cancellation of debt by a creditor is but one method. Others include: repurchase of an obligation by a debtor at less than face value [Treas. Reg. § 1.6112(a); *U.S. v. Kirby Lumber Co.*, 284 US 1 (1931)]; and payment of a debt or obligation by a third party [*Old Colony Trust Co. v. CIR,* 279 US 716 (1929)].

The touchstone is whether a taxpayer realizes a net economic gain as a result of a transaction. Lack of compensatory motive or the expectation of a future *quid pro quo* on the part of the creditor is not determinative. [That is not to say that under certain circumstances the transaction may not constitute a gift excludable from gross income under IRC § 102(a). However, discussion of the fine line separating gifts is beyond the scope of this article.]

Computing the amount of debt forgiveness income for an unsecured obligation is relatively easy. If an entire obligation is forgiven, then the amount of the obligation owed is debt forgiveness income. If, on the other hand, an obligation is satisfied on a discounted basis, the amount of the debt forgiveness is the difference between the amount paid and the face amount of the obligation.

Where an obligation is secured, however, the computation becomes infinitely more complex. Initially, one must determine whether the underlying obligation is recourse or nonrecourse.

In a true nonrecourse debt situation, there is no debt forgiveness because the debtor never has any legal obligation to respond personally on the debt. IRC § 61(a)(12) is, therefore, inapplicable. That does not mean, however, that no adverse tax consequences exist as a result of a nonrecourse foreclosure, because they most certainly do. A foreclosure on a nonrecourse debt is treated the same as a sale or exchange of the property securing the nonrecourse debt [Reg. § 1.1001-2(a)(1)]; a "sale" also occurs when a debtor voluntarily conveys (e.g., deed in lieu of foreclosure) [*Freeland v CIR*, 74 TC 970 (1980)] or abandons [*Middleton v. CIR*, 77 TC 310 (1981) aff'd *per curiam*, 693 F2d 124 (llth Cir. 1982)] the property. The amount of a nonrecourse obligation extinguished is treated as the amount realized. A taxpayer computes the amount of the gain (or loss) realized and recognized by comparing the tax basis in the property to the amount of the nonrecourse obligation extinguished at the time the foreclosure action is completed [*Commissioner v. Tufts*, 461 US 300 (1983)]. The character of the entire gain (or loss) is determined by the character of the property securing the obligation: if the property is a capital asset the gain (or loss) is capital [subject, of course, to the recapture rules of IRC §§ 1245 and 1250]; if the property is not a capital asset, the gain (or loss) is ordinary.

In the case of mixed property containing both capital and non-capital assets, the allocation is made on the basis of each asset's fair market value ("FMV") relative to the total FMV of all the property. This is the only role that FMV plays in the tax computation in a nonrecourse debt situation; FMV is otherwise totally irrelevant to the tax computation.

In a recourse debt situation the computation is infinitely more complex and the result frequently bizarre. Where debt is recourse, a debtor has personal liability and there is a potential for debt forgiveness. In any case where the creditor accepts the property securing a recourse debt in exchange for satisfaction or cancellation of the indebtedness, whether by deed-in-lieu or through foreclosure action, the transaction must, for Federal income tax purposes, be bifurcated into sale or exchange and debt forgiveness components. Unlike a nonrecourse debt, where the debt is recourse, FMV of the property is as important to the ultimate determination of tax liability as tax basis and amount of debt.

The sale or exchange component is computed in the usual manner. Gain (or loss) is determined by subtracting tax basis from amount realized. However, amount realized for this part of the computation "does not include amounts that are (or would be if realized and recognized) income from the discharge of indebtedness" [Treas.Reg. § 1.1001-2(a)(2)]. The amount realized is the FMV of the property and the excess of the obligation over FMV is treated as income from the discharge of indebtedness [see Treas.Reg. § 1.1001-2(c) Ex. (8)]. Gain (or loss) recognized on a sale or exchange is the amount by which the amount realized (FMV) exceeds (gain) or is less than (loss) the tax basis in the property. The character of the gain or loss (capital or ordinary) is determined by the character of the property — capital or non-capital asset; and, if capital, also applying the recaptures rules of IRC §§ 1245 and 1250.

The manner in which this works can be illustrated by a few examples.

Example 1: The taxpayer owns Blackacre (a capital asset) having a tax basis (A/B) of $75,000 and a FMV of $100,000 on which the taxpayer owes $125,000. The lender forecloses nonjudicially. The taxpayer has received an economic benefit of $125,000 (discharge of indebtedness) of which $50,000 [$125,000 (indebtedness) - 75,000 (A/B)] is a net economic gain; the gain is characterized as $25,000 capital [100,000 (FMV) - 75,000 (A/B)] and $25,000 ordinary (debt forgiveness) income [125,000 (indebtedness) - $100,000 (FMV)].

Example 2: Same facts as Example 1 except that tax basis is $100,000 and FMV is $75,000. The taxpayer has received an economic benefit of $125,000 of which $25,000 [$125,000 (indebtedness) - 100,000 (A/B)] is a net economic gain. For Federal income tax purposes however, the taxpayer has both a gain and a loss. On the sale or exchange component the taxpayer has a capital loss of $25,000 [$75,000 (FMV) $100,000 (A/B)]; however, the taxpayer has realized ordinary (debt forgiveness) income of $50,000 [$125,000 (indebtedness) $75,000 (FMV)]; net economic gain of $25,000.

Example 3: Same facts as Example 1 except that tax basis is $125,000, debt $100,000 and FMV $75,000. The taxpayer has realized a net economic loss of $25,000 [$100,000 (indebtedness) 125,000 (A/B)]. However, for federal income tax purposes, the taxpayer again has both a gain and a loss. On the sale or exchange component the taxpayer has a capital loss of $50,000 [$75,000 (FMV) - $125,000 (A/B)]; however, the taxpayer realizes debt forgiveness income of $25,000 [$100,000 (indebtedness) - $75,000 (FMV)]; a net economic loss of $25,000.

One might ask, "so what is the problem, just net one against the other and the ultimate tax consequences track the economic consequences."

Not so!

Although the 1986 tax act eliminated the preferential tax rate for capital gains, it did not eliminate the concept of capital assets and for the most part left the provisions relating to capital assets (particularly losses) intact. Capital losses may only be netted against capital gains. Net capital losses (excess of capital losses over capital gain) may be used by an individual to offset ordinary income in an amount not exceeding $3,000 in any one taxable year [IRC § 1012]; the unused balance is carried forward to subsequent years. Thus in Example 2, the taxpayer has taxable income of $47,000 [50,000 (debt forgiveness income) - $3,000 (capital loss offset)] and a capital loss carryforward of $22,000; while in Example 3 the taxpayer has $22,000 in ordinary income ($25,000 debt forgiveness income $3,000 capital loss offset) and a $47,000 capital loss carryforward. (Remember, I told you the result could be bizarre). In Example 3 the taxpayer had a net economic detriment (lost $25,000 on the transaction) but still incurs a tax liability for the year in which the transaction occurred — rubbing salt in the wound.

The real "triple-whammy" exists where the foreclosed property is "personal use" property such as a residence or personal automobile. Losses sustained upon the sale or other disposition of property held for personal, living and family purposes are not deductible [Reg. § 1.262-1(a)(4)]. Accordingly, in Examples 2 and 3, if the property were a personal residence, the taxpayer would have no loss to offset any part of the taxable either in the year the discharge occurs or any subsequent year. Therefore, in the case of a solvent taxpayer, the debt foregiveness income is taxed but the economic loss actually incurred is never recognized for tax purposes. An admittedly inequitable result, but one which is nevertheless mandated by the IRC and Treasury Regulations. In some situations the resulting disparity in tax treatment may be justified by deeming it a form of recapturing prior tax benefits [e.g., depreciation or the IRC § 1034 deferral of gain realized on sale of earlier residence(s)]. But for the average individual caught in this web there is no justification as either a tax trade-off or in sound public policy.

To exemplify the inequity, assume the taxpayer "A" a first-time home buyer purchases a home for $125,000, and finances $100,000 of the purchase. Three years later the house has declined in value to $75,000 and "A" still owes $99,000; "A" loses his/her job, defaults on the loan and the lender forecloses non-judicially. "A" is out the $26,000 paid into the home, has a capital loss of $50,000 which "A" cannot use, and has taxable debt forgiveness income of $24,000, with a tax liability of $3,600 to $6,720 which must be paid. One also must remember that "A" probably used after-tax income to pay the $26,000.

The taxpayer "B" on the other hand owned two prior homes on which "B" realized, in the aggregate, gain of $25,000 on the sale, which gain was deferred under IRC 1034. "B" also purchases a new home for $125,000 using the $25,000 deferred gain as a down payment, financing the balance. "B" suffers the same fate as "A." "B," like "A," is out the $26,000 paid; has $24,000 in taxable debt forgiveness income and a non-deductible capital loss ($25,000 instead of $50,000 because of the reduction in basis rules applicable under IRC § 1034). The main difference is that "B," unlike "A," used before-tax rather than after-tax dollars for the down payment; thus, it may be said that "B" is paying the taxes on previously unrecognized, untaxed income that was in fact realized. However, this may not be said of "A" who has paid taxes on income which was realized and income which was not, in any economic sense, realized.

The next article will discuss how this result may be allevi ated, or even eliminated, if the obligation on the debt is discharged as part of a bankruptcy proceedings.

Estate Planning Corner

By Steven O'Hara

Much of estate planning is simply a matter of not wasting available exclusions, deductions, credits, and exemptions.

For example, consider a married couple, domiciled in Alaska, both U.S. citizens. They have no debts and neither has ever made a taxable gift. Their assets are all in Alaska and total $1.2 million.

Suppose the husband dies first, giving everything to his surviving spouse, who does not disclaim. Suppose she dies a year or so later, with a taxable estate of $1.2 million.

Under such circumstances, the surviving spouse's estate would, under current law, owe $235,000 in estate taxes (I.R.C. Sec. 2001, 2010, 2011, and A.S. 43.31.011).

These taxes could have been avoided had the husband not wasted his unified credit (I.R.C. Sec. 2010).

The couple could have first equalized their estates, by separating their assets so that each owned $600,000 separately. Then the husband could have signed a will or living trust that gave the unified credit equivalent amount, which is currently $600,000, to a trust that would be available to the surviving spouse, but would not be included in her gross estate on her subsequent death.

This trust is often called a "credit-shelter trust," since it shelters the unified credit equivalent amount from estate taxes. It is also often called a "bypass trust," since it bypasses the surviving spouse's estate for tax purposes.

In general, under current law, whenever a surviving spouse's estate could exceed $600,000, the unified credit of the first spouse to die should not be wasted.

Just as the name of the game for years has been not wasting the unified credit, now much of estate planning is concerned with not wasting the $1 million GST exemption (I.R.C. Sec. 2631).

The objective of the generation-skipping tax is to assure that a transfer tax is paid at each generation. The federal government would like to see, for example, a tax paid when grandparent dies, when child dies, as well as when grandchild dies.

The generation-skipping tax tries to catch those transfers that would avoid the payment of a transfer tax on the death of the middle generation — the child in our example. Like the estate and gift tax, however, the generation-skipping tax is not limited to family transfers (I.R.C. Sec. 2651(d)).

Each of us has been given a $1 million GST exemption (I.R.C. Sec. 2631). In contrast to the unified credit against gift and estate taxes, which is automatically applied on taxable gifts and on death, the GST exemption applies, in general, only when allocated by the transferor or her personal representative (I.R.C. Sec. 2632).

This exemption is valuable and should not be wasted. For example, consider again our couple mentioned above. Suppose neither has ever used the GST exemption, and suppose their assets have now grown to $2 million.

Suppose the husband dies, giving everything to his surviving spouse, who does not disclaim. Suppose she dies a year or so later, with a taxable estate of $2 million.

After paying $588,000 in estate taxes, suppose her remaining estate of $1,412,000 is payable to a single trust for the benefit of her son and his children.

Suppose the son then dies, and suppose this event triggers the termination of the trust. Suppose $1,412,000 is now payable to the surviving spouse's grandchildren.

Under such circumstances, $226,597 in generation-skipping tax would, under current law, be payable (I.R.C. Sec. 2612(a), 2622(a), 2631, 2632(c)(1)(B), 2641, and 2642).

This tax could have been avoided had the husband not wasted his GST exemption.

The couple could have first equalized their estates, by separating their assets so that each owned $1,000,000 separately. Then the husband could have signed a will or a living trust that gave the unified credit equivalent amount ($600,000) to the bypass trust, and the balance (not to exceed the remaining otherwise unused GST exemption) to a so-called QTIP trust, for the benefit of his surviving spouse.

"QTIP" stands for qualified terminable interest property. It is the only trust that qualifies both for the marital deduction and for allocation of the decedent's GST exemption (I.R.C. Sec. 2056(b)(7) and 2652(a)(3)).

In general, whenever the surviving spouse's estate could exceed her remaining GST exemption, the GST exemption of the first spouse to die should not be wasted.

With asset equalization and the creation and administration of various trusts in order to avoid wasting credits and exemptions, the lives of clients who are exposed to transfer taxes can become very complicated. Recently, a proposal has been made to Congress that would go a long way in simplifying the transfer taxes and thus people's lives.

The American Institute of Certified Public Accountants has recommended that any unused unified credit and GST exemption should be passed to and be usable by a decedent's surviving spouse. *House Committee on Ways and Means, Written Proposals on Tax Simplification*, WMCP 101-27, 101st Cong., 2d Sess. 208 (1990).

For example, in our first hypothetical above, the husband's unified credit would pass to his surviving spouse and, when added to her unified credit, would completely shelter (from estate taxes) her $1.2 million taxable estate.

Similarly, in our second hypothetical above, the husband's GST exemption would pass to his surviving spouse and, when added to her GST exemption, would completely shelter (from generation-skipping tax) her $2 million taxable estate.

Of course, this discussion could be rendered moot by a Congress that seeks additional revenue through reducing or eliminating the unified credit or GST exemption. Accordingly, it is generally advisable from a tax standpoint for clients to use the unified credit and GST exemption now, before death, by making substantial gifts.

JURISPRUDENCE

By Daniel Patrick O'Tierney

Although judges are not elected in Alaska, there will be an unusual number of them on the ballot this fall. Alaska uses a merit system to select its judges, but they must appear periodically on the ballot to allow voters to decide whether they should be retained in office. This year, about 20 percent of the judiciary statewide will be subject to voter approval.

The Alaska Constitution provides for the governor's selection of each new judge from a list submitted to him by the Alaska Judicial Council. An independent agency, the council itself is created by the state's constitution. The Judicial Council is composed of six non-paid members: three attorneys appointed by the Alaska Bar Association and three non-attorney members of the public appointed by the governor. The chief justice of the Alaska Supreme Court serves ex-officio as the chairman.

The merit system requires applicants for judicial vacancies to submit a detailed application to the Judicial Council for review. Next, each member of the Alaska Bar Association is asked to evaluate the applicants' abilities and qualifications. Finally, following interviews and a public hearing, the Judicial Council makes its nominations to the governor, who must select the appointee within 45 days.

This year a rather large number of new judges must be selected across the state, primarily because of retirement. For example, the present Superior Court judges in Sitka, Kotzebue, Juneau and Kodiak will be retiring soon. Also, the legislature recently created a second Superior Court judgeship in Kenai. Applicant interviews and public hearings were scheduled for the month of June in Kenai and Sitka.

In addition, a Fairbanks District Court judge has recently resigned from the bench and a vacancy has arisen on the Alaska Court of Appeals as a result of the appointment of the present judge to a federal judgeship.

Periodically required to appear on the ballot for retention by the voters, Supreme Court justices must stand for retention every 10 years; Appeals Court judges every 8 years; Superior Court judges every 6 years; and District Court judges every 4 years.

The Judicial Council is charged by law with evaluating those judges up for retention and making recommendations to the voters. This fall, 14 judges will be standing for retention across the state.

Because judges are not allowed by the ethical rules to campaign for retention in Alaska unless they are opposed, the council's evaluation provides information about judicial performance that otherwise would go wanting for the vast majority of voters. The council gathers information from three sources: a survey of police and probation officers, a survey of attorneys, and comments from the public in writing compiled at scheduled public hearings in each judge's district.

Public hearings in the Interior, Southcentral, and Southeast Alaska were held last spring.

The evaluations and recommendations of the Judicial Council were published this summer ("at least 60 days before the election") and also will be printed in the Official Election Pamphlet. It is important to the quality of our judicial system that Alaskans take the time to review the available information and cast an informed ballot.

Daniel Patrick O'Tierney is an Anchorage attorney and the lawyer member of Alaska Public Utilities Commission.

The preceding article is reprinted with permission from "Alaska Business Monthly" (June 1990) for which the author writes a regular column on legal matters of interest to the business community.

THE MOMMY TRACK

By Jamilia George

The curious three-year-olds of this world have an additional chromosome. It is called the "U" chromosome. "U" for unique, ubiquitous, unflappable.

It is a fact that once a child turns three, the "U" chromosome takes over and all the other hereditary traits associated with family lineage cease producing whatever it is they are supposed to produce.

What this means in effect is that if you have a grandparent, sibling or spouse known for their calm manner, practical approach or kind nature, these particular traits will not surface until sometime post-majority. In the interim, you will set upon an adventure like no other in an effort to make the most of your child's uniqueness.

For starters, certain tools will be more necessary than others, (Superglue is not one of them), and the cultivation of precise skills will dominate your waking hours.

Let us start with the most essential...

The introduction of invisible friends to the three year old should be a priority. Having met several (invisible friends, or "guests" as my child is fond of saying) I suggest you begin with Zorbus, Igor and "the man with the briefcase." Zorbus ALWAYS lives on your child's left shoulder; Igor, a very friendly monster, lives in your child's closet and is his protection against forces of evil; the "man with the brief case" lives in the back of your child's throat and generally wears tennis shoes unless your child's throat is sore, in which case he is wearing cowboy boots.

These companions are often the target of a child's aggression (better them than you) and once the skill of "dressing down" is learned, you can expect to hear your child say "Zorbus, that was the WRONG thing to do, you are going to kiddie jail," or "Igor, you can't have any sugar because that makes you bounce off the walls."

"Sugarfree" is the lingo to remember here. Think, live and breath sugarfree. To do otherwise will cause you to run screaming for the Dimetap syrup when bedtime rolls around.

There is, of course, the old standard of the "dream box." This approach works particularly well with "bribes," i.e. dream about the trip we're going to take on the airplane. You simply deliver up a piece of paper pulled out of a small box upon which you have inscribed the subject for your child's dream. Your unbelieving child will challenge this approach. You simply have to wear your most "honest, it will work" look and provide gentle assistance in the art of "dream harvesting."

An additional skill necessary to the care and feeding of a three year old is the "safe hold." Mastering the "safe hold" in public places will require some skill, not to mention embarrassment. You simply drop to the ground, place the unruly toddler between your legs, wrap your legs over the top of the child's, and hold them securely until the child either ceases his tantrum or you give in.

From experience I can tell you that the aisles in Carrs grocery store are not wide enough to manage this task and still allow for passing shoppers. And the stares you will invite from passersby will cause you to wonder why your friends tell you this trick works. I am told that after about a dozen attempts, the safe hold is very effective. While I am still a novice, I do know that my son has mastered this technique because he is fond of practicing the safe hold on his nine-month-old sister, usually when she has had enough of what ever she is being fed and begins to spit it back out. In any event, I don't recommend the use of the safe hold in public places for the easily shamed parent.

You will also have occasion to discover some great secrets of the universe from time to time.

One profound discovery occurred enroute home from the grocery store, with the sure voice of a child tucked safely into his car seat questioning whether you are driving on the highway. Since you are traveling down A street towards town you say yes. But your child prodigy informs you that you are wrong, that you can't be on the highway. "No mom, this is the LOW way, the other way is the HIGH way." You see, C street southbound is the HIGH way (up the hill to Fireweed), A street northbound is the LOW way, under the overpass. You wonder if this isn't how Gallagher gets his material for his comedy act, traveling with the gentle assistance of a three-year-old.

You should understand that this pattern of logic is cross-generational. I know this truth to be self-evident because my three-year-old niece is living proof. When asked by her mother why she had feet (this woman is also a lawyer, adept at deposition taking) the daughter said "Why mommy, to hang my toes on." There you have it. Supreme logic at its finest.

Then there are the occasions when your heart melts so suddenly that you know small lives are the greatest gift as your child turns to you and says "You're a good woman mom, I love you too, too, too much." It does not matter that this loving interchange is followed by "now can I have a popsicle?" (sugarfree, of course). Or that something your child claims is a "butterfly" has mystically appeared on several newly-papered walls. Or that Zorbus is pronounced to be the culprit responsible for the dismembering of your new cassette tapes.

No, this is your wonder-child, the one who introduces himself to your friends as a "radical boy dude," the warm body beside you in the middle of the night who won't sleep unless it's in your bed, no matter how many Ninja Turtle sheets you buy.

And you suddenly realize that the care and feeding of this three-year-old is more critical than the files, people and deadlines you face each day when you walk into your office. You are astonished to find yourself wondering what it is that turns a wide-eyed elf into a mass-murderer or a bully to others. And it hits you like a truck travelling at 100 miles per hour — never, ever feed your three year old sugar!

First North American Serial Rights.

Homeless hero was troubled people advocate

Continued from page 1

died on the streets without relatives and no one to claim their remains except Mitch. The remains were in a place of prominence much as a family displays photos of beloved relatives. During the course of that evening, I spoke with Mitch again and remarked, more amicably, that there was an interesting letter to the editor addressing the problem of homelessness. "Great!" he said. "What are you doing about it?" Bulls Eye!

The Community for Creative Non-Violence was Mitch's home base. It began as a social activist group in the 1970's by Ed Guinan, an ex-priest. The group adopted the methods of famous non-violent leaders like Ghandi in confronting social injustices. Mitch came on board later, but his style influenced the group markedly. He remained committed to the principle of issues leadership, i.e. individuals led activities based on their interests in issues, since a guiding CCNV principle is no one member of the group is greater than any other.

I worked alongside Mitch and the rest of the CCNV for 18 months. Amidst all of the acitivism, I learned the contemplative side of the man. This is the side of Mitch which, to my knowledge, has never made the papers. I would like to sketch that part of his profile in greater detail here.

Whenever Mitch prepared himself and others for an "action," such as a demonstration, a meeting or an act of civil disobedience, he spent time with others in a moment of silent reflection, Quaker-style and then waited for others to start sharing their thoughts before he himself spoke.

There were other glimpses of the meditative man. Among the geraniums and jade plants on the living room window shelf, there was a Jerusalem thorn. It had a magnificent blossom but with uninviting thick, long thorns. A living contradiction, it was an object of affection to Mitch who mentioned that the thorns were the kind used to crown Jesus of Nazareth on Calvary.

He celebrated individual freedom at every opportunity with a fluorish. At one event, the CCNV held a 4th of July picnic which was a tribute to human equality. The street people were invited to a park with free food on large tables. Overhead a flag with the words "Don't tread on me" fluttered in the trees. There was an open mike for people to express their thoughts. Members of differing economic strata, from the obviously affluent to the street people, conversed together and stood side by side waiting for hot dogs and condiments.

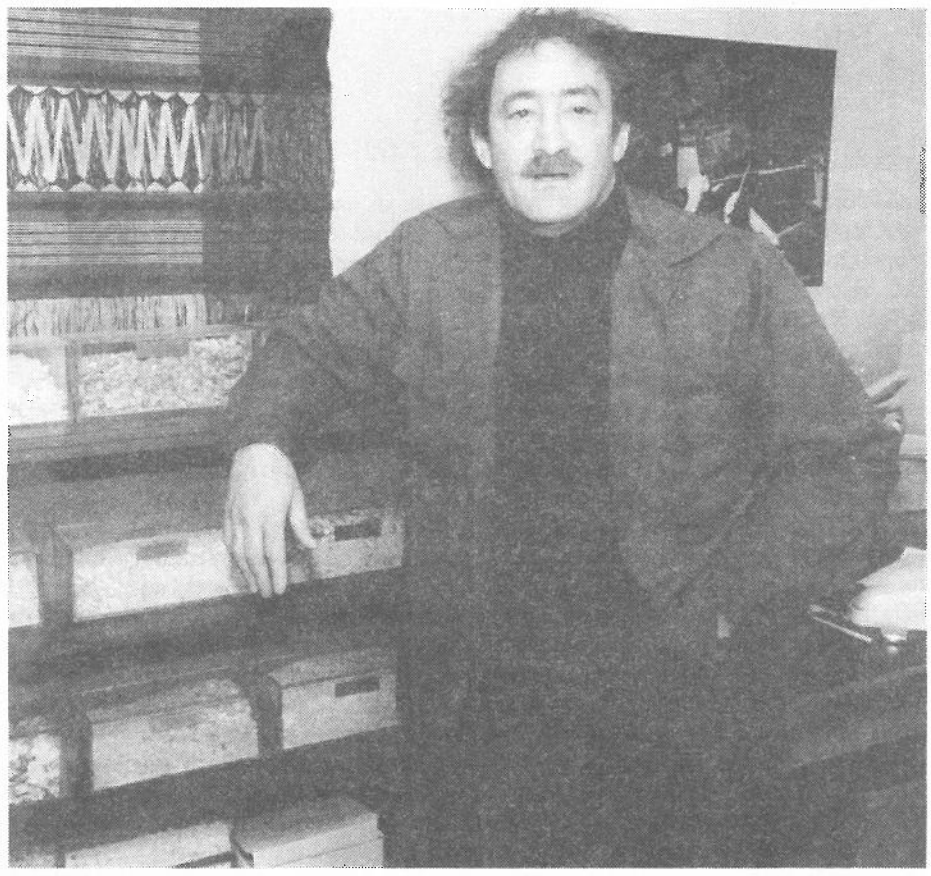
Mitch knew better than anyone I had ever met what his unique role was in society. He was a radical social activist and a catalyst for others to abandon their inertia and to abandon their inertia, rediscover their inherent worth, and use their creative energies to help their less fortunate brethren, the homeless. He considered the possibility of the CCNV "occupying" a zoo to demonstrate that some animals have paid-for shelter, but not all humans are so fortunate.

The street people and the poor loved Mitch and the CCNV. Those usually dull, depressed faces lit up with smiles; eyes bright, they hugged him. While Mitch's critics may have argued that he loved power, the use of his power uplifted the spirits of the lowly.

Mitch did not want traditional charity only; rather he insisted upon justice for the poor. His spirituality was centered on his motto: "We serve soup, not Caesar." Traditional charity, while useful, was merely a bandage on a serious disease whose roots needed the cauterization of justice he believed. Mitch, sometimes brash, and always controversial, was the perfect cautery.

Like Walt Whitman, he could say: "Agonies are one of my changes of garments, I do not ask the wounded person how he feels, I myself become the wounded person...."

America's fertile garden grew an important voice for the poor, a Jerusalem thorn in the form of a human named Mitch. Equally charismatic as confrontational, he combined the heart of a Mother Teresa of Calcutta with the mind of a think tank.



Mitch Snyder keeps in his office the cremated remains of homeless people who have frozen to death in Washington. *(AP Newsfeatures photo)*

For Mitch Snyder, life and death carried a consistent thread: his suicide was his final statement that individuals had to make decisions, even difficult and ugly ones, by themselves.

Spouses have rights

Continued from page 3

Information on VIP can be obtained from the medical benefits counselor at any military medical facility, or by contacting Mutual of Omaha Insurance Company, Attn: U.S. VIP Department, Mutual of Omaha Plaza, Omaha, NE 68175.

Conclusion

Whether representing the non-member spouse or the military member, an attorney should have a thorough understanding of FSPA entitlements. An Identification Card is issued by military personnel offices, and the cooperation of the member facilitates the application process. Thus any agreement or order should include language to the effect that the member will fully cooperate in executing any documents necessary to obtain a card.

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"No relief," says McGee of wilderness race

Continued from page 8

Gedney and McGee decided to pair up, as they had the year before. Last year Gedney went on to finish fourth, but McGee's leg stiffened up and he scratched, because it would have been unsafe for him to swim.

Despite no former champions in the field and temperatures in the mid-80s, which caused all the glacially-fed rivers to swell, McGee and Gedney were actually ahead of the record pace when they reach Chisana.

The record through Chisana was set in 1989 by Anchorage's Dave Manzer, who later almost killed himself on the Chitistone River when his raft got caught in the rapids. Manzer's problems with the rapids kept him from breaking Dial's course record.

McGee and Gedney were just three minutes behind Manzer's pace when they arrived at the old log mail cabin above the tree-line on Solo Mountain.

They continued down Lime Creek, but ended up having to spend the night as they waited for the water level to drop.

"When we got stopped by Lime Creek there was no way to make up the time we lost," McGee said. "We lost about two hours because we had to camp at 9:30 instead of hiking until 11 (p.m.)."

"We had to wait until morning for it to cool off and for the water level to drop," Gedney added. We were able to just wade across the year before."

McGee and Gedney got up early and finally were able to cross Lime Creek. They continued towards Skolai Pass when they ran into another problem. The lake at the top of Skolai Pass was missing.

"This lake just disappeared," Gedney said. "All that was left was a huge hole in the ground with moraine at the edge of the lake collapsed into the lake bed. The walls of the hole looked like gravel, but there was ice mixed in that easily could have caused a racer to slip into the quicksand-like silt at the bottom of the hole.

"We'd heard that people last year had made good time by going up high around the lake," McGee said. "If we had followed the normal route we would have been blocked by the hole, and we would have spent an hour or two backtracking to get around."

Finally past the missing lake, Gedney and McGee continued past Castle Mountain, through the Chitistone Pass, and along the Goat Trail until they reached the Chitistone Gorge.

With Manzer's near brush with death last year etched into their memories and the Chitistone River swollen into a raging cauldron, Gedney and McGee camped out until the water went down in the morning.

"If that's how bad the river was at 5:30 in the morning, I would have hated to see it at three in the afternoon," McGee said.

The two racers safely made their way down the Chitistone River, despite having to pull over to the riverbank about 30-40 times each to dump water from their 6-foot long inflatable rafts.

They hiked past Toby Creek and Glacier Creek, put into the Nizina River and rafted to the Nizina Road, some nine miles from the finish line.

"That was the hairiest part for me," McGee said. "In one part of the Nizina there were two channels, one with rocks all over the place. I had to get out in the middle and walk back to the right one. There was no relief."

They finally made their way to the bridge below Sourdough Hill, packed away their rafts and began the nine-mile hike to the finish line. They were met at McCarthy Creek by Gedney's father, Larry, who walked the remaining half-mile to McCarthy Lodge, where they rang the bell signalling the finish of the race.

"That last nine miles was probably the worst part of the trip, or at least the most boring," McGee said. "You had no vista because the trees were so close to the road, and you knew you were on the home stretch and all the dangerous part was over."

This column originally appeared in the Anchorage Times.

THE RHYME OF AN ANCIENT ASTRONAUT

Look at me, mister.
Do you see this face?
Starfire burned me
Out there someplace.

I was on a mission
With a few of my men.
We had just blasted off
For somewhere when,
Something changed me.
Fused and lit me.
Sent me elsewhere,
Past my ken.

I lost my roadmap.
Starmap. Timemap.
With all the instructions
That were necessary.
So, I just kept moving,
Always moving,
In any new direction
That I could see.

I've almost forgotten
What was behind me
Before the light
Put out my eyes.
Only sometimes,
Dreams remind me.
That I was other.
Otherwise.

Will you listen to me, brother?
Would you stand in my place?
'Cause I'm the only survivor
of the damned human race.

Harry Branson

Back next month!

Samantha Slanders returns from her hiatus.

With advice on friends and other relationships of import.

INTERESTED IN MEETING YOUR SOVIET COLLEAGUES— HOW ABOUT A TRIP TO MAGADAN?

The Presidium of Magadan Collegium of Advocates (the Magadan Bar Association) has extended an invitation to Alaska Bar Association members to visit Magadan in the Fall of 1991.

Alexander Boikov, Chairman of the Presidium (President of their Bar Association), attended the 1990 Northern Justice Conference held here in June of this year and during his visit expressed his organization's desire to host a joint meeting with Alaska Bar Association members.

Such a meeting would be an **unofficial** activity of the Alaska Bar Association, and any members traveling to Magadan would be expected to pay their own travel and lodging expenses.

We need Bar members to assist in the planning and logistics of such a meeting. If you are interested in participating in such a program, please call Barbara Armstrong, Assistant Director, at the Bar Office 272-7469.

1990 ***1990*** ***1990***

T-SHIRTS • T-SHIRTS • T-SHIRTS

There are still some T-shirts left from the 1990 Northern Justice Conference. This whimsical design by Ayse Gilbert has been a best-seller! Take this colorful and delightful bear home with you as a happy reminder of the 1990 Conference. We have 4 *Mediums* and 35 *Larges* left in this 100% cotton Hanes Beefy-T shirt so order below or call the Bar office at 272-7469 to reserve one before they are a vanished species! This T-shirt is definitely going to be collector's item!

1990 T-Shirt Order

YES, please reserve _____ medium (M) t-shirts and _____ large (L) t-shirts for me.

_____ If you don't have mediums (M) left, it's ok to substitute larges (L)!

_____ I will pick the item(s) up at the Bar Office.

_____ I live outside Anchorage. Mail the item(s) to me and add $2.00 for shipping and handling.

Cost: $15 each Total enclosed: $_____ (Be sure to include shipping & handling charge if outside Anchorage.)

Name: _____

Firm: _____

Address: _____

City: _____ zip: _____

Phone: _____

Please make check payable to the Alaska Bar Association and mail to PO Box 100279, Anchorage, Alaska 99501. Phone: 907-272-7469 • fax 907-272-2932.