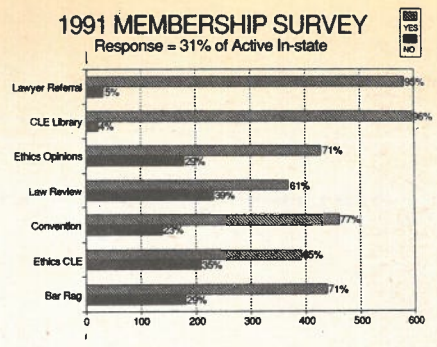
Bar poll results *--Page 18*



In this issue

Meet the president, fruitless fishing, estate stress, movies, surviving Chapter 13, youth court activities, 9th Circuit news, ALPS, and the Justice & the Bar Rag.

$2.00

The Alaska BAR RAG

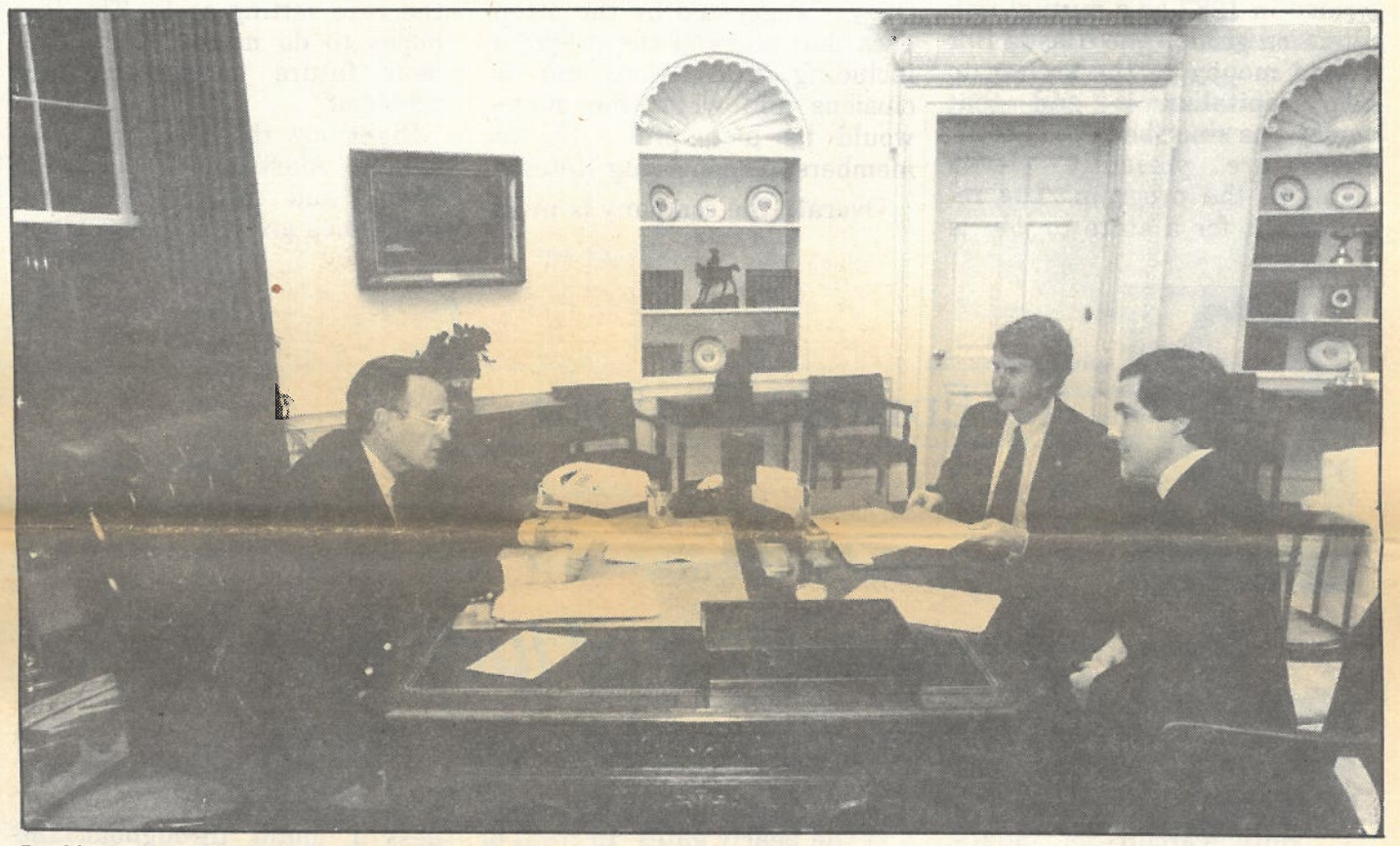
VOLUME 15, NO. 5 — *Dignitas, semper dignitas* — SEPTEMBER-OCTOBER, 1991

New AG leaves Washington for Alaska

BY SCOTT A. BRANDT-ERICHSEN

Anyone who has heard anything about the new State District Attorney in Anchorage has probably heard about a brief episode in 1986 in which Edward McNally was arrested as a spy while on a motorcycle trip across China's countryside.

Such stories make for lively social conversation, but hardly form the basis for evaluating the qualifications and abilities of the person with prosecutorial discretion over major crimes in Alaska's largest city. Exercise of this prosecutorial responsibility utilizes both the personal values which McNally brings to the job as well as his experience both as a prosecutor and an administrator.



President George Bush and Presidential Assistant David Demarest (center) meet with Ed McNally in the Oval Office, April, 1989.

Ed McNally spent part of his early childhood in Texas as an "air force brat." However, his formative years were spent in the Chicago area going through public grade school and public high school as one of 10 children in an Irish family.

McNally's contact with Alaska came in 1978 when he worked on Governor Walter J. Hickel's gubernatorial campaign. He then returned to Yale University where he received a Bachelors Degree in Political Science in 1979. The following summer he worked on George Bush's presidential campaign before attending Notre Dame Law School in the fall. During law school he spent his second year at Notre Dame's London campus. He graduated in 1982, taking and passing the Illinois Bar that summer.

McNally was an employee of the Justice Department from the fall of 1982 through April of 1991. From 1982 through 1985 he worked in the Office of Legal Policy, an office of approximately 12-15 attorneys focused on the policy rather than the practice end of the law. In the 1985-1986 academic year, while still an employee of the Justice Department, McNally was a Luce scholar teaching law at Peking University. He was recommended for this position by Vice President Bush, Walter Hickel, Attorney General William French-Smith, and his law school dean from Notre Dame.

Anchorage's new D.A. is quick to point out all of the exemplary facets of this educational and cultural experience. In essence, as China was in the process of opening up more contacts with the United States, McNally was one of the pioneers in introducing Chinese law students to American legal concepts. His class grew from 20 students initially, to over 200 students towards the conclusion of his stay. One of his former students was able to use knowledge gained from McNally's courses to assist his defense when he was tried for his participation in the Tienamen Square demonstration. The "motorcycle event" occurred only during McNally's last week in China.

Upon returning to the United States, McNally moved to the "hands on" side of the Justice Department, working in New York as an Assistant U.S. Attorney. Thereby McNally initially handled prosecution of general crimes, then moved on to primarily narcotics offenses. During this period, from September of 1986 through April of 1989, McNally gained the prosecutorial experience he brings to the job. According to McNally, this experience included 5 to 8 felony jury trials, between 10 and 20 suppression hearings and 2 to 3 appearances before the Second Circuit. Two of his longer trials lasted approximately 3 weeks, and he says that approximately half of his trials were handled jointly with another attorney. The most memorable or notorious of these involved five Jamaican defendants convicted of conspiracy, attempted murder of a federal agent and cocaine distribution. While this case might be one of the largest in a year in Alaska, McNally said that "in New York it was a fairly normal case."

In March of 1989, a federal narcotics agent was assassinated in New York. McNally called the White House and recommended that President Bush contact the officer's family. Instead, Bush came to New York and, with remarks drafted by

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President's Column

By Pat Kennedy

Recently, ALPS (Attorneys Liability Protection Society) invited the presidents, presidents-elect and executive directors of the member bars to a meeting in Missoula, Montana, to get an inside picture of the company. For those of you unfamiliar with ALPS, it is a "captured" insurance company, partially owned and managed by members of the Alaska Bar.

In 1986, there was a crisis in the legal malpractice insurance field in the smaller states. Bar leaders were requested by their members to look into the issue, and as a result, ALPS was formed in 1987 as a mutual risk retention group. The Alaska Bar loaned money to the society to help capitalize it and that money has since been paid back. There are presently eleven states in the program. The requirement for a state to join is that the state must be predominantly rural, and have no major metropolitan area which is within its borders. ALPS is not unusual - there are now over 25 states with bar sponsored companies.

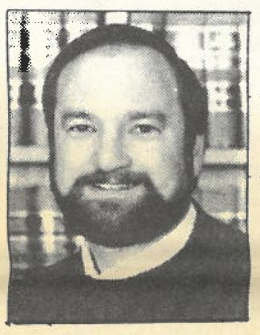
The program I attended went over every aspect of the society, from setting rates to marketing. It was very informative, particularly to someone like myself who has just started using malpractice insurance. There was even a segment on what all the questions mean on the application, and what sort of rate consideration the answers trigger. (It was suggested by the attendees that parts of the program, including rate setting and exclusions and what they mean, would be a helpful CLE for members in sponsoring states).

Overall, the company is in excellent shape - so much so that it has excess carriers who wish to be considered for coverage. It has been audited by potential excess carriers, who have found it to be both sound and well managed.

One of the problems with Alaska is our statistical record, which shows that Alaska has the highest cost for defense of claims, the highest percentage of claims, and the highest cost for claims made and paid. We were constantly used as an example of what not to do. Part of the problem with a record like that is that we are at the top of the rate setting scale. The Bar hopes to do more CLE in the near future to mitigate the problem.

Right now the insurance market in Alaska is competitive again, and rates from some companies are lower than those from ALPS. The formation of ALPS seems to have brought competition into the market, to the benefit of us all. But it is important to remember that ALPS is owned by our lawyers, and will not desert the marketplace when times get a little tougher. If you have any questions about the program, Mike Thompson from Ketchikan is our director on the ALPS Board.

On a separate note (notice the smooth transition), now is the time when the convention for June is being planned. It is difficult to know, nine months before the fact, what issues the membership is interested in having placed on the program. Since we are still in the planning stage, I am looking for suggestions from all segments concerning what they would like to see presented, and by whom. Please contact me soon if you have any ideas.



Editor's Column

By Ralph Beistline

A gathering of judges: 9th Circuit meets in Maui

Court was in recess for most of the Ninth Circuit as judges, clerks, and lawyer representatives convened in Maui, Hawaii, during the week of August 5, 1991, for the Ninth Circuit Judicial Conference. As a first-time attendee and one of four lawyer representatives from Alaska (also attending were Hal Brown, Gary Zipkin, and Robert Bundy), I was somewhat uncertain what to expect and certainly concerned about the nature and scope of interaction that there would be between lawyers and judges. This concern was highlighted as I waited in line at the hotel's front desk to check in. After about 10 minutes, a senior judge arrived and stood in line behind me. Very soon thereafter, a new desk clerk arrived and asked who was next. Before I could move, the gentleman behind me raised his hand and rushed to the front indicating that he needed to check in. I was overcome by a feeling of invisibility and wondered if this feeling would continue throughout the entire conference. As I waited in line, I recalled a joke I had recently heard at the last Tanana Valley Bar Association luncheon:

It seems that a federal court judge died and found himself at the pearly gates. In front of St. Peter was a long line of people waiting to enter. The judge moved to the front of the line and requested entry, noting that he, in fact, was a federal court judge. St. Peter quickly told him, however, that he would have to go to the back of the line and wait his turn. This the judge reluctantly did. A few moments later a white haired gentleman attired in a black judicial robe, with the words "Federal Court Judge" stenciled on the back, walked up to the front of the line, nodded to St. Peter, and was escorted through the gates. This really upset the federal court judge standing in line and he rushed up again to St. Peter to complain. He asked how it was that St. Peter let that federal court judge into heaven so quickly while he, on the other hand, had to wait in line. St. Peter responded: "That wasn't a federal court judge; that was God. He just thinks he's a federal court judge."

The convention events of the following days proved my initial concerns to be unfounded and the joke not quite right. In fact, I was impressed with the openness I found throughout the meetings and the accessibility of judges at all levels. As an example, let me tell you about several things that occurred during the convention.

On the first evening of the convention, the attendees convened in a large conference hall. I was seated with my wife, three rows back from the front table. At the front table were Justice Sandra Day O'Connor and Justice Antonio Scalia. Two rows in front of me was William Webster, director of the CIA and a former federal court judge. I commented to my wife at the time how impressed I was to be so near such distinguished people.

The next day I returned to the conference room for a presentation on the subject of cameras in the courtroom. There were no seats with the Alaska delegation, so I sat immediately behind them. To my left was an empty chair, and to the left of that was a lady seated by herself. A moment later another lady came and sat between us, I turned to shake her hand and introduce myself. I then leaned

Continued on page 20

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

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

The Alaska BAR RAG

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 310 K Street, Suite 602, Anchorage, Alaska 99501 (272-7469).

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

New president juggles jobs to bluegrass

BY BARB KISSNER

"You never know what I'll be doing next," said Pat Kennedy, new president of the Alaska Bar Association.

Like her life, her duties as president keep her jumping from place to place, doing a variety of tasks. From the day she entered office, she has been trying to manage the demands of the Bar Association with those of a new solo practice as well as other personal interests. But juggling time and commitments is nothing new to Pat Kennedy. Her ability to handle her initial assignments such as going to the Alaska Bar Convention in Fairbanks, then flying to Arizona for the Arizona Bar Convention on a reciprocal exchange, to reviewing complaints and fielding inquiries, reflects her ability to not only handle an interesting job, but also an interesting life.

Born in Pittsburgh, Pat spent most of her childhood living in Pittsburgh and Ohio, floating back and forth. She graduated from Sarah Lawrence College in New York City and went on to receive a masters degree in teaching at Wesleyan. After teaching for the Quakers in Sandy Springs, MD., she went back to school and studied for a doctorate degree in guidance and counseling at Ohio State University. She moved to Alaska in 1969 with her then-husband who was with the U.S. Coast Guard stationed in Kodiak. She became the guidance counselor at Kodiak Regional High School, helping over 600 kids from all over the state.

While in Kodiak, Pat took in her first foster child, Gabriel, a 19-year-old Eskimo. She received her foster parent license, took in more children, and learned a lot about Alaska Native culture. Little did she know that Gabriel would be the first of over 40 children Pat would take in over the next several years.

In the early 1970's, Pat moved to Anchorage and became a Native counselor and later Associate Dean of students at Alaska Methodist University (now Alaska Pacific University). While serving in these positions, Pat helped many young Native students register under the Alaska Native Claims Settlement Act (ANCSA). While gathering family information and plotting genealogical trees for the government's requirements, Pat realized that there were a lot of legal issues that would soon appear. This prompted Pat to go to law school.

After graduating from the University of Washington Law School, Pat returned to Alaska, even though she had no job and no money awaiting her. As luck would have it, Pat landed a job with a small firm who laid her off the Monday after she was told that she passed the Bar Exam. Pat then interviewed with the Attorney General's Office, who offered her a job the same day. She spent the next 14 years with the Department of Law, working mostly on child abuse and neglect cases.

In addition to the Department of Law and her foster kids, Pat has a third love: bluegrass music. Known to some as the "Grandmother of Alaska Bluegrass," she occasionally travels across the country with a bluegrass band to attend bluegrass festivals. In fact, after spending a month on one bluegrass trip, she decided that she needed more free time and retired from the Department of Law in October, 1990 to open her own practice.

Although new to the presidency of the Alaska Bar Association, Pat is certainly not unfamiliar with the actions of the organization. Pat joined the Bar in 1976 and was first elected (as a result of campaigning at a CLE) to the Board of Governors in 1979. Three years later, she became the treasurer. Later she was elected to a statewide seat which she has held since that time. She knows where the bar association has been, she has watched it multiply in size, and has a good idea of what issues are going to face Alaska lawyers in the future.

One of the hottest issues facing attorneys all over the country is the quality of life. Pat noted that many professional women have often faced the challenge of balancing work and family, but now it is an issue affecting all professionals, regardless of gender. Another issue is how to handle the growth of para-professionals. There are arguments for including and excluding para-professionals from the bar association, as well as issues regarding statewide regulation and supervision, all of which the bar association, must face.

In the meantime, it is business as usual. Pat is juggling her new solo practice, the presidency of the bar association, and the rest of her life. There is no doubt that Pat can handle it. In fact, with a little bluegrass music playing, Pat can probably handle anything.

Estate administrators face myriad pitfalls

BY ROBERT L. MANLEY
Second in a series

An attorney involved in estate administration must pay attention to the emotional landscape and be alert for various obstacles and pitfalls.[1]

The potential problems are not limited to family members. Attorneys frequently have their own problems in dealing with death. Dealing with a bereaved family (particularly where the deceased was a former client or personal friend) forces the attorney to confront his or her own mortality. Sometimes attorneys respond by avoidance, "which ultimately leads to neglect of the clients' affairs. Such avoidance does not serve the clients and exposes the attorney to disciplinary proceedings. *See* Disciplinary Rules 6-101(3); *In Re Collins,* 583 P.2d 207 (Alaska 1978). In addition, the attorney may feel guilty about profiting from the death of the client and a "better him than me" reaction. This guilt may make the avoidance reaction even stronger.

If the attorney overcomes the avoidance reaction, there may be tendency to step into an overprotective role.

When a surviving spouse consults on a variety of matters (many of which will be non-legal) there is temptation to make decisions for the spouse. The attorney may respond to impotency in the faith of death by becoming a rescuer or white knight for the survivors. this overprotection reaction should be avoided. It is not beneficial to the long-term interests of family members.

Family members sometimes encourage overprotection by the attorney because they transfer their dependency and reliance on the deceased to the attorney. It is important for the attorney to help the clients evaluate options, but the attorney should not replace the deceased.

Some aspects of the grieving process may cause special difficulties. Client problems can include inability to concentrate, anger, mistakes, irrational attachment to assets and even hallucinations. Survivors are more likely to have accidents or suffer an illness after a loved one has died. The risk of suicide increases especially if the decedent committed suicide.

The attorney must recognize and deal with these problems. The inability to concentrate often leads to difficulty in communication. It may be necessary to repeat instructions frequently, explain things more than once, and communicate more frequently with less information contained in each communication. An oral explanation followed up by a letter which can be referred to as questions occur is often helpful.

The anger family members may have is often really directed at the deceased. This may be anger at the deceased for "leaving them" or may be unresolved anger from predeath events. Anger at the deceased is usually a psychologically and socially unacceptable emotion. Family members may project that anger onto third parties. The attorney is often a target for the projection and you need to recognize that this anger is not really a personal attack.

It is frequently necessary and prudent to liquidate certain estate assets. Some family members may have trouble with this necessity. There is a tendency to view the deceased's investments as monuments or memorials.

Greed is another unacceptable emotion which family members (particularly those of more remote relationship) may feel. Again, this is an unacceptable emotion and family members may project it onto the attorney or other professionals involved in the administration of the estate.

Completion of the grieving process may be tied to closing the estate. Sometimes family members will not feel that they can get on with their lives until the deceased's affairs are settled. It is important for the attorney to be responsive to client inquiries and to explain any necessary delays.

It is generally not advisable for a surviving spouse to make too many major changes during the first year after death. This applies particularly to sale of the family home which may provide some much needed stability. Economic realities may force changes more promptly than is ideal. It is important to help a surviving spouse recognize the economic realities of the situation, which may require selling the family house, seeking employment or scaling back lifestyle.

The attorney assisting with estate administration cannot truly avoid the counselor role. The only real question is how well the attorney will perform. The survivors will have emotional concerns and responses. They are entitled to those emotions and the attorney should not attempt to deny those reactions.

It may be appropriate for the attorney to refer clients and other family members to support groups or counselors to assist with the grieving process.

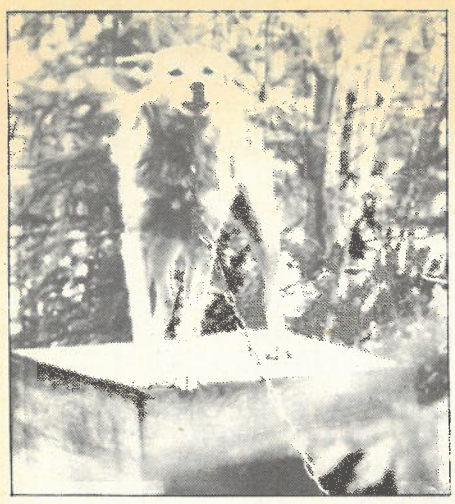
In some cases, a complete physical should be recommended. The physician may be helpful in urging the survivor to accept the need for counseling.

The emotional landscape is important to consider because recognizing the potential obstacles and pitfalls will allow you to better serve your client and facilitate a good working relationship. This in turn will make a break in the relationship and a subsequent malpractice claim less likely.

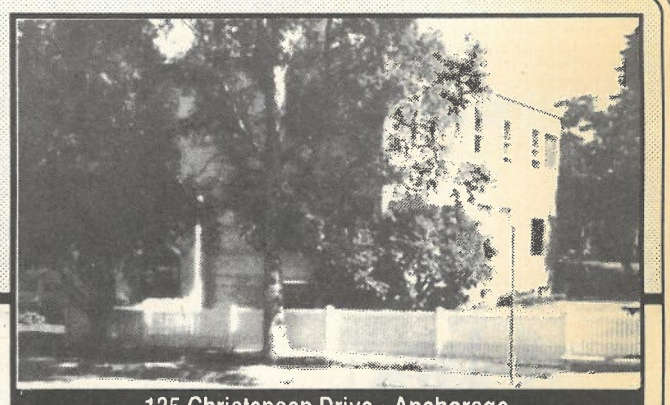
[1]For a more thorough review of some of these issues, refer to Schlesinger & Kliman, *Counseling the Survivors After Death* University of Miami Institute on Estate Planning, ch. 11 (1982); Gorman, *All Alone and Confused: Planning for the Survivor* 15 University of Miami Institute on Estate Planning, ch. 10. (1981).

* * *

Correction to July-August, 1991 Article. "An adopted person is the child of an adopting parent and not the natural parents unless the decree of adoption specifically provides for the continuation of inheritance rights." AS 13.11.045(1) has been amended and is now consistent with AS 25.23.130(a)(1). This should be a drafting consideration in preparing adoption decrees. It continues to be important to review adoption decrees to determine whether an adopted-out child retains inheritance and other rights with regard to natural parents.



If it's fall in Alaska, the dogs must be getting eager to hit the sled trails from the Arctic to Southcentral. This fellow was captured by a curious Bar Rag photographer on the Chena Hot Springs Road near Fairbanks on a crisp fall day.



Don't try the *Sisyphus* for good fishing

BY DAN BRANCH

So That's Why Fish Cost So Much Here.

It was going to be great. Saturday morning Tom and I would board his boat, the *F/V Sisyphus,* and motor to the sockeye-rich waters of Kegan Cove. There we would dipnet our winter supply of red salmon from the Kegan River and spend the rest of the weekend exploring Moria Sound.

I have long wanted to test the waters of the Kegan River. The world class steelhead and sockeye stream drains into Kegan Cove on Prince of Wales Island. Most people fly there in float planes to avoid a marine crossing of the Clarence Strait. The high winds and waves that plague that body of water make it foolhardy to go to Prince of Wales in an average pleasure boat. You need a 65-foot World War II search and rescue ship like the *F/V Sisyphus* to make the passage to Kegan Cove.

We loaded the *Sisyphus* with camp food and dip nets on Friday night and agreed to meet at its Bar Harbor slip early the next morning. Tom called me Saturday morning as I was walking out the door with fishing pole in hand. In the first of a series of troubling phone conversations he told me about a little problem with the boat.

It seems that the *Sisyphus* rested the entire year at anchor—a year in which Tom had heated it with the diesel-fired galley stove. The cook stove had used up almost all his fuel and the *Sisyphus's* engines died while the boat was on its way to the fuel dock. He tied her up to the Talbot Hardware Store and used their phone to call me.

Tom assured me that we would soon be on our way to Kegan Cove, right after I picked up about 50 gallons of diesel from The Last Chance gas station. I was going to chip in for fuel, anyway, so I drove the diesel over to Talbot's and lowered it down to Tom on the *Sisyphus.* He told me to stand by as he started her up.

The boat's twin Detroit Diesels coughed and sputtered but would not yield. From time to time Tom stuck his head out of the cabin to give me words of encouragement. When the batteries gave out he tossed up a long electric line and told me to ask Talbot's for the use of an outlet.

Tom charged his batteries all day while we drank coffee and watched rain drops run down the wheelhouse windows. Every once in awhile he tried, without success, to start up the boat. I gave up and went home about five in the afternoon after extracting a promise from Tom to call me when he was ready to move. After dinner he did call, shouting over the sounds of *Sisyphus's* roaring engines. He was on his way to the fuel dock to fill her tanks and asked me to meet him in an hour at Ryus Float.

I hurried down to the docks to find the *Sisyphus* is tied up at Ryus Float beneath the Arctic Bar. Patrons of the bar were sitting out on its dock drinking and sharing their opinions about Tom's boat. When I walked by, they were exchanging stories about the black cloud of frustration that always hung over the *F/V Sisyphus.*

Tom greeted me with bad news. Apparently the batteries gave out again and he had no way to start up the engines. He had the charger plugged into the Arctic Bar and felt we could soon be on our way. We drank more coffee and watched revelers swan dive off the deck and into the waters of the Tongass Narrows. From time to time Tom would try the starter. At ten o'clock he went below to check on the batteries. The charger had malfunctioned ruining his very expensive batteries and ending any chance of making the trip to Moria Sound.

Dejected and under the eyes of the bar patrons, I unloaded the camp and fishing gear. It took many trips, each more humiliating than the previous one to complete the task.

I felt bad about leaving Tom and the *Sisyphus* dead in the water but I figured that he could find comfort with the crowd at The Arctic Bar. Tom actually spent the evening towing his boat with a rowing skiff to its home in Bar Harbor where it has been providing him snug housing since our aborted trip to Prince of Wales Island.

I visited Tom last week to tell him that the sockeyes have returned to Kegan Cove. When I asked him about the possibility of making the run to Moria Sound, Tom silently pointed to the fuel gauges. He was out of diesel again.

"Now," he explained, "If you could pick up, say 100 gallons of diesel from the gas station and bring it over here we could soon be on our way to Kegan Cove."

Tom's words sent me running to the fish store for some of their sockeye salmon. As usual, they charged me more than I would have to pay for the same fish in Seattle. Until then I had never understood why Ketchikanites are willing to pay such a high price for fish in the salmon capital of the world.

ALPS' reinsurance backs policies

One of the keys to the Attorneys Liability Protection Society's (ALPS) success has been its carefully designed and administered program of reinsurance. Standing by itself, a young and growing company like ALPS won't present a financial statement that looks like the commercial carriers'. They have been around for years, accumulating assets, and maintain many lines of insurance which, by shear mass, reflect in large accumulated assets.

To compare a commercial carrier with ALPS, you have to examine the degree of risk found in all lines of insurance offered by the company and the strength of their reinsurance relationships. As a mono-line company, ALPS is in a far better position to monitor its performance and to control the risks to their insureds than a large commercial company that may be in property, medical malpractice, legal malpractice and general casualty lines. ALPS' specially designed reinsurance program is another significant factor in the protection it offers its insureds.

Virtually all insurers maintain reinsurance relationships and retain only a portion of the risk associated with any policy (or group of policies). Such reinsurance programs generally fall into two categories:

• Faculative reinsurance involves negotiating a specific agreement between the insurer and the reinsurer on a policy-by-policy bases.

• Treaty reinsurance involves an automatic agreement between the insurer and the reinsurer for a fixed period of time covering multiple risks/policies.

By its very nature, insurance is a system of sharing risks; reinsurance is no different. Whether the relationship is facultative or treaty, it's quite common for several reinsurers to participate in a particular risk. They, like ALPS, spread the risk in order to avoid a single entity absorbing a catastrophic loss.

ALPS maintains four separate layers of reinsurance, with different reinsurers covering different groups of policies and different levels of risk. As part of its agreement with reinsurers, ALPS retains the first $100,000 of any given loss. The reinsurers then cover the excess. The ALPS treaties, in an effort to provide the maximum protection possible to its insureds, contain "an insolvency clause" which provides that the reinsurers will honor their commitment to pay covered claims of our insured lawyers, subject to ALPS' retention of $100,000.

Because of the financial size of the collective companies that make up ALPS reinsurers (including Lloyds of London, Transamerica Reinsurance, CNA RE (UK), and Hanover RE, to name a few), ALPS insurance policies stand on footings that are every bit as strong as those of the commercial carriers. Specifics of the ALPS reinsurance program are available from the company upon request. (Contact Robert W. Minto, Jr., President, P.O. Box 9169, Missoula, Montana 59807-9169.)

The strength of any company's program is important to its insureds. All companies, captive and commercial alike, should be prepared to share this information with their insureds and prospective insureds. A company that can't or won't, should be avoided when selecting a lawyer's professional liability insurer.

* * *

In recent weeks, the Board of Directors of Attorneys Liability Protection Society (ALPS)—in consultation with its actuarial firm (Millman & Robertson)—voted to reduce the relativity factor for Kansas Lawyers by 10%. "While the base rate for all ALPS States is the same, each State is assigned a 'relativity factor' to, in part, reflect its own claim experience versus the entire group of 10 States," explained Ray Conger, ALPS Vice President for Underwriting. "Since our experience with Kansas lawyers is better than average, it is appropriate that this reduction be given," he continued.

Because of the various underwriting factors used by ALPS in rating a policy for Kansas firms, this 10% reduction in the state relativity factor will not necessarily result in 10% premium reductions for all Kansas insureds. However, the change will reduce the overall cost to the vast majority of Kansas attorneys.

* * *

At its June meeting, the Vermont Bar Association Board of Managers voted unanimously to sponsor and endorse ALPS for its membership. That action was subsequently ratified by the ALPS Board of Directors at its quarterly meeting in Denver.

John Primmer of the firm of Primmer & Wilson, St. Johnsbury, Vermont, was seated as ALPS Director representing Vermont. His law practice has included work with numerous Risk Retention Groups. He currently serves as Chairman of the Professional Liability Insurance Committee of the Vermont Bar Association.

ALPS is now doing business in eleven (11) states: Alaska, Delaware, Kansas, Idaho, Montana, Nevada, North Dakota, South Dakota, Vermont, West Virginia and Wyoming.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY,
PENNSYLVANIA ORPHANS' COURT DIVISION
IN RE:
Adoption of Baby Boy : Register Number: 45376
CUMBERLEDGE: Relinquishment Number: 752

NOTICE OF INTENTION TO REQUEST INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

TO: LORNE LEWIS

You have been named as the respondent in a Petition for Involuntary Termination of Parental Rights to a Child Under the Age of 18 Years, which Petition is related to the adoption proceedings in the above-captioned matter.

If you fail to object to the Petition, your parental rights may be terminated.

You may lose important rights relating to custody and/or visitation as to the minor child.

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Mercer County Lawyers' Referral Service, c/o Northwestern Legal Services, 1031 Roemer Boulevard, Farrell, Pennsylvania 16121 - Telephone: (412) 346-6332

By: John Edward Calior,
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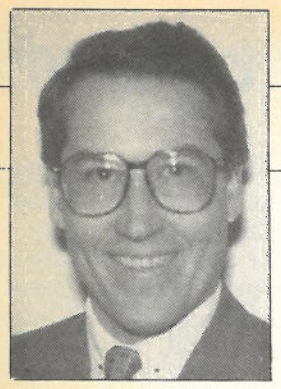


Estate Planning Corner

By Steven T. O'Hara

The gift tax is imposed on gratuitous transfers of property (I.R.C. Sec. 2501).

The gift tax statute was originally enacted in 1932 (Revenue Act of 1932, Sections 501, *et. seq.*). While the statute does not define the term "property," the Committee Report accompanying the Act states: "The term . . . 'property' . . . [is] used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value" (H.R. Rep. No. 708, 72nd Cong. 1st Sess. (1931), *reprinted at* Krahmer, 154-4th T.M. *Gifts* B-301).

It is generally understood that the gift tax is not imposed on gifts or services (D. Westfall & G. Mair, *Estate Planning Law and Taxation* (2nd Ed) at 10-13 (1989)). For example, a lawyer's gratuitous representation of a client is ordinarily not a taxable gift. A taxable gift, as well as taxable income, could result if the services were first provided, a fee was earned, and then the fee was forgiven (*see* rev. Rul. 66-167, 1966-1 C.B. 20).

Recently the IRS ruled that a father's gratuitous, unsecured guarantee of a loan for the benefit of his child is a transfer subject to gift tax (Private Ltr. Rul. 9113009). The IRS ruled that the amount of the gift is equal to the "economic benefit conferred" on the primary obligor by the guarantee. Under the facts of this ruling, without the guarantee, the lender either would have charged a higher interest rate or would have not made the loan.

While debatable, the signing of an unsecured guarantee more closely approximates, for this writer, the providing of a personal service than the transferring of property. Property would first appear to be transferred, if at all, on enforcement of the guarantee. Even that enforcement, however, would not ordinarily be subject to gift tax because the guarantor would be entitled to indemnification. Only on the guarantor's gratuitous release of the primary obligor would a gift occur.

On this subject, Jonathan Blattmachr has observed: "Prior case law suggests that a guarantee is not a gift unless the primary debtor is insolvent at the time of the guarantee or it is otherwise unreasonable to expect the primary debtor to be able to repay the loan." Blattmachr & Rivlin, *The Chase Review* 13 (July 1991).

Despite what this writer believes to be a faulty conclusion by the IRS, this ruling naturally has an *in terrorem* effect. Accordingly, to avoid litigation, a client considering a gratitous guarantee should consider (1) borrowing the sum directly and reloaning it to the otherwise purported donee or (2) charging a fee for the guarantee. Since the value of the guarantee may be difficult to determine, the client may prefer the direct-loan alternative.

Chapter 13 relief for undersecured, disputed claims

BY THOMAS J. YERBICH

Section 109(e) limits relief under chapter 13 of the bankruptcy code to an individual "that owes on the date of the filing of the petition, *noncontingent, liquidated, unsecured debts* of less than $100,000 and *noncontingent, liquidated secured debts* of less than $350,000" (emphasis added). The emphasized language of the statute is the main source of problems in determining whether a particular individual is eligible for chapter 13 relief. Generally, this problem presents itself in one of two forms: undersecured and disputed debts.

Undersecured Debt

In the usual "garden variety" chapter 13, undersecured claims are generally of such insignificant size as to be inconsequential. However, not only did the popularity of chapter 13s increase substantially after the decision in *In re Houghland* [886 F.2d 1182 (9th Cir. 1989)] permitting residential mortgage "strip-downs" under 11 USC § 506, but the potential impact on eligibility because of "stripping-down" secured debts increased as well. Federal tax liens also can involve significant differences between the total tax claim and the value of the property to which the tax lien attaches. The question is: For determining eligibility under § 109(e), is a debt "stripped-down" under § 506 considered a secured debt in its entirety or is it bifurcated into its secured and unsecured portions?

Although there is authority to the contrary, the majority view, as noted by the court in *Miller v. United States Through Farmers Home Administration,* 907 F.2d 80, 82 (8th Cir. 1990), is that, in determining eligibility for relief under chapter 13, the unsecured portion of an undersecured debt should be treated as unsecured debt. This is also the rule followed in this District [*see In re Jewell,* 1 A.B.R. 103, 107 (1990), citing with approval *In re Bros,* 108 B.R. 740 (Bkrtcy.Mont. 1989)].

This rule presents little procedural difficulties since § 506 requires that the valuation hearing be held concurrently with the hearing on the plan. In addition, at the confirmation hearing, the court must determine if the plan conforms to the Code, including eligibility for relief under chapter 13, and fixing of the secured portion of an undersecured claim may very well go to confirmability of the plan under § 1325(a)(5) or (6).

Accordingly, in determining eligibility for chapter 13 relief, the unsecured portion of an undersecured debt must be deducted from the "secured debt" total and added to the "unsecured debt" total. For example, if the debtor owes $150,000 to a creditor having a security interest in property having a value of $100,000, in determining eligibility, $50,000 must be included as an unsecured debt not secured debt. This situation presents a two-edged sword. "Conventional wisdom" holds that it is generally preferable to maximize the unsecured portion of the debt, which can generally be accorded more favorable (to the debtor) treatment in the plan. Still, an "over-aggressive" debtor could increase unsecured debt to the point of becoming ineligible for chapter 13 relief, leaving the debtor faced with either dismissal or conversion of the case to a chapter 7.

Disputed Debts

Disputed debts generally arise in one of two ways: (1) the debtor schedules the creditor's claim as disputed from the outset; or (2) the claim, having initially been scheduled as undisputed in some amount, the creditor subsequently files a proof of claim in a greater amount.

The first presents squarely the issue that has perplexed courts since the Bankruptcy Code of 1978 was adopted: in determining eligibility under § 109(e), are disputed debts treated as unliquidated and, if so, to what extent? The second situation usually presents the second prong of the "amount of debt" controversy: in determining eligibility, does the court consider the debt *as scheduled* or does the court decide based on *a subsequently filed claim?*

These present courts with the twin horns of a dilemma: if the court accepts the amount of the debt as scheduled, debtors might be encouraged to dispute debts or undervalue claims to come within the eligibility limits of § 109(e) [*See Matter of Vaughan*, 36 B.R. 935, 939 (N.D.Ala. 1984)]; on the other hand, if the court accepts claims as filed, even if disputed by the debtor, creditors might wittingly or unwittingly assert false or inflated claims to deny a debtor eligibility under § 109(e) [*see In re Lambert*, 43 B.R. 913, 920 (Bkrtcy.Utah 1984)]. *Lambert* resolved this dilemma by determining that "the provisions of Section 109(e) should be liberally construed so as not to unnecessarily obstruct the eligibility of debtors under Chapter 13." In reaching its decision, the *Lambert* court reasoned:

> as to amount and liability. This court holds that a debt cannot be certain to the extent there is a bona fide dispute as to the amount or the underlying liability of the debtor to pay the debt.
>
> If there arises a dispute as to the amount of the underlying liability of the debtor, then the entire debt is unliquidated until the liability is determined by a court of competent jurisdiction.
>
> * * *
>
> If there arises a dispute as to the amount of the debt, the debt is also 'unliquidated,' but only to the extend it is disputed. That is, the portion of the debt which the debtor and creditor agree is owing is 'liquidated,' but the portion which they dispute is 'unliquidated' because it cannot be fixed, settled, adjusted and made certain mathematically and with precision. (Citations omitted)
>
> * * *
>
> It is the opinion of this court that, if a determination of a disputed debt cannot be made expeditiously, that the court should rely on the characterization of the disputed debt as set forth by the debtor in its schedules. This latter approach is an acceptable alternative to holding a hearing on the disputed debt because of the provisions of Section 502(c), which permit a bankruptcy court to estimate for the purposes of allowance 'any contingent or unliquidated claim, fixing or liquidation of which, as the case may be, would unduly delay the closing of the case.'

In the only case that presented the issue to it, the Ninth Circuit very adroitly sidestepped and did not decide the issue [*In re Fostvedt*, 823 F.2d 305, 306 (9th Cir. 1987)]. However, in *Fostvedt*, the Ninth Circuit signified agreement with the Bankruptcy Appellate Panel holding in *In re Sylvester* [19 B.R. 671, 673 (9th , cir. BAP 1982)) that whether a debt is liquidated turns on whether it is subject to "ready determination and precision in computation of the amount due." In *In re Wenberg* [94 B.R. 631, 634-35 (9th Cir. BAP 1988)], the BAP further refined Sylvester by differentiating between a "simple hearing to determine the amount of a certain debt and an extensive and contested hearing." If the former, the debt is subject to ready determination and is liquidated. If the latter, and subject to a *bona fide* dispute, it is not subject to ready determination and is unliquidated.

Taking what may be considered the "middle ground" is the Sixth Circuit rule: "Chapter 13 eligibility should be determined by the debtor's schedules checking only to see if the schedules were filed in good faith." [*Matter of Pearson*, 773 F.2d 751, 757 (6th Cir. 1985)]. The *Pearson* rule is based on the following rationale:

> We adhere to this construction as more harmonious with congressional intent and with the statutory scheme. First, Section 109(e) provides that the eligibility computation is based on the date of filing the petition; it states nothing about computing eligibility after a hearing on the merits of the claims. Second, the fact that evidence must be taken to determine the amount of the claim indicates that, until then, the claim was unliquidated. Third, the Bankruptcy Code contemplates that a Chapter 13 plan be adopted and implemented in a short period of time.

The author suggests that there is little difference between *Pearson, Lambert* and *Sylvester-Wenberg*. Both *Lambert* and *Sylvester-Wenberg* require a *bona fide dispute*. *Pearson* requires that the debtor have scheduled the claim "in good faith"; it is difficult, if possible, to imagine that good faith exists if the dispute is not *bona fide* or that good faith could, if challenged, be determined without a hearing. *Lambert* implicitly requires a hearing to determine the "*bona fides*" of disputes and explicitly acknowledges that, if they can be resolved "expeditiously," the dispute should be resolved at that hearing. *Sylvester-Wenberg* require a hearing to determine if the dispute can be resolved by a simple hearing (presumably occurring simultaneously) and, if so, the claim is liquidated; but, if both *bona fide* and subject to an extensive contested evidentiary hearing, it is not subject to ready determination and is unliquidated. The author suggests that this is, in reality, a distinction without a difference — being more semantical or stylistic than substantive.

Facially, the distinction is: *Lambert* held that as to all debts, to the extent subject to a *bona fide* dispute and not capable of expeditious resolution, the characterization of the debt in debtor's schedules is accepted; *Sylvester-Wenberg* requires the court determine whether the dispute can be resolved by a simple hearing or is it subject to an extensive contested evidentiary hearing, and, if the latter, it is unliquidated. Just what is the difference? The result is the same in either case. Presumably, "expeditious hearing" is synonymous with "simple hearing" and both require a *bona fide* dispute: thus, whether one adheres to *Lambert* or *Sylvester-Wenberg*, it is the characterization *by the debtor* that prevails. Furthermore, nothing in *Pearson* suggests that the court should not resolve minor disputes capable of "expeditious resolution" by a "simple hearing" held at the same time that the court determines the "good faith" of the debtor in scheduling the debt. In fact, prudent utilization of available judicial resources probably mandates such an approach.

In short, *Pearson, Lambert* or *Sylvester-Wenberg* all arrive at the same destination by slightly different routes. A rule, synthesized from *Pearson, Lambert* and *Sylvester-Wenberg*, can be stated thus: "A debt subject to a *bona fide* dispute, which dispute is incapable of ready and speedy determination by the court without resort to an extensive evidentiary hearing, is unliquidated to the extent the debt is disputed. To the extent the debtor and creditor agree there is a debt owing, the debt is liquidated." To this may be appended: "When in doubt, accept the debtor's characterization."

Anchorage attorney makes it to the top

BY JULIUS BRECHT

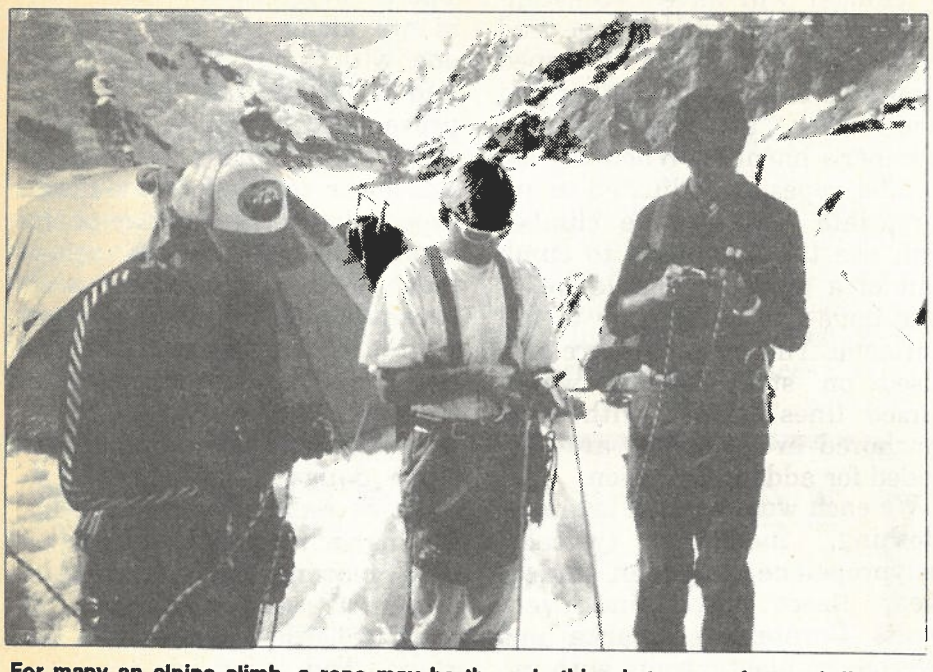
A high point in the life of this long-time Alaskan was attained on June 22, 1991 in reaching the highest elevation in North America—the summit of Mt. McKinley. The climb was at once one of the most exhilarating and exhausting adventures I have ever encountered. It took 15 grueling days to climb to the top and, in some respects, two equally difficult days of descent back to the base camp on the lower reaches of the Kahiltna Glacier.

Since this climb would be my first on Mt. McKinley, I decided to go with a guide. There are seven guide services licensed by the National Park Service for hire on Mt. McKinley climbs. I chose The Mountain Trip, which has offices in Anchorage, in part because of its reputation and in part because of a personal interview that I had with Gary Bocarde, the owner and guide on my expedition.

The expedition began with six climbers, one guide and one assistant guide, Susan Bocarde, Gary's spouse and a capable and experienced mountain climber in her own right. Three of the climbers were from Anchorage, and three were from outside of the state. We rendezvoused in Anchorage the day before setting out for Talkeetna and Mt. McKinley. It was then that the climbers met each other for the first time, with the exception that I knew one of the other climbers from the Anchorage area.

While our climbing team did not have the advantage of experience in climbing with each other in the past, we proved to be a very compatible group, willing to help one another. I believe that this close teamwork contributed to the overall success of the expedition.

Julius Brecht prepares to assault the summit of Mount McKinley from 16,000 feet, pack and pick at the ready in this photo taken by Susan Bocarde.



For many an alpine climb, a rope may be the only thing between safety and disaster. Brecht practices those knots at the Kahiltna Glacier Base Camp with Harry Guggenmos (center) and Reinhold Abler (right), who both came from Germany to climb North America's highest mountain.

The weather was stormy and unpredictable but sometimes sunny and clear. At times we could go no further because of storms. For example, we were forced to cower before the turbulent winds at 12,800 feet for three days, staying in our tents and hoping for the best. At other times, the weather was clear and warm. For example, at 14,000 feet where we camped for three days to acclimate to the high altitude, the sunlight was so intense (daytime temperatures at times as high as 70-80°F) that one had to beware of sunstroke. By sundown (around 10:30 p.m.) the temperature would plummet to around 0°F and lower.

At times the wind blew so hard while we were on the trail that I would look for a rock to hang onto because I had that uneasy feeling that I was about to be lifted up by the force of the wind. Of course, there were very few rocks available, in that a good portion of the climb is on snow and ice.

To the Summit

We took the West Buttress route to the summit of Mt. McKinley, starting with a fly-in by small plane to a southeast fork of the Kahiltna Glacier. This base camp is at approximately 7,000 feet elevation.

The West Buttress trail covers about 16 miles to the summit with a good portion of the trail below 14,000 feet being on the Kahiltna Glacier. The trail then rises steeply to 16,000 feet where it follows the ridge along the West Buttress of Mt. McKinley to a staging area at 17,000 feet where we established our highest camp. The trail above 17,000 feet continues a steep climb to 19,000 feet where it comes out on what is called the "football field," a wide open expanse, the other side of which is the final 1,400 foot assent to the top of the south peak of Mt. McKinley at 20,320 feet.

The scenery along the trail is vast and breathtaking. At the base camp, the base of Mt. Hunter (the mountain slightly to the west of Mt. McKinley) is less than a mile away across the glacier rising 14,573 feet. Avalanches periodically roared throughout our stay in the area. At the lower reaches of the trail between 10,000 and 12,000 feet, one can look back on a series of "island" mountains interconnected by a sea of glaciers, with the ever present and massive Mt. Foraker rising to 17,400 feet less than five miles to the west.

The clouds rolled in and out at times, creating beautiful and striking forms. At other times, the weather brought menacing clouds, high winds and blowing snow, where visibility was marginal at best. At times, the trail was easily discernable, but at other times it was obliterated by high winds or new snow, causing us to pick our way carefully through hazardous, thinly snow-covered crevasses.

On the day of the ascent to the summit, we left our camp at 17,000 feet and soon found ourselves climbing through a growing turbulence that developed into a blizzard where we could just barely see the person in front. The wind chill factor was easily 40-50° below zero. At this state, I used a balaklava to cover my face and neck; dark sunglasses with side covers protected my eyes from the sun's ultraviolet light. This inclement weather continued until we were at approximately 19,000 feet at which time the wind and weather subsided, and the temperature hovered around 0°F.

For the several hours that it took us to climb the remaining 1,400 feet to the summit, the weather remained clear and sunny. We climbed to within 300 feet elevation of the summit and had to wait for some logistical preparations for the final ascent. We stayed at that level for almost an hour and experienced clear and calm weather. The north peak of Mt. McKinley rose up 19,470 feet on the other side of the football field approximately 1 mile away. It was a splendid view. During the final ascent (which took about 40 minutes), the weather was perfectly clear and calm—a rather dramatic change from the horrendous storm that we had to come up through to get to the summit. It remained clear at the top for 20 minutes, yielding a panoramic view literally from the top of the world.

Feeling like Bigfoot with his warm overboots, Brecht pauses for a snack at 16,000 feet.

Climbing Details

Another feature of climbing on Mt. McKinley in the summertime is that it never really gets dark enough to require the use of artificial light. As a result, the day-night, climb-rest cycle became skewed at times. For example, on our first day on the mountain, we set up camp at base camp, had lunch around 4:00 p.m., then dinner around 7:00 p.m., and at 10:00 p.m. commenced our climb to establish a cache of food and gear about 4 miles up the trail, only to return to our base camp at 4:30 the next morning. As the expedition continued, we gradually got back to a mode of climbing during the day and early evening and sleeping during the night hours.

In preparing for the Mt. McKinley expedition, I had

Continued on page 10

In climbing, preparation is everything

Continued from page 9

some apprehension as to the way past climbers may have treated the trail and mountain. I was pleasantly surprised to find that there was very little evidence of trash or abuse of the mountain in the immediate environment of the trail and the camp sites. We could not tell whether storms simply covered debris or blew it away, but a National Park Service ranger at Denali National Park recently informed me that his experience had been that the trash problem on the mountain is more the result of insensitive foreign climbers than American climbers.

My own observation is that climbers with which I came in contact along the trail were making an effort to keep it clean. In fact, I have heard that the mountain is cleaner today than it was 10 years ago, not in small part because of a conscious effort in past years to carry out debris of other climbers or to burn it on site. However, the only way that the pristine vistas of the mountain may be preserved for future climbs is through an unending effort to instill in users of the mountain trails a sense of responsibility for that preservation.

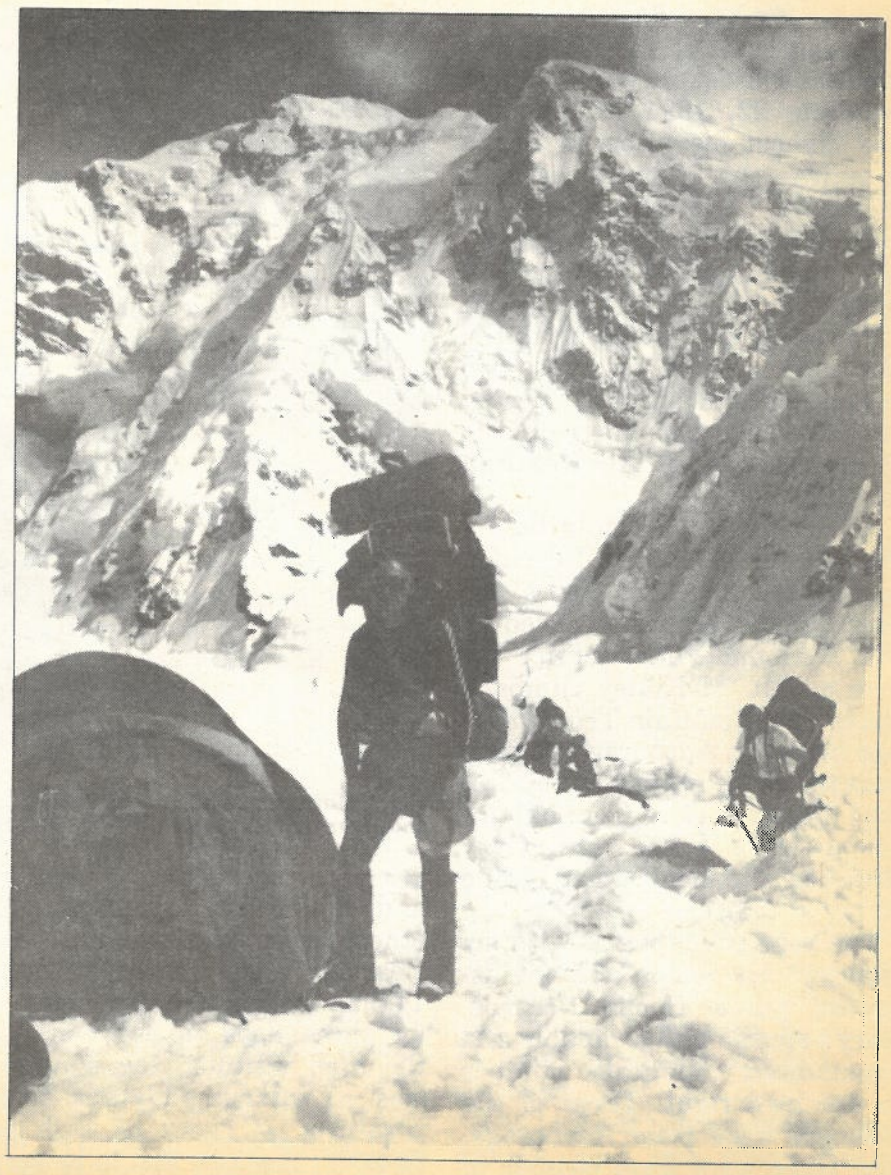
Even in a supposedly free and frontier environment such as Mt. McKinley, there are some administrative matters that must be tended to. Our first taste of this was in arriving at Talkeetna to have our expedition registered with the National Park Service. Each climber had to submit an application to the park service outlining his or her prior experience in climbing.

A National Park Service ranger told me recently that the park service legally cannot deny climbers access to the mountain. However, the information gathered on the climbers through the application process gives the park service a better idea of who is on the mountain at any given time. It also gives the park service the opportunity to present guidelines on climbing the mountain including being more sensitive to handling of trash on the mountain.

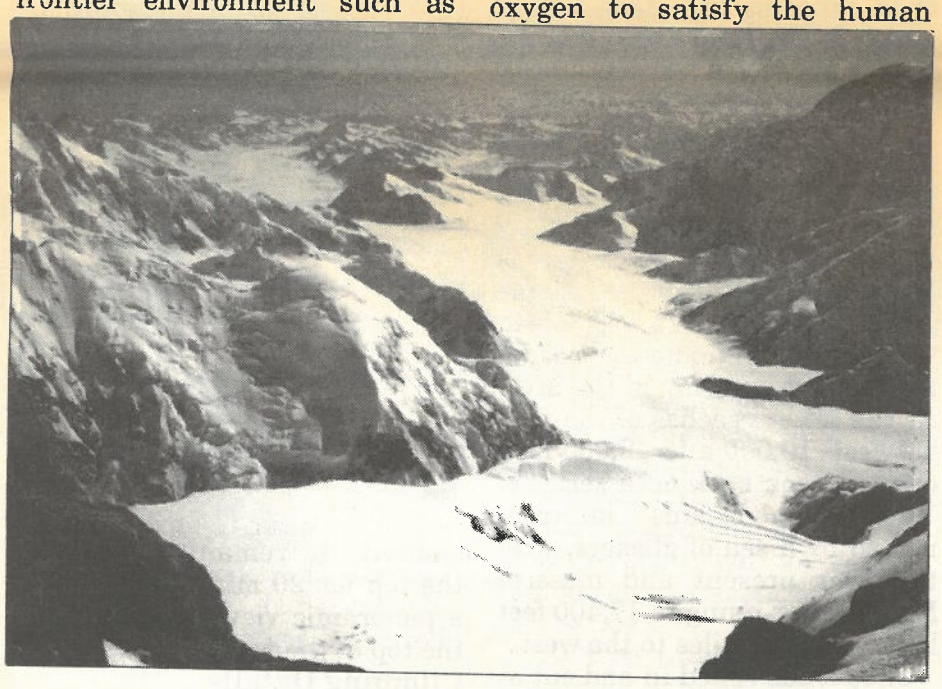
Safety is a most important aspect of a successful climb on any mountain and, in particular, Mt. McKinley. It is said that any climb on Mt. McKinley, whether it be done in summer or winter months, is considered a winter climb because of the far northern latitude of the mountain and, because of the unpredictability of storms, even in the peak of summer.

Because of its latitude and the tendency of the earth's atmosphere to sag to the equator, the barometric pressure at a given elevation on Mt. McKinley is less than for equivalent elevations at latitudes closer to the earth's equator. The result is that from a barometric pressure standpoint, the peak of Mt. McKinley is equivalent to a mountain approximately 22,000 feet in elevation at the equator. This phenomenon makes it more difficult to inhale enough oxygen to satisfy the human body. So, one must "acclimate" by spending time at higher altitudes working, eating, drinking lots of fluids, and sleeping.

Safety was particularly stressed within our expedition. All members of the expedition were roped together, ideally with three persons to a rope. That is, we used 165 foot long nylon 9mm rope with the climbers approximately 50 feet apart. Each climber wore a climbing harness which, in turn, was clipped or tied into the rope. The only place that the climbers were not roped together on the mountain was in the camp areas.



Brecht stands outside his two-man tent at the Kahiltna Glacier Base camp, anxious to begin the climb to the top of Mount McKinley.



From 16,000 feet, the climbers' camp at 14,000 feet (the tiny dots of gear at the bottom left of photo).

We had other special equipment that we used for safety, including ascenders, a device that can grip a climbing rope when pulled down but easily slides when pushed up the rope. A climber will have two ascenders, each one with a rope tied to it. One rope would be looped around a boot of the climber and the other attached to the climber's harness. When the ascender ropes are adjusted to appropriate lengths, the climber can use the ascenders to climb out of a crevasse should he or she have the misfortune to fall into one. The ascenders are also used on steep climbs where "fixed lines" (ropes with ends anchored in the snow) are provided for added protection.

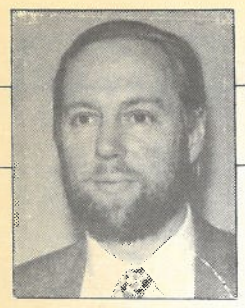
We each wore several layers of clothing, including typically polypropelene long-john underwear, fleece jacket and overpants, Goretex stormparka and overpants, plastic boots with inner thermal liners, wool and polypropelene socks, wool or polypropelene balaklava, dark sunglasses and several pairs of gloves starting with lightweight and working up to heavy-lined mittens. I found that I used all of this equipment off and on throughout the climb.

Because of the constantly changing weather patterns, the often winter climbing conditions, steep slopes and treacherous terrain, danger can and should be anticipated with every step. At the lower reaches of the mountain, the danger can be from crevasses which can be partially covered by snow. If the snow layer is thick enough, it may have the strength to be a bridge. Often it does not have sufficient strength, and one can poke through with a foot or even actually fall into a crevasse. There were some tense moments along the trail, but no one within our climbing party had a serious fall. In part, to prevent such things, we used snow shoes during portions of the lower reaches of the climb, especially on the last day of the climb. Even with this equipment, we would, at times, sink several inches into the snow and maintain constant vigilance to the risk of falling into a crevasse.

The blowing snow was a constant danger from the standpoint of reducing visibility. On the higher reaches of the mountain, blowing snow and wind presented serious threats of frostbite, although no one in our group had such a problem. There were long stretches along ridge lines or traverses of steep snow slopes, where the trail was not wide enough to walk normally one foot aside from the other. Rather, one had to walk heel to toe, swinging one foot around and in front of the other taking care not to trip in the process.

(Next: Techniques, preparation and strategy to reach the top, and the bottom).

Coming next issue: **The Return of the TVBA, Rule 11 traps, the Carter Files, and More**



GETTING TOGETHER

By Drew Peterson

Alternate dispute resolution and the courts: What does the future hold for dispute resolution in the United States? Will we soon have to meet with the court mediator before getting access to the courtroom? Will early neutral evaluation be required prior to discovery? Will we need to pay private judges to do the same job now expected of our public judges, or else wait years before getting a trial date? Will we be forced to waste our clients' time with unqualified or even biased ADR practitioners before being allowed our day in court? These and many other questions hover over the future of ADR.

On August 6, 1990, Robert D. Raven of San Francisco, the immediate past President of the American Bar Association, delivered the inaugural address of the Frank Sanders Lecture Series on Alternate Dispute Resolution at the ABA Convention in Chicago. Raven's speech, which is reprinted in the Winter 1991 issue of *Forum,* the magazine of the National Institute for Dispute Resolution, raises many interesting questions about the future of ADR in the United States.

Raven opens by concluding that ADR has arrived in full flower in his home state of California. Old trial lawyers who formerly scoffed at ADR now hint that they invented it, Raven says. Clients increasingly demand ADR. Underfunded courts see it as their salvation. Legal periodicals are full of ADR articles. Retired judges now believe—as the money rolls in from private judging—that they no longer have to die to go to heaven. If California is the harbinger of social movement for the nation at large, Raven declares, then victory for ADR has arrived and its advocates can roll up the flags and go out to look for a new cause.

While Raven concedes that what is currently true in California is not true in many other jurisdictions, he nevertheless confidently predicts that a similar complete victory for ADR is on its way to the rest of the country.

The reason he believes so is not because of the work of ADR missionaries in spreading the word, however, but because of the near collapse of the public justice system in the United State. Such a crisis in the courts is first felt in large metropolitan areas, but eventually even the rural areas become blighted. Two years earlier, as ABA president-elect, Raven predicted that civil jury calendars would be put on hold in most metropolitan areas. Even so, he never dreamed that a rural state like Vermont would suspend civil juries for half a year, as it did in early 1990.

Thus the ultimate success of ADR is no reason for its advocates to rest on their laurels, Raven asserts. Rather it remains critical for the members of the bar to scrutinize the strengths and weakness of both private and public judging.

The primary problems with the administration of justice come not from private judging or other forms of ADR, but from the underfunded court system. Clients should choose ADR because it is right for them in a particular dispute; they should not be forced into it because of delays in the court system. There will always be some disputes that only traditional litigation can solve.

Raven asserts that our first duty is to help restore the public justice system to levels of adequate funding. ADR can also help the court system directly. Experience is proving that some ADR aspects can be melded directly into the court system to increase its effectiveness and efficiency. Raven gives examples of programs involving early neutral evaluation, and certain forms of non-binding arbitration. Such meshing of ADR techniques into court cases will not be without their problems, however, particularly concerning freedom of choice of ADR providers.

More specific rules of conduct are going to be needed for private judging and ad hoc - administered arbitration and mediation programs. The variety of different ADR models and structures will serve to complicate this need for standards of conduct and practice. Should we demand uniformity from all ADR providers and administrators, Raven queries, to avoid the current multi-tiered system of rules for each separate state court and local federal court?

Along with such new problems, the old problems of ADR are still with us. The task of properly training lawyers and clients in the uses of ADR techniques remains.

Raven believes that some good progress has been made in the law schools, but not nearly as much progress has occurred in continuing legal education. Many practicing lawyers still do not accept the need for ADR training. There appears to be a belief that if you are an old hand at court settlement conferences that is all that is necessary to participate in the mediation process, even as a mediator. Those who have been through the training, however, know that it is not that simple.

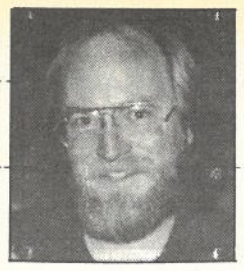
Immediate and direct client participation in dispute resolution is an important bonus of ADR. Clients must be prepared to accept this new role, however, and overcome prior conditioning to simply turn their disputes over to lawyers until the time comes to have their deposition taken.

When ADR techniques are used, great care must be taken to obtain the client's full involvement and consent, and discussing the pros and cons in detail. Otherwise, we risk malpractice actions against us, particularly if the ADR option chosen is binding, non-appealable arbitration, and the result is unfavorable. Raven cautions that we lawyers habitually do not tell our clients nearly enough about dispute resolution processes, whether within or without of the court system. Too often we forget that the dispute does not belong to us but is rather the property of the clients who initially generated it.

Another problem which Raven sees is the lack of communication between those lawyers in the firm who handle dispute resolution once they occur and the other lawyers who often put ADR provisions into an agreement when the parties initially enter into a relationship.

The contract lawyer, the client, and the conflict resolvers all need to get together at the onset, Raven believes, to discuss what type of dispute resolution is best to the particular case. What kinds of ADR techniques, if any, should be used, and what exact rules should apply? Should there be one arbitrator or three? What law should govern? Such matters should be thought out carefully in advance and not determined arbitrarily.

The increasing importance of ADR in the American legal system provides a unique opportunity to write on a clean slate and do things the right way. Raven concludes that "(h)istory tells us that this great opportunity is unique and we have a high duty to craft ADR procedures and practice rules carefully and well."



Torts

AS 09.17.080 and Dunnaway v Alaskan Village: The first round

By Michael Schneider

I. INTRODUCTION

This case is extremely important because it is the first time, to my knowledge, that a bunch of good lawyers and a good judge have spent a lot of serious time and effort addressing the issues raised by the adoption of Proposition 2. Proposition 2, you will recall, was advertised as a vehicle to end the inequities of joint and several liability.

Some time after March 5, 1989 (the effective date of Proposition 2, as embodied in AS 09.17.080), the Dunnaways witnessed the mauling of their daughter by "Ransom," a wolf hybrid. Ransom was owned by the Rosses. The Rosses rented a trailer space from Alaska Village, Inc./Avanti, Inc.

A complaint was filed in the Superior Court for the Third Judicial District (3AN-90-3526 Civil) wherein the adult Dunnaways sought damages for their own individual claims and asserted claims on behalf of their daughter. Alaska Village/Avanti answered, counterclaimed against the adult Dunnaway, alleging a lack of parental supervision contributed to the mauling, asserted affirmative defenses, including the Dunnaways' failure to join indispensable parties, and filed a third-party complaint naming the Municipality of Anchorage and the Rosses. It was alleged that the Municipality of Anchorage had received prior complaints with regard to Ransom and had failed to act reasonably to protect the public from whatever danger this animal posed. The Rosses were named as owners of Ransom. Ransom had since received the death penalty from the MOA.

The Alaska Village/Avanti brought a motion to dismiss for failure to join indispensable parties. The motion asserted that, because AS 09.17.080 required apportionment of damages among *parties at fault* and was intended to address not only defendants named by plaintiff but all those potentially responsible for plaintiffs' injuries, the elder Dunnaways, the MOA, and the Rosses must be included in the litigation or the complaint dismissed pursuant to A.R.C.P. 12(b)(7) and 19(a). This notion was supported by arguments focusing on legislative intent, statutory interpretation, and constitutional concepts of due process and equal protection.

The Dunnaways opposed the motion to dismiss and further moved the court for an order dismissing the defendants' third-party complaints against the MOA and the Rosses for failure to state a cause of action. Additionally, plaintiffs moved the court for an order dismissing the portion of defendants' counterclaim that sought to have a percentage of fault allocated to the Dunnaway parents in connection with their daughter's damage claim.

The Dunnaways argued, regarding the indispensability issue, that concurrent tort feasors had never been considered indispensable parties, that defendants were attempting to assert third-party claims that were invalid as a matter of law (thus precluding a finding of indispensability), that the interpretation of AS 09.17.080 and A.R.C.P. 19 sought by the defense would create bizarre results and that no problems of constitutional proportion would be created by denying the defense request.

Predictably, defendants replied to the Dunnaways' opposition to the defense motion to dismiss regarding indispensability and further opposed plaintiffs' motions to dismiss their third-party complaint and a portion of their counterclaim. Plaintiffs replied to the defendants' opposition regarding plaintiffs' motion to dismiss the third-party complaints and a portion of the counterclaim.

After about three-quarters of an inch of excellent briefing, the superior court issued its "Decision on Pending Motions" dated July 25, 1991.

II. Trial Court Rulings

Neither the introduction above nor the highlights that follow fully address the issues before the superior court. The effort in this article is to focus on those rulings that impact multi-defendant, or potentially multi-defendant cases. The superior court ruled as follows with regard to some of the issues before it:

1. Where more than one defendant *may have caused* the plaintiffs' injury, plaintiffs *cannot* choose which defendant or defendants to sue and avoid having the jury allocate fault among other concurrent tort feasors by virtue of the fact that they were not named by the plaintiffs as "parties." *Id.* at 6.

2. The superior court recognized a cause of action for equitable or implied indemnity. Through this cause of action, defendants may make other actors "parties." The jury will be required to allocate fault among these new entities, now "parties" to the lawsuit. *Id.* at 7.

3. The superior court reasoned that previous Alaska Supreme Court cases expressly rejecting equitable or implied indemnity as a cause of action were so substantially founded on the existence of the Joint Contribution Among Tort Feasors Act (since expressly repealed by 1988 Ballot Proposition 2 effective 3/5/89) as to invalidate the prior authority rejecting these causes of action. *Id.* 7-9.

4. The extent of the liability of concurrent tort feasors, whether sued by plaintiff directly or brought into the action by way of third-party complaints alleging implied or equitable indemnity, is limited to each party's percentage of fault, as determined by the jury. *Id.* at 9.

5. Other potential defendants are not "necessary and indispensable parties" under the provisions of A.R.C.P. 19. The court's ruling was motivated by the variety of practical and procedural difficulties that would flow from any other decision, including those raised by Civil Rules 11 and 82.

6. Defendant Alaska Village had no right to assert its contractual indemnification as the basis of a cause of action bringing in third parties as that provision and its lease agreement was expressly contrary to AS 34.03.040(a)(3) prohibiting such agreements. Note, however, that an indemnity provision that is not statutorily precluded will allow one defendant to make another potential defendant a "party," whether or not the concept of equitable or implied indemnity survives appellate review.

The court also held that, as to injuries to the Dunnaway *child*, the Dunnaway *parents,* as subject to an allocation of fault in causing their daughter's injury under AS 09.17.080. Though the court's decision is not explicit in this regard, it suggests that the parents' fault would not necessarily be considered in reducing their child's recovery if comparative negligence was the only consideration (*i.e.,* only the parents' negligence will reduce the parents' recovery; only the child's negligence will reduce the child's recovery if comparative negligence is the only consideration).

III. The problem, or, we should have listened to Stevie

Stevie Wonder warned us that "when you believe in things you don't understand, you suffer. . ."

In the fall of 1988, the Citizens Coalition for Tort Reform spent approximately $300,000 on an unopposed media campaign to make Alaska voters believe that Proposition 2 was the answer to flaws in the civil justice system. Seventy percent of the voters believed in proposition 2, but understood neither the civil justice system nor the practical/legal implications of the proposition.

Clients and litigators on both sides of the personal injury fence have been suffering in the legal no-man's land generated by Proposition 2 ever since. Pleadings put forth by both parties in the *Dunnaway* cases do a good job of setting forth the various imperfections in this statute. If nothing else, this exercise illustrates that doctors are no more equipped to "fix" the civil justice system than attorneys are equipped to perform orthopaedic surgery.

IV. Judicial options and the procedural status of Dunnaway

Any court looking at the issues generated by Proposition 2 is faced with two competing approaches. In *Dunnaway*, the superior court elected to "fix" the problems caused by Proposition 2 by implying a cause of action previously expressly rejected by the supreme court. This is the "it may have been a bad idea, and it wasn't our idea, but we'll fix their problems anyway. . ." approach.

The other competing approach, and one alternatively sought in pleadings filed by the defendants in the *Dunnaway* litigation, is simply to recognize Proposition 2 for the unconstitutional mess that it is and, consistent with a good body of Alaskan precedent, relegate it to the same fate suffered by previous enactments of similar quality. All parties in the *Dunnaway* case have petitioned the supreme court for review of the trial court's decision, and no party has objected to review. Most of us, on either side of the fence, hope the supreme court grants review and resolves the issues generated by Proposition 2 so that we can review our clients and reassure our E & O carriers.

V. Sources of information

The Dunnaways are represented by Ashburn & Mason through Lewis Gordon. Defendants Alaska Village and Avanti, Inc., are represented by Crosby & Sisson. Rod Sisson is lead counsel. Larry Keyes of that firm has been responsible for most of the briefing. Copies of most of the relevant trial court pleadings can be obtained by contacting the Alaska Academy of Trial Lawyers, P.O. Box 102323, Anchorage, Alaska 99510, or by calling the Academy's Executive Director, Debra Gravo, at 258-4040.

This information is free to academy members. Nonmembers will be charged $25.00 for copies of the pleadings.

Shaw appointed first PD for Alaska fed district

Chief Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit announces that the court has appointed Nancy Jean Shaw, of Anchorage, Alaska, as the first Federal Public Defender for the District of Alaska. The appointment was effective August 26.

In mid-1991, the Administrative Office of the United States Courts established a separate Office of the Federal Public Defender for the District of Alaska. The office was formed at the request of the five federal judges in the district as a result of the district's filing its April, 1990 Criminal Justice Act implementation plan which was approved by the Ninth Circuit Judicial Council in May, 1990. Until now, indigent criminal defense services were provided to eligible Alaska residents from an Anchorage branch office of the Office of the Federal Public Defender for the Western District of Washington in Seattle, supervised by Thomas W. Hillier II.

Shaw, 41 , has served as the supervising attorney for the branch office, consisting of two attorneys and support staff, since April, 1986. A graduate of the University of California at Berkeley and the University of California at Los Angeles School of Law , she participated in a clinical program placement with the Alaska Public Defender Agency during her second year in law school in 1973-1974. She returned after law school to work with the Agency from 1980-1982, handling felony intake, appeals, and felony trials.

In 1983, Shaw became litigation counsel for the International Brotherhood of Teamsters in Anchorage, and in 1985 transferred to the Alaska Teamster Employer Service Corporation until assuming the position with the Office of the Federal Public Defender.

The Federal Public Defender for the District of Alaska is responsible for providing criminal defense representation to indigent defendants charged with federal crimes in the district. The Alaska Federal Public Defender maintains one office in Anchorage and supervises a staff of 7 people, including 3 attorneys. Funding for the Federal Public Defender is provided from the budget for the United States courts through its Administrative Office.

Women lawyers organize monthly meetings

In 1976 a group of Anchorage women lawyers joined together to form the Anchorage Association of Women Lawyers. These first members drafted articles of incorporation and bylaws creating an organization to promote the continuing education of its membership; to encourage the professional advancement of women in law; and to provide information and service to the public. Judge Karen Hunt became the first president of the Association and remains an active member to this day.

Now in its 15th year, The Anchorage Association of Women Lawyers begins its 1991-1992 season with the association's first luncheon on Wednesday, September 25, 1991. The topic for the first meeting is Practicing in Federal Court. The speakers will be Susan Lindquist speaking on proper service to the U.S. and Federal agencies; Larry Card speaking on the Federal Tort Claims Act; and Federal District Court Judge James K. Singleton, who will speak on various aspects of litigating in federal court.

The Association sponsors monthly lunches with guest speakers. Last years' lunch topics included "Meeting with the Women Judges," "Women Lawyers in Non-Law Jobs" and "The New Discovery Rules." Topics slated for this year include "Marketing and Client Referral," "Negotiation Skills for Women Attorneys," and "Balancing Work and Family." The monthly lunches are held at the Westmark Anchorage (5th Avenue) on the fourth Wednesday of each month. All women attorneys are welcome.

This September the Association joins forces with the Alaska Bar Association to sponsor a Continuing Legal Education seminar on "Women in the Law: Successful Communication Techniques." A committee of the Association met with the Bar over a three-month period to formulate the structure for this one-day workshop. The CLE is on September 28, 1991 at the Captain Cook Hotel. The Association hopes interest in this first workshop will lead to a continuing series of CLE's for women lawyers in the future.

This year's officers of the organization are Nicole Faghlin, Chair, Susan Lindquist, Mary Jane Sutliff and Marie Crosley. For more information about the activities of the Association, contact any one of the officers.

AYC's Future Plans

Youth Court produces video, creates new projects

BY DEBBIE HIPSHER AND JESSICA SLAMA

Anchorage Youth Court Bar members have much to anticipate this year. With the aid of IOLTA and the Anchorage Bar Association, Youth Court offered a Summer Trial Advocacy Workshop for 24 students. In addition to providing hands-on learning during the workshop, a video is being produced to share with all AYC students as preparation for court appearances. Jim Gleason of Duke University, who worked with Birch, Horton, Bittner and Cherot this summer, helped to coordinate the workshop project.

Also this summer AYC has worked in cooperation with the Anchorage School District on an application to the State Justice Institute for strengthening and expanding the Anchorage Youth Court partnership model for long-term local stability and effectiveness, and for state and national dissemination.

This project is designed to use extensive state and national networks to share the model, train others and compile and analyze longitudinal data. It will help other communities to institutionalize youth courts in partnership with state courts, local bar associations, and local school districts.

During the next year AYC will create curriculum using the training module developed by AYC's volunteer attorney trainers, in constitutional law, criminal procedure, evidence, trial advocacy and ethics; provide hands-on trial training for students and teachers based on the National Institute for Trial Advocacy Program; expand creative sentencing alternatives for juvenile offenders; produce and disseminate a comprehensive Youth Court handbook; conduct "training for trainers" on the state and national levels; track participation by students, teachers, and law volunteers and evaluate the impact of Youth Court's innovations in schools.

These projects will increase Youth Court's ability to develop an awareness and respect for their legal responsibilities to society among youth. Through the projects, Youth Court will be able to extend its ability to lighten the burden on the State Court System and to provide timely justice for juveniles.

All projects that AYC would like to pursue do, unfortunately, cost money and AYC receives different grants from certain businesses and associations. Recently, AYC received an IOLTA fund grant from the Alaska Bar Foundation in the generous sum of $50,000 for July 1, 1991 to June 10, 1992. The money will be used for general operating expenses and to help fund some of the new and exciting projects that AYC is working on.

AYC also was fortunate to receive a $9,000 specific projects grant from the Anchorage Bar Association. These funds are for the Trial Advocacy Workshop, swearing-in and reception for new members to be held in January and monthly publication of the "Defender" and AYC bar agenda. All of the members of AYC are extremely grateful for the opportunity that the Alaska Bar Foundation and Anchorage Bar Association have given us in the pursuit of further projects.

Celebrate the Bill of Rights

BY KRISTINE A. SCHMIDT

The Bill of Rights Celebration

Did you know that there was a Bill of Rights exhibit that came to Alaska? Well, there was, and it traveled to Juneau on July 2-12, 1991. But just in case you missed it, it's not too late to participate.

What you can do: mark December 15, 1991 on your calendars, because that is the official day of celebration of the signing of the Bill of Rights, and that is when all the hoopla will be scheduled. Call your local LRE (law related education) group, or the Alaska Bar Association (272-7469) for a list of local activities you can participate in. If groups sponsoring Bill of Rights events will contact me before October 21 (262-8609, FAX 262-1892), I will put your event in an article for the *Alaska Bar Rag*.

LRE

I am a big fan of (and participate in) the Law Related Education (LRE) movement. There are lots of descriptions of LRE floating about, but basically it means education about the law, focusing on both the abstract (like learning about criminal law) and real life situations. Citizenship skills are another big focus of the movement. There are LRE programs in every urban Alaska locale, and many rural ones.

What you can do: If you've ever felt dismay about why many people don't vote, or don't understand the way the legal or political systems work in the United States (or why there are so many lawyer jokes), get involved in LRE. Community volunteers (lawyers, judges, court and law enforcement personnel) go into elementary and secondary education classrooms and interact with students, using planned LRE activities, such as mock trials, moot court, etc. The volunteer and teacher work together to plan and present the class, and usually everyone has a lot of fun. Or learns something. Or both! To start, contact Deborah O'Regan at the Alaska Bar Association (272-7469) or Marjorie Menzi at the State Department of Education (465-2888) to find out what LRE groups exist in your community. Ms. Menzi administers the statewide LRE program, which is starting to gather momentum after beginning in 1987.

McNally pursued diverse law career

Continued from page 1

McNally, used the event to make a speech concerning the problem of drugs. Apparently enamored with McNally's speechwriting prowess, Bush had McNally transferred "on loan" from the Justice Department to become part of his speech writing staff in April of 1989. McNally worked in this capacity until April of 1991 when he left to come to Alaska.

McNally was first admitted to the Illinois Bar in 1983, and later to the Federal Bar for the Southern District of New York in 1986, the Second Circuit in March of 1987 and the U.S. Supreme Court in May of 1990.

Although he has not been admitted in Alaska, McNally stated that he was applying for a waiver based upon his prior employment as an Assistant U.S. Attorney. In the interim, A.S. 08.08.210 authorizes employees of the Department of Law to practice for up to 10

McNally (center) poses with Howard Wilson, chief of the criminal division, U.S. Attorney's Office, New York (left) and Rudy Guiliani, U.S. Attorney for the district.

months prior to admission. McNally and three other state prosecutors currently practice pursuant to this section.

Those familiar with admissions by waiver may be confused due to the Bar Rule requirement that a waiver admission applicant be employed in the active practice of law for 5 years immediately preceding admission. McNally satisfies this requirement because the two years spent as a speech writer for President Bush were as an "on loan" employee of the Justice Department where his job title required that he be an attorney.

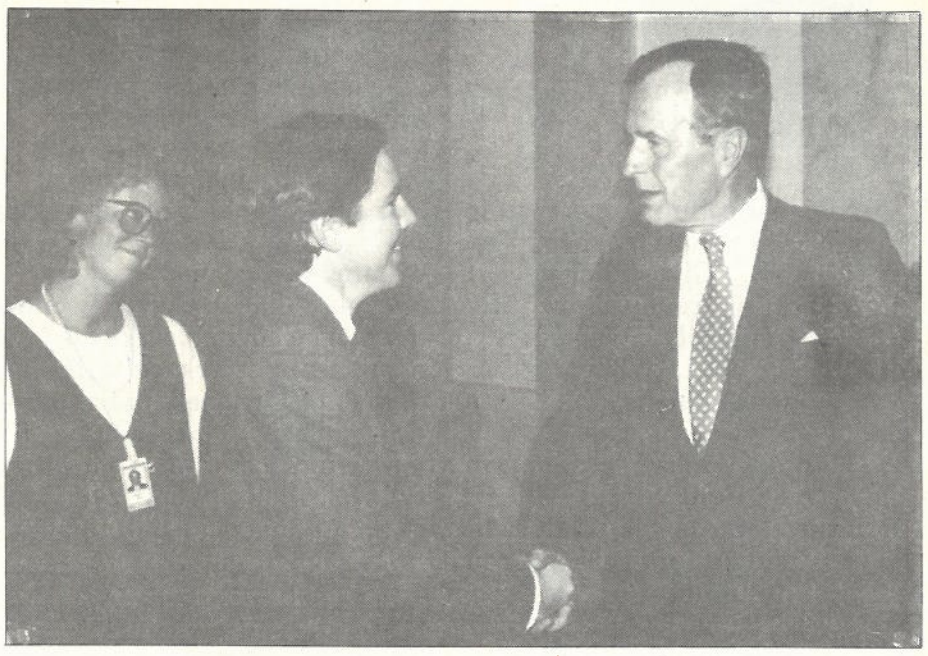
A review of McNally's resume shows that he has had a significant change in duties, about every 18 months since 1982. The common theme for all of the various jobs has been a mix of law enforcement and policy-making.

Meeting with McNally and hearing about his past experience, the focus on drugs and drug crimes comes out clearly. More prominent however, is the focus on political contacts and influence. With 2 1/2 years of actual litigation or court experience, McNally comes across as primarily an administrator, and he appears to have outstanding skills in terms of his ability to communicate and motivate others. What is unclear is the degree to which McNally will be an independent decision maker as opposed to "toeing the party line" for the Hickel administration.

When asked about his goals or focus for the office, McNally stated that his priorities were the Governor's. To elaborate, he referred to the speech Governor Hickel gave at McNally's swearing-in ceremony, at times reading directly from the text of Hickel's speech. These goals were primarily an aggressive response to the proliferation of crack use, improved response to rape and sex crimes, and a new focus on environmental prosecutions.

One of the focal points of Hickel's speech was federal and state cooperation. McNally described this cooperation, named "Operation Triggerlock," as meaning that in any serious drug offense, federal and state prosecutors would weigh all of the charges which might be brought and choose the most appropriate. McNally and three of the Assistant District Attorneys are to be cross-designated as Assistant U.S. Attorneys in order to facilitate full use of all of the anti-drug laws at a prosecutors' disposal.

When asked if the potential for a death penalty in federal court might be used as a bargaining threat to obtain conviction on state charges, McNally clarified that the cross designation was not to be used for plea bargaining, but for cooperation between the state and federal prosecutors.



President Bush and McNally exchange greetings as a White House staffer looks on, October, 1990.

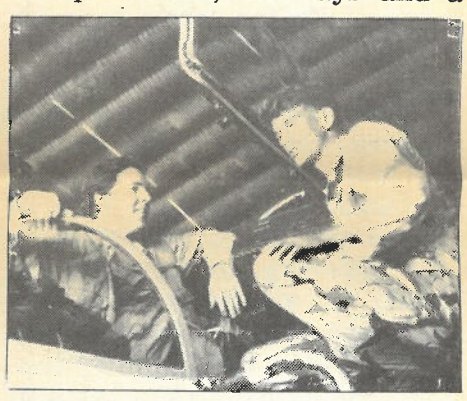
As to the death penalty, McNally stated that he would "be hesitant to seek the death penalty if it were available in the state, but any responsible prosecutor should consider all of the charges that might be based upon the evidence."

"Whether to bring a federal death penalty case would be decided by the U.S. Attorney and the Justice Department," McNally said. Thus, whether the defense bar should be prepared to defend such a case is a question more appropriately directed to Wevley Shea.

When asked what sort of things he would like said about him when he is gone, McNally replied that he would like to be remembered as fair and consistent, and that the District Attorney's Office in Anchorage be perceived as fair. McNally said that, "the job of a prosecutor is not just to convict, but to seek justice."

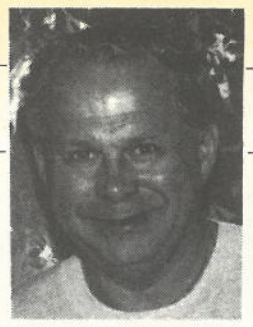
McNally sees himself not as a professional administrator, but as a leader capable of contributing the resources of information, experience and perspective. He is quick to praise some of the outstanding Assistant District Attorneys working with him such as Mary Anne Henry, Steve Branchflower, Bob Linton, and James and Shannon Handley. He appears comfortable with sharing the responsibility for deciding whether to prosecute particular cases with his assistants. In this respect, it appears clear that Edward McNally is, if nothing else, a team player rather than a dictator. He approaches his task with a balanced perspective.

"Prosecution is a very idealistic profession," he says and a profession in which McNally thinks it is good to have a sense of humor about oneself. This sense of humor has kept him from being bothered by the "fun guy" label put upon him by a gossip column, and may serve him well as the pressures of high profile cases formulate the reputation of the McNally-led prosecution team.



McNally and a U.S. fighter pilot (right) talk during Desert Shield at a Saudi Arabian base on Thanksgiving Day, 1990.

As the opportunities develop to evaluate the District Attorney's Office's performance on major cases under McNally, it would be too idealistic to expect miracles. However, one can expect and, by all appearances, should get a responsible and professional response from his office.



Movie Mouthpiece

By Ed Reasor

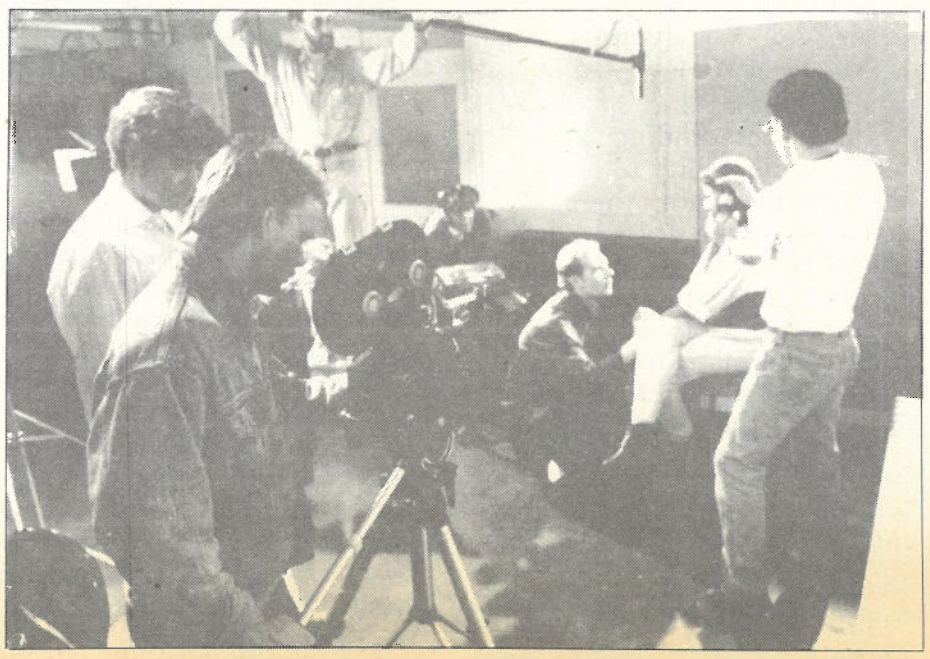
In my last column, one I wrote from NYC in the presence of an extra from "City Slickers," I promised a report on film schools generally. On Friday, August 16, 1991, at the regular noon luncheon of the Anchorage Bar Association, I was pleased to show my group's graduation film "One Night Stand." Every filmmaker wants his product to be seen and so I do volunteer to show it to other Bar Associations around the state when I am in your vicinity around a meeting date. The film is a combined effort of five fellow students from a class of 52 at last summer's intensive NYU Film School, New York City on Manhattan. It is only six minutes and forty-five seconds long, but it contains a wealth of film techniques that we learned.

Why should a lawyer go to film school and is it worth it? If you are fresh out of law school and want a career in entertainment law, film school although not required, would be a good move. I do not know a single lawyer anywhere in America who is a graduate of film school. I know lawyers who are filmmakers, but they either learned the craft on the job or by seminar-trainee programs. One of the things film schools stress is the necessity to have on retainer at all times an entertainment lawyer, so for that reason — the very common sensical one of acquiring clients in entertainment law, film school is a viable option. There will always be films and a need for entertainment lawyers.

I went to film school to learn the craft of filmmaking. I knew the theory, appreciated the technique, had produced or served as associate producer on two feature length films and had written and sold film scripts. But I did not know the variations of the camera, the wondrous, expansive challenge of sound recording and the mysterious collaboration and genius of dialogue, sound effects, and music mix. I also lacked a keen appreciation of what the lab could do for you or to you photographically.

For me film school was well worth the effort, but I want to say quite candidly that it was also a more difficult task than law school. I never once got up later than 6 a.m. nor did I hit the sack for a much needed rest before 11 p.m., seven days a week for six solid weeks. It was equivalent to the stress and strain of the largest and longest trial I've handled (6 weeks and a verdict of $2.4 million), and although I passed the Alaska, Iowa and Hawaii bar exams all on the first try, I wasn't convinced I would graduate from NYU Film School until the evening before the ceremony.

When I realize that only one of my 52 classmates will ever have a chance to work on a feature film in any capacity whatsoever during their whole lifetime, the economist in me questions whether film school is the answer. Couple that with the fact that out of 25,000 scripts submitted to Hollywood last year, only one was purchased and of that one group, only one in 40 made it to the silver screen, the idea of becoming a feature filmmaker either as a writer or director appears remote. Still — if it was easy everyone would be doing it.



A group of five film students work together on a set to film and record live dialog for their graduation film at NYU. Bar Rag Movie Mouthpiece Ed Reasor graduated from the program July 6.

New York University has the third best film school in the world. Oliver Stone ("Platoon"), Martin Scorsese ("Goodfellas"), Spike Lee ("Jungle Fever") are just a few of its renowned film graduates. University of Southern California Film School is the best, followed closely by the University of California at Los Angeles. Graduates of these schools seem to stay in California and acquire studio jobs. Both schools tend to teach glamorous color, functional but rigid story lines, and deal making. Film graduates here are successful, but it's similar to the Yale or Harvard law graduate who finds out that at thirty Wall Street was not all he thought it to be and that his creative legalese is wasted in a stare decisis environment.

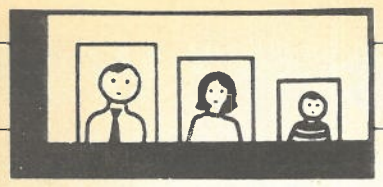
NYU film grads tend to film grainier, more realistic, more innovatively written story lines, ones that cannot be reproduced by some software product that you buy at your friendly computer store. New York for all of its faults (homeless, taxes, immense crowds, generally dirty parks and streets) does have a world of acting talent, camera personnel, sound experts, and lab facilities. After all this is the Big Apple. What I liked most about NYU was its contacts with this professional industry and its invitation to utilize these experts on our student movie projects and further to develop a relationship for our future films because the professional staff at NYU (all accomplished filmmakers) ignore the sad and belabored statistics of low opportunity with an enlightened view that someone in some class someday will make a film that does well and when that happens he will use other NYU grads on future films. They've been teaching film for 28 years at NYU, so obviously people keep trying to break into a very restricted industry. Some with success, some not. I believe a film graduate of NYU is more apt to independently produce a feature film than would a USC or UCLA grad.

Filming and recording sound require exactness and some imagination, but editing requires concentration, a wide knowledge of human nature and patience. Our man at NYU Ed Reasor said he thought women were better editors than men by far.

New York University photos.

Spike Lee has said publicly that the only reason one goes to film school is because that's where the equipment is. NYU had the equipment. Each of us participated in five films. We all had a chance to learn light meters, camera angles, lenses, sound recordings, boom position, and more we learned how to edit the film ourselves on modern editing equipment. Through NYU contracts we were able to acquire permits from the mayor's office, talented actors and actresses from the Screen Actors Guild (who like us were trying to build a portfolio of film experience), and seasoned sound mixers (mine had done all of Richard Pryor's films). This is a hard act to follow and virtually impossible anywhere except New York City or Los Angeles.

I did not go to NYU for a certificate in film. That's more for those who want the quiet, tenured life of the college professor, but after six weeks of total immersion in cinematography, culminating in a final sync-sound film of professional quality, I was proud to get one. How proud? It's hanging in the reception area of my law office right next to my American Bar Association membership, the one I deliberately hung upside down over a decade ago. The next step for me is to make a 35mm feature film. When that day occurs, I'll ask someone else from this August body to write the review for this column. Until then, I'll keep giving you topical reviews myself. With that in mind, do go see Richard Harris in "The Field." That's acting. Powerful, raw, emotional. Contrast it with William Hurt's excellent portrayal of "The Doctor." Also excellent acting, but more schooled, more skilled. One thing NYU Film School maintained about directing is that sometimes the talent can bring out more than is there. These are two such film occasions. In each, the director had the good sense to let each actor reach his own horizon. Don't miss either film.



People

Robin Brena and **Cathleen McLaughlin** have formed the firm of Brena & McLaughlin.....**Thatcher Beebe** has moved to France.....**Michael Dieni** is now with the P.D.'s office in Palmer....**Nicole Faghin** is with Reid, Middleton.....

Rhonda Fehlen has opened her own law office in Anchorage....**Eugene Hardy**, formerly with the Fairbanks North Star Borough, is now with the Alaska Railroad Corp.....**Douglas Mertz** has left the A.G.'s office and is now in private practice in Juneau.....**David Marquez**, former senior counsel with ARCO, is now general counsel at Alyeska.....

Patrick Owen has relocated to Idaho.....**Laurie Otto** has moved from Juneau to Anchorage.....**Robert Reges,** formerly with Clough & Associates, is now with the Natural Resources Section in the A.G.'s office in Juneau.....**R. Scott Taylor,** formerly with the P.D.'s office, is now with Rice, Volland & Gleason.....**Mark Worcester,** formerly with the A.G.'s office, is now a senior attorney with ARCO.....**Wendy Feuer** will be leaving Perkins Coie to work in the Oil Spill Litigation Section of the A.G.'s office.

The law firm of Jensen, Harris & Roth is pleased to announce that effective September 1, 1991, **Timothy C. Verrett** is a shareholder of the corporation. Verrett joined the firm in May, 1984, and was admitted to the Alaska Bar Association as well as the U.S. District Court, District of Alaska and U.S. Court of Appeals, Ninth Circuit in 1983.

Hickel picks Motyka for DA slot

Governor Walter J. Hickel has appointed Gregory J. Motyka to fill a vacancy on the Anchorage District Court in the Third Judicial District. Motyka, a former assistant D.A. who specialized in narcotics prosecutions, was one of five candidates nominated to the position by the Alaska Judicial Council.

"I am pleased to appoint Greg Motyka to this opening," Hickel said. "He brings the experience of the trenches of felony drug prosecutions, as well as the private sector, where he has had a very successful practice. I welcome him aboard."

Motyka, 41, has been an Alaskan resident for 10 years, and has practiced law for 13 years. He is a 1976 graduate of Brooklyn Law School in New York, who worked for the U.S Attorney's Office and the New York County D.A.'s Office in the 1970s before moving to Alaska.

Hickel was pleased by the nomination of four other highly-qualified candidates for the judgeship. "This was a tough, tough decision," Hickel said. "Any of these candidates would make a fine judge and we will encourage them all to consider the next opening that becomes available."

The other four candidates were Lynn H. Christensen, a magistrate in Kenai; Carolyn E. Jones, an assistant attorney general in Anchorage; Michael J. Lindeman, an attorney in private practice in Anchorage; and Kevin F. McCoy, also an assistant AG in Anchorage.

Governor's Office press release, July 26, 1991

Bar benefit plans get new broker

A new servicing broker for the Association's benefit plans has been appointed, according to Association Controller Geraldine Downes.

Aurora Employee Benefits and Insurance now handles the Life, Health, and Disability plans offered to Bar members. The plans have proven very popular with the membership, according to Downes, with almost half the Bar participating in the life plan and over 70 firms in the medical plan.

"We wanted to maintain the highest level of service possible for our members," she said, "and our past association with Aurora's principal shows that they can deliver."

Aurora is operated by Bob Hagen, original architect of the health plan, the disability plan, and of the present format of the life plan. The health plan, underwritten by Blue Cross, offers true group coverage to firms of all sizes. The life plan provides term insurance at very low rates.

Disability is underwritten by Unum, the country's largest writer of disability income protection on attorneys. Unum provides a 15% discount to members of the Alaska Bar.

For more information or to join any of the group plans, contact Aurora Employee Benefits at P.O. Box 240326, Anchorage, AK 99524-0326.

The phone number is (907) 563-0334.

DIAL 800-478-7878 FOR CLE & BAR INFO

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

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

Groh appointed to advisory board

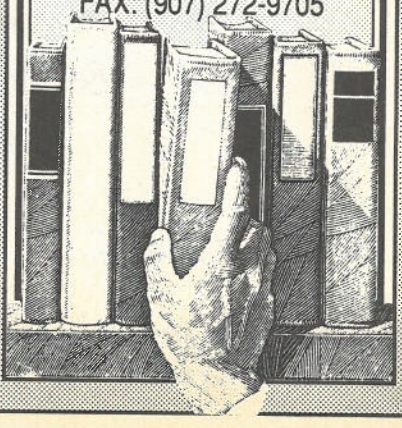
Chief Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit announced the selection of Clifford J. Groh, of Anchorage, Alaska, to the Ninth Circuit Judicial Conference Senior Advisory Board. Groh will serve a five-year term beginning at the end of August 1991, and will replace Windsor Calkins, of Calkins & Calkins in Portland, Oregon, who passed away.

Commenting on the selection, Chief Judge Wallace said, "We are indeed fortunate to be able to draw upon the extensive experience and fine talents of expert federal practitioners like Groh, and I know the judiciary and the operation of our courts will be improved by his participation and contributions."

Clifford J. Groh, Sr., 65, is a partner in his own firm of Groh, Eggars & Price in Anchorage. Born in Ramapo, New York, Groh was graduated from St. Lawrence University, attended the University of Miami School of Law, and received his J.D. degree from the University of New Mexico School of Law. He served in the United States Navy, attaining the rank of Lieutenant.

Groh engaged in the general practice of law from 1955 to date in Anchorage, and has been active in numerous public offices. He served as president of Operation Statehood in 1952-53; as an elected school board member and later president; as a city council member; as chair of the Anchorage Charters Commission; and as an Alaska State Senator from 1971-1974. He is a former president of the Alaska Bar Association and was named "Outstanding Legislator of the Year" in 1972 by the Eagleton Institute of Politics, Rutgers University.

The Senior Advisory Board is composed of nine experienced federal court practitioners, all distinguished leaders of the bar, who have an outstanding record of many years of contribution to the administration of the federal justice system in the Ninth Circuit. The Board was created in 1982 to advise the Judicial Council — the principal governing body of the circuit — the judicial conference, and the courts of the circuit on proposed matters relating to their effective administration. The United States Courts for the Ninth Circuit encompass the nine western states and consist of over 300 judicial officers.



Patronize Bar Rag Advertisers
Tell them "I saw you in the Bar Rag"

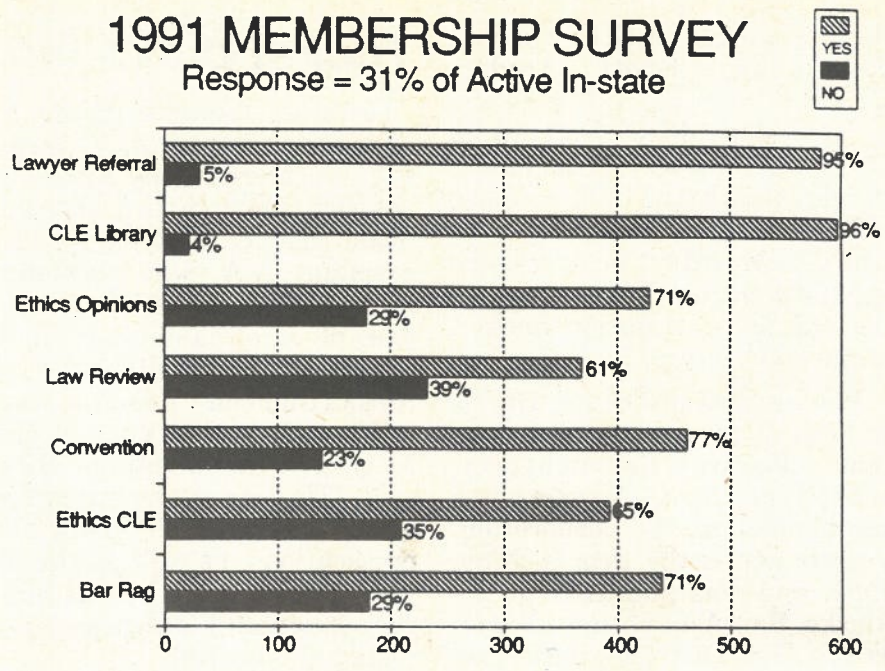
Lawyers vote for 7 ABA programs

BY DANIEL WINFREE

The results are in, and while the members generally support the services covered by the membership survey conducted this spring, the comments submitted demonstrate a wide diversity of opinion about just about everything.

First, the numbers: 637 responses were received from the 2,027 active/in-state attorneys to whom the survey was sent, a 31% response rate. The responses are as follows:

ACTIVITY	YES	NO	N/R
Bar Rag	438	180	18
Ethics CLE	393	209	36
Convention	461	139	39
Law Review	369	232	37
Ethics Opinions	429	179	30
CLE Library	597	22	18
Lawyer Referral	582	32	17



Far more interesting than the numbers, however, were the comments. The main lightening rods for praise and abuse were the Bar Rag, the new Ethics CLE, and the Alaska Law Review.

For some, the Bar Rag is silly, embarrassing, and undignified, and needs a major format revision with no more movie/wine reviews, no more b___s___ reminiscences, and no more repetitious columnists with nothing new to say. For others, the Bar Rag is refreshing and unpretentious, although it could be streamlined to put more focus into being the official publication of the Bar Association.

To some, the mandatory Ethics CLE for new admittees seemed appropriate; to others, the new CLE aimed at the wrong target, *i.e.*, the "older attorneys." A common theme of the comments was that the new admittees have been exposed to ethics in the classroom and as a part of the bar exam, so that the new course would be superfluous. At the same time, many respondents suggested mandatory ethics CLE's for all attorneys every 3-10 years.

A good number of respondents felt the Alaska Law Review provided nothing relevant to the general practitioner. Others noted its importance to the development of Alaska law. One theme raised in the responses was the desire for the ALR to be "awarded" to a law school geographically nearer to Alaska.

The survey results and comments were illuminating, and they will be widely discussed during the 1992 budget decisions in October.

One survey theme to leave you with — a number of members who also hold membership in other jurisdictions stated that they favored the Alaska Bar Association. Two comments stand out:

> I belong to several other state bar associations and I am consistently proud of the leadership of the Alaska Bar with the exception of not having a mandatory CLE.
>
> * * *
>
> I am a member of the Bar in five jurisdictions. Of the five, Alaska Bar has the most personal touch and the staff is, by far, the most responsive to questions and requests from members. Membership in this bar is truly a pleasure.

The Board will never please everyone, but it will do its best to provide an appropriate level of services for the membership along its statutory mandate.

SOLID FOUNDATIONS

By Mary Hughes

The Alaska Bar Association now has a CLE information line courtesy of the Alaska Bar Foundation. The 800 number, originally utilized by members of the Alaska Bar Association who wanted copies of cases, treatises or periodicals sent to them from Anchorage repositories, was furnished this last summer to the ABA to provide a communication link with its members toll-free. The recording informs the listener of association hours, telephone number and fax number. The CLE schedule for the month is also included. Additionally, the association reminds members of other events of note. The line is a valuable service and should be used frequently by members of the association.

800-478-7878

IOLTA

IOLTA membership continues to grow — as of the end of July, 1991, 231 lawyers or law firms were IOLTA firms. As membership grows, the ability to meet the ever-increasing needs of Alaskans for legally related services increases. Gross IOLTA revenue on a monthly basis is $20,000. That commitment of the IOLTA firms ensures funding of programming at a substantive level. A total of $195,000 in grant funds have either been approved or disbursed in 1991.

The Alaskan banking community has been extremely receptive to IOLTA accounts. Security Pacific Bank Alaska and National Bank of Alaska are exceptional in their commitment. First National Bank of Anchorage, Key Bank of Alaska, Denali State Bank, First Bank of Ketchikan, Northrim Bank and First Interstate Bank are also IOLTA banks and provide IOLTA trust accounts as a service to their lawyer customers.

1990 Annual Report

The Trustees of the Alaska Bar Foundation published the first Annual Report in the Spring of 1991. The feat does not seem so impossible; however, the Foundation was incorporated in October of 1972. Although copies were sent to all IOLTA firms, additional copies of the 1990 Annual Report are available at the association office.

JUST CHUCK ME IN THE OLD CHUKCHI*©

By John M. Holmes

I was down and out in Fairbanks,
in the unemployment line,
when a Doctor of Consultantcy
stepped up and spoke his mind. (he said)
'So you're of late from the Forty-Eight,
a statewide refugee.
Well there's still hope on the great North Slope
and the shores of the Chukchi Sea.'

As he advised, I dredged my mind
and found some talent there,
Lying neglected and unexpected,
a certain talkative flair.
So I printed cards and letterhead
in grand hyperbole,
And I placed my hope in the great North Slope
and the shores of the Chukchi Sea.

Subsistence is the field in which
I found I do excel.
I hunt and trap consultant's fees
and do it pretty well.
No more bumming cigarettes,
I'm fixed financially,
For I placed my hope in the great North Slope
and the shores of the Chukchi Sea.

So dry those tears, you refugee,
and join the planning game.
Consult your way to solvency,
move on to wealth and fame.
Look beyond that handicap
of mediocrity,
And place your hope in the great North Slope
and the shores of the Chukchi Sea.

—Refrain—

Oh—When my contract's done,
And my luck has run,
And the Slope's downhill for me,
Then my only hope is to head on North,
So Chuck Me In The Old Chukchi.

Yes, Check Me In The Old Chukchi,
Just Chuck Me In The Old Chukchi,
For My Only Hope Is To Head On North,
So Chuck Me In The Old Chukchi.

*US Copyright by John M. Holmes, May, 1979. Use by permission only.

Youth classes begin

Presently, Anchorage Youth Court (AYC) is preparing for its fall classes to begin in mid-September. Approximately 300 students will sign up to participate. Classrooms are reserved in all high schools and two junior high schools for these weekly, two hour classes. Classes may also be held in attorneys' offices. The course lasts for 10 weeks.

Practicing attorneys are needed to act as volunteer teachers. Team teaching has been found to be quite effective and reduces the demand on each individual. Please contact the AYC office at 274-5986 if members of your firm or agency would like to be a part of the AYC learning experience.

Notice of Typographical Error 1991-92 Edition of Alaska Rules of Court

The 1991-92 edition of the Alaska Rules of Court published by Book Publishing Company contains a typographical error in Administrative Rule 11 on process server costs. The error appears on page 724 in section (a) (1) (iii) of the rule. The amount recoverable for each hour in excess of two spent to obtain service should be $15.00 **not** $5.00.

9th Circuit turns 100

Chief Justice Robert Boochever of the U.S. Court of Appeals for the 9th Circuit presented a brief history of the relationship between Alaska and the 9th Circuit.

Board of Governors President Pat Kennedy welcomed bench and bar to the luncheon on Aug. 20, honoring the 100th anniversary of the 9th Circuit and the Bar Association members who practiced before the 9th Circuit during Territorial days.

ALASKA BAR ASSOCIATION

One Hundredth Anniversary of the First Session of the United States Court of Appeals for the Ninth Circuit

Luncheon Program
Tuesday, August 20, 1991

Hotel Captain Cook
Anchorage, Alaska

Welcome	*Elizabeth Page Kennedy,* President, Board of Governors, Alaska Bar Association
Opening Remarks	*Justice Edmond W. Burke* Alaska Supreme Court
Introductions	*Chief Judge H. Russel Holland,* U.S. District Court, District of Alaska
Honored Guests from the United States Court of Appeals for the Ninth Circuit	*Senior Judge Robert Boochever* *Judge Thomas Tang* *Judge Stephen R. Reinhardt* *Judge Pamela Ann Rymer*
Remarks	*Senior Judge Robert Boochever*
Relationship of the Territorial Court and the Ninth Circuit Court	*Clifford J. Groh, Sr.* Alaska Bar Association
Closing Remarks	*Elizabeth Page Kennedy*

Alaska Bar Association Members Who Practiced Before the Ninth Circuit Court of Appeals During Territorial Days

Russell E. Arnett
W. C. Arnold
Jack O. Asher
Jane F. Asher
Kenneth R. Atkinson
R. E. Baumgartner
Norman C. Banfield
Burton C. Biss
William V. Boggess
Robert Boochever
Edgar Paul Boyko
Seaborn J. Buckalew, Jr.
Donald A. Burr
Harold J. Butcher
Henry J. Camarot
Warren C. Christianson
Charles L. Cloudy
Charles E. Cole
Roger G. Connor
Roger T. Cremo
Daniel H. Cuddy
Floyd O. Davidson
James J. Delaney, Jr.
M. Ashley Dickerson
Fred O. Eastaugh
James E. Fisher
James M. Fitzgerald
William C. Foster
Richard O. Gantz
Douglas L. Gregg
Clifford J. Groh, Sr.
Gordon W. Hartlieb
George N. Hayes
John C. Hughes
Barry W. Jackson
Robert L. Jernberg
Eben H. Lewis
Neil S. Mackay
Albert Maffei
J. L. McCarrey, Jr.
Kenneth McCaskey
Joseph A. McLean
Edward A. Merdes
Eugene V. Miller
Mary Alice Miller
Ralph E. Moody
William J. Moran
Buell A. Nesbett
William M. Olsen
Robert N. Opland
Robert A. Parrish
Frederick Paul
Howard W. Pollock
David J. Pree
Jay A. Rabinowitz
John L. Rader
Dickerson Regan
Julian C. Rice
Burke Riley
Paul F. Robison
William H. Sanders
Walter Sczudlo
John D. Shaw (deceased)
Evander C. Smith
Michael A. Stepovich
John M. Stern, Jr.
Senator Ted Stevens
Thomas B. Stewart
Herald E. Stringer
A. David Talbot
Warren W. Taylor
David H. Thorsness
Charles E. Tulin
James A. Von der Heydt
Peter T. Walton
Lloyd J. Webb
J. Gerald Williams
L. Eugene Williams
Juliana D. Wilson
T. Stanton Wilson
Gladys B. Wynd
Robert H. Ziegler, Sr.

The Alaska Bar Association wishes to express special thanks to the following firms, organizations, and individuals for their donations to this event:

Anchorage Bar Association
Leroy J. Barker
Bradbury, Bliss & Riordan
Heller, Ehrman, White & McAuliffe
Hughes, Thorsness, Gantz, Powell & Brundin
Jensen, Harris & Roth
Perkins Coie
Sonosky, Chambers, Sachse, Miller & Munson

The photography exhibit is courtesy of the Ninth Judicial Circuit Historical Society.

O'Connor reads Rag

Continued from page 2

over to shake the hand of the lady who had been there when I arrived. It was Sandra Day O'Connor.

I usually bring copies of the Bar Rag whenever I attend a legal gathering of any type and had followed that practice on this occasion. Earlier, in fact, I had set out about 50 copies for anyone to take. As I was sitting in the convention, I thought that it might be appropriate to present Justice O'Connor with the edition of the Bar Rag in which she was mentioned. It was the February 1991 edition with the article on Alaska Attorney General Charlie Cole, a classmate of hers in law school. Therefore, during the break I went back out to the table to see if any papers were left. There were only a few, but fortunately there was one copy left of the edition I sought. I grabbed it and turned to look for Justice O'Connor. She was just a few feet away and I approached her and presented the newspaper to her. She accepted it pleasantly and recalled attending law school with Attorney General Cole. At that point, I doubted that I would have occasion to see her again. Several minutes later, I returned to the convention hall. I noted, as I approached my seat, that Hal Brown was standing and staring quite intently toward the area I had been seated. I arrived to find Sandra Day O'Connor seated in the chair immediately next to my seat, her eyes focused intently on the Bar Rag which she held wide open before her. Everyone passing by the Justice glanced in her direction and was very much aware of the paper she was reading. Interestingly, all the copies were gone when I checked again later in the afternoon.

I sat down next to Justice O'Connor and she commented about the newspaper and its unique name. She was particularly interested in the article that appeared on the front page concerning Jim Cantor, the attorney preparing to run the Iditarod. She explained that only last week she had met Susan Butcher. Justice O'Connor also asked questions about Charlie Cole and Alaska in general. I was impressed with how cordial she was and how interested she seemed in our activities in Alaska. Throughout the remaining two hours, Justice O'Connor read the Bar Rag during any breaks that occurred. As I was seated there next to her, my mind strained to remember what the subject matter of the Editor's Column was that I had written for that edition. I hoped it was one of my more intelligent or thought-provoking articles. Upon returning to my room, I grabbed another copy of the paper to see what I had written about in that edition and was not terribly happy to find that it was the column I wrote on lost socks. I did comment to my wife, though, how impressed I was at having been able to spend some time in discussion with a Supreme Court Justice. I mentioned, however, that I hadn't been able to speak with Justice Scalia.

That afternoon there was a break in the proceedings and we were able to spend a little time on the beach (really, just a short time). My wife and I found a secluded corner and I began to work on my sunburn. About 15 minutes later, now well into my burn, my wife tapped me on the elbow and asked if the gentleman walking in our direction was Justice Scalia. My contacts were back in the room, so I grappled for my sunglass which I had been laying on and which were covered with suntan lotion and sand. Even in this condition, though, I was clearly able to see that it was, in fact, Justice Scalia heading in our direction. I waved briefly at him and he came directly over to us. He spoke first — about the wind. I indicated that I had appreciated his remarks earlier in the day and had recently read an article about him that I found very interesting. He responded that such articles were generally not completely true, whether they be good or bad. We introduced our wives and talked for a few moments about the weather and the convention in general. He then proceeded down the beach.

In the course of one day, I had spoken, in a very informal setting, with two Chief Justices of the United States Supreme Court. On several other occasions during the convention, similar opportunities arose. I was impressed with their accessibility and warm demeanor. The initial feeling of invisibility passed.

The remainder of the convention addressed various matters of concern to the Ninth Circuit. The primary theme concerned whether or not cameras should be permitted in the courtroom. Ultimately a vote was taken. The lawyers were pretty well split on the issue, while the judges opposed cameras in the courtroom by a 2-1 margin. There seemed to be a real desire, however, by all those in attendance to improve the quality of law in the Ninth Circuit, although there was disagreement as to how this should be obtained. Some felt that emphasis should be placed on expediting the process, while others expressed concern that if we continue to place undue emphasis on getting cases through the system quickly, we will lose the quality that has been the hallmark of the American judicial system since its beginning.

Probably the best aspect of the whole convention, however, was the ability to see and listen to other people throughout the district express their concerns, to see that we share mutual goals and problems, and to realize that everyone's role in the system is equally important.