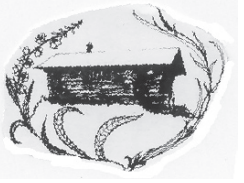
The Alaska BAR RAG

Historical Bar



An ex-P.D. recalls the good old days
Page 30

VOLUME 30, NO. 2 | *Dignitas, semper dignitas* | $3.00 | APRIL - JUNE, 2006

MCLE once again before the Bar

Just say no to MCLE

By Jason Weiner

Published in this issue of the Bar Rag is Proposed Alaska Bar Rule 65, which would make Continuing Legal Education mandatory in Alaska. We would be required to complete at least 24 credit hours of approved MCLE, including 2 credit hours of ethics continuing legal education every two years. I am a representative to the Board of Governors from the Second and Fourth Judicial Districts and I recommend against passing the proposed rule.

The most common argument I have heard from those in favor of MCLEs for lawyers is that "everyone else is doing it." Turns out that not every American jurisdiction has an MCLE rule. Alaska is one of 9 states without an MCLE rule. Nebraska most recently looked at imposing an MCLE rule and decided against it, citing the Alaska Voluntary Continuing Legal Education (VCLE) Rule as a model that should be explored. We are all well aware that no state is as large as Alaska, and no state has the challenges of providing services to such a small population over such great distances. An MCLE rule would ignore these difficulties, requiring lawyers in remote communities to either fly to a live CLE or listen to CLEs on tape or over the phone. So even if every other state "were doing it," that would not mean that it would work in Alaska.

Mandatory reporting is the logical next step, not mandatory CLEs.

Not only are there several jurisdictions that do not have an MCLE rule, there are several professions that do not have mandatory continuing education requirements. Engineers, architects, bankers and marine pilots do not have state mandated continuing education requirements. The fields that do require continuing legal education fall into one of two categories – the health professions or professions that do not require graduate school. So doctors, dentists, and nurses are required to have continuing legal education, as are real estate agents. Companies that employ engineers, architects, bankers and marine pilots may require their employees to participate in continuing education programs like law firms and government agencies do, but there is no state mandate for such training.

Let's also not forget that at least for the health professions, all health providers can benefit from the same bank of knowledge. A doctor from the United States can be equally effective treating someone in the United Arab Emirates. Meanwhile, few if any Alaska lawyers would be able to practice law in the United Arab Emirates (ignoring the language difficulties), and they certainly would not try to practice there based solely on continuing legal education courses on Alaska law.

Another argument, for which there has been no supporting statistical data found or presented to the Board of Governors, is that CLEs improve lawyer competence. I am not saying that continuing legal education cannot help improve a lawyer's knowledge of the law. For some it is a great way to learn about your field or even a new field a lawyer wants to explore. However, one cannot assume that all lawyers will learn from classes, especially ones they are forced to attend. In the end, lawyers will be required to sit through classes they might not want to take at the expense of their clients, who would rather get a call back from their attorney instead of hearing from the attorney's secretary that he or she is at a CLE and will get back to them sometime next week.

MCLE programs ignore the specialist who "is" the CLE for the field. There are a number of lawyers in this State practicing in unique fields of practice or working for companies that focus on narrow areas of the law. Alaska,

Continued on page 20

So you're going to retire...

pgs. 22& 25

Now is the time to adopt rule

By Allison Mendel

On April 26, the Board of Governors voted to publish a new proposed rule for mandatory continuing legal education. This topic is perpetually contested, and the Board vote was not unanimous. But the reasons for requiring continuing legal education of all lawyers convinced a majority of the Board that now is the time to adopt a mandatory rule.

The Alaska Supreme Court and the Alaska Bar Association currently "encourage" all members of the Alaska Bar to participate in continuing legal education. But voluntary CLE has not succeeded in bringing lawyer participation in Alaska into line with the 40 states in which CLE is mandatory.

Reported participation in Alaska's VCLE program has consistently hovered around 50%, far below the 100% participation that is the goal of MCLE.

The purpose of Alaska's current VCLE program, according to Alaska Bar Rule 65(a), is "to promote competence and professionalism" among attorneys. The public expects Alaska's attorneys to possess these qualities.

Continued on page 20

Featured in this Issue

Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510

Non-Profit Organization
U.S. Postage Paid
Permit No. 401
Anchorage, Alaska

PRESIDENT'S COLUMN

Can we talk? The BOG needs *You*

By John Tiemessen

So here it is, the first presidential address of the year. I'm supposed to say something inspirational to make you feel great about your chosen profession. Maybe I could inspire you to do more pro bono. Maybe I could encourage you to get more active in your local bar association or form a local bar association. Perhaps you will want to get involved in the state bar or in a section committee that interests you. I have learned to set more reasonable goals. I would like you to just talk to us.

Now, we all know that nothing good ever comes out after a spouse or significant other pokes their head into the room and says, "Can we talk?" The only thing more ominous is when your supervisor comes into your office, shuts the door, and says, "Got a sec?" However, there should be no sense of foreboding about this request. It is just that the Board of Governors has some very large items on its plate and needs input from the members on how they want to proceed. This will require reading proposed Rules and actually commenting on them in writing. We want to tap the intellectual and analytical resources of our 3,000-plus members to help make rules that we can all live with.

The first is MCLE; the proposed rule is published in this issue. In a nutshell, this proposed rule would require all attorneys to complete 24 hours of approved CLE every two years. You would certify that you have complied by signing a space on your annual dues notice. You would need to keep records of compliance and these will be subject to audit.

There are many reasons that we are addressing MCLE including the fact that 41 other jurisdictions have it. The reason we are addressing it now is because this was a specific deficiency that was raised in a recent legislative audit and at least one legislator has threatened to try to take care of this legislatively if we did not address it administratively.

"The Board of Governors has some very large items on its plate and needs input from the members on how they want to proceed."

The second issue is Ethics 2000. These ethical rule changes are somewhat deceptive because they retain the familiar architecture of the Model Rules. However they add concepts of professionalism and best practice to the Rules. You can find details at www.abanet.org/cpr/ethics2k.html. The major changes are in the lawyer's duty to communicate with the client, a lawyer's duty to clients in certain specific problem areas, the changing organization and structure of modern law practice, new issues and questions raised by the influence that technological developments are having on the delivery of legal services, better guidance and explanation to lawyers, a lawyer's obligations to the tribunal and to the justice system, changes in the delivery of legal services to low and middle income persons, and increased protection of third parties.

Study these rules carefully. If you like them as is, let us know. If you think they need to be scrapped, let us know why. If you see problems or sections that need to be changed or added, let us know. By way of example, some have suggested that we should offer some MCLE credit for pro bono work (six states have such a provision). Although this suggestion was too late to be incorporated in the proposed rule, it may be incorporated in the final rule.

There are other ways that we can "talk." These include participation in bar committees. We currently have a need for members who are willing to serve on Area Discipline Divisions, particularly in the First and Third Districts. You will need to submit a resume or a brief statement of your background. We also have a need for members from all districts willing to serve on the Fee Arbitration Committee.

If members know of a public member who would make a good fee arbitration or discipline panel member, they should suggest them for appointment. Contact Deborah O'Regan at oregan@alaskabar.org for more information on the duties and time commitments and how to apply.

We will be continuing our efforts to reach out to the membership. I will continue the plan to visit every community with six or more active members on a three-year cycle. This year we have trips scheduled to Dillingham, Valdez, Nome, Barrow, and Kotzebue. This is part of a continuing reminder that we are the Alaska Bar Association, not the Anchorage or Railbelt or large city Bar.

So how do we talk? You can e-mail me at jjt@cplawak.com. The other Board members' e-mails are listed at www.alaskabar.org. MCLE, and Ethics 2000 comments should be directed to Steve Van Goor at vangoors@alaskabar.org or to info@alaskabar.org. For those of you who haven't caught onto this whole e-mail fad, there are even addresses and phone numbers.

Oh yeah – feel good about your profession and do more pro bono.

EDITOR'S COLUMN

Contrarianism and the art of dissent

By Thomas Van Flein

A well-written dissent is a thing of beauty. (Justice Scalia even got a book written about his dissents called "Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice" by Kevin Ring; I haven't read the book but I don't think it is satirical).

The more probing the dissent, the more references the majority is compelled to make to rebut the dissent, even though the battle of words and ideas is largely superfluous. After all, the dissent is not going to change a thing—at least at the moment.

But in the dissenter's heart rests a certainty that one day, hopefully soon, people (or at least a minimum number to gain a majority) will see the folly of their ways, adopt the dissent as the prevailing view, and maybe even declare the dissenter a visionary never to be questioned again. Even a dissenter can dream. Or should I say, the dissenter can only dream, because the reality is he or she is a lone voice, perhaps treated by the other members of the court the way we treat people who walk down the street muttering to themselves—with a polite and safe distance. There may be a fine line between being a dissenter and simply being a crank.

"But in the dissenter's heart rests a certainty that one day people will see the folly of their ways, adopt the dissent as the prevailing view, and maybe even declare the dissenter a visionary never to be questioned again."

But dissent is undeniably valuable. According to one author: "At least three modes of dissent are built into American law as legal counter activities: (1) voices of nondominant religions, (2) dissent within the legal system, *e.g.,* dialogue among and within the courts, (3) challenging the legal system sanctioned by the right to civil disobedience and by other forms of reaction against an oppressive government." Kevelson, Roberta (2002) "Dissent and the Anarchic in Legal Counter-Culture: A Peircean View." *Ratio Juris* 15 (1), 16-25. The focus for the moment is on the second form of dissent.

"There is a fine line between being a dissenter and simply being a crank."

A good dissent takes a certain level of self-confidence. How else does one proceed with the premise "I'm right and the rest of you are wrong?" And a good majority response is to ignore the dissent, *i.e.*, "it really is not worth the effort to respond to this but we will . . . in a footnote." Or perhaps the somewhat condescending majoritarian "tsk, tsk" is all that is needed, usually expressed as "Justice So-and-So dissents, arguing for reversal based on some crazy notion of due process. We think it's the booze talking and will stick to our sober analysis of the law."

Certainly a dissenting view can be based on experience or lack of experience. As Justice Burke told my then young co-clerk, Keith Sanders, who explained the great flaws of the proposed majority decision and was urging the judge to dissent: "I don't agree with you and in a few more years, you won't agree with you." And Justice Burke was right.

There are polite dissent-majority discussions, like this one: "Some comments are in order to explain why we are unpersuaded by the dissent's thoughtful discussion of this theory." *Vaska v. State*, 2006 WL 1314007 (Alaska May 15, 2006). I am assuming the term "thoughtful discussion" was genuine and not a term of art, the way senators who don't respect each other refer to the other as "my esteemed colleague." If the term was not genuine, then I have to take this discussion out of the polite category and put it into the condescending category. But otherwise that is a decent segue before intellectually shredding the opposing view.

And there are some testy dissent-majority discussions: Take the recent Supreme Court decision *Georgia v. Randolph,* 547 U.S. __, 126 S.Ct. 1515 (2006), which addressed yet another

Continued on page 3

The Alaska BAR RAG

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 550 West 7th Avenue, Suite 1900, Anchorage, Alaska 99501 (272-7469).

Publication Dates	Editorial Deadlines
January-March	Feb. 10
April - June	May 10
July - September	Aug. 10
October - December	Nov. 10

Board of Governors meeting dates
September 7 & 8, 2006
October 26 & 27, 2006
January 25 & 26, 2007
April 30 & May 1, 2007
May 2 - 4, 2007 Annual Convention - Fairbanks

EDITOR'S COLUMN

Contrarianism and the art of dissent

Continued from page 2

warrantless search case and the scope of the Fourth Amendment. The majority concluded that the police could not rely on consent from a third party occupant to enter a home over the objections of the first party occupant without a warrant. The dissent essentially argues that anybody in the house can give consent.

The majority and the dissent were fairly acerbic towards one another: The majority writes "None of the cases cited by the dissent support its improbable view . . . ." Not one case? Can't the dissenters read English? And asserting "improbable views" at that. I would expect that at the level of the U.S. Supreme Court one would have at least 'probable' views. But the dissenters respond with a prophecy, and reveal some hurt feelings: "Perhaps one day, as the consequences of the majority's analytic approach become clearer, today's opinion will be treated the same way the majority treats our opinions in *Matlock and Rodriguez*—as a 'loose end' to be tied up." Perhaps the next confirmation hearing will see to that "loose end."

"A good dissent takes a certain level of self-confidence. How else does one proceed with the premise 'I'm right and the rest of you are wrong'"?

And how about the majority comment at note 8: "The dissent is critical that our holding does not pass upon the con-stitutionality of such a search . . . We decide the case before us, not a different one." Touché. But, not one to back down, the dissenters note: "The majority also mischaracterizes this dissent . . ." Take that majority, but also know that the scope of your new decision "is not only arbitrary but obscure as well."

I can see arbitrary. I can even see obscure (though not as easily since it is, well—obscure). But being both "arbitrary and obscure" is too much. The opinion is obviously a rough draft that should never have been released in its current form.

"In what type of Orwellian world does an immunity for false and malicious testimony 'ensure' a witness 'will be more open and honest in testifying.'"

Yet Chief Justice Roberts maintains, in dissent, that the "correct approach to the question presented is clearly mapped out in our precedents." So, to one group the precedents are "clear" and to the other group "none of the cases" support the dissenting proposition. Seeing as the U.S. Supreme Court can't agree, that leaves only me to decide who is really correct. I say the majority wins this one and here is why: How hard is it to get a warrant (both sides concede this was a non-exigent circumstance)? Just make the call. More time was spent finding a parking spot for oral argument than it would have taken to get a warrant. There is hardly a magistrate around who won't sign off on a warrant. Since nobody expressed this view, this will have to be my concurring (and ultimately dispositive) opinion.

Not being a member of any court, I can't write a dissent, but I can express some lingering doubts about judicial doctrines that appear to be rarely questioned. Maybe they are sound, but maybe they should be looked at more closely. So, in the true spirit of contrarianism, here are two doctrines that are due a spirited dissent by somebody:

1. The absolute privilege to lie in court. "Testimony in a judicial proceeding, if pertinent to the matter under inquiry, is absolutely privileged, **even if given maliciously or with knowledge of its falsity**." *Gilbert v. Sperbeck*, 126 P.3d 1057, 1059 (Alaska 2005). Really? Do we want to give the official stamp of immunity of any consequence for people who knowingly testify falsely and maliciously? (Yes, I know perjury is a theoretical option, but it is rarely prosecuted—the person most interested in vindicating such a harm is the person against whom such false testimony was offered, not the State). So what is the big policy reason for this? The "privilege leads to more just trials by (1) encouraging more witnesses to come forward and (2) ensuring that witnesses will be more open and honest in testifying." *Lawson v. Helmer*, 77 P.3d 724, 727 (Alaska 2003).

Well, do the courts want to "encourage" a witness to come forward who has or will knowingly offer false and malicious testimony and, in what type of Orwellian world does an immunity for false and malicious testimony "ensure" a witness "will be more open and honest in testifying." This reasoning is tautological and barely passes the blush test.

2. The abdication of real appellate review in certain arbitration decisions. I understand the push to lighten the load at the courts. I understand some of the benefits of ADR. But how did it come to pass that the courts won't even examine an arbitration decision unless there is corruption involved (the standard under the Arbitration Act)? In other arbitration contexts, the Alaska courts will review arbitration decisions only for "gross error." *Alaska State Employees Ass'n/AFSCME Local 52 v. State*, 74 P.3d 881, 882 (Alaska 2003). Gross error "means that 'only those mistakes which are both obvious and significant' warrant reversing the arbitrator's award." *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1170 n.30 (Alaska 2002). In other words, the decision can be riddled with errors, and be plain wrong, but if not "obviously" wrong it stands.

In a world where arbitration clauses have cropped up faster than dandelions in Jeff Lowenfels' back yard (sorry, it's the best metaphor I could come up with on deadline), what amounts to a substantial abdication of judicial involvement essentially leaves thousands of litigants every year without a fair review of decisions that may have substantial impact on each person involved. That doesn't sound fair, and "fairness is our business." (It's written on the court stationery.).

So there you have it. Until I get some better answers, I respectfully dissent.

Letters to the Editor

Judicial Council over-reacts

I was surprised, in the last issue, to find that Teri Carns of the Judicial Council had written a lengthy diatribe attacking me for my previous column, "Gumshoeing the Bench". I had understood that it was the Bar Rag's policy in such circumstances to allow the contributor to respond in the same issue, but I had not been given that opportunity. Thank you for subsequently acknowledging that as a mistake, and giving me the opportunity to respond, belatedly. Unfortunately this means that to follow the thread here, readers will have to pull their previous issues from where they are stored, thus leaving many parakeets to wallow in their own filth.

First of all, I am astounded that the entire Judicial Council, all seven of them, are apparently lacking in basic literacy. I make the assumption that it is all of them based on the fact that Ms. Carns signed in her capacity as a "senior staff associate" for the AJC, rather than in her individual capacity, so she must have had the Council's authorization for this activity (the alternative, that the employees of a governmental body as powerful as the Judicial Council, which can make or break a promising lawyer's career, can file letters to the editor on their own initiative and use the name of the Council in doing so, is simply too horrible to contemplate).

So, apparently the entire Council missed the fact, obvious to anyone who read the article, that I am not named Steve. My name, as shown on the byline, is in fact Kenneth. While the article was written in the first person in order to emulate the style of old detective novels, I intentionally had that character's name mentioned twice, so that there would be no confusion that his views were necessarily mine.

You see, the idea was to have a dialogue between these two characters, in which each of them has some valid points, but neither is necessarily completely right. Both of them use statistics to make their points. Steve is in some sense an anti-hero, in that... oh for Heaven's sake, didn't you people take a Lit course in college? Do I really have to explain all this?

But what really annoyed me about Ms. Carns' letter is that she accuses me of getting the statistics wrong. Well, let's see: She says that only one judge was appointed to the bench with only two years' experience. Did I (or rather, Steve) say otherwise? No, he said "with as little as two years' experience" She says that there were men appointed to judgeships with less than 10 years' experience. I had said that almost all of the male appointees had at least 10 years in practice before being named to the bench. The rest of her statistical challenges appear to be mere differences in rounding, or differences in when, during a particular year, we are using a starting point.

I also wish it noted for the record that I intentionally did not use the names of any specific judges in my article. I did not want to embarrass any of the judges in question, or diminish their authority, especially given that those who remain of the "baby judges" of the 1980's are by now among the most experienced jurists on the bench.

So it appears our esteemed Judicial Council is only quasi-literate, misuses statistics, and is tactless on top of it all. And these are the folks who get to decide who becomes a judge. Disturbing, no?

— Kenneth
("I am not a Neanderthal, I went to the Ivy League") Kirk

New rule needed

I was startled to recently read a headlined article on the *Anchorage Daily News* website detailing the substance of a hearing at which the defendant in a prominent pending criminal case successfully sought the replacement or his court appointed counsel.

In order to guard client confidences and not prejudice a criminal defendant's case, such hearings should be conducted in camera with the public and the prosecutor excluded and the resulting transcripts sealed. This is the practice in at least one other jurisdiction, (*People v Marsden* (1970) 2 Cal.3d 118, 465 P.2d 44; Cal Rule of Ct. 33.5), which should be followed in Alaska. The courts and the state bar should take action to implement such a confidential procedure so that attorney-client confidences are not bandied about on the front page of the largest circulating newspaper in the state.

—Tom Quinn
(Editor's Note: Mr. Quinn's letter was forwarded to the Criminal Rules Committee)

ECLECTIC BLUES

Kayaking brings old friends together 'in life'

By Dan Branch

It's been a cold wet spring. In a good year by mid-April the air in Downtown Juneau is filled with the sweet scent as the balsam popular buds crack open. This year they were still closed in mid-.May when my friend and I loaded up the kayaks on the Sheep Creek beach.

We have done this many times: loading up the kayaks with dry bags, pulling on spray skirts and life jackets, balancing with the paddle as we ease into narrow cockpits. It didn't take long before we were in deep water approaching a thick line of surf scoters.

Usually this late in the year, the birds are jumpy and prone to stampede into the air long before we can approach them. On this trip they let my friend get within 50 feet before the first scoters struggled off the water and gave their Three-Stooges warning call. In seconds all the birds exploded off the water. Two flew right at me at eye level before veering off.

After the birds cleared a path my friend and I started down Gastineau Channel. The outgoing tide was setting up a strong current that carried to our campsite on Marmion Island in a couple of hours. On the way I thought about other kayaking we've done. My friend has always been a strong paddler but he is now more than 60 years old. That afternoon he was still strong and kept up a good pace.

Marmion is the gateway to Admiralty Island. From there it's a short three miles across Stephens Passage to the Oliver's Inlet salt chuck. My friend has made many trips across the passage, some of them with me. Together we have paddled hundreds of miles on Admiralty's Seymour Canal passing brown bears, whales and countless bald eagles.

"My friend has made many trips across the passage, some of them with me."

That was before his heart attack. This trip would be the first overnight paddle since then.

No one was at Marmion Island when we arrived even though it was Juneau's first warm and sunny day of the spring. The tide was still high enough to allow us to land near the campsite. My friend arrived first. A marmot whistled out a warning while he beached his kayak. My friend easily carried his own kayak off the beach--something he would have to do on his own during an upcoming solo paddle along the outside coast of Baranoff Island.

After unloading our boats and carrying them above the storm surge line we set up camp. He cooked Thai curry soup, which we ate around a driftwood fire. Behind us marmots scurried around the base of the Marmion Island volcanic plug.

The plug is a steep-walled rise with a flat top. It is attached to Douglas Island by a sandy strand. The strand separates two small bays that were filled with ducks and scoters that night. Years ago someone had planted an apple orchard on top of the Marmion plug. The trees have gone wild but still furnish food for bears and deer.

After dinner a small family of marmots came out to feed a few feet from our tent. They grazed on the new grass shoots until something we could not see startled them to cover. Seconds later a bald eagle flew close over them.

My friend went to sleep early, but I stayed up to read. It was dry and mild. A humpback whale sounded in Gastineau Channel and I watched him feed before returning to my book. Later the whale worked the waters on the Stephens Passage side of the strand, close to our camp.

At dusk four deer walked along the waterline with stiff-legged grace, moving in a single line spaced evenly apart. They froze 100 feet away from me. I shifted an inch to avoid some smoke and the deer sprinted into the woods.

Just before turning in, I watched a mink stroll along some driftwood logs just a few feet away from our camp. He knew I was there but didn't care. That's a mink for you. They are the litigators of the animal world.

I fell asleep to the sound of shore birds and awoke to a robin's sound. A wind was rising but it was still warm. It was low tide when we were ready to leave. We carried the boats and gear out to the water's edge. A flock of shore birds worked the exposed sand as if we were not there.

We entered Gastineau Channel at the height of the incoming tide surge. The surge, working with the wind, raised waves that we surfed all the way back to Sheep Creek. It always takes me a while to get comfortable in a following sea, especially when I can hear waves breaking behind me. My friend paddled nearby, looking tranquil as if age and health problems were irrelevant in a kayak. He was the first to slip up the mouth of Sheep Creek where we found a calm spot to land.

We carried boats and gear a safe distance from the water just before the wake of a large cruise ship hit the beach. My friend looked strong as we put the kayaks on his car rack. He was looking forward to his trip to the big waters off Baranoff Island. I was already looking forward to his safe return.

Law LibraryAids

Finding the Answers:

Secondary Sources to the Rescue

Now that you can retrieve statutes and case law from the comfort of your office, maybe you haven't visited the law library in a while. There are many useful resources in the library that are not available online – reliable secondary sources in particular. Treatises, which explain and analyze the governing legal doctrines in various subject areas, are a great place to start research in an unfamiliar field. Likewise, articles in law reviews and journals analyze the history and trends in areas of law, often discuss the anticipated impact of new legislation, and provide useful statutory and case references on specific legal issues

Treatises & Form Books

The law library's treatise collection covers a broad range of legal topics including administrative law, construction litigation, criminal procedure, estate planning, family law, intellectual property, tax, workers' compensation, and much, much more. Treatises provide a useful introduction to the terminology associated with any given issue. Reading a treatise prior to conducting on-line research will help you formulate a search with the language used by the courts addressing a particular issue. Treatises published by West offer sample search queries.

Law Reviews & Journals

The Anchorage Law Library subscribes to over 350 journals and law reviews in print. Articles can be delivered to you on request if you are not in Anchorage. Online access to legal periodicals is available for free in court system law libraries. All libraries have access to Westlaw's full-text articles of over 800 journals and law reviews. These articles can be searched by terms and connectors or natural language, just like the case law databases. Law libraries in Anchorage, Juneau, Fairbanks, Kenai, and Ketchikan have access to the HeinOnline database which contains searchable PDF images of the full text of over 1100 law reviews back to volume one.

Check Out Books!

Remember that the law library's catalog is available on the web at www.state.ak.us/library.htm. You can search the catalog to confirm that a book is on the shelf prior to making a trip down to the law library. If a book is not in your local law library, you can e-mail the Anchorage Law Library at library@courts.state.ak.us and request that a book be mailed to you through our interlibrary loan program.

—Cynthia Fellows

ALSC alums have early celebration; mayor's award

Alaska Legal Services Corporation (ALSC) alumni and friends gathered on April 26 for an early celebration of ALSC's 40 years of service. The official anniversary and celebration date will be on September 15, 2006. The agency plans to host a commemorative event in Anchorage in conjunction with the kickoff of its Robert Hickerson Partners in Justice Campaign during that month.

Mayor Begich makes a Harrington proclamation.

The pre-anniversary gathering was held in conjunction with the Alaska Bar Association convention, at the Law Offices of Vanessa White. Former and current board members, staff, volunteers, several members of the Alaska Court System, the Alaska Bar Association and the Municipality of Anchorage attended the event.

During the celebration, Andy Harrington, ALSC's Executive Director, was presented with an Award of Merit by Anchorage Mayor Mark Begich in appreciation and recognition of 25 years of outstanding work in public service and tireless advocacy in the pursuit of equal access to justice for all Alaskans.

Harrington said, "It's the efforts of ALSC's staffers, board members, and pro bono attorneys over the years that merit recognition. Anchorage has always been home to ALSC's largest office, and the community should be proud that so many of its attorneys and other citizens have made such outstanding contributions towards equal justice for all."

Andy Harrington has been the Executive Director of Alaska Legal Services Corporation (ALSC) since 2002. He has a law degree from Harvard Law School and joined ALSC in 1982. He has taken two sabbaticals during his tenure with ALSC to pursue his interests in physics. His work at ALSC has concentrated in the fields of domestic relations, elder law, public benefits, health care coverage, consumer law, Alaska Native issues, and community legal education. He taught for several years in the University of Alaska Fairbanks paralegal studies program, and has made several Continuing Legal Education presentations on various topics.

Alaska Legal Services Corporation is a non-profit organization established in 1966 and the largest statewide provider of free legal services in Alaska.

Fans of ALSC gather. From the back row and left to right:
Back Row: Judge Eric Smith, retired Judge John Reese, Chris Cook, Judge Fred Torrisi, Judge Joel Bolger
Row 4: Jewell Hall, Erick Cordero, Robin Bronen, Jon Katcher, Charles Osbourne, Katherine Alteneder, Ann Richardson,
Row 3: Maryann Foley, Judge Sharon Gleason, Denise Bakewell, Terri Floyd, Joanie Meister, Jody Davis, Stacey Marz, Diana Lucente, Judy DeMarsh, Wendy Leukuma, Judge Michael Jeffery, Tom Daniel, Chief Justice Alex Bryner, Krista Stearns, Andy Harrington, John Hedland
Row 2: Hugh Fleischer, Maggie Humm, Diane Miller, Nikole Nelson, Christine Pate, Jim Davis, Carol Daniel, Elizabeth Hickerson, John Hickerson, Goriune Dudukgian
Front Row: Olyana, Naima, Augustine, Sara Acharya

We didn't know Manhattan had plants...

Judge declines to find hoses inherent danger to bicyclists in Manhattan

Taxis. Manholes. Pedestrians. Perhaps even horses and carriages. These are all seemingly inherent dangers for bicyclists in Manhattan. But what about garden hoses? Judge Sherry Klein-Heitler has ruled that question too close to call and allowed a biker's personal injury suit to go forward. The injurious hose was carrying water to a docked ship at the Chelsea Piers. Klein-Heitler found that "it is not clear that a garden hose in New York City is so common as to eliminate any duty of care in its placement."

New York Law Journal, May 10,2006

Pro Bono Corner

Spanish legal & referral hotline announced

Alaska Legal Services Corporation (ALSC), with support from members of its Pro Bono Spanish Language Committee and the generosity of AT&T, GCI and interpreters Grace Anderson and Sindy Donahue, is announcing the first Spanish Legal & Referral Telephone Hotline (hotline) in Alaska. This free service will be launched on June 26 and will be staffed once a month by a volunteer attorney and if necessary, an interpreter.

Attorney Currey Cook from the Office of Public Advocacy and interpreter Sindy Donahue will be the first volunteers. Andy Harrington, ALSC's Executive Director, stated, "We are delighted that this service is being made available through the joint efforts of volunteers and the contributions of GCI and AT&T. Currey was recognized by the Bar Association for his outstanding contributions to pro bono, and he's taking this to an even higher level by kicking off this new program."

The hotline will be staffed on the last Monday of every month (except December) from 4:00 – 7:00 p.m. Callers will receive a free telephone consultation on general civil matters (housing, family law, public benefits, employment, etc.) or referrals to a local non-profit that can provide additional assistance and information. The hotline will be accessible by dialing (907) 644-4856 in Anchorage or toll free at (866) 377-4856 outside of Anchorage. With help from Krista Scully, Pro Bono Director of the Alaska Bar Association, GCI & AT&T have donated local and toll free telephone services to ALSC to make this project a reality.

Establishment of this hotline has been one of the goals set by a committee ALSC established in June 2005 to identify and address some of the civil legal problems affecting the Spanish-speaking community in Alaska. Other accomplishments have included four successful clinics in Mountain View over the last few months and plans to add more during the current calendar year.

The next Spanish Language Legal Clinic will be held at Our Lady of Guadalupe church (3900 Wisconsin Street) on June 6, 2006 at 5:30 p.m. Topics will include: how the legal system works in Alaska, how to work with an interpreter, civil rights, unauthorized practice of law, and where to find other legal resources. Representatives from other agencies will be there to talk about their services.

"These clinics and the hotline are the first step to provide more services to the growing Spanish speaking population in Alaska with the limited resources we have. It is my hope that if successful, this model can be used for outreach to other minority groups in the future," said Erick Cordero, ALSC's statewide Director of Volunteer Services and Community Support and founder of the committee.

Alaska Legal Services Corporation is a non-profit organization established in 1966 and the largest statewide provider of free legal services in Alaska. ALSC will celebrate its 40th anniversary on September 15 in conjunction with its Robert Hickerson Partners in Justice Campaign kickoff. Plans are underway to host a series of events. The award-winning Volunteer Attorney Support pro bono program has been assisting low-income Alaskans for over two decades through the generosity of members of the Alaska Bar Association.

Posters kicked off the Spanish campaign.

Thanks, from the Youth Court (Fairbanks)

Many thanks from the Alaska Bar Association and North Star Youth Court to their 2005/2006 volunteers! Volunteers are essential to the NSYC's thriving program and have assisted at arraignments, trials, mock trials, and swearing-in ceremonies for new youth attorneys

John Hagey, NSYC Legal Advisor and 2006 Youth Court All-Star
Standing Master Kathy Bachelder
Denise Bakewell
Eric Bills
Lori Bodwell
Jim Cannon
Alan Clendaniel
Paul Ewers
Judge Ray Funk
Gail Garrigues
Jason Gazewood
Bob Groseclose
Kelly Lawson
Cam Leonard
Tye Menser
Mike O'Brien
Joe Paskvan
Judge Richard Savell
Mark Sherer
Jessica Simbalenko
Frank Spaulding
Nelson Traverso
Jeff Wildridge

Special thanks to Judge Andrew Kleinfeld for encouraging his clerks to volunteer each year.

Alaskan receives national award

L to R: Christine McLeod Pate, ANDVSA; Judge Mark Rindner; award recipient and Pro Bono Director, Krista Scully; and Erick Cordero, ALSC Volunteer Attorney Support Program Director.

By Erick Cordero, Krista Scully & Christine McLeod Pate

The Equal Justice Conference (EJC) is an annual event organized by the American Bar Association, the National Legal Aid & Defenders Association (NLADA) and the National Association of Pro Bono Professionals (NAPBPro). It offers sessions, workshops and networking opportunities to members of the legal profession who are interested in equal access to justice issues.

This year, five Alaska residents attended the conference in Philadelphia on March. Judge Mark Rindner; Christine McLeod Pate, mentoring attorney of the Alaska Network on Domestic Violence and Sexual Assault; Krista Scully, pro bono director of the Alaska Bar Association; Rene McFarland; staff attorney of the Alaska Civil Liberties Union; and Erick Cordero, director of the volunteer attorney support program at Alaska Legal Services Corporation (ALSC).

The surprise of the year was for Krista Scully, who was selected as the recipient of NAPBPro's annual Pro Bono Professional of the Year Award. The award is presented to individuals who have made outstanding commitments to and made positive impacts upon the institutions or systems of providing pro bono legal services. Krista is the first Alaskan to receive this award.

Christine McLeod Pate and Erick Cordero were first-time presenters at the Beyond the Basics—designed for seasoned pro bono professionals--workshop. Their topic was on marketing their pro bono pro programs in rural areas. Christine did not miss the opportunity to delight the audience with one of her pro bono songs. Erick was also re-elected for a three year term as a member of the NAPBPRo executive committee during the conference.

How can attorneys help Anchorage Youth Court?

- Volunteer as an in-court advisor. (Contact Denise Wike, 274-5915)
- Volunteer to teach an AYC class
- Make a tax deductible contribution
- Donate snacks or drinks for youth members on court days.
- Donate an item for our office (call 274-5986 to check on needs.)
- E-mail your interest to info@anchorageyouthcourt.org

Outside of Anchorage?
Contact United Youth Courts of Alaska
(907-263-6936) or visit:
www.alaskayouthcourts.org

2006 Pro Bono Awards

L-R: Judge Mark Rindner, Andy Harrington, Jim Parker, Barb Hood, Currey Cook, Donna McCready, and Jon Katcher. Currey Cook received the Alaska Pro Bono Service Award for an agency practice.

Public sector attorney award goes to Cook

Currey Cook has provided pro bono immigration legal services more than half of his legal career. As an attorney with the Office of Public Advocacy and the first recipient of the Public Sector Pro Bono award, Currey is no stranger to helping others. His introduction to pro bono immigration representation began when he represented an asylum seeker fleeing persecution from Mexico. Since that time, he has successfully represented three additional asylum seekers.

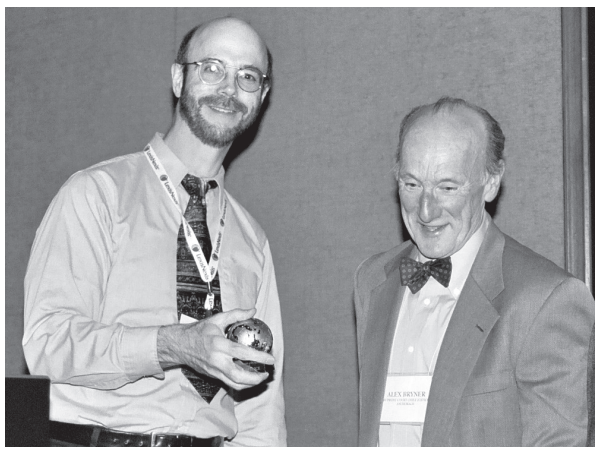
Currey was also instrumental in creating the Special Immigrant Juvenile Project devoted to providing pro bono representation to undocumented immigrant children who have been abused and neglected. Since the implementation of the Project, 12 children have been granted legal residency in the United States.

Currey works and plays hard. His job share arrangement at the Office of Public Advocacy has allowed his extensive world travel to document humanity through his photography. His most recent trip to Brazil yielded colorful and poignant images of vibrant Brazilian life which were unveiled and sold at a First Friday event which helped raise funds for the newly formed Alaska Immigration Justice Project.

Paslay receives solo practitioner award

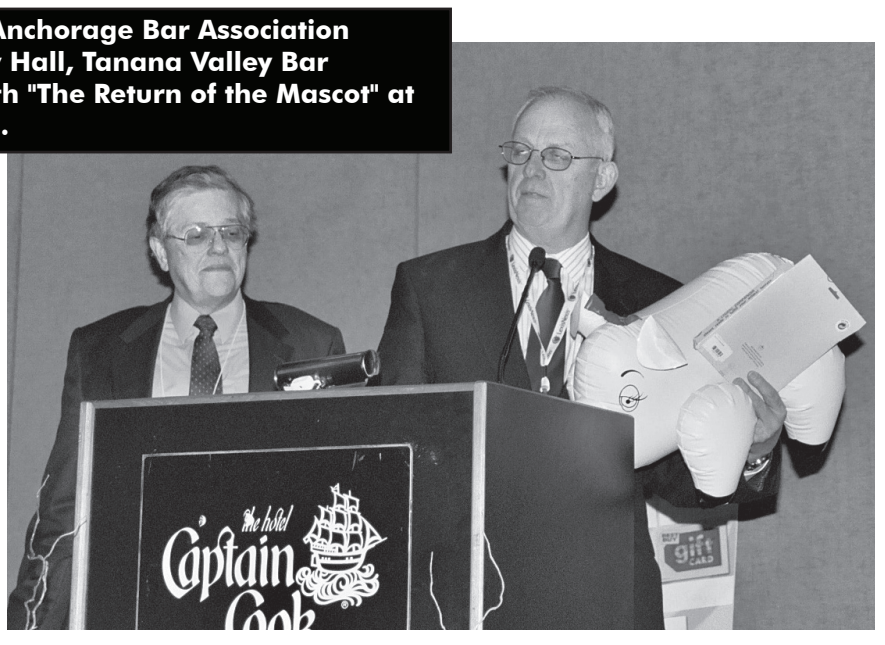
Paul Paslay is a first of many for Alaska Legal Services Corporation: A chartering volunteer for their pro bono program and legal clinic instructors.

For more than a decade, Paul has been teaching the Chapter 7 Bankruptcy clinics in Anchorage and represents an average of eight (8) pro bono clients per year. Distance, timing and location have never been a problem for him; he is one of the few volunteers willing to help clients who live in rural Alaska. More than once, he has been a mentor to other attorneys and to ALSC staff attorneys.



Paul Paslay (left) and Chief Justice Alex Bryner.

In just one year, Paul assisted more than 30 people through clinics and representation in court. He has donated countless hours helping clients in rural Alaska and has demonstrated that consistency and dedication go hand in hand. Cumulatively, Paul has assisted over 70 clients through representation in the last few years and hundreds more through the clinics.



Ken Jacobus, Anchorage Bar Association (left) and Terry Hall, Tanana Valley Bar Association with "The Return of the Mascot" at the convention.

John Treptow of Dorsey Whitney, accepts award from Chief Justice Alex Bryner, and Eric Cordero.

Dorsey & Whitney is law firm of the year

The law firm of Dorsey & Whitney has been selected to receive the 2006 Pro Bono Law Firm of the Year Award for its never-ending support of equal access to justice in Alaska.

In just one year, Dorsey & Whitney's attorneys reported over 900 hours of pro bono work through Alaska Legal Services Corporation. As a firm culture, however, Dorsey & Whitney's Anchorage office deservedly prides itself on 100% pro bono participation from every staff member—from the front desk to the corner office—and recommits itself each year to helping Alaskans in need.

Their innovation and approach to pro bono is outstanding. The firm is responsible for reviving a partnership with Alaska Legal Services Corporation to deliver the very effective "Attorney of the Day Project". 52 times a year you would find at least one Dorsey & Whitney attorney housed in the ALSC library assisting clients and honing their skills in poverty law. They've since inspired another firm to join the project.

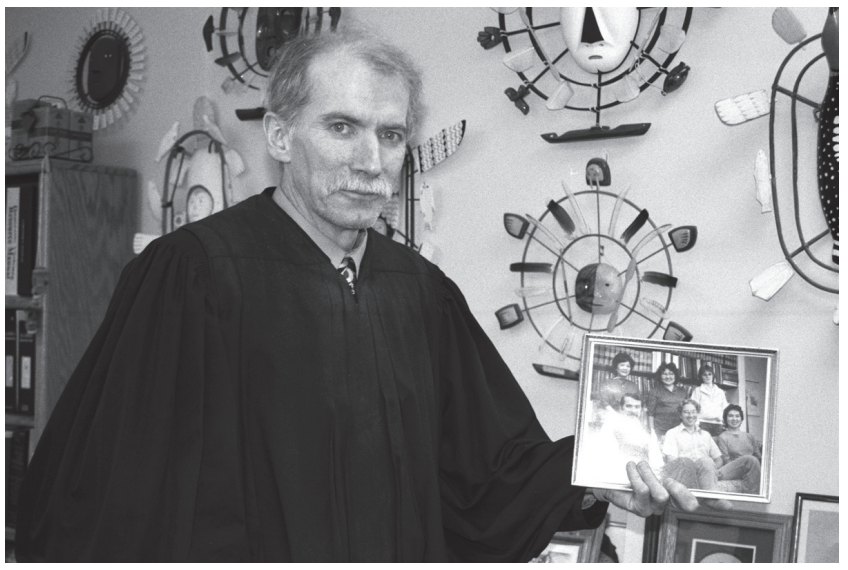
Dorsey & Whitney's strong pro bono program and presence is driven by attorney John Treptow. John's commitment to equal justice in Alaska has spearheaded efforts to make pro bono participation by public sector attorneys easier, created a lunch model format for increased law firm participation and mobilized his firm to start, continue and grow the "Attorney of the Day Project" at Alaska Legal Services Corporation.

Our deep and sincere thanks to John Treptow and all the outstanding attorneys and staff at Dorsey & Whitney LLP.

Women meet for annual law lunch

The Alaska Association of Women Lawyers and the Gender Equality Section of the Alaska Bar Association co-sponsored the annual Women in Law Luncheon on April 20, 2006, at the Anchorage Hilton Hotel. The theme of this year's luncheon was "Women and Public Policy," and the panel of speakers included: L-R (Back)-Marcia Davis, Vice President, ERA Aviation; Gail Schubert, Of Counsel, Amodio, Stanley & Reeves; Carol Comeau, Superintendent, Anchorage School District; L-R (Front)-Heather Kendall-Miller, Native American Rights Fund; and Susan Reeves, Amodio, Stanley & Reeves, Moderator.

In Memoriam



Magistrate Craig McMahon stands in his office at the Bethel Courthouse holding a photograph of the Bethel court staff from the early 1980's. In the background is a portion of his Yu'pik mask collection.

Craig McMahon

Long-time Bethel Magistrate Craig McMahon died March 17, 2006, after a long illness.

Magistrate McMahon served the Alaska Court System in the Yukon-Kuskokwim Delta region for over 28 years, beginning as magistrate in Aniak in 1977 and continuing from 1984-2006 as a magistrate in Bethel.

Originally from Connecticut, McMahon first came to Alaska in 1976 to serve as a VISTA attorney with Alaska Legal Services Corporation in Bethel. In a recent oral history taken in January 2006, McMahon recounted many experiences from his years on the Delta and the reasons why he always chose to make his home there. His fond recollections ranged from the "tremendous patch of raspberries" behind the Aniak courthouse to the "very cozy" metal shipping container-with a home-made window that served as his early home in Bethel.

Living in the region allowed him to run dog teams, garden, pursue his love of nature, and enjoy the Yu'pik culture. For many years, he volunteered for the Camai Dance Festival, studied the Yu'pik language, and was an avid collector of Yu'pik art. He was also known for the lavish feasts he would prepare for holidays and special occasions. Magistrate McMahon is remembered by his colleagues at the court system for distinguished service, hard work and dedication to the people of the Y-K Delta.

A raven mask carved by Magistrate McMahon during his early years in Bethel.

Star lawyer takes Alaska case

Kenneth Starr, the former Whitewater special prosecutor, will represent the city school board in appealing a court ruling that favored a high school student who displayed a "Bong Hits 4 Jesus" banner during an Olympic torch relay.

The school board wants the U.S. Supreme Court to hear the case. In April, an appeals court said school officials violated the student's free speech rights when they suspended him for 10 days.

Starr, who is dean at Pepperdine Law School in Malibu, Calif., has agreed to take the case for free, said Phyllis Carlson, president of the school board.

"Federal law requires us to maintain a consistent message that use of drugs like marijuana is harmful and illegal. Yet, when we try to enforce our policies, our administrators are sued and exposed to damage awards," she said.

Joseph Fredrick was 18 and a high school senior in 2002, when he unfurled his banner during the Winter Olympic torch relay through Juneau, hoping to grab the attention of television cameras.

School district officials said his banner violated the school's anti-drug policies and suspended him despite the fact that he was off campus at the time and did not disrupt school functions.

Frederick sued the school district but lost in federal court when a judge ruled that school officials had wider discretion to control his actions and were entitled to regulate speech that encouraged drug use.

The 9th U.S. Circuit Court of Appeals in San Francisco disagreed, saying school officials violated Fredrick's free speech rights.

Frederick's lawyer, Douglas Mertz, said it is unlikely the nation's highest court will hear the case.

Starr was independent counsel in the Whitewater hearings and his investigation into former President Clinton's relationship with Monica Lewinsky led to Clinton's impeachment.

— From the Associated Press, May 4, 2006

NOTICE OF PUBLIC DISCIPLINE

By order of the Alaska Bar Association
Disciplinary Board
entered April 25, 2006

MIKEL R. MILLER
Member No. 8306048
Bend, Oregon

is Publicly Reprimanded
for neglect of a client matter
effective April 25, 2006

Published by the Alaska Bar Association,
P. O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules.

NOTICE OF PUBLIC DISCIPLINE

By order of the Alaska Supreme Court,
entered November 29, 2005

JOHN C. MARTIN

Member No. 9211092
Houston, Texas

is **suspended**
from the practice of law for a period of three years
for a felony conviction
retroactive to October 24, 2001,
effective November 29, 2005,
based on the discipline imposed by
the Supreme Court of Louisiana.
Mr. Martin may not resume practice in Alaska until
reinstated by the Alaska Supreme Court.

Published by the Alaska Bar Association,
P. O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules.

All Alaska citizens have a stake in seeking justice

By Mary Anne Henry

Alaska's rate for many violent crimes is among the highest in the nation, including sexual assault, child sexual abuse, and domestic violence. Crime in Alaska has a devastating impact on victims and survivors, neighborhoods, and our society as a whole. Crime continually threatens our individual and collective sense of safety and security. Unfortunately, too many of our citizens have been or will be victims of crime.

Victims and witnesses naturally look to our legal system for justice, but the aftermath of a violent crime can be the worst possible time to try to understand such a complex and perplexing structure. While the criminal justice system is designed to protect, support and serve our communities, most citizens do not learn about it until after they become victims of crime. In proclaiming the first National Crime Victims' Rights Week in 1981, President Ronald W. Reagan stated: "Our commitment to criminal justice goes far deeper than our desire to punish the guilty or to deter those considering a lawless course. Our laws represent the collective moral voice of a free society – a voice that articulates our shared beliefs about the roles of civilized behavior."

For a long time, however, crime victims were essentially left out of the criminal justice system. Victims had no rights. They were excluded from proceedings, they were kept in the dark about the status of their case, and they were told they had no voice. Alaska has been in the forefront of the Victims' Rights movement. Beginning in the mid-1980s, the Alaska legislature passed laws giving victims various rights. In 1994, Alaska's citizens overwhelming passed Article I, section 24 of the Alaska Constitution. This constitutional amendment elevated to constitutional stature the rights of crime victims to be treated with dignity, respect and fairness during all phases of the criminal and juvenile justice process, to be protected from the accused through appropriate bail conditions, to be present at all criminal or juvenile proceedings where the accused has a right to be present, to prompt disposition of the charges against the accused, to be heard at bail hearings, at sentencing, and at any proceeding where the accused's release from custody is considered, to restitution from the offender, and to be informed of the accused's escape or release from custody before or after conviction or juvenile adjudication.

"Our commitment to criminal justice goes far deeper than our desire to punish the guilty or to deter those considering a lawless course. Our laws represent the collective moral voice of a free society – a voice that articulates our shared beliefs about the roles of civilized behavior."

— President Ronald W. Reagan

In 2001, the Alaska legislature did what no other state had done – it created an agency to provide legal representation to crime victims during the course of juvenile and adult criminal proceedings, and to investigate violations of victims' rights: the Office of Victims' Rights. Attorneys who provide legal representation for crime victims when their constitutional or statutory rights are violated are on staff at the Office of Victims' Rights. The Office of Victims' Rights attorneys can only represent those victims who meet statutorily defined criteria and who formally request assistance. There is no fee for these services.

The advocacy and legal representation provided by the Office of Victims' Rights does not interfere with criminal justice. Of course the parties to the criminal case also have rights, (particularly the constitutional and statutory rights of a person charged with a crime). However, a witness who is invoking a privilege has a right to do so, and has a right to have an attorney represent him to ensure that the privilege is enforced. A witness who has justification that a subpoena should be quashed, can have an attorney represent him on that issue. At sentencing, a victim can hire an attorney to represent him to provide the court with information and legal argument as to what an appropriate sentence should be. Similarly, a crime victim has a right to invoke constitutional and statutory rights, and to have an attorney from the Office of Victims' Rights to represent him or her.

Justice isn't served until crime victims are informed of all their rights throughout the justice process – rights that empower them, and offer them opportunities to have voices and choices in their cases, and in their future.

Recently the Court of Appeals issued an opinion in *Cooper v. District Court*, ____ P.3rd _____ (Alaska App. 2006) Op. No. 2043, April 14, 2006. To quote Erwin Chemerinsky's recent comments about the case at this year's Bar Convention and Judicial Conference: "[the issue in this case] is if the victim believes the sentence imposed violates Alaska law, does the victim or the Office of Victims' Rights have standing to appeal?" The Court of Appeals answered in the negative. However, Judge Mannheimer noted at page 40 of the Cooper opinion:

> [W]e leave for another day the question of whether a crime victim in Alaska has the right to seek appellate relief when a lower court fails to honor a crime victim's procedural rights specified in Article I Section 24 of the Alaska Constitution of in the Alaska Statutes.

Thus the Office of Victims' Rights still represents victims to ensure their constitutional rights are not violated.

The Office of Victims' Rights also has contacts with many other victim assistance organizations. It refers crime victims to these other agencies whose services they may need, such as emotional support from Victims for Justice, and financial support from the Violent Crimes Compensation Board.

However, there remain today many challenges to ensuring that crime victims are treated with respect, recognized as key participants within our systems of justice, and afforded services to help them in the aftermath of crime. There are still crime victims who are neither informed of their rights, nor engaged as active participants in our justice system. There are still crime victims who remain unaware of a variety of supportive services that can provide help, hope and healing in the aftermath of crime. There are still crime victims who suffer immeasurable physical, emotional, and financial losses, who must wait a long time – months and even years – until a criminal case is concluded. Justice isn't served until crime victims are informed of all their rights throughout the justice process – rights that empower them, and offer them opportunities to have voices and choices in their cases, and in their future. Justice isn't served until we realize, as a community, as a state and as a nation founded on the principles of "equal rights for all," that violence and crime affects us all, and that victims' rights represent the very foundation upon which our nation was created.

As attorneys, you may come in contact with someone in need of assistance from the Office of Victims' Rights. Refer them to the Office of Victims' Rights:

Alaska Office of Victims' Rights
1007 West 3rd Ave. Suite 205
Anchorage, Alaska 99501-1936
Main number: 272-2620
Toll free number in Alaska: 1-866-274-2620
Fax number: 1-907-272-2640
Web site: http://www.officeofvictimsrights.legis.state.ak.us
e-mail: officeofvictimsrights@legis.state.ak.us

Note: Mary Anne Henry, Director of the Office of Victims' Rights, and a 1976 graduate of Harvard Law School wrote this article. She has practiced in the State of Alaska for 30 years, 29 of those years as a prosecutor. Susan Sullivan, Director of Victims for Justice, assisted Ms. Henry with portions of the article.

Attorney Discipline

DISCIPLINARY BOARD REPRIMANDS ATTORNEY

The Disciplinary Board privately reprimanded Attorney X who breached duties owed to his client when he took on a case at a time when his health prevented him from performing the legal work promptly.

The client hired Attorney X to handle a legal matter within a short time frame. Attorney X assured the client that it could be done. At the time Attorney X took on the legal representation he was struggling with significant health issues. He took the work because he needed the money even though he was not able to meet the client needs regarding the deadlines.

The deadlines were ones imposed by the client, not the court, and the client was not legally prejudiced by the delays that occurred. Nonetheless the client was very stressed by the need to monitor the attorney in order to have the matter move forward. The delays were significant to the client.

Attorney X violated ARPC 1.7 by representing a client when the client's interests were limited by the lawyer's own interests to take on work due to financial necessity. Attorney X also violated ARPC 1.16 when he agreed to represent the client when he should have known he was not medically fit to do the legal work in the agreed-upon time.

The misconduct was an isolated event and it caused little injury to the client. Under the ABA Standards for Imposing Lawyer Sanctions, the misconduct merited an admonition in the form of a private reprimand issued by the Disciplinary Board.

ATTORNEY DISCIPLINED FOR PAYING FOR CLIENT REFERRALS

Attorney X violated Alaska Rule of Professional Conduct 7.2(c) which prohibits a lawyer paying another person for channeling professional work.

Over the course of a few years a friend made four referrals to Attorney X. The referrals were of friends and co-workers – not solicited strangers. Two referrals became clients of Attorney X.

Attorney X was appreciative of the referrals. He also knew that his friend was struggling financially. He wanted to steer money toward the friend without it appearing as charity. Hence he paid for the referrals and also purchased sports gear for his friend's son. The payments totaled approximately $600.

Attorney X acted negligently when he chose to advance money to his friend by paying for the referrals. Attorney X's professional judgment and his handling of the cases were not affected by the referrals.

Attorney X presented several mitigating factors: he was inexperienced in the practice of law; he made full and free disclosure of all related facts and he cooperated with bar counsel's investigation; he demonstrated good character; and, he was remorseful.

In view of the limited nature of the misconduct, the absence of actual harm to the clients, and limited harm to the profession, the Disciplinary Board instructed bar counsel to issue a written private admonition, the lowest level of discipline that can be issued for a rule violation.

NEWS FROM THE BAR

When is it OK to raise issue of mental health?

ALASKA BAR ASSOCIATION ETHICS OPINION 2006-2
Responsibilities of A Lawyer to Honor Client's Instructions on Means of Representation in Criminal Cases

Question Presented

The Committee has been asked how a criminal defense lawyer should proceed in representing a client on an application for post conviction relief when the client insists that the lawyer not place his mental health into issue, when the defense lawyer believes that the best chance of success is in arguing that the client lacked mental competence to assist his trial counsel.

Conclusion

The Committee concludes that the lawyer need not, as an ethical matter, follow his client's instruction with regard to raising mental health issues. However, the lawyer must consult with the client on the issue. Further, the lawyer would not act unethically, if following discussion, the lawyer chose to follow the client's instruction and not pursue the avenue that the lawyer believes offers the client the best chance of success.

Analysis

Rule 1.2 of the Alaska Rules of Professional Conduct, Scope of Representation and Allocation of Authority Between Client and Lawyer, requires a lawyer to abide by a client's decisions concerning the objectives of representation and to consult with the client as to the means by which they are to be pursued.[1] In the situation presented by this question, the objectives of the client and lawyer are the same, to obtain post conviction relief. However, the client and the lawyer differ on the means to achieve this objective. The lawyer believes that the best argument to obtain post conviction relief is to allege that the client was mentally incompetent to assist his own counsel at trial. In order to make that argument, the lawyer must necessarily reveal the nature and extent of the client's mental health problems. The client is adamantly opposed to this tactic.

Legal theories and the type of evidence to be offered in support of those legal theories are typically the technical and legal tactical issues left to the lawyer's determination. *See* Comment, Rule 1.2 ARPC. Moreover, the Alaska Court of Appeals has held that a lawyer for a criminal defendant does not render constitutionally ineffective assistance of counsel by failing to heed a client's wishes on tactical matters other than those specifically listed in ARCP 1.2(a). In *Simeon v. State*, 90 P. 3d 181,184 (Alaska App. 2004), the defendant's lawyer did not request jury instructions on lesser included offenses. Simeon contended that he, not his lawyer was required to make the decision whether to request such instructions, and the lawyer's usurpation of Simeon's prerogative amounted to constitutionally ineffective assistance of counsel. The Court of Appeals disagreed and held that ARCP 1.2(a) sets the standard for constitutionally effective representation in criminal cases and that it does not require the lawyer to give up decision-making on those decisions not specifically set out in the rule as committed solely to the client's discretion: what plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal. The court stated:

> [ARCP 1.2(a)] specifies clearly those decisions over which the client has the ultimate authority. Since the rule limits the client's authority to those decisions, it follows that the lawyer has the ultimate authority to make other decisions governing trial tactics….

Simeon, 90 P. 3d at184. *See* also; *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska App. 1988) (differences over strategy and tactics with client does not render counsel's performance constitutionally substandard; "the state and federal constitutions do not guarantee a 'meaningful relationship' between client and his appointed counsel.")

Like the jury instruction issue in *Simeon*, the issue before the Committee is whether the client in a criminal case should have the ultimate decision-making authority as to a matter not specifically listed in ARCP 1.2(a). The Committee believes the better view is to follow the holding of the Alaska Court of Appeals. Otherwise, a lawyer rendering constitutionally effective representation in making certain tactical decisions might be considered to be acting unethically for making the same decisions. Criminal defense lawyers should not be subject to differing standards when faced with the same issue.

Even though the lawyer may have the ultimate authority to make technical legal and tactical decisions, the client has the right to consult with the lawyer about those decisions. ARCP 1.2(a). Careful consultation is particularly important when, as here, the decision involves a matter of substantial personal importance. Decisions about whether to reveal mental health information may well have an impact on family members or other third persons. The ARPC recognize that, at least in civil matters, decisions involving concern for third persons who might be adversely affected are generally left to the client. *See* ARPC 1.2 cmt. ("[T]he lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be affected.") A lawyer representing a client in a criminal matter should be mindful of the importance of these matters to the client when exercising the lawyer's decision-making authority.

However, the lawyer would not act unethically if, after discussing the issues with the client, the lawyer chose to follow the client's wishes. As the Alaska Court of Appeals stated in *Valcarcel v. State*, 2003 WL 22351613 (unpublished):

> Although counsel is responsible for giving competent advice and is ultimately responsible for the tactical and strategic decisions which they control, many courts have concluded that an attorney does not provide ineffective assistance of counsel when, after advising the client of what the attorney believes to be the best legal tactic, the attorney acquiesces in the client's desire to proceed in a different manner.

Citations omitted.

The question posed here raises the additional issue of whether the client is mentally competent to make the decision about revealing his mental health history. When confronted with a client under a disability, such as a mental health impairment, a lawyer is required, as far as reasonably possible, to maintain a normal client/lawyer relationship with the client. Rule 1.14, Alaska Rules of Professional Conduct. This would include consulting with the client as to the means of the representation and following the client's instructions insofar as they are lawful and conform to the lawyer's other ethical obligations. When, however, the lawyer reasonably believes that the client cannot adequately act in the client's own interest, the lawyer may take additional steps including, if necessary, seeking the appointment of a guardian. *Id.* ABA Ethics Opinion 96-404 (1996), stresses that when a client can no longer act in his or her own interest, the lawyer should take the action that is least restrictive under the circumstances, stating that "[t]he appointment of a guardian is a serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available." Other less drastic solutions may be to seek the assistance of counselors, clergy or mental health professionals in assisting the client to understand what may be in his best interest.

A criminal defense lawyer who doubts a client's competence may be obliged to disclose those doubts to the court, even though it might be to the client's disadvantage and contravene the client's wishes. *See* ABA Annotated Rules of Professional Conduct, Rule 1.14, Legal Background at 216. Some practical guidance for the lawyer trying to assess a criminal defendant's competence may be found in *Uphoff, The Rule of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant, Zealous Advocate or Officer of the Court?* 1988 Wis. L. Rev. 65, 99-108 (offering step-by-step analysis of degree of client's impairment, importance of decision being considered, type of case, and costs and benefits to client of alternative courses of action, in suggesting questions to ask client, similar to those used by mental health experts in forming competency opinions).

Approved by the Alaska Bar Association Ethics Committee on April 6, 2006.

Adopted by the Board of Governors on April 25, 2006.

NOTICE OF AMENDMENTS TO LOCAL BANKRUPTCY RULES
U.S. BANKRUPTCY COURT, DISTRICT OF ALASKA.
Comments are sought on the Interim Rules adopted by the Court effective May 1, 2006 and the preliminary draft of other proposed amendments to the Local Bankruptcy Rules implementing the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
All Comments received become part of the permanent files on the rules.
Written comments are due not later than July 31, 2006
Address all communications on rules to:
United States District Court, District of Alaska
Attention: Court Rules Attorney
222 West Seventh Avenue, Stop 4
Anchorage, Alaska 99513-7564
or
e-mail to AKD-Rules@akd.uscourts.gov

The interim rules and preliminary draft of proposed amendments to the rules may be reviewed at: State Court Libraries in Anchorage, Juneau, Fairbanks and Ketchikan; U.S. Courts Library in Anchorage; U.S. Bankruptcy Court Clerk's Office in Anchorage, Fairbanks, Juneau, Ketchikan, and Nome; or at the U.S. Bankruptcy Court Home Page http://www.akb.uscourts.gov.

NOTICE OF PRELIMINARY DRAFT OF
PROPOSED AMENDMENTS TO LOCAL RULES
U.S. DISTRICT COURT, DISTRICT OF ALASKA.
Comments are sought on proposed amendments to Local Rules [Civil and Criminal]
All Comments received become part of the permanent files on the rules.
Written comments on the preliminary draft rules are due not later than July 31, 2006
Address all communications on rules to:
United States District Court, District of Alaska
Attention: Court Rules Attorney
222 West Seventh Avenue, MS 4
Anchorage, Alaska 99513-7564
or
e-mail to AKD-Rules@akd.uscourts.gov

The preliminary draft of proposed amendments to the rules may be reviewed at: State Court Libraries in Anchorage, Juneau, Fairbanks and Ketchikan; U.S. Courts Library in Anchorage; U.S. District Court Clerk's Office in Anchorage, Fairbanks, Juneau, Ketchikan, and Nome; or on the web at the U.S. District Court Home Page http://www.akd.uscourts.gov

NEWS FROM THE BAR

Board acts on 19 items during April 24 - 25 meeting

• Voted to recommend nine reciprocity applicants for admission.

• Voted to approve the contract with LegalSpan for a new Bar Association database through the Bar Alliance consortium.

• Heard a presentation from the Law Related Education subcommittee on the process, criteria and disbursement of the LRE grants.

• Approved a stipulation for discipline for a three year suspension with one year stayed.

• Denied a stipulation for a private reprimand and instructed Bar Counsel to issue a Written Private Admonition.

• Approved payment of $6,727.23 from the Lawyers' Fund for Client Protection to Yale Metzger for his work as Trustee Counsel.

• Adopted the ethics opinion entitled "Responsibility of a Lawyer to Honor Client's Instruction on Means of Representation in Criminal Cases."

• Adopted the ethics opinion entitled "Disclosure of Confidential Insurance Defense Attorney Bills to Non-Insurer Contractors for Electronic or Computerized Screening."

• Approved the following appointments to the ALSC Board of Directors: 2nd District Regular Bryan Timbers and Alternate Connor Thomas; 3rd District Regular Lisa Rieger and Alternate Tina Grovier; 4th District Alternate Corrine Vorenkamp; and Board of Governors Representative Regular Greg Razo and Alternate Arthur "Chuck" Robinson.

• Approved the appointment of Maryann Foley as the ABA Delegate.

• Reviewed the request for a waiver of active bar dues along with a request to waive the proof of hardship as stated in the Bylaws, and denied the request.

• Approved the minutes of the January 26 & 27, 2006 Board meeting.

• Approved reciprocal discipline of a public reprimand in the Oregon discipline matter involving Mikel Miller.

• Voted to publish proposed amendments to Bar Rules 22(a) and 61(e) which would provide for administrative suspension for failure to timely respond to a grievance accepted for investigation.

• Tabled the proposed amendment to Bar Rule 15.1 until the next meeting and requested more information. This rule would require Bar members to maintain their trust funds in financial institutions that agree to provide notice of trust account overdrafts to the Bar Association.

• Discussed holding special Board meetings to consider discipline matters. The Board determined that this would be at the discretion of the President.

• Voted to recommend the following slate of Board officers: President-elect: Matt Claman; Vice President: Sid Billingslea; Secretary: Bill Granger; Treasurer: Phil Pallenberg.

• Voted to publish a proposed amendment to the Bylaws which would allow for electronic notice of Board meetings on the State of Alaska's Online Public Notice system and delete the requirement for publication in the newspapers.

• Voted to publish the proposed MCLE rule.

• Considered two resolutions which would be before the annual business meeting. Voted to recommend approval of the resolution to maintain the status quo of the 9th Circuit.

• Voted to recommend approval of the resolution seeking repeal of the civil case reporting requirements.

Take care in who's processing your billings

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2006-3

Disclosure of Confidential Insurance Defense Attorney Bills to Non-Insurer Contractors for Electronic Or Computerized "Screening"

QUESTIONS

The Committee has been asked to give an opinion as to whether it is proper for a lawyer to send confidential defense bills, at the request of a client's insurer, to a computer contractor that is not the insurer for screening through a computerized software program. A secondary question is whether the practice would be allowed without the informed consent of the insured.

CONCLUSION

It is the committee's opinion that Ethics Opinion 99-1 controls this issue. The lawyer may not disclose, through electronic means, or otherwise confidences and secrets of the client to an outside contractor that is not the insurer without the informed consent of the insured client.

DISCUSSION

I. Facts

The facts presented with this question are helpful in setting the stage for the discussion which follows. In the scenario presented to the Committee, an insurance defense firm is retained by Insurer to represent its insureds in litigation in Alaska. The Insurer agrees to pay defense costs as part of its insurance agreement with the Insured client of the law firm. Insurer requests that the lawyer transmit billings through a third-party computer contractor for initial review and screening. The lawyer's billings contain detailed and confidential statements discussing the lawyer's work on the client's behalf.

In the usual case, the bills are "screened" by a computer software program for comparison to certain guidelines established by Insurer. If the lawyer's billings pass the software screen, then the billing is automatically forwarded to Insurer for review and payment by Insurer's claims personnel (a human being). The electronic screen may also raise an electronic red flag which is similarly forwarded automatically to Insurer. In the normal course, the Computer Contractor's employees do not review the lawyer's billings. However, in case of computer malfunction, or other glitch, the employees of Computer Contractor are able to review the confidential billings, for the purpose of correcting possible hardware or software malfunctions. The process is intended to be fully automated.

II. Analysis

In Alaska Bar Association Ethics Opinion 99-1, the Committee addressed a similar question. There, the issue was whether defense counsel appointed by an insurer was permitted to send detailed billings (presumably containing confidences and secrets of the insured client) to a third party auditor hired by the insurer solely to review attorney bills. The Committee concluded the practice was ethically problematic for defense counsel. An attorney is only permitted to send billings which contain client confidences and secrets to an outside auditor with the specific consent of the insured client. *See Ethics Opinion 99-1.*

The principal concern is that disclosure of billing statements may disclose information or materials protected by the attorney-client privilege or attorney work-product doctrine. Typically, because insurer imposed guidelines for defense counsel require detailed billing statements reflecting each and every activity involved in the defense of a case, the billing statements may contain confidences and secrets of the client-insured within the meaning of ARPC 1.6(a). Because of the possibility that disclosure of billing records to an outside auditor might result in a waiver of the privileges, the Committee reasoned that attorneys must act cautiously and choose the option least likely to result in an unintended waiver. *Id.; See Also, ARPC 1.6(a).* In Ethics Opinion 99-1, the Committee explained that caution requires the attorney to obtain the informed consent of the client insured before transmitting or disclosing the billing records.

Since the Committee issued Opinion 99-1, several courts, bar associations, and commentators have weighed in on the issue. More than thirty state Bar Associations, and the American Bar Association have now addressed the issue and concluded that insurance defense counsel may not submit billing statements containing confidential information to outside auditors without first obtaining the informed consent of the client-insured. *See ABA Formal Opinion 01-421 (2001); See also In Re The Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures,* 2 P3d 806 (Montana 2000). These additional authorities provide further support for Ethics Opinion 99-1.

Here, the practice of sending billing statements through a computer program is, for all practical purposes, the same as sending billing statements to an outside auditor. The billing statements are transmitted to an outside computer, where they are presumably processed, compared by means of a computer program to a series of pre-determined criteria, and then forwarded again to Insurer. In the Committee's view, the fact that the bills are reviewed by an "electronic screen" or software program rather than an outside human auditor makes no difference. The billing statements have been transmitted to an "outside party" with confidences and secrets of the client available to third parties to review.

In summary, the practice of sending billing statements containing confidences and secrets of a client-insured through a computer screen that is not the insurer's for comparison to an insurer's defense guidelines raises the same ethical concerns addressed by the Committee in Ethics Opinion 99-1. Lawyers may not send billing statements through such screens without first obtaining the informed consent of the client-insured.

Approved by the Alaska Bar Association Ethics Committee on April 6, 2006.

Adopted by the Board of Governors on April 25, 2006.

NEWS FROM THE BAR

Board of Governors invites comments on various rules

The Board of Governors invites member comments concerning the following proposals regarding several of the Alaska Bar Rules & Bylaws. Additions are italicized while deletions have strikethroughs.

Emeritus Attorney

Alaska Bar Rule 43.2: To encourage inactive or retired lawyers to provide pro bono services to qualified legal services organizations, the Board proposes an addition to the Bar Rules that would allow these lawyers to perform these services under supervision.

Rule 43.2. Emeritus Attorney.

(a) Purpose. *The purpose of this rule is to encourage attorneys who do not otherwise engage in the active practice of law to provide legal representation to members of our community who cannot afford private legal services.*

(b) Bar Dues. *Bar dues, if any, for a member acting as an Emeritus Attorney shall be determined by the Board of Governors in the Bylaws of the Alaska Bar Association.*

(c) Definitions.

(1) An "Emeritus Attorney" is an inactive or retired member of the Alaska Bar Association who is not otherwise engaged in the practice of law and

(i) provides free civil legal services under the supervision of a qualified legal services provider as defined in this rule;

(ii) is a member in good standing of the Alaska Bar Association and has no record of public discipline for professional misconduct imposed at any time within the past fifteen (15) years in any jurisdiction; and,

(iii) neither asks for nor receives personal compensation of any kind for the legal services rendered hereunder.

(2) A "qualified legal services provider" is a not-for-profit legal assistance organization that is approved by the Board of Governors. A legal assistance organization seeking approval from the Board to utilize an Emeritus Attorney shall file a petition with the Board of Governors certifying that it is a not-for-profit organization and explaining with specificity:

(i) the structure of the organization and whether it accepts funds from its clients;

(ii) the major sources of funds used by the organization;

(iii) the criteria used to determine eligibility for legal services performed by the organization;

(iv) the types of legal and nonlegal services provided by the organization;

(v) the names of all members of the Alaska Bar Association who are employed by the organization and who regularly perform legal work for the organization; and,

(vi) the extent of malpractice insurance which will cover the Emeritus Attorney.

(d) Authority.

(1) An Emeritus Attorney is authorized to practice law to the extent permitted an active member of the Alaska Bar Association, but only for services performed in association with a qualified legal services provider.

(2) An Emeritus Attorney shall not be paid by the qualified legal services provider, but the qualified legal services provider may reimburse the Emeritus Attorney for actual expenses incurred while rendering services. If allowed by law, the Emeritus Attorney may seek attorney's fees on behalf of the client, but may not personally retain them. The Emeritus Attorney and the client shall enter into a written fee agreement under Rule of Professional Conduct 1.5 for the disposition of such fees. Collection of any money from the client, including, but not limited to reimbursements for expenses incurred, shall be handled exclusively by the qualified legal services provider.

(e) Duties of An Emeritus Attorney. *A member who wishes to perform pro bono work as an Emeritus Attorney on behalf of a qualified legal services provider shall file a sworn statement with the Alaska Bar Association that:*

(1) provides the name of the Emeritus Attorney; and

(2) states that:

(i) the Emeritus Attorney will not be paid compensation;

(ii) the name of the qualified legal services provider for whom the Emeritus Attorney will provide pro bono services;

(iii) that the Emeritus Attorney will be covered by the legal services provider's malpractice insurance;

(iv) that the Emeritus Attorney has read and is familiar with the Alaska Rules of Professional Conduct; and,

(v) that the Emeritus Attorney has not been publicly disciplined within the last fifteen (15) years in any jurisdiction.

CSED Name Change

Alaska Bar Rule 61(d): This housekeeping amendment reflects the Child Support Enforcement Division's name change to the Child Support Services Division.

Rule 61. Suspension for Nonpayment of Alaska Bar membership Fees and Fee Arbitration Awards.

...

(d) Suspension for Nonpayment of Child Support Obligation.

(1) If notified by the Child Support ~~Enforcement~~ *Services* Division that any member is not in substantial compliance with his or her child support order or a payment schedule negotiated with the Child Support ~~Enforcement~~ *Services* Division, the Executive Director shall serve such notice on the member.

(2) If the Executive Director has not received a release from the Child Support ~~Enforcement~~ *Services* Division, or notice of a court order staying suspension, within 150 days of the mailing or personal service of the notice described in (1) of this paragraph, the Executive Director shall petition the Supreme Court of Alaska for an order suspending such member for substantial noncompliance with his or her child support order or payment agreement negotiated with the Child Support ~~Enforcement~~ *Services* Division suspension of the member for this reason, the member shall not be **reinstated until the Child Support ~~Enforcement~~ *Services* issues a release to the Executive Director and the Executive Director has certified to the Supreme Court and the clerks of court that a release has been issued by the Child Support ~~Enforcement~~ *Services*.

Admission Requirements

Alaska Bar Rule 5, Section 1(b): This amendment would add the filing of the Bar Rule 64 affidavit to the requirement to file membership acceptance forms within 60 days of the completion of certain admission requirements.

Rule 5. Requirements for Admission to the Practice of Law.

Section 1. (a) To be admitted to the practice of law in Alaska, an applicant must:

(1) pass the bar examination prescribed pursuant to Rule 4 or be excused from taking the bar examination under Rule 2, Section 2;

(2) pass the Multistate Professional Responsibility Examination by obtaining a scaled score of 80;

(3) be found by the Board to meet the standard of character and fitness, as required pursuant to Rule 2(1)(d);

(4) be determined by the Board to be eligible in all other respects;

(5) pay prorated active membership dues for the balance of the year in which he or she is admitted, computed from the first day of admission;

(6) attend a presentation on attorney ethics as prescribed by the Board prior to taking the oath prescribed in Section 3 of this rule;

(7) file an affidavit as required by Bar Rule 64 stating that the applicant has read and is familiar with the Alaska Rules of Professional Conduct; and

(8) take the oath prescribed in Section 3 of this rule.

(b) Within 60 days after completion of the requirements stated in subparagraphs (a)(1), (2), ~~and~~ (6), *and (7)* of Section 1 of this Rule, an applicant must file with the Alaska Bar Association the forms provided by the Board, formally accepting membership in the Association and admission to the practice of law in Alaska.

Failure to Respond

Alaska Bar Rules 22(a) and 61(e): These amendments would provide for administration suspension for failure to timely respond to a grievance accepted for investigation under certification that a response has been properly filed.

Rule 22. Procedure.

(a) **Grievances.** Grievances will be in writing, signed and verified by the Complainant, and contain a clear statement of the details of each act of alleged misconduct, including the approximate time and place of each. Grievances will be filed with Bar Counsel. Bar Counsel will review the grievance filed to determine whether it is properly completed and contains allegations that warrant investigation. Bar Counsel may require the Complainant to provide additional information and may request a voluntary verified response from the Respondent prior to accepting a grievance.

If Bar Counsel determines that the allegations contained in the grievance do not warrant an investigation, Bar Counsel will so notify the Complainant and Respondent in writing. Complainant may file a request for review of the determination within 30 days of the date of Bar Counsel's written notification. The request shall be reviewed by the Board Discipline Liaison, who may affirm Bar Counsel's decision not to accept the grievance for investigation or may direct that an investigation be opened as to one or more of the allegations in the grievance.

If a grievance is accepted for investigation, Bar Counsel will serve a copy of the grievance upon the Respondent for a response. Bar Counsel may require the Respondent to provide, within 20 days of service, verified full and fair disclosure in writing of all facts and circumstances pertaining to the alleged misconduct. Misrepresentation in a response to Bar Counsel will itself be grounds for discipline. Failure to answer within the prescribed time, or within such further time that may be granted in writing by Bar Counsel, will be deemed an admission to the allegations in the grievance, *and will result in a petition for immediate administrative suspension from the practice of law being filed under Rule 61(e).*

For the purposes of this Rule, a grievance or response is "verified" if it is accompanied by a signed statement that the writing is true and correct to the best knowledge and belief of the writer.

...

Rule 61. Suspension for nonpayment of Alaska Bar Membership Fees and Fee Arbitration Awards

...

(e) ***Suspension for Failure to Respond to a Grievance Accepted for Investigation.*** *If a member fails to respond to a grievance accepted for investigation within the prescribed time as required by Rule 22(a), or within such further time that may be granted in writing by Bar Counsel, Bar Counsel shall petition the Supreme Court of Alaska for an order immediately suspending the member for failure to respond to a grievance accepted for investigation. Upon suspension of the member for failure to respond to a grievance accepted for investigation, the member shall not be reinstated until Bar Counsel has certified to the Supreme Court that a response to the grievance has been filed as required by Rule 22(a).*

[Editor's Note: This section will be re-lettered "(f)" if administrative suspension for failure to comply with the mandatory CLE requirement is adopted by the Supreme Court.]

Electronic Notice

Alaska Bar Association Bylaw Article IV, Section 8: This amendment would provide for electronic notice of Board meetings on the State of Alaska's Online Public Notice system and the Bar Association's website, or e-mail as specified instead of publication in the newspapers or other means.

Continued on page15

NEWS FROM THE BAR

Board of Governors invites comments

Continued from page 14

Bylaws:

ARTICLE IV. BOARD OF GOVERNORS

Section 8. Meetings.

(a) **Regular Meetings.** The regular meetings of the Board shall be held within the State at the times and places designated by the President. Upon assumption of office, the President shall promptly schedule at least four regular meetings during the year of his or her term. These meeting dates may be changed as circumstances require. The schedule of the Board's regular meetings shall be published *electronically on the State of Alaska's Online Public Notice system and on the Alaska Bar's website* ~~in each edition of the official publication of the Alaska Bar Association and in the public press~~ at least 30 days prior to each regularly scheduled meeting. Timely notice and the tentative agenda of each Board meeting shall be *sent electronically* ~~mailed~~ to the officers of the Alaska Bar Association, to the members of the Board of Governors, and to the presidents of all local bar associations.

(b) **Emergency Meetings.** The President, may, or upon the written request of three governors filed with the Secretary shall, call emergency meetings of the Board of Governors. If the President, for any reason, fails or refuses to call an emergency meeting for a period of five days after receipt of the request for the emergency meeting, the Secretary, or some other person designated by the three governors joining in the request, may call the emergency meeting. The date fixed for that meeting shall not be less than five days nor more than ten days from the date of the call. Notice of an emergency meeting shall be signed by the Secretary or by the person designated by the three governors in their call. The notice shall set forth the day and hour of the emergency meeting, the place within the State where the meeting shall be held, and the purpose for holding it. Emergency meetings may consider only those matters that are specifically set forth in the call of the meeting. ~~Written or e~~*E*lectronic notice of the emergency meeting call shall be given to each governor, unless waived by him or her, ~~. Notice shall be in writing and may be communicated by telegraph, facsimile, e-mail or by mail, addressed to each governor at his or her law office or business address. Notice by telegraph, facsimile, e-mail or regular mail deposited with the United States Postal Service shall be sent to the governor~~ at least three days before the date fixed for the emergency meeting. Public notice of the emergency meeting shall be published *electronically on the State of Alaska's Online Public Notice system and on the Alaska Bar's website* ~~in the public press~~ at least three days prior to the date of the emergency meeting.

Mandatory CLE

Alaska Bar Rules 65, 66 and 61: These amendments would provide for mandatory continuing legal education in Alaska and administrative suspension for noncompliance.

Rule 65. *Mandatory* Continuing Legal Education *(MCLE)*

(a) In order to promote competence and professionalism in members of the Association, the Alaska Supreme Court and the Association ~~encourage~~ *require* all *active* members to engage in *Mandatory* Continuing Legal Education (MCLE). This rule is intended to set minimum standards for Mandatory Continuing Legal Education.

(b) Every active member of the Alaska Bar Association ~~should~~ *shall* complete at least ~~12~~ *24* credit hours of approved *M*CLE, including ~~1~~ *2* credit hours of ethics *M*CLE, *in* each *two* year *reporting* period. An active Bar member may carry forward from the previous reporting period a maximum of 12 credits. To be carried forward, the credit hours must have been earned during the calendar year immediately preceding the current reporting period.

DRAFTING NOTE: If the Board prefers no carryover, the last two sentences of this paragraph would be deleted.

Commentary. - The Alaska Supreme Court and the Association are convinced that *M*CLE contributes to lawyer competence and benefits the public and the profession by assuring that attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices. ~~But the Supreme Court is not convinced that a mandatory rule is necessary and believes that a CLE program can become successful by using incentives to encourage voluntary participation in CLE rather than sanctions to penalize noncompliance with a mandatory rule. Accordingly the Supreme Court and the Association have adopted this rule as a three-year pilot project. At the end of this pilot project, the Supreme Court will assess the project's results, including recommendations and statistics provided by the Association, and will determine whether a sanction-based mandatory CLE program is necessary.~~

(c) *The Board of Governors will appoint a person to be the MCLE Administrator of the Alaska Bar Association who will serve at the pleasure of the Board and perform the duties and responsibilities contained in these rules.* At the end of each *two* year *reporting period*, each member will certify on a*n* ~~form~~ *affidavit,* prescribed by the *M*CLE ~~Director~~ *Administrator* ~~and distributed with the invoice for bar dues~~, the member's approved *M*CLE hours earned during the preceding *two* year *reporting period, or carried over from the prior period as provided in paragraph (b). A member shall maintain records of approved MCLE hours for the two most recent reporting periods and these records shall be subject to audit by the MCLE Administrator on request.* ~~The CLE Director will supervise the CLE program and perform the duties and responsibilities contained in these rules.~~

(d) ~~Members who comply with this rule by completing the minimum recommended hours of approved CLE provided in section (b) of this rule will receive a reduction in their bar dues, in an amount to be determined each year by the Board. Only members who complete the minimum recommended hours of approved CLE are eligible to participate in the Alaska Bar Association's Lawyer Referral Service.~~ If a member does not comply with this rule by completing the minimum hours of approved *M*CLE, that fact may be taken into account in any Bar disciplinary matter relating to the requirements of Alaska Rule of Professional Conduct 1.1. ~~The Association shall publish annually, and make available to members of the public, a list of attorneys who have complied with this rule's minimum recommended hours of approved CLE. The Association may devise other incentives to encourage compliance with this rule.~~

~~Commentary. - This rule contemplates a modest reduction in bar dues, to be determined annually at the Board's discretion, that will serve as an incentive for members who have voluntarily complied with the CLE standard; the reduction is not intended as reimbursement for CLE costs actually incurred by members.~~

~~(e) A member may file a written request for an extension of time for compliance with this rule. A request for extension shall be reviewed and determined by the CLE Director. A member who is granted an extension and completes the minimum CLE requirements after the end of the reporting period is not entitled to the discount on bar dues.~~

(e~~f~~) The *M*CLE requirement of this rule may be met either by attending approved courses or completing any other continuing legal education activity approved for credit under these rules. The following activities may be considered for credit when they meet the conditions set forth in this rule:

(1) preparing for and teaching approved *M*CLE courses; credit will be granted for up to two hours of preparation time for every one hour of time spent teaching;

(2) studying audio or video tapes or technology-delivered approved *M*CLE courses;

(3) writing published legal texts or articles in law reviews or specialized professional journals;

(4) attendance at substantive Section or Inn of Court meetings;

(5) participation as a faculty member in Youth Court;

(6) attendance at approved in-house continuing legal education courses;

(7) attendance at approved continuing judicial education courses;

(8) attendance at approved continuing legal education courses.

(9) participation as a member of the Alaska Bar Association Law Examiners Committee, the Ethics Committee, the Alaska Rules of Professional Conduct Committee, or other substantive rules committees of the Alaska Bar Association or the Alaska Supreme Court.

(f~~g~~) The *M*CLE ~~Director~~ *Administrator* shall approve or disapprove all education activities for credit. *M*CLE activities sponsored by the Association are deemed approved. Forms for approval may be submitted electronically.

(1) An entity or association ~~must~~ *may* apply to the Board for accreditation as a *M*CLE provider. Accreditation shall constitute prior approval of *M*CLE courses offered by the provider, subject to amendment, suspension, or revocation of such accreditation by the Board.

(2) The Board shall establish by regulation the procedures, minimum standards, and any fees for accreditation of providers, in-house continuing legal education courses, and publication of legal texts or journal articles, and for revocation of accreditation when necessary.

(g~~h~~) This rule will be effective ~~September 2, 1999~~ ***DATE***. The first *two year* reporting period *for members admitted in even numbered years* will be ~~the calendar year,~~ from January 1st ***YEAR*** to December 31st~~,~~ ***YEAR*** *and each two year reporting period thereafter. The first two year reporting period for members admitted in odd numbered years will be from January 1st* ***YEAR*** *to December 31st* ***YEAR*** *and each two year reporting period thereafter. A member may report any CLE credits earned in the calendar year immediately preceding the member's first two year report,* ~~and the first calendar year to be reported will be the year 2000. Any CLE credits earned from September 2, 1999 to December 31, 1999 may be held over and applied to the reporting period for the year 2000.~~

DRAFTING NOTE: If the Board prefers no carryover, the last sentence of this paragraph would be deleted.

Rule 66. Non-compliance with MCLE Requirement.

Within 30 days after the end of the two year reporting period, the MCLE Administrator shall send each member whose affidavit shows that the MCLE requirement has not been met, or who has failed to file an affidavit, a notice of non-compliance. The member shall remedy the non-compliance within 45 days of service of the notice of noncompliance. If the member is still not in compliance at the end of this 45-day period, the member will be subject to administrative suspension under Rule 61.

Rule 61: Suspension for Nonpayment of Alaska Bar Membership Fees, and Fee Arbitration Awards*, Child Support Obligation, and Non-compliance with MCLE Requirements.*

(e) Any member who has not complied with Rule 65 within the time period provided in Rule 66 shall be notified in writing by certified or registered mail that the Executive Director shall, after 15 days, petition the Supreme Court of Alaska for an order suspending such member for failing to complete the MCLE requirement.

A member suspended under this section shall not be reinstated until the member has complied with the MCLE requirement, paid a reinstatement fee in an amount set by the Board, paid any dues accruing during suspension, and the Executive Director has certified the member's compliance to the Supreme Court and the clerks of court.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by August 15, 2006.

HI-TECH IN THE LAW OFFICE

Authenticating digital photographs as evidence: A practice approach using JPEG metadata

By Joe Kashi

When I first contemplated this article, the issue of authenticating digital photographs for evidentiary purposes seem fraught with arcane complexity and uncertainty. However, that's not actually true in practice. In fact, the metadata stored in any JPEG or RAW photographic file can help you authenticate that photograph and contradict the popular view that digital photographs can be easily and undetectably altered. Certainly, it is harder to undetectably fake a print made from a film negative than a digital file, but current digital cameras contain enough non-evident metadata to detect most alterations.

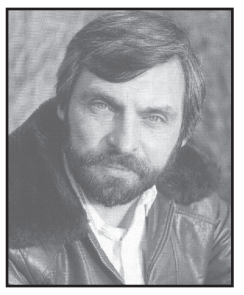
In this article, I will discuss some general evidentiary issues that arise when a party wishes to use any photographic evidence and then propose a standard procedure to ease the authentication of your own digital photographic evidence and, conversely, to test whether you are receiving discovery of authentic photographic evidence from the other side. Surprisingly, this may be as easy to do with digital photographs as with photographic prints made from film negatives.

The metadata stored in any JPEG or RAW photographic file can help you authenticate that photograph and contradict the popular view that digital photographs can be easily and undetectably altered.

Photographic Authentication and Admissibility: Evidence Rules 901 and 1001

Under Evidence Rule 901 and its state analogues, photographs are typically admitted as demonstrative evidence to illustrate testimony. When used purely as demonstrative evidence, legal issues regarding authentication and chain of custody are somewhat relaxed so long as a competent witness can testify that the photograph fairly and accurately depicts the scene about which he or she is testifying. In these situations, it is generally not necessary that the authenticating witness be the same as the photographer or as a competent person who observed the making of the photograph. *United States v. Clayton*, 643 F.2d 1071, 1074 (C.A. 5, 1981. Videos are typically authenticated in the same manner as a still photograph. *Saturn Manufacturing, Inc. V. Williams Patent Crusher and Pulverizer Company,* 713 F.2d 1347, 1357 (C.A. 8, 1983). I will illustrate some portions of this discussion using a series of decisions by the Alaska Supreme Court, whose evidentiary rules and interpretations typically closely follow majority federal views.

Under Evidence Rules 1001 through 1004, an "original" document (including a photograph) is required to prove the truth of the facts for which any document is offered. However, over many years, the definition of an "original" has been greatly expanded, particularly with regard to electronically stored information, and the requirement for an "original" is honored more in the breach than to the letter. Indeed, duplicates, including electronically made prints or digitally identical electronic file duplicates, are typically admissible to the same degree as an original document unless admitting the duplicate would prove inaccurate or unfair.



"Generally, a trial court's admission or exclusion of proffered photographs is reviewed under an abuse of discretion standard."

Authenticationrequirements are somewhat stiffened where there is a strong argument that a photograph does not accurately reflect the scene or that the use of a duplicate is inaccurate or unfair. Generally, a trial court's admission or exclusion of proffered photographs is reviewed under an abuse of discretion standard. (See footnotes 2 and 4, below) Common sense, a reasonably objective evaluation of your intended use of the proposed photographic evidence, and some trial experience are usually an adequate guide to the allowable demonstrative or evidentiary uses of a photograph. A trier of fact's evaluation of "non-demeanor" evidence like photographs (as contrasted with live witness testimony) is theoretically subject to a less deferential standard of appellate review but this more stringent approach is often not strictly applied. (See footnote 5, below). However, when photographs are to be used as the basis for expert witness testimony or to actually prove the existence of an allegedly depicted condition, then they will be held to a higher standard and you will need to be much more cognizant of subtle technical and photographic parameters.

Admissibility of photographs varies, depending upon the evidentiary context and the purpose for which a photograph is offered

Courts are usually willing to tolerate some inaccuracies in a photograph so long as these are explained to the trier of fact so that they may be taken into account. However, where a photograph is used as a basis for establishing critical ultimate facts or as the basis for expert testimony, courts are less willing to overlook major gaps. For example, the Alaska Supreme Court, in *Kaps Transport, Inc. v. Henry*, 572 P.2d 72 (Alaska, 1977) stated, at 572 P.2d 75-76, the majority rule:

"That there are inaccuracies or defects in the photograph does not necessarily render it inadmissible as long as there is an explanation of these imperfections so that the jury is not misled", quoting Riksem v. Hollister*, 96 Idaho 15, 523 P.2d 1361 (1974) and* Southeastern Engineering & Mfg. Co. v. Lyda, *100 Ga.App. 208, 110 S.E.2d 550 (1959).*

However, in *Kaps*, the Alaska Supreme Court **excluded** the photograph in question because the defendant's accident reconstruction expert was attempting to use the photograph, in conjunction with a reconstructive technique known as perspective analysis, to establish how far across the highway centerline the Plaintiff had alleged strayed. In order to use a photograph as a basis for perspective analysis reconstruction, the focal length used to take the photograph and the conditions under which the photograph was taken must be known with a substantial degree of precision, which the Defendant could not show.[1] In this case, the photograph was to be used to provide actual data about the accident scene rather than merely illustrating the area. Hence, it was subject to a more rigorous authentication process which it ultimately failed.[2]

Similarly, where a photograph is offered to prove that some condition did not exist, a court will look closely at the time frame when a photograph was purportedly taken but still use a common sense case by case analysis. For example, if a photograph is offered of a criminal defendant's hands purporting to show that there was no gunshot residue, then the offering party must establish that the photograph was taken at a time when gunshot residue would still be apparent. Absent that showing, the photograph may not be admitted.[3] On the other hand, where direct evidence of a condition provided by an otherwise authenticated photograph is only one link in a logical fact structure, the photograph will likely be admitted to prove the depicted condition.[4]

In cases where there is sufficient countervailing testimony, the admission of photographs with a shaky time frame may be harmless error. For example, the Alaska Supreme Court refused to reverse a verdict despite the trial court's admission into evidence of the defendant highway department's arguably inaccurate photographs that purported to show that an accident site was well-sanded despite the Plaintiff's contrary contentions. The time frame when these photographs were taken, relative to the time of the accident, was never precisely established but was sufficient contrary testimonial evidence by the investigating State Troopers actually at the accident establishing that photographs were inaccurate and that the road was poorly sanded. Hence, admitting these allegedly misleading photographs with an imprecise time frame was harmless error.

Metadata and Discovery

The proposed amendments to Civil Rules 26 and 34 effective as of December 2006 further broaden the definition of what constitutes an "original" document and expand both the discovery and usefulness of documents whose original format is electronically stored information (ESI). Indeed, the proposed new discovery amendments seem to require, as a default position, that any discoverable ESI be produced upon request in its "native format", i.e., production of Microsoft Word documents should include identical copies of the original .doc format files, production of photographic documents should include digitally identical copies of the original JPEG format files, etc.

It appears that the new federal rules will also generally require the production of an electronic file's "metadata", that is, the electronic file's internally stored information about the creation and alteration of any electronic file. Although privilege reviews will become more complex when you must produce metadata, the production of document metadata may be the most readily available, although not entirely fool-proof, means of determining the authenticity or alteration of electronically stored photographs. Most native format files, including the JPEG photographic files made by most modern digital cameras, will include the document's metadata unless it is rather obviously stripped out with one of the numerous metadata removal programs now on the market.

I suggest that removing metadata from photographic files produced by non-attorneys and by expert witnesses is inappropriate in most instances except when there are obvious privilege issues. Consider, for example, how untrustworthy a photograph would be if the internal metadata showing the camera model, focal length and original date/time stamp is later removed. Concerns about its accuracy and authenticity would be very high, particularly if the metadata would have shown use of a camera that the witness did not own or that the photograph was taken on date or time remote from the pertinent time frame. On the other hand, if you know how to use a photographic file's metadata, then you can use it to authenticate your own photographs for evidentiary purposes and possibly impeach the other party's exhibits.

Here is how I suggest that a trial lawyer take advantage of these changes in the Civil Rules that provide for the discovery of both metadata and also native file format.

Continued on page 15

HI-TECH IN THE LAW OFFICE

Authenticating digital photographs as evidence

Continued from page 14

Some Authentication Procedures for Digital Photographs

1. Use a modern digital camera that conforms to the current EXIF 2.2 JPEG standard - most modern digital cameras store photographs in this file format. EXIF 2.2 JPEG stores a wealth of metadata that can help you authenticate and use digital photographs.

2. Use the digital camera's setup menu to set the camera for normal sharpness, contrast, and color saturation. When feasible, try to use a zoom setting that renders the scene's optical perspective equivalent to how it would be seen by the human eye. This is relatively objective data will be recorded in the JPEG metadata and will either help you authenticate your digital photos or render them suspect in the case of non-standard settings.

3. Cameras do not always expose scenes perfectly, especially under non-standard lighting conditions. In order to minimize ANY authentication challenges based upon alleged later digital alteration with a computer program, I suggest that whenever possible you use either the exposure bracketing feature found in most better digital cameras or the RAW file format found in many higher end cameras.

4. Bracketing basically means that the camera will take three differently exposed shots of the same scene, one shot at the calculated best exposure, one with less than calculated exposure, and one with more exposure. Adjust the camera's setup to provide for a 0.7 EV value between each bracketed exposure. One of these JPEG shots should be quite usable without the need for any computer enhancement for brightness, contrast or sharpness.

5. RAW format photographic files are easier to enhance and often provide a better final result with the concomitant benefit of being able to more easily revert the original RAW file back to exactly the default as taken by the camera. Most cameras that include a RAW file option also make a JPEG file of the shot at the same time, which is very helpful for authentication. However, you will not be able to use exposure bracketing, which is probably the best way to deal with authentication challenges.

6. Make reference files for each photograph that you may use later. Do not modify any reference files, ever. Make any corrections to an exact copy. Use JPEG 2.2 metadata to your advantage to authenticate your photos by always retaining the original JPEG in an unmodified state exactly as it came from the camera

7. Use a digital signature to lock the original unaltered reference file exactly as it came from the camera to avoid allegations of potential tampering. Digitally sign a photograph as promptly as possible.

8. Be aware that almost all digital cameras sequentially number each photograph and producing only the best of the bracketed images will result in gaps that may cause some questions that you will probably need to explain. Of course, if you or your office staff took the photographs, then any photographs are likely protected by the work-product privilege until you disclose them.

9. Learn how to view the metadata in a EXIF 2.2 JPEG file. The newer 2.2 version of EXIF includes date of exposure, focal length, exposure data, etc, the total of which is quite enough to authenticate photographs in most instances. You probably didn't even know that this data exists in modern JPEG photographic files but you can easily view it using the File, file info, commands contained in Adobe Photoshop CS2 and in Photoshop's lower end "lite" version, Adobe Photoshop Elements 4.0. Under PDF properties, you will find not only the "creation date" but also the most recent "modification date".

10. Sony's RAW file conversion program, and probably RAW file programs provided with other high-end cameras, will display a surprising amount of metadata for RAW format photographs simply by moving your mouse cursor over a photo's thumbnail view in a folder window. In fact, even with basic JPEG files, moving the mouse cursor over a JPEG thumbnail will display metadata showing the camera with which the picture was taken, the size of the picture in pixels, and the date that the picture was taken.

In fact, even with basic JPEG files, moving the mouse cursor over a JPEG thumbnail will display metadata showing the camera with which

11. As soon as possible after taking a photograph, use Photoshop CS2 or Elements 4.0, to add optional metadata documenting where the photograph was taken, by whom, etc. This will also help you sort out photographs by category later. Do this only to an exact copy because adding the optional metadata will show as a modification to the photograph in its basic metadata. Digitally sign and also retain this documentation file in an otherwise unaltered state.

12. Note that the advanced metadata shown in Photoshop CS2 and in Elements 4.0 also shows whether the photograph was subject to any non-standard saturation, contrast or sharpness modification by the camera when the picture was taken. The equivalent focal length to which the zoom lens was set when the picture was taken will also be retained, which can be useful if there are challenges to the accuracy of the photograph's optical perspective. (For more information on this point, see End Note 1.)

13. It will sometimes be necessary to enhance photos that are underexposed or to sharpen latent detail using the standard functions of a generally used program like Photoshop CS2 or Photoshop Elements 4.0. However, avoid any excess processing or any functions that alter, hide or enhance only part of a photo. Examples of partial alteration include the clone stamp tool that is often used in art photos to replicate part of an image in another part of a photograph or to blot out some details. While these tools may be useful for art gallery photos that look great except for the power line that's unfortunately in the way, they have no place in the courtroom in almost any conceivable circumstances.

14. You can use these same procedures in reverse to determine whether the other side's photographs can be properly authenticated. A disclosed photo's metadata may also provide clues that, in conjunction with other information, may or may not support authentication of a photograph. Does the person purporting to take the photograph know what sort of camera was used and do they have access to the actual camera? The EXIF 2.2 metadata will show the camera model actually used to take the photo. Does the photograph match what would be expected under the given lighting conditions, taking into account the camera data embedded in the EXIF 2.2 metadata.

15. What does the picture itself show? Some of the screen shots that I have included here depict unusual circumstances, a low level volcanic eruption of Cook Inlet's Mt. Augustine on an unusually clear evening with at least 70 miles visibility. Granted that this is an extreme case to show a point, but if it was sufficiently important, you could check governmental weather and geological data to see whether reported weather and volcanic conditions on a particular date are consistent with what's purportedly shown on a photograph. Cross-checking accident site photographs would be a more mundane example of the same principle. As another example, consider the boiler corrosion photographs at issue in the case discussion in End Note 4, below. If the apparent contrast, color saturation, and color balance of any exhibits seem incongruent with the camera settings contained in the metadata, then you may have an argument that these exhibits unfairly and inaccurately depict a condition and should be excluded.

End Notes

[1]Both 35mm and digital photographs are subject to the same rules of optical perspective. A wide angle lens, typically in the 35 mm film camera equivalent range of 24 mm to 38 mm, distorts perspective (compared to how it is perceived by the human eye) by lengthening perspective and making nearby objects look larger than they really are while minimizing more distant objects. Conversely, a telephoto lens, typically in the 35 mm equivalent range of 120 mm or more, distorts perspective (compared to how it is perceived by the human eye) by shortening perspective and making more distant objects look bigger compared to nearby object.

The most photographic perspective that is most nearly comparable to that seen by the normal human eye is rendered by camera lenses that are equivalent to 35 mm film cameras in the 90 mm to 105 mm range. For this reason, portrait photographers typically use 90mm to 105 mm lenses to ensure that their facial portraits look natural.

[2]"In the case at bar, appellant Kaps sought to introduce its exhibit QQ to challenge Mr. Severy's calculations without laying a proper foundation. As Mr. Severy pointed out himself, there was no explanation of how the photograph was taken, whether there was lens distortion and, if so, of what nature. Therefore, Mr. Severy's inability to use the perspective analysis on appellant's photograph does not contradict the reliability of his calculations which were based on Trooper Pollitt's photographs. We conclude that the trial court did not abuse its discretion by refusing to admit the proffered photograph." *Kaps Transport, Inc. v. Henry,* 572 P.2d 72, (Alaska 1977) at 572 P.2d 76

[3] "Beagel next contends that Judge Johnstone erred in excluding photographs of Beagel's hands. Beagel sought to admit the photographs, which were allegedly taken at the time of her arrest, to show that she did not have gunshot residue, gunshot stippling, or powder burns on her hands. Beagel wished to introduce these photographs to support her contention that she did not fire the weapon which killed her husband. However, the record shows that Officer Zabala, the witness through whom Beagel attempted to introduce the photographs, was not sure when the photographs were taken. Judge Johnstone sustained an objection to the admission of the photographs, subject to Beagel establishing a proper foundation for admission of the photographs at a later time. We conclude that Judge Johnstone did not abuse his discretion in requiring Beagel to show with more specificity when the photographs were actually taken." *Beagel v. State*, 813 P.2d 699, (Alaska App. 1991) at 813 P.2d 708-709.

[4]"Although the Lambs did not produce any direct evidence that they were ever exposed to carbon monoxide, such as ambient air measurements of carbon monoxide in their home or blood samples indicating elevated carboxyhemoglobin levels taken while the allegedly defective furnace was operating, they did provide circumstantial evidence. For instance, they provided the testimonial evidence of Cloudy and Clark that an improperly operating furnace with corroded components could introduce carbon monoxide into a home. And they provided pictures documenting the corroded condition of their furnace. Thus, there was an evidentiary footing from which both the Lambs' experts and the jury could build a logical framework of facts indicating the Lambs were exposed to carbon monoxide." *John's Heating Service v. Lamb,* 46 P.3d 1024, (Alaska 2002) at page 46 P.3d 1036

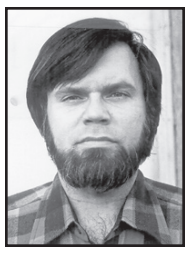
[5]"Although it is true that in the case of nontestimonial evidence there is no need to give deference to the trial judge's evaluation of the credibility of witnesses, this court, in *Alaska Foods, Inc. v. American Manufacturer's Mutual Insurance Co.*, 482 P.2d 842, 848 (Alaska 1971), rejected the argument that a more rigorous standard of review should be applied to non-demeanor evidence. In the case at bar, there was considerable testimony that little or no sand was on the road at the time of the accident. Moreover, not only was it never established precisely when the photographs were taken, but Trooper Carpenter, one of the investigating officers, testified that the pictures did not accurately represent the condition of the road. We cannot agree with the state's contention that the trial judge's findings were clearly erroneous. " *State v. Abbott*, 498 P.2d 712, (Alaska 1972), at 498 P.2d 728

25 Years
1981 - 2006
ALASKA BAR ASSOCIATION

25 Years of Bar Membership


Alexander K. Abraham


David L. Allison


Mark Andrews

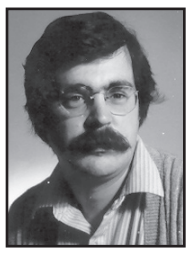

Kathy L. Atkinson


Adrienne P. Bachman


David W. Baranow


Mark J. Barnes


Elizabeth J. Barry


Robert M. Beconovich


S. Joshua Berger

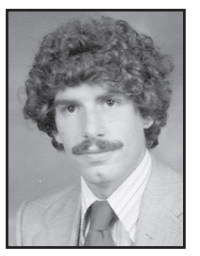

Jack Birmingham


Michael R. Boling

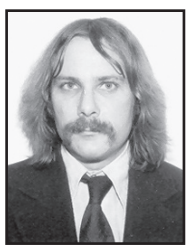

Kenneth F. Brittain

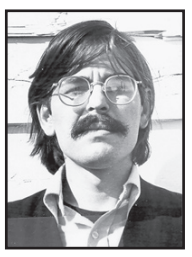

David W. Carney


Barney J. Chisolm, Jr.


John F. Clough III


Larry S. Cohn

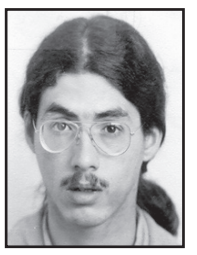

Steve W. Cole


Steven Constantino

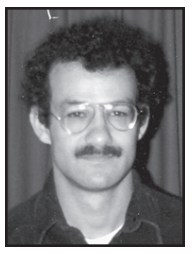

Glenn Edward Cravez


Pamela J. Cravez


Dennis P. Cummings


Bruce O. Davies


Astrid M. E. De Parry

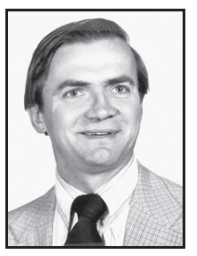

Lawrence C. Delay

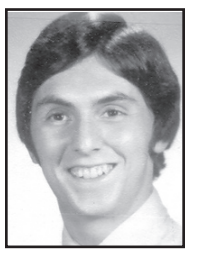

Dan D. Dixon


Stephen M. Dodge


Robert Michael Donahue

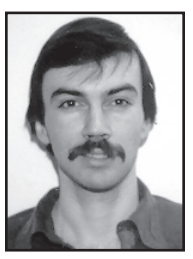

Kevin B. Dougherty


Michael W. Dundy


John Michael Eberhart


D. Randall Ensminger


Richard H. Erlich

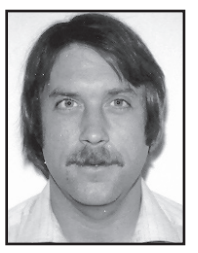

Walter T. Featherly, III


Sarah Jane Felix


Scott Thomas Fleming


Richard H. Foley, Jr.


D. Monita W. Fontaine


Peter B. Foor


James B. Friderici

Raymond M. Funk

Bart K. Garber

Ray D. Gardner

Gayle L. Garrigues

Joseph W. Geldhof

David E. George

Kay E. Maassen Gouwens

Nancy J. Groszek

Carmen L. Gutierrez

R. Poke Haffner

Andrew R. Harrington

Patricia R. Hefferan

Elizabeth J. Hickerson

Elaine M. Houghton

Curtis W. Johnson

Mark K. Johnson

Jonathon A. Katcher

James B. Kentch

Elizabeth J. Kerttula

Christopher M. Keyes

Richard M. Kovak

Sally J. Kucko

Bruce M. Landon

James N. Leik

25 Years
1981 - 2006
ALASKA BAR ASSOCIATION

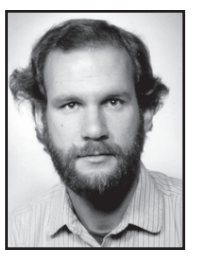
25 Years of Bar Membership


John A. Leque


Nels R. Leutwiler


Jacquelyn R. Luke


Peter J. Maassen


Mark C. Manning


Donald W. McClintock, III

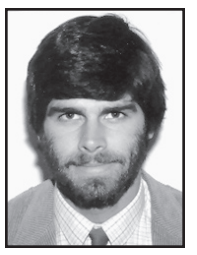

Mary Alice McKeen


Michael Sean McLaughlin


David H. Mersereau


William F. Morse


Gregory Motyka


Steven E. Mulder


William B. Oberly

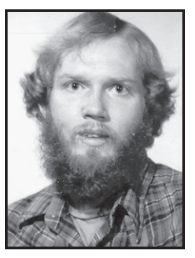

Mary-Margaret O'Connell


David W. Oesting


Susan C. Orlansky


Joseph L. Paskvan


Charles R. Pengilly


Kenneth C. Powers


Stuart Cameron Rader


Joseph L. Reece


Michael V. Reusing


John M. Richard


John S. Robinson


James P. Rohrback


Steven B. Sacks

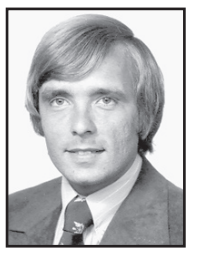

Marie G. Sansone


James A. Sarafin


A. William Saupe


George F. Schaefer


David J. Schmid


H. Craig Schmidt

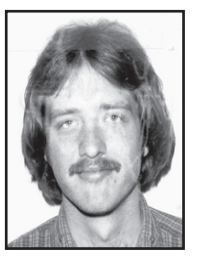

Richard W. Shaffer

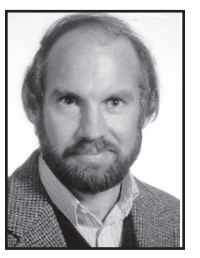

Susan R. Sharrock


Gary Sleeper


Rita Jane Spillane


Walter Stillner


Earl M. Sutherland


Stephan E. Todd


Andrew W. Torrance

Joan Travostino

Patrick A. Trudell

Tom Wagner

Daniel J. Weber

Susan M. West

Sandra J. Wicks

Mark P. Worcester

William M. Wuestenfeld

NOT PICTURED
James A. Farr
Pamela Short Finch
Michael S. Marsh
Steven Robert Porter
John M. Talley
Richard E. Vollertsen

25 year award recipients

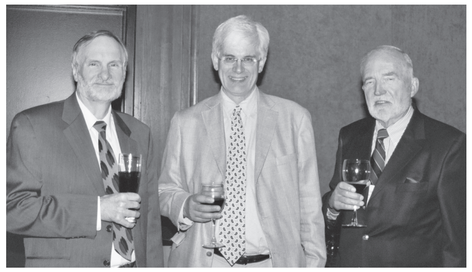
Silver anniversary pin recipients gathered for a group photo at a convention luncheon.

Judge Michael Thompson and Donna Willard.

Michael Jungreis and Jon Katcher.

L to R: Tina Sellers, Aileen Haviland, and Josh Fitzgerald.

L to R: Lori Colbert, Allison Mendel, Marge Kaiser, Krista Stearns, and Roy Ginsburg.



L to R: Ken Eggers, Cliff Groh, and Vic Carlson.

2006 Bar Convention Highlights

Bar community gathers in Anchorage

SINCE 1896
ALASKA BAR ASSOCIATION

The Alaska Bar Association Thanks the Sponsors

Alaska Association of Legal Administrators
Alaska Association of Paralegals
Alaska Court System
ALPS – Attorneys Liability Protection Society
Anchorage Bar Association
AVIS Rent-a-Car
Federal Bar Association
First Indemnity Insurance Agency, Inc.
Hagen Insurance
International Data Systems, Inc.
LexisNexis
MARSH USA, Inc.
Moburg & Associates, Court Reporters, Seattle
Professional Legal Copy, LLC
TRACKS
United States District Court
Wells Fargo Private Client Services
West, a Thomson Company

Special Thanks to the Following Law Firms for their Generous Contributions

Birch, Horton, Bittner and Cherot
DeLisio Moran Geraghty & Zobel PC
Hartig Rhodes Hoge & Lekisch
Hughes Bauman Pfiffner Gorski & Seedorf, LLC
Law Offices of Dan Allan & Associates
Law Offices of William G. Azar, P.C.
Law Offices of Davison & Davison, Inc.
Law Office of Joseph P. Palmier LLC
Law Offices of David G. Shaftel, PC
Perkins Coie, LLP
Royce & Brain
Sonosky, Chambers, Sachse, Miller & Munson, LLP

Thanks to the Exhibitors

Alaska Association of Legal Administrators
Alaska Association of Paralegals
Alaska Court System Family Law Self-Help Center
Alaska Immigration Justice Project
Alaska Legal Services Corporation
Alaska Network on Domestic Violence and Sexual Assault
Alaska Office of Victims' Rights
Alaska Pro Bono Program
Alaska Telecom Inc.
Alaska USA Trust Company
ALPS – Attorneys Liability Protection Society
Anchorage Bar Association
Anchorage Youth Court
Bureau of National Affairs
First Indemnity Insurance Agency, Inc.
Hagen Insurance
LexisNexis
MARSH USA, Inc.
Professional Legal Copy, LLC
Thomas, Head & Greisen, APC
TRACKS
Wells Fargo Private Client Services
West, a Thomson Company

THREE ATTORNEYS RECEIVE BAR AWARDS

Anchorage attorney Bruce Bookman was the recipient of the the Alaska Bar Association's Distinguished Service Award, which was presented during the Bar's annual convention held April 26 – 28, 2006 in Anchorage. This award honors an attorney for outstanding service to the membership of the Alaska Bar Association. Bookman, who is a partner with the Anchorage firm of Bookman & Helm, previously served on the Board of Governors, chaired the Continuing Legal Education Committee and served as Trustee Counsel in a Bar case.

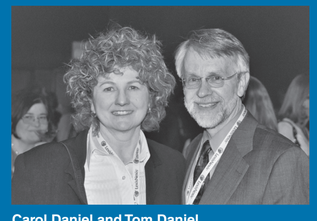
Photos by Karen Schmidlkofer

Anchorage attorney Peter Maassen received the Alaska Bar Association's Professionalism Award. This award recognizes an attorney who exemplifies the attributes of the true professional, whose conduct is always consistent with the highest standards of practice, and who displays appropriate courtesy and respect for clients and fellow attorneys. Maassen, who is with the firm of Ingaldson, Maassen & Fitzgerald, has been in practice in Alaska since 1981, and is a past editor of the *Bar Rag*.

Donald McClintock was the recipient of the Robert K. Hickerson Public Service Award. This award recognizes outstanding dedication and service to the citizens of the State of Alaska in the provision of Pro Bono legal services. McClintock, a partner in the firm of Ashburn & Mason, has been in practice in Alaska since 1981. McClintock was recognized for his pro bono work on behalf of numerous non-profit agencies, including Camp Fire USA.

L to R: John Tiemessen, Speaker Dr. Isaiah Zimmerman, and Paul Eaglin.

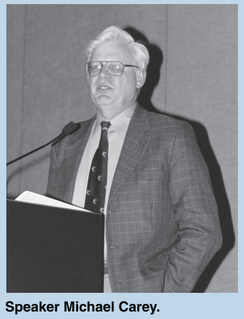
Jon Katcher and Kate Michaels.



Carol Daniel and Tom Daniel.

Mitch Seaver and Judge Trevor Stephens.

Judge Justin Ripley and Bruce Bookman.



Speaker Michael Carey.

Terri-Lynn Coleman and Rita Allee.

Just say no to MCLE

Continued from page 1

unlike many other jurisdictions that have MCLE programs, does not have enough lawyers to make it economical to provide CLE that meets the needs of these specialists. Instead, these lawyers will be forced to take classes that do not apply to their field of expertise and may not even be of interest to them simply to satisfy the requirements of the rule.

MCLE says that everyone should remain updated in the current state of the law the same way – through classes. The rule ignores the time spent by practitioners reading new court decisions or studying new legislation. It ignores the time judges spend researching the issues they are presented with on a daily basis. It ignores the time spent by young associates learning from their mentors while on the job (resources spent on MCLE could instead be spent on a mentoring program).

Personally, I happen to learn better from spending an hour a week reading the latest legal opinions and reviewing legislation. I have sat through a number of CLEs where 20% of the class consisted of substantive and interesting information. The rest were war stories, some of which were interesting, but were of no help to improve my legal skills (this was especially true in the jurisdiction I am admitted to that required mandatory legal education for new lawyers – I was forced to take at least two classes that were nothing but war stories). I am sure most of you have had at least one similar experience.

If you did not like the latest bar dues increase, another one is most likely on its way to pay to administer the new MCLE rule. To make the rule effective, the bar will need at least one staff member to certify CLE programs in Alaska and from outside the state and conduct audits on bar members to ensure compliance. There will also be an increase in discipline as members end up out of compliance. Some funding might come from reinstatement fees, but it is highly unlikely these fees will pay for anything but a small portion of the cost of MCLE, if there are any reinstatement fees collected at all.

Young lawyers will be disproportionately affected by a mandatory CLE program. These lawyers just spent four years in college, three years in law school, have most likely taken at least one bar review course, and have paid to take a bar exam with a 61% pass rate (based on the results from this past February's bar exam). If they pass the exam, they will be paying bar dues that are more expensive than most other jurisdictions in the country. Many have loans to repay. Some will be trying to establish a home in Alaska after spending the past three years out of state in law school. They will be making less money than they will hopefully make during the rest of their careers. An MCLE program will add the burden of increased bar dues, fees to pay for classes, time away from their practice, time away from their families, and time away from learning from their partners and supervisors.

Another concern is that companies may move in to Alaska that are focused not on providing quality CLE programs, but instead only want to help lawyers satisfy their CLE requirements at the last minute. Currently, CLE providers must focus on quality in order to attract lawyers. A mandatory CLE program will give providers incentive to direct their programs to lawyers seeking to meet minimum requirements. These programs would also be unlikely to provide CLE programs geared to young lawyers, who will not be able to afford more expensive CLE programs.

An MCLE program could mean that part time lawyers will become inactive to avoid spending time and money on CLEs (retired lawyers would not be subject to the MCLE rule so long as they are being supervised by Alaska Legal Services doing pro bono work). It could also mean that lawyers who are on maternity leave or are overseas will become inactive. These lawyers can remain proficient by doing research or reading case law after hours, but the MCLE rule will mean they will not be able to handle cases unless they meet the mandatory requirements, meaning less lawyers available for pro bono cases or taking on a few cases simply to remain proficient.

I know there are going to be some who will never be convinced that requiring lawyers to take classes they do not want to take is a bad idea. They will always believe that any time in class is better than no time at all. They will also believe that because the percentage of lawyers complying with the current voluntary CLE rule has allegedly declined over the past several years (from 43% in 2000 to 37% in 2005, going as high as 47% in 2001 and as low as 35% in 2004), the current voluntary program has not been a success.

To them I must point out that we are basing a decision to make a program mandatory at great expense both in time and money when reporting is voluntary. One board of governors representative noted that some lawyers do not fill out their bar dues forms, leaving the task to their secretaries. If we are going to consider an MCLE rule based on the current reports of compliance, shouldn't we wait until we get some reports that we know are accurate? After all, I was at the Bar Convention this past year and the large conference room was packed. Our bar members did not seem to shy away from CLEs on that occasion. Mandatory reporting is the logical next step, not mandatory CLEs.

Now that I've expressed my opinion on MCLEs, please express yours. We can not make an informed decision on the issue without your input.

Now is the time to adopt rule

As Alaska's rules of professional conduct require, a lawyer has a duty to his or her clients to provide competent representation. Competence requires knowledge and skill, which can only be maintained through continuing study and education.

There are many reasons why an MCLE program is necessary:

• Most members of the public probably assume that lawyers have a mandatory continuing education requirement, and would be dismayed to learn that we do not.

• The law is complicated and constantly changing, sometimes in very substantial ways, such as the overhaul of the bankruptcy laws.

• Periodic updates through continuing education provide the best means of ensuring that lawyers keep abreast of new developments.

• The public expects attorneys to be competent and professional, and a competent professional must keep current with changes in the law. The best way to insure that this happens is by requiring continuing education.

All members of the traditional "professions" in Alaska must undertake continuing education. In addition, members of occupations that are charged with the public trust in Alaska--such as social workers, real estate agents, and paramedics—must meet continuing education requirements. Many additional occupations require continuing education as a matter of state occupational licensing requirements. As it presently stands in Alaska, the continuing education requirements of HVAC technicians and home inspectors are higher than for Alaska attorneys.

As it presently stands in Alaska, the continuing education requirements of HVAC technicians and home inspectors are higher than for Alaska attorneys.

Critics of MCLE programs in other states complain that CLE programs are often low quality, expensive, and needlessly time-consuming. A successful MCLE program will include high quality programs offered at reasonable cost to Alaska's lawyers. The history of recent bar conventions shows that these goals are within reach and, indeed, are being attained every year in Alaska. A lawyer need only attend the bar convention to meet all the requirements of the proposed rule.

A lawyer can also meet the requirements in many other ways, such as taking courses on the internet, teleconference and video replay, and self-tests published in the *Bar Rag*. In addition, the Rule would allow continuing legal education credit for participation in bar committees, including ethics committees, and bar association Section meetings; attendance at local bar meetings with substantive speaker programs; participation in Youth Court; attendance at Off the Record programs, and the like.

MCLE's opponents also argue that no statistics prove that MCLE reduces disciplinary actions against lawyers. But, a lawyer who manages to avoid malpractice does not mean that the lawyer is up to date, expert, and informed.

In other words, if avoiding malpractice is the floor, then excellence is the ceiling.

We believe that MCLE will raise the overall quality of legal practice in Alaska, something both lawyers and the public have a right to expect.

ESTATE PLANNING CORNER

The future of the federal estate tax — 2006 edition

By Steven T. O'Hara

The U.S. House of Representatives voted recently, as it has in the past, to repeal the federal estate tax. The battle now lies in the U.S. Senate, where Democrats will need to join with Republicans to avoid a filibuster and repeal the tax. The future of the tax is likely to be decided this summer.

The above words appeared in this column a year ago. Then delay occurred and Hurricanes Katrina, Rita and Wilma hit. The above words apply again this year except complete repeal appears politically impossible.

A quick review of the law will provide context for the drama that may occur this summer.

The law currently in effect repeals federal estate and generation-skipping taxes beginning in 2010. The current law contains a "sunset" provision that provides, in effect, that the repeal will last one year only (*Economic Growth & Tax Relief Reconciliation Act of 2001 at Section 901*).

In other words, at present the U.S. government has scheduled one year – the year 2010 – for there to be a moratorium on federal estate and generation-skipping taxes.

During the year 2010, however, clients could owe substantial tax if they *gift* any of their property because the law does not repeal the federal gift tax.

By way of further background, the amount that may pass free of federal estate tax is generally known as the unified credit equivalent amount or, more recently, the applicable exclusion amount. Here we will call it the "exclusion."

"At present the U.S. government has scheduled one year – the year 2010 – for there to be a moratorium on federal estate and generation-skipping taxes."

From 1987 through 1998, the exclusion was $600,000. Beginning January 1, 2000, the exclusion was increased to $675,000. The exclusion was scheduled to increase to $1 million in 2006.

Under the 2001 Tax Act, the exclusion increased to $1 million in 2002, four years earlier than the pre-existing schedule. Beginning January 1, 2004, the exclusion increased to $1.5 million but only under the estate tax. The exclusion remains at $1 million under the gift tax.

The exclusion increased to $2 million this year and is scheduled to increase to $3.5 million in 2009 but only under the estate tax. The exclusion remains at $1 million under the gift tax.

In addition, the 2001 Tax Act reduced the top estate and gift tax rate from 55 percent to 50 percent in 2002, 49 percent in 2003, 48 percent in 2004, 47 percent in 2005, and 46 percent in 2006. The law contains a further reduction to 45 percent in 2007.

Under the sunset provision, the 2001 Tax Act is scheduled to go out of existence in 2011 as if it had never been enacted. The effect of this sunset provision is that, in 2011, the top estate and gift tax rate will increase back to 55 percent and the exclusion will decrease back to $1 million. The present effect is uncertainty.

So current law contains good news, but it also contains bad news with the scheduled erasure of all tax breaks in 2011.

Many are hoping the U.S. government will, this summer, create only good news and change the law to make the reductions or repeal permanent. As a practical matter, in the wake of the hurricanes of last year and Washington scandals, complete repeal appears politically impossible.

Look for a compromise to be worked out this summer. For example, one compromise being talked about this year is to increase the exclusion to $5 million. So only estates in excess of $5 million would be subject to federal estate tax. Also under this proposal, the top estate tax rate would be 15 percent, the same as the current top income tax rate on capital gains. Thus this proposal is known as the "5/15" plan.

Much of the uncertainty in federal transfer taxes may actually be eliminated this summer.

Our Euro-Class constitution -- *Part One*

By Peter Aschenbrenner

I'm here to praise the Alaska Constitution. As for recent celebrations honoring the convention, I brought a shovel. It was the winter of 1955-56 as alert readers will remember, and the goal of the conventioneers was to write a constitution so modest in scope and purpose that no Congressman could rouse his Dogpatch to fury over the admission of Alaska to the union; or at least the constitution wouldn't be the stick to shake at our 49th state aspirations.

But was that all there was?

Hans Kelsen is the patron saint here. St. Hans wandered in a desert known as legal positivism, which for over a century (as of 1947) was of interest to scholars of European dignity, who offered to strip pedigree, history, purpose from the construction of constitutions and codes, or, more generally, written legal systems. They were perfect Benthamites, of which more later.

Positivists didn't care where law came from and they didn't care who'd written it up, and they hated Blackstone and all of his notions about 'you have to know how the common law was constructed as a work of legal history, if you want to understand the law.'

On the other hand, as Kelsen told me (yes, others were there) in 1968, the discipline of constitution and code writing was, well, vigorous and manly, and most of all, least of all, that is, minimalist. Start with a Grundlage which authorizes the legislature to write to codelaw in matters usually reserved for public law, and let the private parties write contracts in areas reserved to private law (by downward delegation or upwards reservation, your choice). Administrators fill books with regulatory law; courts rewrite private law or gloss public law, and so forth, usually with downward delegations and occasionally with an assertion of reserved or implied lawmaking power. Think private contracts here, as noted, or the Supreme Court's power to say that it has the power to say what the law is or to write procedural rules.

These systems are hierarchical, clean and crisp in structure, easy to understand, and very elegant. Latterday scholars have badgered Kelsen's reputation with the question, where does the Grundlage come from? His answer, it doesn't come from Mt. Olympus or William Blackstone, lacks a foundation myth and that's most of what he was getting at.

Both the problem and the opportunity with Kelsen's approach to constitution and code-writing are pretty obvious: When you have major social rifts, public gulfs and divides, yawning and ready to swallow lawmaking effort whole, do you want evasion or confrontation in your legislative venues?

So St. Hans is also the (ersatz) patron saint of evasive optimism: when conventioneers construct a state (or nation) as in "creating Alaska" (see alaska.edu/creatingalaska) they have to assume that ethical discourse – more or less, debate in venue – will bring about some resolution of the underlying divides, or some accommodation that was impossible for conventioneers to tackle.

The best example bar none is afforded by the Philadelphians of '87, who were so eager to write a constitution that they settled a dismal compromise equating "all other persons" to be worth "three fifths" of "free persons," a voting rights mishap in itself and the cause-in-chief of Bull Run, 1861 and all that. But: let's give Hans and the positivists their due. It's not necessarily the job of basic norms – national shouldstatements – to solve national problems. It's just the task of a constitution to jump start legislative, judicial, private and other venues in which problems evaded at the start can be addressed along the way.

Which returns us to Bentham, the armchair philosophe who wrote constitutions and codes for fun; I'm not kidding. Bentham's 'one man band' approach to codewriting inspired his offer to President James Madison to serve one up ("fast and hot") for the United States of America, that pesky War of 1812 delaying Madison's rejection by a year or two. Alaska is celebrating a constitution that took 55 people to write while Bentham could write 'em in French and English and annotate footnotes, pen-in-foot.

Let's keep in mind that the celebration is about "creating Alaska". Some observations in the celebratory website are intriguing: Alaska has a "model constitution"—so who did we crib our provisions from or who has borrowed from us? Vapid: "internal conflict [during Alaska's history] has been more the rule than the exception," proof positive that somebody is alive, breathing and, yes, arguing. And then ironic, if you don't live here. "A common political cause … seemed to bring out the best in Alaskans … ." Back then, either we couldn't solve our own problems in the state constitution and we did expect the federal government to cash out our worries or we thought later generations would be towers of moral power and purpose, and willing to amend the constitution "just in time" or as need might arise.

How does evading issues "reduce the political influence of outside interests who controlled the territory economically?" Alaska's constitution was written for a territory which was (and still mostly is) a mezzogiorno, a vast sprawl of latifundias, plantations dedicated to single commodities or constituencies, one after the other. Did the constitution address land reform, i.e., redistribution of the land, with real insurable title to land and minerals in the bargain? Did the constitution address public school education and its expensive and nasty questions as to who got educated and where? Did the constitution promise development of local infrastructure through state-wide county governments, a formula tried in 48 other states? Nope.

The constitutional conventioneers must have hoped that someone would wash the state in cash and solve these problems. Now that's something to celebrate, pushing all our territorial chips across the felt and yelling "hit us again!" And it does have a ring of truth. The reason why the conventioneers wrote a boring, evasive and meaningless constitution (a cynic's theory) or (my theory) one of euro-class purity and elegance, is that once in the Union our state would both (a) get more representation than it deserved, for which we have Article II, Sec. 1, Cl. 2 of the federal Constitution to thank, and (b) get more money than we deserved, for which we can thank you-know-who.

But even in the most effusive cascade of self-congratulation for having written a boring constitution, the purveyors of current constitutional whoop-la have conceded that the Constitution did not constitutionalize, much less debate issues that divide the state along "geographic, ethnic and partisan lines".

If I'm even remotely right about how short and minimalist constitutions drape euro-pose over evasions of these divides and watersheds, then celebration of a constitutional writing, not exactly the same thing as celebration of a constitution itself, is really a celebration of society, of us and now. It's really a way of saying, "Our fore-lawyers didn't step up to the plate, didn't carry the heavy water, didn't do any heavy lifting, shunted it all off on future generations. They went to Philadelphia or Fairbanks and all we got was this (hmm) minimalist constitution. But we made it work anyway, and hurray for us."

TALES FROM THE INTERIOR

A lawyer's dreams for retirement

By William Satterberg

As I attended a continuing legal education course recently, I smiled to see Barry Jackson, one of the "older" attorneys, straining to listen intently to the program presented on the video screen.

"Why would Barry be attending a CLE at this stage of his professional career?" I asked myself. The CLE was about "winding down" a law practice.

It was one of the classic "Ethics at the 11th hour" presentations that most attorneys desperate to save their malpractice rates take prior to the year's end. I was no exception. On the other hand, this particular video had value beyond simply CLE credits and malpractice savings. This was because I, too, was beginning to contemplate retirement. The nice thing about being a professional is that one is not usually limited by their physical condition. Rather, law practice can extend well into a person's 70's. Barry is certainly a monument to that concept. Charlie Cole is no slouch, either. What concerns me is that I am beginning to recognize that I am not that far behind these elderly gentlemen in planning my own exit strategy.

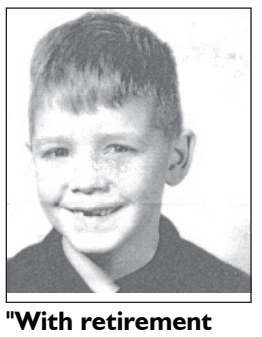
I celebrate birthdays regularly. I seem to do so once every year. As long as I continue to celebrate birthdays, I should have no serious problems. Still, I am forced to accept that I am rapidly approaching the phase of life where I will soon be termed, as well, an "old age" attorney.

Occasionally, I read the local obituary column to recognize that one of my fellow bar members has moved on to that Great Appeals Court in the sky. Moreover, I have come to recognize that, with perhaps the very rare exception of the Don Logan, "Peter Pan" effect, all attorneys invariably grow old. To a certain degree, chemistry has been able to put much of the aging process behind us, with the advent Viagra, Levitra, Cialis, and other performance enhancing drugs. These products regularly pop up as spam messages on my computer along with the Metamucil ads when nothing else seems to want to pop up.

Sadly, even these drugs often leave us lacking. Physical alterations such as creative face-lifts, tummy tucks, and resection of the intestinal tract can admittedly prolong the agony of age to a certain degree, but time marches ever onward.

As I see it, age and youth are but states of mind, philosophically speaking. What is most embarrassing is when I go to a reception and spy some nice-looking young lady and have one of those thoughts which the American male is said to have every 26 seconds. Sometimes, a little bit of the flirtatious nature of me emerges, since everything else in my age tends to be rather reserved. In the process, I feed my ego by fantasizing that this young delight truly does find me at least somewhat captivating, in return, even though my intentions are purely honorable. After all, I am married.

As an additional incentive for marital loyalty, I did recently read about an event that took place in Anchorage which impressed upon me and likely all other Alaskan males that the irate spouse response to infidelity is alive and well in Alaska. Judge Downes calls it "Bobittizing." Still, there is always something to be said for feeding the ego.



"With retirement comes a certain luxury of life. That luxury is the ability to be an old person, with everything that frustrates the youth."

Invariably, my ego-boosting is dashed upon the rocks when the young lady offers that she finds me "cute," but then remarks that I am "old enough to be her father." My normal response is to ask for her mother's maiden name. After all, who knows? Rather than debate the issue, I then go home in order to be asleep by my usual time of 9 p.m.

My last birthday was philosophically different. As I burned my face on the towering inferno known as the office birthday cake, which looked more like a funeral pyre, and ate the traditional black frosting, I began to recognize that I was definitely growing older. It was clear that more than a few strands of gray hair had appeared. Even more depressing was that the top of my head, where gray hair should have been, had long since become barren. As I strained my eyes to read the large print on my birthday card, I accepted that retirement was rapidly approaching. Denial was no longer an option. It was definitely time for my second childhood. And, none too soon. I began to consider the options.

With retirement comes a certain luxury of life. That luxury is the ability to be an old person, with everything that frustrates the youth. I intend to embrace advancing old age rather than run from it. I intend to maximize my opportunities to be obnoxious to the fullest.

For a first impression, I no longer intend to walk in straight lines. Rather, having no specific obligations, I will wander absentmindedly in the classic, "S" pattern down narrow store aisles, sidewalks, and twisting paths. I do not plan to be consistent. As such, when the paths are wide and people can easily pass, I will take only the middle of the path, and not the entire pathway. Still, I should prove to be a significant obstruction if I apply myself.

But, staggering around like a drunken sailor will not be my only attribute.

When I go to discount shopping stores like Fred Meyer, Wal-Mart, or Sams, I will ask the pimply faced teenagers to carry out my shopping bags, even though I may only have one plastic bag holding some Polident. When no one is watching, I will purloin one of those racy courtesy scooter carts. I will then do like my geriatric father did one time, turning the corner too tightly in his classic European grand prix fashion and loudly knocking over an entire display of canned goods. Fortunately, such transgressions are socially acceptable because nobody ever really comments about it, directly. Instead, they just talk behind the offender's back. Of course, under such circumstances, the key will be simply to act as if I did not hear the gossip, since hearing is optional during the retirement years, as are those hearing aids with the loud feedback.

Not that hearing aids may be that desirable at all times. The lack of hearing will also allow me to yell loudly in court while cupping my ear in attempting to hear some objectionable ruling. Poor hearing also provides a good excuse to tune out the criticisms of other family members.

In walking down the jetways, I intend to exploit my frequent traveler status to its utmost, boarding in the front of the line, and taking as long as possible to toddle down to the aircraft and to stow my items. I might even drop a bag or two from the overhead bin on the head of a seated passenger. Years ago, I dropped a potted plant I had purchased on the head of a state legislator. Although I was rather younger than she, I was fortunate that it was an election year and all was forgiven. Then again, perhaps all was forgotten instead, given the obvious age factor. Forgetfulness has its benefits.

Rather, having no specific obligations, I will wander absentmindedly in the classic, "S" pattern down narrow store aisles, sidewalks, and twisting paths. I do not plan to be consistent.

I look forward to motor-homing. Motor-homing is fun because, once again, I will be able to drive very slowly, taking up lots of space and using the proven old age excuse. There is a subtle irony in the fact that large motorhomes should only be driven by young people with good vision, capable hearing, and fast reflexes. Unfortunately, young people can rarely afford such extravagances. As such, the vehicles are left to the old people who are the least equipped to drive them. I undoubtedly will qualify.

Incidentally, did I mention that forgetfulness is an attribute? The nice thing about forgetfulness is that it is always a ready excuse, which can cover anything from missed dates to unzipped flys. As my deceased father once remarked, "When your memory goes-forget it!" Dad also bragged about being able to hide his own Easter eggs. On the other hand, old age also brings with it an uncanny ability to remember things that everybody wishes were long since forgotten. For example, how often have I been reminded by one of the elderly members of my family of something that I did what I was three years old and which, as an adult, would have been patently criminal?

Unfortunately, the time-accepted excuses of becoming older and entering active-retirement do not necessarily apply to one educated in law. I may have to work longer than I really want to work, simply in order to buy car gas. Justice Rehnquist was a good example of the aspect of lifelong employment in law. Ronald Reagan was no slouch, either, as a politician. But, without doubt, George Burns took the cake, even if he was not an attorney or a politician, but was a comedian. Strangely enough, all three fit into the same category. Like the other two, George Burns was happy playing God, also. Needless to say with such an attitude, George Burns would have made a good presiding judge, too.

If I am to retire, I obviously need to change my attitude. One attitude change would be to try to grow a ponytail. Something to make me look distinguished - like an Alaskan Danny DeVito. The ponytail would represent my symbolic rebellion against the very system that spawned me. Call it the "Dave Call Effect", or the "Savell Syndrome." I long to become cranky with just about everybody. Again, it is the Dave Call Effect. In time, I will become opinionated and unpredictable. Id. I will then top it all off and buy a racy European sports car. Something I could afford like a Volkswagen Golf. After all, Mercedes are well beyond my financial reach. Dave Call reportedly has a motorhome. Dick Savell has a Mercedes. Obviously, the condition is contagious.

There was a time when the concept of things like Pensions, Medicare, and Social Security meant absolutely nothing to me. As far as I was concerned, those were old people's problems. Such legal fictions were the things that the occasional short timer judges like Jim Blair would doodle incessantly about on their bench desk pads while pretending to be interested in yet another routine divorce. But now, they are my problems. Like those I used to laugh at, I have become obsessed with concepts as 401(K), SEP IRAs and defined profit sharing.

And, don't knock AARP! For those who are not in the know, AARP is not something that happens after a hard night on the town. Rather, AARP is for old people. Recently, I have found that active (an oxymoron) AARP members can enjoy (another oxymoron) the benefits of generic medicines ordered via the Internet – if they can focus well enough to see the screen. I actually look forward to the AARP magazine. AARP magazines make for

Continued on page 23

TALES FROM THE INTERIOR

Retirement dreams

Continued from page 22

interesting reading and do not bulk up the mattress like the magazines I used to collect as a teenager. Still, my back hurts, but for different reasons than before.

There are certain more subtle advantages to retirement. For example, there are old age discounts at theaters, senior's breakfasts at Denny's, kisses on the top of my bald head from cute little coeds, and, if I make it long enough, free skiing at the local ski resorts. Those skiing privileges are still about 15 years off, at a time where I will probably not be physically capable of claiming them, regardless. Still, I can dream, can't I? But, other things are "out". For example, snowboarding is out. So are vibrating Harley Sportsters. Honda Goldwings are a different matter, however, with shaft drive-the only thing at that age which seems to be shaft driven. Those nifty three-wheeled Rascal scooters that you can get for free from your AARP distributor if Medicaid says you don't qualify are quite fun also.

I long to become cranky with just about everybody. Again, it is the Dave Call Effect. In time, I will become opinionated and unpredictable. Id. I will then top it all off and buy a racy European sports car.

I have seen too many people who have grown old and have missed out on the fun of life at a time where they can still somewhat enjoy it, either for lack of health, lack of memory, or death. There is an axiom that teaches "You spend your health to get your wealth, and then spend your wealth to get your health." Too true. Better to enjoy life while you are alive, I say. Like Dear Old Dad said to me the week before he passed on, "Billy, if I had known I were going to live this long, I would have taken better care of myself!"

To a certain degree, retirement is driven by family obligations. Children are such an obligation. In this regard, our family's two girls are in the graduation phases of their education. The oldest daughter graduated recently from college and began postgraduate school. The youngest daughter graduated from high school and has now entered college. By my calculations, I have only four more years of indentured servitude, if one does not count additional postgraduate education and the "boomerang kid" phenomena which the millennium seems to have created. Hopefully, I can avoid bankruptcy, especially given the latest reforms.

In growing old, I am not alone. I have a close friend, Marc, who lives in Europe. Marc regularly bemoans the fact that his three children still live with him and his wife. The children are over 30 years of age.

To a certain degree, Marc's two younger girls come and go, as do their seasonal boyfriends. But, Marc's eldest son seems to be embedded - literally. Despite Marc's best efforts, Marc cannot get rid of the fellow.

One has to be creative in such situations. As I explained to Marc, the trick is to take a nylon tow-rope (which I recently bought from a local auto parts store and sent to Marc as a gift) and attach one end of the rope to the ankle of his soundly sleeping son. After ensuring that the line is secure, the next step is to play the line out the bedroom door, along the hallway, down the steps to the first floor, and out into the driveway. The final step for Marc is to attach the other end of the rope to the trailer hook of his strong, little European SUV, start the vehicle, shift into low range, and drive away like mad. If things work as planned, the somnambulistic son should follow. For added security, I told Marc that he should then burn down the house and change his name.

For some reason, it wasn't like that for me when I was a kid. At age 18, I was ready and most anxious to see the world. I was not alone in my desires. My parents were quite eager to point the world out to me. As such, when I announced one day that I was going to attend the University of Alaska in Fairbanks as opposed to an obscure college in Oregon, my loving mother began weeping uncontrollably.

Moved by Mom's uncharacteristic compassion, I asked her, "Why all the tears, Mom? Will you miss me?"

"Too close," came her choked reply.

Not that I necessarily had a bad childhood. Considering the fact that nobody was quite sure whether or not I had been left on the doorstep in a basket, I was still raised in a happy family. It was just that the wanderlust had bit me. I am Romanian on my mother's side of the family and reportedly one-half gypsy. Occasionally, the genetic code surfaces and I want to empty other people's pockets and to travel aimlessly. When that happens, I want to go walkabout like attorney Don Logan. Now, approaching 40 years later, it looks like I will finally have my wish.

As an initial goal, my wife, Brenda, and I intend to travel. David and Shelly Call have turned travel into an art form. So have the Savells. We hope to buy a condominium in a tropical environment (no, not Mexico) where we can set up wintertime housekeeping. Having lived in Micronesia for a period of time and with two adopted daughters claiming their heritage from the region, Saipan is our second home. Saipan is a small island located one hundred twenty miles north of Guam. It is a Pacific paradise with all the amenities of America. Not only is Saipan a fine place to live, but I can practice law there, as well.

On the other hand, Europe is also intriguing. The entertainment, culture, and style of life on the Continent have always attracted me. After all, those who know me will likely agree that I exemplify only the best in American culture. Where Americans thrive on the fast food, fast cars, fast everything (much to my wife's dismay) culture, Europeans love life, enjoying it far more to its fullest. As another European friend once told me, "Bill, we Europeans savor our wine, food, and sex - but not necessarily in that order." By contrast, we Americans tend to accelerate everything, including our wine, food, and sex, but again not necessarily in that order.

Brenda and I also plan to spend a "sabbatical" in Luxembourg. From there, we hope to base our travels throughout the Continent, visiting castles, wineries, churches, wineries, museums, wineries, scenic vistas, and vineyards. My wife is into the boring cultural stuff. Churches and Castles. As for me, I may take in a winery or two. I also hope to find a pub named "Churches and Castles." That way, we can both be happy. We also plan to spend the same sabbatical in Saipan. Obviously we still have some decisions to make. (Did I mention that? Perhaps I really am getting a bit forgetful.)

I also want to go hiking in the Alps. But, I only enjoy downhill hiking which could present some logistical problems. Still, I think that I would look rather cute in a pair of German lederhosen. I also want to study a foreign language. I think that I will start with English.

Maybe we will also travel to the Middle East. I have always felt a desire to visit the Holy Land, where three of the world's greatest religious groups attempt to coexist not so peacefully together. I have told Brenda that I want to visit Jerusalem. Brenda has told me that we will likely get blown up. For safety, I have suggested that we stay out of the discos and shopping malls, and not use public transportation. As long as we stay locked up in our room, we should be relatively safe. Then, again, maybe we will pass on the Middle East.

Perhaps I will try my hand at creative writing. I have never been very good at it, since my thoughts tend to ramble, which is a little known fact. I might even try to write humor, assuming I can find a publication desperate enough to carry my contributions on a regular basis.

I want to read some of the great books of the world, provided that my eyesight holds out. Classics, like the entire Rambo series or the Police Academy Trilogy.

As another European friend once told me, "Bill, we Europeans savor our wine, food, and sex - but not necessarily in that order." By contrast, we Americans tend to accelerate everything, including our wine, food, and sex, but again not necessarily in that order.

Admittedly, I have these dreams from time to time. For example, I once entertained the notion of the entire family living overseas in England for a year, while our two daughters attended British schools, wore those little, blue-pleated skirts with white blouses, and became socialized. I always thought the girls would look rather cute speaking with an acquired Cockney accent. After I announced my plan at dinner one night, over my objections, the family democratically put it to a vote. In short order, I was soundly vetoed. But, now that the daughters are grown and in college, the opportunity has once again materialized. Living in England has always carried a certain attraction to me.

Sabbaticals can be good. I have always envied the Fairbanks Public Defenders Agency. The attorneys employed in that organization have turned sabbaticals into a refined art. They call it "job sharing." Unfortunately, I have already proven that I am not cut out to be a state worker. Reportedly, I do not play well with others. Still, I am envious of the local public defenders. I also admire the way that Judge Jane Kauvar was able to take a year off to obtain her master's degree in law in Australia. Not only did Judge Kauvar enjoy the experience, but the benefits of the education were substantial. Besides, it looks good on the resume, especially if one wants to apply to be a judge. Except I doubt if anyone would seriously consider hiring me. Something about an undeserved reputation of not playing well with others.

Maybe I will do that. Study, that is. Maybe I will attend class at a prestigious university and pursue a postgraduate degree in something esoteric. I doubt if it would be in law, however. In all fairness, I always found law to be rather boring. To the same degree, mathematics is out. So is art, although I have been told that I was rather good at graffiti in my younger years. I also liked art movies as long as my quarters held out. But, I now have a certain aversion to art. This is because artists, to be really good, are required to either mutilate their non-essential body parts or to adopt a weird life style. I could give anyone an earful on that subject.

Maybe I will study philosophy. That's it, philosophy! But, not just ordinary philosophy. Rather, I will study really heavy duty philosophy. In fact, I will study to become a philosopher-king. After all, it has been a while since the world has had a really good philosopher-king. Perhaps that is my true destiny. I will become somebody who will write existentialistic stuff about rocks rolling down hills and then getting pushed to the top again.

Then, again, I do not know if my professed political affiliation will allow me to study philosophy. Besides, aren't the really good philosophers supposed to be poor? I don't like being poor. But, maybe I can be a yuppie philosopher. Yet, isn't philosophy only for religious fanatics? If so, I don't get worked up that easily. Besides, I feel naked when wearing just a robe. To the contrary, I am becoming partial to Carhartts as of recent. Moreover, I cannot forget my Republican roots, hypothetical as they often are. Republicans are rather strict when it comes to creative thought. In fact, on second thought, I will pass on the philosophical stuff entirely.

Did I just confess to being a Republican? Quel faux pas! I hold too many contrary philosophies, not the least of which is that my office wrote the widely acclaimed Noy brief which relegalized certain aspects of pot ownership but little to engender warmth with the existing administration. Given that background, I probably would be a better Libertarian.

That's it! Maybe I will become a Libertarian. Moreover, I will not just be any routine Libertarian. Instead, I will go one better. I will form my own political party. I will then run for office where I can become an absent-minded politician. Once elected, I can then appoint my friends to lofty Commissions and esteemed positions of power. But, because I am also a sensitive person with a delicate ego, I might not be able to handle the political fallout for long. I am told that I do not respond well to criticism, especially when it comes to dress codes. Nor do I play

Continued on page 24

Caroline P. Wanamaker

Cheryl Mandala

Mark P. Melchert

Michelle L. Boutin

Raymond E. Goad, Jr.

Sarah E. Josephson

Thomas A. Ballantine

Jermain, Dunnagan & Owens, P.C., announces changes

Mark P. Melchert became a shareholder in January 2005, and **Sarah E. Josephson** in January 2006.

Mr. Melchert practices in the areas of business, commercial and transactional law, and litigation. The focus of Ms. Josephson's practice is in labor and employment law and employee benefit trusts.

Raymond E. Goad, Jr., Michelle L. Boutin, Cheryl Mandala, Caroline P. Wanamaker, and **Thomas A. Ballantine** have joined the firm, as well. Mr. Goad practices in the areas of labor and employment law, education, real estate, and civil litigation. Ms. Boutin's practice includes commercial and consumer bankruptcy, creditor rights, collections, business transactions, and commercial litigation.

Ms. Mandala's practice focuses primarily in the area of education law, employment law and civil litigation. Ms. Wanamaker practices in the areas of trusts and estates, emphasizing estate tax planning and administration, business and commercial succession planning, and real property. Mr. Ballantine's areas of practice include civil litigation and civil appeals.

Bar People

The law firm of Holmes Weddle & Barcott is pleased to announce that **Jeffrey D. Holloway** has become a shareholder of the firm, effective March 1, 2006. Mr. Holloway is a graduate of Cumberland College in Williamsburg, Kentucky and earned his J.D. with Distinction from the University of Nebraska, Lincoln. He joined Holmes Weddle & Barcott in 2003, and practices in the firm's Anchorage office with an emphasis on workers' compensation insurance defense. He also handles a variety of civil litigation and educational law matters.

Heidi Drygas, formerly with Guess & Rudd, is now counsel to the Alaska District Council of Laborers.....**Thomas P. Owens, Jr.** has left Turner & Mede, P.C. and is now in solo practice.

C. Deming Cowles is now in central Florida, representing the state's only charter school system, running a community based family literacy program and consulting for the state's Department of Education. He is on the Hillcrest Heights Town Commission, Chairman of Florida Bipartisans Civic Affairs Group, Polk County Water Policy Advisory Committee and on several community boards. He misses Alaska and Alaskans, though. He can be reached at demingcowles@aol.com.

Dan Winfree (past Bar President), is closing his law office and taking the position of Executive Director and General Counsel of the Fairbanks Hospital Foundation. He will start there July 1.

Will Schendel will open his own office and **Corrine Vorenkamp** will join the DA's office.

Former prosecutor **Mary Anne Henry** was appointed by the legislature as the Director of the Office of Victims' Rights.....Former District Court **Judge Suzanne Lombardi** was hired as an associate attorney at the OVR office. The office is located at 1007 W. 3rd in Anchorage. The e-mail address is officeofvictimsrights@legis.state.ak.us.

Susanne DiPietro, Judicial Education Coordinator for the Alaska Court System, recently received the Director's Award of Merit for Applied Research from the Institute of Court Management. The award is presented annually to a graduating fellow of the ICM's prestigious Court Executive Development Program (CEDP), which DiPietro completed in early May. The award was presented at CEDP's graduation ceremony at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. Susanne recently returned from a 6-month tenure at the Mongolian Supreme Court Research Center.

Susanne DiPietro

Interested in submitting an article to the Alaska Bar Rag?

The Bar Rag welcomes articles from attorneys and associated professionals in the legal community. Priority is given to articles and newsworthy items submitted by Alaska-based individuals; items from other regions are used on a space-available basis.

A Special Note on File Nomenclature (i.e. filenames)
Use descriptive filenames, such as "author_name.doc." Generic file names such as "Bar Rag September" or "Bar Rag article" or "Bar article 09-03-01" are non-topic or -author descriptive and are likely to get lost or confused among the many submissions the Bar Rag receives with similar names such as these. Use, instead, filenames such as "Smith letter" or "Smith column" or "immigration_law."

Submission Information:
By e-mail: Send to oregan@alaskabar.org
By fax: 907-272-2932.
By mail: Bar Rag Editor, c/o Alaska Bar Association,
550 W. 7th Avenue, Suite 1900, Anchorage, AK 99501

Next Chief Justice selected

By unanimous vote May 25, the members of the Alaska Supreme Court have selected Justice Dana Fabe to serve as Chief Justice commencing July 1, 2006 for a three-year term. Justice Fabe follows Chief Justice Alexander O. Bryner, whose three-year term expires June 30, 2006.

Justice Fabe was the first woman appointed to serve on the Alaska Supreme Court and was the first woman to serve as Alaska's Chief Justice from July 1, 2000 through June 30, 2003. This will be her second term as Chief Justice. Under Alaska's Constitution the Chief Justice is selected from among the justices of the supreme court by majority vote of the justices. The Chief Justice serves as the administrative head of the judicial branch of government, provides policy direction for all courts statewide, and appoints presiding judges for all judicial districts. A justice may serve more than one three-year term as Chief Justice but may not serve consecutive terms in that office.

Justice Dana Fabe has served on the Supreme Court since March 1996. Justice Fabe was born in Cincinnati, Ohio on March 29, 1951. She holds a B.A. degree from Cornell University and a J.D. degree from Northeastern University School of Law. Justice Fabe clerked for Justice Edmond W. Burke of Alaska Supreme Court in 1976-77. She served as a staff attorney for the Alaska Public Defender Agency from 1977-81, and in 1981 she was appointed by the governor to be Chief Public Defender for Alaska. She was a member of the Board of Governors of the Alaska Bar Association in 1987-88. Justice Fabe was appointed to the superior court bench in Anchorage in 1988. She was Deputy Presiding Judge of the Third Judicial District from 1992-95, as well as a Training Judge for the Third Judicial District. She has co-chaired the Alaska Bar Association's Gender Equality Section, and currently chairs the Alaska Supreme Court's Civil Rules Committee, its Commission on Judicial Outreach, the Law Day Steering Committee, and the Alaska Teaching Justice Network. She has also served as Chairperson of the Alaska Supreme Court's committee on Criminal Pattern Jury Instructions and its Special Committee on Contempt of Court. Justice Fabe is married to Randall Simpson and they have a daughter, Mia.

Kyan Olanna Joins Perkins Coie

Perkins Coie welcomes Kyan Olanna as an associate in its national Labor & Employment practice. She practices in the firm's Anchorage office.

Ms. Olanna joins the firm from Norton Sound Health Corp., where she served as general counsel. Prior to that she worked with Sonosky, Chambers, Sachse, Miller & Munson and served as a law clerk with the Alaska Supreme Court. She joins a team of more than 50 attorneys nationwide who counsels clients across a range of private industries and public agencies on virtually every aspect of labor and employment law.

Ms. Olanna received her legal degree from Yale Law School and her undergraduate degree, cum laude, in Rural Development from the University of Alaska. She grew up in Shishmaref, Alaska and graduated from Nome-Beltz High School.

Tales from the Interior

Retirement

Continued from page 23

well with others.

Alas. So much to do… So little time to do it! Meanwhile, my impending old age looms ever onward. There is only one realistic option left. In the end, I will simply have to apply for a judgeship. Such positions regularly become available once the occupants vest for their coveted retirement. As an added extra, the immunity from accountability is rather nice.

That's it! I will be a judge. Once a judge, I can read what everybody says about me in the bar polls. After five years, I can then retire at an exorbitant salary with full state medical benefits. In fact, as I see it, being a judge is probably the best of all worlds. After all, as a judge, I can safely become cranky, opinionated, grow a ponytail, throw rubber gavels of various sizes at people and look forward to pursuing a life of exotic travel. David, you quit too early!

Semi-retirement brings new challenges

By Vivian Munson, Esq.

Eight years ago I married a pilot who was just retiring from Reeve Aleutian Airways. He was 62 at the time and I was 50.

I had never thought about retirement. I had no money to retire but more than that, I had no desire to stop working. My new husband had the plan and the money, and he had a house, paid for, in California. He wanted me to move with him.

My law practice was never going to support any retirement, but suddenly there it was, circling for a landing. I decided to try it, but only on the condition that we keep a place in Alaska. What if I didn't like California? I don't. What if I didn't like retirement? It's only okay.

The best decision we've made so far was to build a cabin in Willow. Neither of us had ever built anything, but we took the Carpenter's Union shed, 12'x24' from my husband's back yard and put it on a full-story foundation on the lot I owned in Willow. We hired local tradesmen, for cash, to finish the interior and build a wrap-around deck overlooking a tiny loon lake. Most of this was accomplished before the stock market crashed and the War in Iraq doubled the price of building materials. We couldn't build the cabin now.

We spend four to five months at the cabin every year, and the winter in suburban Sacramento. I had a very hard time adjusting to California. The weather is warm but the people are not. The traffic is intense. A few miles from our house two middle-aged men, driving with their families, went into a road rage. One shot and killed the other; two weeks later the shooter returned to the spot and shot himself. Other drivers honk and yell at me. When I am walking to the Post Office, young men in trucks rev their engines to scare me. 1 would like to kill them. This stuff has never happened to me in Alaska.

My husband likes California, especially the sunshine. He says, "36 million people can't be wrong."

Theoretically, retirement should be a time for trying new things. I am always up for that. 1 have written four books, become a Stephen Minister at the Presbyterian Church, sold fine jewelry at a department store one Christmas, and taught as a substitute in three public elementary schools and two charter schools for high school drop-outs and delinquents. I am presently volunteering with the Sacramento affiliate of the National Alliance for Mental Illness.

This rendition makes me sound dynamic, but I would characterize my experiences more as exercises in fiustration. Take the teaching. I dusted off an old master's degree, took a four-hour state exam to prove that I know enough to teach third graders, had my fingerprints taken by the FBI and the local sheriff, and waited to be called out to a classroom by a computer.

I soon discovered what no discipline combined with No Child Left Behind means. The children are run through reading, writing and arithmetic at a breakneck speed. Kindergartners are rushed by their aide from one table to the next, madly cutting and pasting, identifying letters and numbers and taking tests! Fourth-graders are expected to complete and correct five workbook pages in 45 minutes. It is not surprising that these children are restless and many of them are lost.

I had more fun as a phys. ed. teacher, seven elementary school classes in one day. As I raced to find the school before 9 a.m., I tried to remember some skill from my days in gym class. What could I actually teach? I hit on the bounce pass. I would have the kids count off, form lines facing each other and pass basketballs up and down the lines. It worked okay, even though the children did not know how to count off, and some of them simply broke away to do whatever they wanted to do. One boy called me Coach, which was great. A little girl stared up at me and asked, "How old are you?" (Older than her grandmother.) An Arab boy was thrilled to learn the bounce pass. He had obviously never handled a basketball before.

I left the school tired and happy. However, I took one of those bounce passes on the end of my middle finger. It stiffened up and hurt for months. I wondered if I should file a Report of Injury after one day on the job. Answer: No. The greater problem was that after running around with approximately 200 children for seven hours, I was unable to get out of bed for two days.

(Query: Which occupational group in California files the highest percentage of workers compensation claims? According to the Sacramento Bee: Workers compensation judges.)

Work with the high school drop-outs was much more sedentary, possibly because I was neither required nor permitted to teach anything.

The entire charter school program was designed around workbooks. Student credits and teacher bonuses depended upon completion of multiple choice tests graded by a computer. Actual discussion or, say, review and improvement of student work was unnecessary, a waste of time.

Upon hearing that one-half of the students in the program were juvenile offenders, I asked the master teacher if all teachers were covered by a liability policy. She said that she'd check on that, and I never received another call.

Selling jewelry did not entail any ethical dilemmas. If people want to pay the prices that jewelers charge, fine. My best moment was late on Christmas Eve when a very elderly gentleman approached the counter and asked to see the most expensive emerald that we had. I offered him a necklace, saying, "Oh, is this a Christmas gift?"

"No. Sixty years ago tonight, I asked my wife to marry me."

I lost it. Cried while I draped the necklace in the gift box.

I wanted to see if I could sell. I could. My sales were second only to the department manager's. But guess what I made for a month of work? $800! And on top of that, if I ever want to work for another month for $800, I won't be asked to because I couldn't close down fast enough at the end of each night.

How ahout the writing? As of this date I don't have a publisher or a literary agent for any of my four latest books, even though I've had two books published and I have letters of praise for each of them, including one from Sandra Day O'Connor and one from Pope John Paul II. (Honest to God. That's another article for another time.)

I think I will break through with the books eventually. I have to learn to pitch them. Living in California should help with that. There's a lot of pitching going on in Sacramento, not much catching.

My conclusion: it's not so easy to find another profession. The practice of law is a hassle, but once you know how to do it, it has certain attractions.

Here's some good news. If you decide to try a part-time practice, or work for somebody else on contract, E&O insurance is now available at reasonable rates. This was not the case three years ago. LeAnne Boldenow of Marsh USA remembers when this unavailability of insurance affected a dozen sole practitioners each month. I was one. Brady and Co. worked with the Alaska Director of Insurance to file for an admitted carrier to solve the problem. A Michigan company now offers coverage to Alaskan firms of all sizes, at affordable rates.

So I'll be available for contract work.

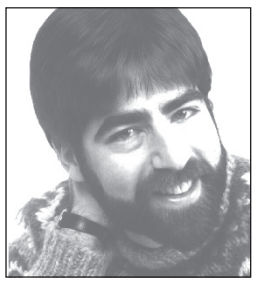
FAMILY LAW

Plenty of legal resources for the family law lawyer

By Steven Pradell

There was a time not long ago when constant trips to the law library, expensive subscriptions to case law research services and maintenance of an updated set of statutes and other in-house law library materials were required in order to effectively practice law. Although spending money on some of these materials and services may still be useful, a savvy 21st century Alaska family law lawyer now has access to numerous free internet resources to assist with legal research and other practice tools. With the click of a few buttons, materials are there for the taking, and it is easy to cut and paste the quote you need from the case you want without ever leaving your chair. This article explores some of these helpful tools. You may want to bookmark the following gems so that you can have them at your fingertips the next time you need to quickly locate a case, statute or civil rule. While many lawyers may already have some or all of these citations, it wasn't long ago when I received the "green" page of a carbon-copied pleading probably hand-typed by a practitioner's secretary who was still doing things as they always were done.

Anchorage attorney Jim Gottstein should be commended for setting up his website which contains the Alaska Legal Resource Center located at http://touchngo.com/lglcntr/index.htm. He has been posting all of the Alaska Supreme Court Opinions since 1991. These can be searched by subject, word searched, and chronologically located by year issued at http://touchngo.com/sp/sp.htm. Family law cases are separately indexed at http://touchngo.com/sp/s_family.htm, and there is a short blip about each case's main points following the name of the case, so the "find" feature can assist you with your research as you search through that particular page.



"You may want to bookmark these gems so that you can have them at your fingertips the next time you need to quickly locate a case, statute or civil rule."

Recently, Touch N' Go has added a link on his website to resources provided by Thomson West to provide all Alaska Supreme Court Opinions dated from 1960 and published in West's Pacific Reporter and West's Alaska Reporter through the most recent Advance Sheets, as well as unpublished opinions. Opinions can be searched by word, official citation, docket number, case name, judge name, counsel name, opinion type and decision date. This expands the free access case law research thus including cases issued between 1960 and 1991, which were previously missing from the Touch N' Go web site. Check it out at http://government.westlaw.com/akcases/.

Alaska statutes can be found at http://touchngo.com/lglcntr/akstats/statutes.htm with the Marital and Domestic Relations statutes located at http://touchngo.com/lglcntr/akstats/Statutes/Title25.htm.

The court rules are located at http://www.state.ak.us/courts/rules.htm. Alaska's Rules of Civil Procedure are found at http://www.state.ak.us/courts/civ.htm.

For those of you who are surprised when another lawyer cites a case issued only hours before, you can subscribe for no cost to the Alaska Appellate Slip Opinions service and receive weekly Appellate cases by going to listserv@appellate.courts.state.ak.us.

Save a trip to the courthouse. Many court forms are available on the internet. If you know the form identification number, you can download it by typing in http://www.state.ak.us/courts/forms/ [The court form ID] .pdf. For example, if you wanted to download a copy of a Child Support Guidelines Affidavit (DR-305), you would type in: http://www.state.ak.us/courts/forms/dr-305.pdf. Your computer will need to have a program in order to read the PDF version of the forms. Often these readers, such as Adobe, are available for free to download.

Many family law forms are also available at the Alaska Court System Family Law Self-Help Center. Take a look at http://www.state.ak.us/courts/shcforms.htm#prop and http://www.state.ak.us/courts/shcforms.htm#trial.

Anchorage, Fairbanks and Palmer cases can now be reviewed on line in real time using Court View, in the Alaska Trial Court System Cases page, http://www.courtrecords.alaska.gov/pa/pa.urd/pamw6500.display. Find a case by knowing a citation or check out the legal history of an opposing client by typing in a name. Once you find an interesting case, click your mouse on the case number, and then click on "dockets" to get a virtual pleadings index of all of the events which occurred in the case.

So now I've got you started. The available resources are endless. They will save you time, and your clients will save money. Since lawyers are expected today to be up to date, provide the most bang for the buck, and to give good customer service, your clients will be impressed when you quickly locate the relevant case you just referred to with the click of your mouse, print it out, and give it to the client to take home from your office at the conclusion of your consultation. Happy surfing!

 Steve's book, The Alaska Family Law Handbook, (1998) is available for family law attorneys to assist their clients in understanding domestic law issues. Steve's website, containing additional free legal information, is located at www.alaskanlawyers.com.

Mark Your Calendars! Upcoming Live Alaska Bar CLEs!

Date	Time	Title	Location
June 14	8:30 a.m. – 12:15 p.m.	Tribal Jurisdiction Issues in Alaska Native Law CLE #2006-011 3.5 General CLE Credits	Anchorage Hotel Captain Cook
July 20	11:30 a.m. – 1:30 p.m.	Looking Back at the Rehnquist Court CLE#2006-023 CLE Credits TBA	Anchorage Hotel Captain Cook
July 20	1:30-4:45 p.m.	Oral and Written Federal Appellate Advocacy Practice CLE #2006-019 3.0 general CLE Credits	Anchorage Hotel Captain Cook
September Date TBA	9 a.m. – 12:30 p.m.	Using Acrobat in Litigation CLE#2006-025 3.25 general CLE Credits	Anchorage Hotel Captain Cook
September 20	8:30 a.m. – 5:15 p.m.	Nonprofits Law Update CLE #2006-008 7.0 general CLE credits	Anchorage Hotel Captain Cook
September 26	Half-day	Constitutional Law Update CLE #2006-006 CLE Credits TBA	Anchorage Hotel Captain Cook
November 8	9 a.m.-12:30 p.m.	Alaska's Special Estate Planning Techniques Every Lawyer Should Be Aware Of CLE #2006-018 3.25 general CLE credits	Anchorage Hotel Captain Cook
November 14	9 a.m. – 12:30 p.m.	Lawyer Depression & Substance Abuse: The Way Out CLE #2006-026 3.25 general CLE Credits	Anchorage Hotel Captain Cook
December 5 TENTATIVE	Half-day	HIPAA Update CLE #2006-015 CLE Credits TBA	Anchorage Hotel Captain Cook
December 6 TENTATIVE (NV)	Half-day	HIPAA Update CLE #2006-015 CLE Credits TBA	**Fairbanks Westmark Fairbanks Hotel**
December 13	8:30 – 10:30 a.m.	Ethics at the 11th Hour CLE #2006-010 2.0 Ethics Credits	Anchorage Hotel Captain Cook

About the Bar's office space

The Alaska Bar Association is located in office space on the top floor of the state office building, the Atwood Building. Some Bar members are surprised to learn that although the space looks like a million bucks, it costs the Bar peanuts. The office was designed in 1989 for the West Coast law firm of Heller Ehrman, which occupied the space for over 12 years. Many Bar Association members have taken advantage of the office's large conference room, its smaller library conference room, and its inviting lobby when they visit the offices for section meetings, CLE courses, bar examinations, hearings, or the other numerous events held here. Other meeting rooms and facilities are available for the Bar's use throughout the Atwood Building

When we moved into the space it cost only $1.07 per square foot, substantially less than the then-going rate of $2.00+ per square foot for similar space in downtown Anchorage and less than the $1.90 per square foot we were paying at Peterson Towers when our lease ran out. So during our first year we saved $60,000 in rent at the new space, and even though our rent increases gradually each year, over the term of our lease we will save $506,000 over what we would have paid at our old location.

This was possible because, although the Bar is not a state agency, it is a state instrumentality (created by statute) so we are eligible to occupy space in state facilities. The Atwood Building managers did not want to tear up the Heller Ehrman office, learned the Bar was looking for new space, and thought we would fit "as is." (So, one of the conditions of moving in was that we not make any substantial changes to the space we "inherited" from Heller Ehrman.)

The Board of Governors agreed. We invite you to enjoy these excellent facilities next time you come to the Bar office for business or to participate in a Bar function.

UA program celebrates Alaska Constitution's 50th Anniversary

Re-enacting the Constitutional Convention

On March 10, 2006, over 500 high school students from across Anchorage gathered in the Wendy Williamson auditorium on the University of Alaska Anchorage campus to commemorate the 50th Anniversary of Alaska's Constitutional Convention.
The Visioning Alaska program was a joint effort of the University of Alaska's Creating Alaska project, UAA, and the Anchorage School District, with support from the Alaska Teaching Justice Network and a grant from BP.
As part of the program, the West High Impromptu Players, directed by teacher Pamela Orme, presented a re-enactment of the voting-age debate that took place at the convention. West High student Roz Worcester, L, portrays delegate Mildred Herman, and fellow student Maia Anderson, R, portrays Ada Wein during the spirited debate. Over 20 West High students participated in the skit, along with original delegate Victor Fischer, who proposed the actual voting age amendment under debate.

Honoring the original delegates

Members of the West High Impromptu players and their teacher Pamela Orme (standing second from left) pose with three of the original participants in Alaska's Constitutional Convention during the March 10th commemorative event. Seated L-R: Victor Fischer, Delegate from Anchorage; Katie Hurley, Convention Clerk; and Jack Coghill, Delegate from Nenana.

Cross Purposes

Under my education framed and prominent,
At the appointment made and promptly kept,
I talk happily on,
smiling inwardly at my inside jokes,
raising my eyebrow in presumed understanding,
satisfied and grateful to increase your knowledge,
to sharpen your perception.

Across the barrier of my workspace,
Selectively placed within the premises' confines,
Perched and uncomfortable on a chair that is smaller,
seems tilted, you nod, venture a tentative question,
then reach for your pen and make a note on rumbled paper,
asking, "What was that term you used?"
And I spell it for you.

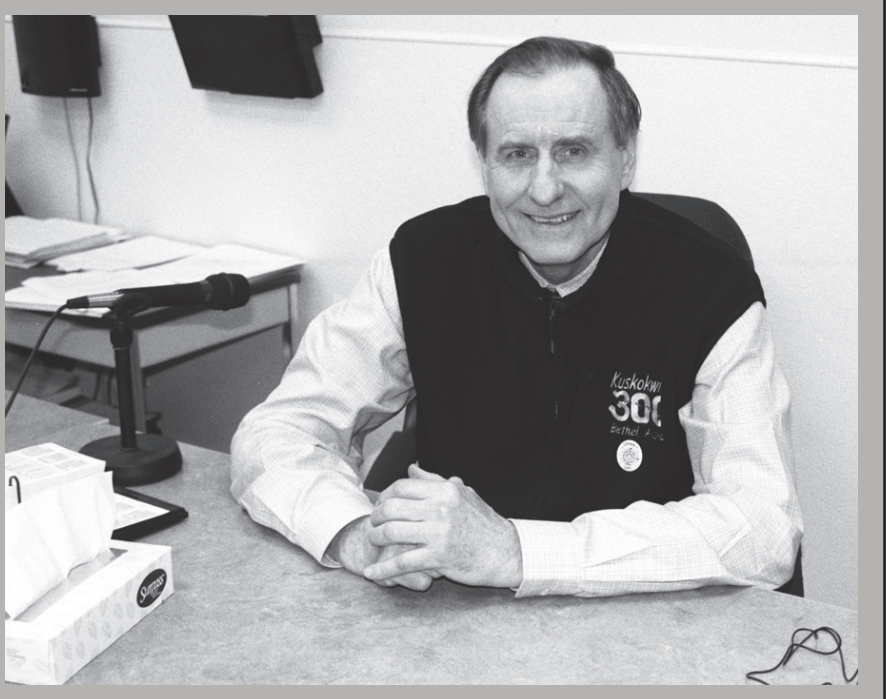
Glancing away and out the window,
the bright noonday sun blinds me for an instant,
and when I turn back to you,
Your face is blotted out by a white donut hole.
The peripheral walls enclose and oppress.
You are not speaking.

I see your hands reaching for your jacket,
your knees shifting across the chair;
your feet are impatient and my voice begins to falter.
I press on, certain of my certainty,
assured by my assurances,
feeling moist under my arms.

And at this point it is "thank you" and "all right"
as you tidy your lap and purse your lips.
Suddenly you are gone,
An exit swirling with the contrails of my dissertation.

Alone in my solo fiefdom,
I stand and see my vague reflection,
in the glassed diploma frames.
On the floor, at the chair where you sat,
are the small stones that dropped from your shoes.

Curda retires from the bench



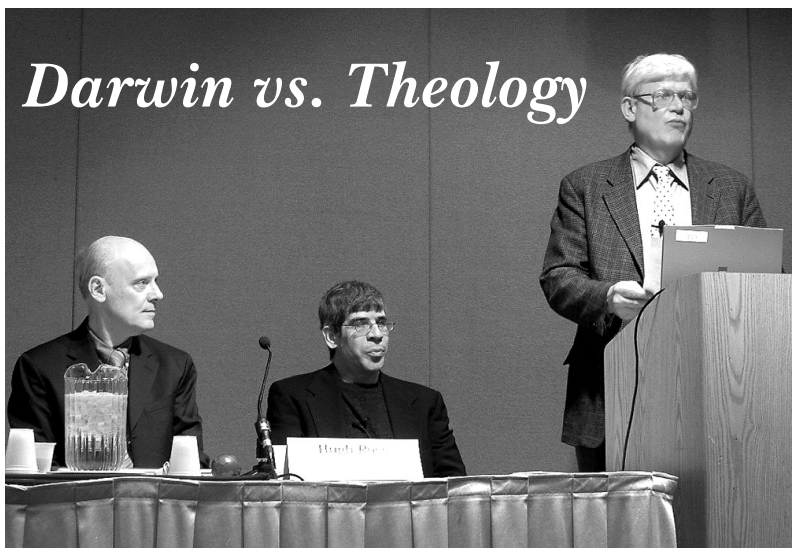
Judge Dale Curda.

Judge Dale Curda retired March 1, 2006, from the superior court in Bethel after 16 years on the bench. Curda and his wife Linda moved to Bethel originally in 1972, where he served a reading, math and resource specialist in the schools and she served as a public health nurse. In 1975, they moved back east, where he attended law school at Antioch University in Washington, D.C., and she pursued a Masters in Public Health at Johns Hopkins University. Alaska remained "on the horizon," and in 1980 they returned to Bethel, where Curda served as magistrate for three years. From 1983-86, he worked for the Angstman law office before returning to the public sector in 1987 at the Bethel District Attorney's office. He was working as an Assistant District Attorney in Bethel when he was appointed to the Superior Court bench by Governor Steve Cowper in December 1989. For the following eleven years, he served as the only superior court judge in the Yukon-Kuskokwim Delta, until a new judgeship was created and Judge Leonard Devaney joined the bench in 2002. Throughout his years in Bethel, Judge Curda says, he found "the work fascinating, and the people the best in the world. I couldn't ask for a better experience." Although he hopes to never stop working, after 16 years of keeping a strict calendar Curda plans to pursue options that allow a flexible schedule. Today, he looks forward to spending more time with family in Anchorage and to traveling with Linda, who is now a leading international community health aide trainer. Both also plan to keep their long-term ties to Bethel, where they remain dedicated volunteers for the annual Camai Dance Festival.

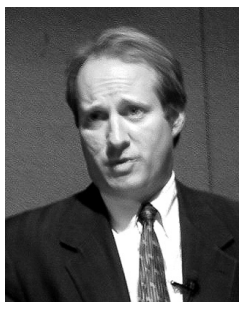
CLEs set convention attendance record

The 2006 annual convention in Anchorage drew the highest number of CLE participants in convention history, with 556 people registered for one or more convention events.

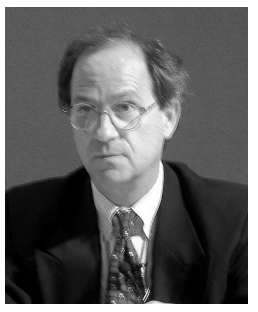
The highest registration for a CLE in 2006 was a recap and prognostication of U.S. Supreme Court Opinions; 394 people attended this popular session.



L to R: Dr. Hugh Ross, Dr. Jerry Coyne, faculty, and Michael Carey, moderator, at the Science, Belief and the Law program.



Kelly Shackelford



Jeremy Gunn ACLU

Two scientists and two lawyers squared off over Darwin/evolution and Intelligent Design/creationism during Friday's convention sessions. Physicist Dr. Jerry Coyne reported on the "narrowing" of possibilities that an intelligent force may be at work in the universe, while biologist Dr. Hugh Ross considered it preposterous to argue with the natural evolution of the species. Dr. Jeremy Gunn, of the ACLU, and Kelly Shackelford, Liberty Legal Institute, briefed the crowd on the courts' findings on keeping God, creationism, or, lately, Intelligent Design out of--or in--the classroom. Was the debate settled in Alaska? Probably not. CLE materials included a Pew Research Center survey of surveys over the decades that show roughly half of Americans believe in one theory or the other, while more than two-thirds believe kids should be exposed to both.

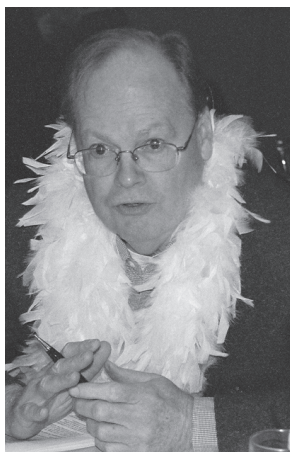
Joan Feldman, Navigant Consulting, Seattle, electronic discovery expert, fields questions from attendees

Erwin Chemerinsky and Laurie Levenson field questions at the US Supreme Court Update CLE.

Fairbanks Superior Court Judge Randy Olsen ponders a tough question.

Chief Justice Alex Bryner is overwhelmed by the brilliance of the teams.

The Raven, Judge Larry Weeks referees the teams.



Bob Linton tries to persuade his team to take him seriously.

Justice Dana Fabe rules from the Bench during Evidence Cranium.

Court of Appeals Judge David Stewart prepares to rule on an evidence question.

Evidence Cranium brings out the best & worst at convention

Presented as a joint Bench - Bar CLE, the annual Evidence Cranium Tournament draws out the best brains and worst costumes at the convention.

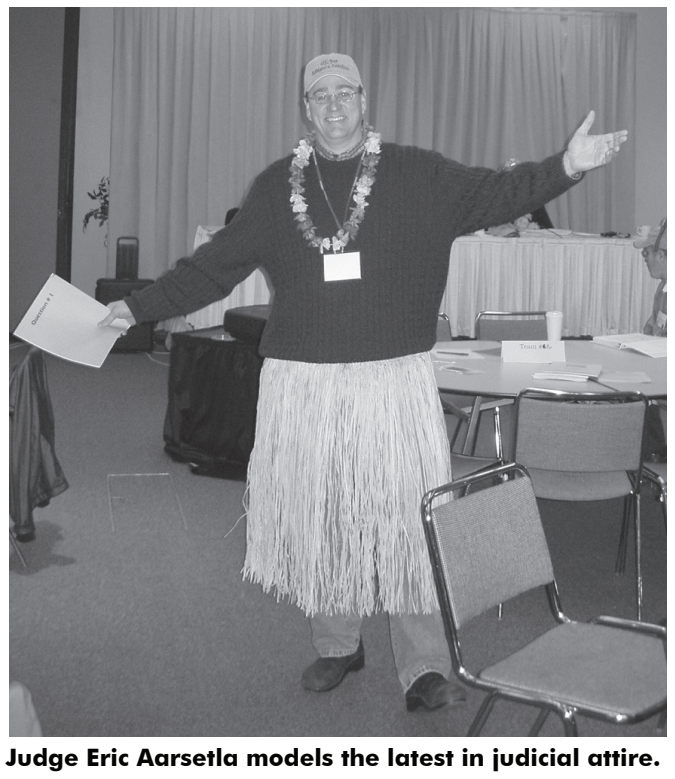
Competing teams listen to an evidence scenario, and attempt to guess whether an objection was sustained or upheld. More than 170 people attended this year's spirited competition—including contestants and volunteers.

All this fun, for 3 CLE credits!

Team members Joan Wilson, Judge Winston Burbank (Fairbanks District Court), and Judge Dennis Cummings (Bethel District Court) work on their team spirit points.

And the winners are: L to R: Bart Rozell, Leonard Devaney, Judge Natalie Finn, and John Kaufman. Justice Alex Bryner joins the photo.

Bethel Law Clerk Dawson Williams, L, offers his team's answer to Anchorage Superior Court Judge Mark Rindner, C, with teammate Jody Davis, R, of the Fairbanks office of Alaska Legal Services Corporation.



Judge Eric Aarsetla models the latest in judicial attire.

Judge Morgan Christen referees.

A SAMPLE QUESTION FROM THE EVIDENCE CRANIUM COMPETITION

Question: Opinion & Privilege

Plaintiff sues for personal injuries that were caused when a staircase collapsed. She sues the architect's firm, the contractor, and the homeowner. The architect turns out to be deceased, but his wife (who was also a partner in the architectural firm) also worked on the project, and she remains living. She is called to testify. Counsel for the deceased architect's estate objects to her testifying, citing spousal immunity.

How do you rule?

Answer: Overrule the objection. Evidence Rule 505(a)(2)(F) allows the wife to be questioned. The Commentary to Rule 505 states, "[I]n business cases under subdivision (a)(2)(F), the need for third parties to have information outweighs the spouse's need for protection, especially about non-personal, commercial matters."

In memory of Barbara, Larry and Rick: For golden friends I had

By Bev Cutler
Part I —

Prologue

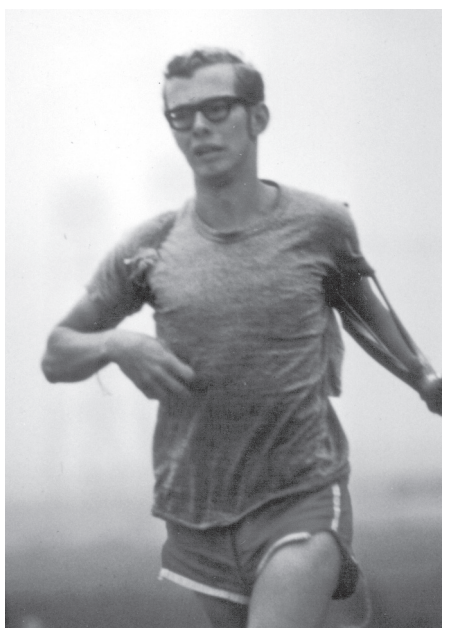
Twenty years ago, the following reminiscence was published in the *Bar Rag* as a memorial to three former assistant Public Defenders who died at unrelated times in the 1980's. All three were young, but not unheralded.

Bill Bryson's recent passing caused many Alaska lawyers to revisit both the times described in the article, as well as the subject of criminal defense work. While the article obliquely mentions Bill, the scant references therein belie the extent to which Bill inspired at least two decades of public defenders coming through the ranks after him.

His passing has caused me to re-focus on those years that were the beginning of my now long life in Alaska, and to reminisce on my fellow young lawyers from those days, who were so wonderfully deep-seeing, hard-working, fun-loving, serious-minded, never-to-be-forgotten idols to those of us lucky enough to be here still, and who continue to inspire us in the variety of legal fields we have chosen.

To all of them I dedicate this republishing. In honor of Bill, I add three more tidbits of gossip. First, Bill really wasn't that much of a gourmet, at least not originally. When I first came to the Agency, within an hour of my arrival, he came by to see who the new "chick" was in the third office down from his, and found me cleaning out the drawers to jettison stuff left by the previous attorney, Ame Ivanov. I was pulling out a can of Planter's peanuts when he came in. I pitched it expertly into the trashcan, basketball style, not yet knowing Bill's love for the sport. He immediately pulled the can out of the trashcan, popped off the lid (it was open already), and started eating the peanuts, even though the can had been open so long they were all stuck to the bottom. His words to me were, "They can't be that old. She didn't last here that long!"

Then I remember a day shortly thereafter when the office was empty at 3:00 in the afternoon. I wandered out to the secretaries' area, to drop off a motion, and noticing our loneliness, inquired. Only Barbara Miracle, Ann Arnce, Joann Denson and I remained, Ann and Joann being our faithful and incredibly productive secretaries. I was told that they (meaning all the guys, led by Bill) had gone to the airport to pick up some "girl" who had interned at the office the summer before and was making a return. We proceeded to discuss how lame men were to presume that six or seven of them were needed to pick up one woman at the airport. My jealousy was short-lived, however, as later that day I had the privilege of meeting Nancy Shaw (the arrivee) and we became lifelong friends.



Bill Bryson at his parents' house, 1982 and running track at Stanford.

My final bit of historical trivia should not be read by the easily offended—but then the hallmark of a successful public defender is a thick skin. Nancy Shaw, Barbara Miracle, and I soon were followed at the agency by a series of ambitious attorneys of the female rank. At one point, unprecedented at the time, all five attorneys comprising the misdemeanor section (in Anchorage) were female: Elaine Andrews, Dana Fabe, Deborah Paquette, Christine Schleuss, and Deborah Smith. Bill blithely nicknamed them "The Ovary Section." The name stuck.

•

I still get a lump in my throat when the jury enters the courtroom to return a verdict.

As a public defender, I dreaded those minutes. The D.A. stood there anticipating the kill. The judge secretly gloated. Even the in-court clerk looked smug as she took the paper from the foreman. Everyone in the courtroom was against us. And if by chance it were a Not Guilty verdict, suddenly I became the new criminal.

Time has changed my perception of judges and clerks, for obvious reasons. But, public defenders have not changed. They are as tough as ever, and still as paranoid – though perhaps with good cause. Public defending is one of the most thankless tasks in Alaska. It also is one of the most inspired.

Recently a Palmer P.D. got a client out on bail Friday, only to find him back in for murder on Saturday. It reminded me of my first year at the agency when the identical thing happened to me. Twice. I was tempted to comfort the P.D. by noting that someone else would have gotten the man out on bail if he had not. But the P.S. didn't want solace. As far as he was concerned, his client was only accused of murder.

This is the tradition of public defending as it has been, and as it should be – no apologies, no crying, and no guilty clients. All new P.D.'s learn these precepts from their mentors at the agency. They also learn that victory is relative, that wit is survival, and that Cicero knew what he was talking about when he advised "When you have no basis for an argument, abuse the plaintiff."

I was thus encouraged over a decade ago by Larry Kulik, by Rick Lindsley, and especially by Barbara Miracle, who was the only woman in the agency when I signed on in the spring of 1975.

Alaska journey begins

I did not come to Alaska to work for the P.D. agency, but events seemed to push me in that direction from the moment I arrived.

The previous year I drove to Alaska on a whim – and in defiance of parental warnings that neither the trip nor the destination were appropriate for a lone female. Barbara Miracle came to Alaska a few years earlier, under similar circumstances. We both were from Washington D.C., from "establishment" families, and in fact had played basketball opposite each other at rival girls' schools. (I realize that given our height, that sounds improbable!)

I had been attracted to Alaska by an ad on a bulletin board. Bob Hicks, then director of the Judicial Council, needed someone to do the grunt work on an LEAA-funded study of bail and sentencing for the court system. A law school soul mate urged me on, promising to come to Alaska if he ever graduated. It was spring and I hadn't decided what to do when school ended. I took the job, sight unseen. It was a perfect match.

Anchorage was a surprise, however, I had never seen so many used car lots. And the cars in them looked so American. I had anticipated a foreign place, or at least a city with more intrigue.

I followed directions to a green duplex on 12th between O and P. There I found Bob Hicks moving a washing machine, and Brian Shortell giving orders as to where it should go. Bob was in the process of moving outward and upward to Turnagain.

The green apartments were to become a prominent feature of those first years in Anchorage. Scores of law clerk and public defender parties were held there. They were inhabited at various interludes by Bob, Brian Shortell, Barbara Miracle, Margie Mock, and Chris Schleuss. My early familiarity with the area proved invaluable – after any party I always managed to find my way home.

Law review classrooms

Barbara was already an Alaska legend when I arrived, though all she had done officially was be a law clerk for Justice Connor and then depart for Europe. We met when I took the Bar Review that winter with Steve Hart, who was Barbara's other self. Our bar review course was a tale in itself.

The class was small, only 18 people. Among the regulars in attendance were Mary Hughes and Dave Walsh. Among the irregulars were Tim Stearns and George Peck. Also in the class was Mark Weaver, the law school soul mate who finally graduated.

The bar review people didn't use bright young, inspiring lawyers for teachers then. They used judges.

The night we were to learn about civil procedure, the judge arrived promptly at 7:00 p.m., armed with the blue book. His teaching method was to read the rules, out loud. He started with Rule 1. He stopped after each reading for a proper discussion of the rule. By 10 minutes to eight, it was apparent that we would mot reach Rule 30 by midnight.

Steve passed us a note, suggesting that we leave right away to catch the beginning of *Five Easy Pieces* at the Polar Twins. He figured we could watch the whole movie and still get back in time, if we felt like it, for the last 60 or 70 rules. The record should reflect that we left but did not return that evening. Some people claim that my knowledge of civil procedures still has a few gaps in it.

At the P.D. agency

My first contact with the Public Defender Agency came when I decided to do some token interviews for the LEAAA study. People had hinted that I could travel and see the state that way. Bob suggested that colorful interviews might be had with Justin Ripley, then an assistant D.A., and Larry Kulik, then a P.D. Unfortunately all I got to see when I interviewed with them was Fourth Avenue.

The P.D. office was a bit intimidating. It had a side alley entrance above the Fur Traders – a known target for burglars. I walked up an eerie staircase to a vacant receptionist desk. I sat down on a chair that apparently had seen a lot of use. I did not hear any voices.

It turned out that the office only appeared abandoned. The fort was manned by Larry, Phil Weidner, Irwin Ravin (of R*avin v. State*) and Bill Bryson. Due to a recent staff exodus, they were attempting to cover 12 courtrooms with only 4 lawyers. Alex Bryner, Bruce Bookman and Brian Shortell recently had left to form Bookman, Bryner & Shortell. Somewhat earlier Collin Middleton, Mike Rubinstein and Bob Wagstaff had gone off to form Wagstaff, Middleton & Rubinstein. For history buffs, the original Public Defender Agency, circa 1970, consisted of Vic Carlson, Jim Gilmore, Collin Middleton, and Frank Kernana.

I did eventually get to talk to Larry. His comments on the local judges' bail and sentencing practices were thought-provoking, but not printable.

My interview with Larry was followed by my trip to Juneau, where I was blessed to receive an audience with Dan Hickey. Dan at the time was a mere D.A., with only one subordinate, Ivan Lawner. When I asked Dan about the sentencing process in Juneau, he swiveled back in his chair, puffed out his chest, pointed at himself, and said "You wanna know who makes the sentencing decisions down here? I make the sentencing decisions down here!" It may have been then that I decided to become a public defender.

Herb Soll, magnet

Not long afterward, I ran into Herb Soll. Some people will not believe

Continued on page 31

In memory of Barbara, Larry and Rick: For golden friends I had

Continued from page 30

this, but Herb was in the law library. He was not completely out of character however – he did have on his rose colored glasses.

I was hard at work, writing a report on sentencing that to my knowledge no one except Barry Stern has ever read.

Some of you may have never heard of Herb, at least not until the recent rumor that he might return to the state to become chief prosecutor. Herb was the second person to head the public defender agency. Vic Carlson was the first. Herb later became a judge in the Mariana Islands.

Herb was magnetic. So magnetic that right there in the library he talked me into accepting a position in the Kenai P.D. office, then a one-lawyer hangout, when I had neither been to Kenai nor been in court for so much as an arraignment. Fortunately, an intern in the Anchorage office, Bob Coan, wanted the position in Kenai and passed the bar just in time to get me a reprieve.

Arrival at the P.D.'s

When I arrived at the agency for my first day of work a few months later, the irreverent remarks of Larry Kulik were still in my mind. Larry had quit the agency but was knocking around the office, as most former public defenders do.

The place was not lacking for character. Larry was bragging about how he had been arrested in Federal Court the day before for making an off-color comment about something Judge Plummer had done. Everyone agreed he was simply in the wrong place – the hallway of the Federal Courthouse – next to the wrong person – the G.S.A. guard.

The agency's offices had just moved to the state court building, to the area that now houses Probate. Bill Bryson had snapped up the large office with the plush rug toward the back. It was the only one that would accommodate his classy furniture. The side rooms were occupied by Rick Lindsley, Frank Koziol, Olof Hellen, and Ben Esch. Ron Drathman took up at least two offices toward the front. I could tell Barbara's den by all the shoes under the desk.

The directory board listed Phil Weidner as the Appeals Division, but I was not introduced to anyone by that name. Later someone identified him for me as the guy bobbling around on a cane. I had thought he was a client.

Fishing trip, Fall 1980. Back: Kerry Backer, Martz Beckwith, Chris Schleuss, Mark Rindner. Front: Barbara Miracle and Steve Hart.

Denizens of the defender agency

Rick Lindsley took me under his wing figuratively of course. Otherwise, I would have been crushed. Rick had been a linebacker at Stanford. His stature bespoke this. I think it gave confidence to his clients and may have intimidated the opposition.

Rick was a person whose success with both jurors and clients derived from his ability to hide his intelligence. He was warm yet unyielding – practical but philosophical – and virtuous yet shrewd.

Rick was the instigator of the "Herb who?" jokes. He and Olaf were recognized as the *de facto* heads of the office, because Herb was always off in Brazil or Bali, or some other exotic place. Sometimes a lawyer would inquire as to where Herb was, or as to what advice Herb would give if there. With a perfectly straight face, Rick would answer, "Herb who?" He did not mean to malign Herb, but Rick had worked with Vic, and Vic had set a precedent for head P.D.'s being down in the trenches like everyone else. Herb's strengths were in other areas, such as finessing the politicians in Juneau to get us money.

First trials

Misdemeanor attorneys like myself did not necessarily get offices (I shared with Bruce Abramson) but we did get files. In fact, Barbara generously gave me all hers when I arrived because she was moving into felonies. As for training, Herb actually sat through a portion of my first trial with me. A portion.

Unfortunately he was not present at the outset when I most needed help in selecting the jury, having never seen that done before. An intern came to my rescue – Walter Share. Together we double-teamed Gene Cyrus until I found my sea legs.

Actually I had already had one trial, on my second day of work, but it had been a non-jury affair. It was before Judge Brewer. It followed on the heels of what was euphemistically called an in-chambers conference. The mad-dog prosecuting attorney, Mike Keenan, had insisted that my client plead to shoplifting a pair of sunglasses and a watchband from Penney's, total value $6, in exchange for 15 days in jail.

It might as well have been life. I was new and bold. My client had been unable to make bail because he was a Native from the Bush. I told Keenan we'd go to trial the next afternoon if he'd let the defendant out on bail overnight to help me prepare.

Early the next day, Barbara urged me to send an investigator down to the Army-Navy store to see if it sold watchbands identical to the one in evidence. The investigator was to determine whether a customer could walk off with such a purchase in his shirt pocket, without a receipt. This was not merely fact finding on Barbara's part, but bore some resemblance to the scenario the client had described in justifying his possession of the watchband.

I soon regretted the bail negotiation. My client had gone out and had a big evening. He fell asleep in my office promptly upon arrival. I wondered if it was ethical to spend your own money on a sandwich for a client. What the heck – I had the impression you could pull out all the stops for a trial. Restored, he made it up to the court room. He was awake when the witness from the Army-Navy store testified. I then asked for a recess, to take my client out in the hallway to rehearse his testimony. I explained to him that I would ask where he got the watchband. He interrupted, volunteering that is came from "N.C." (now Nordstrom.) I wanted to scream. "Don't you see I just had this fellow come down here to testify because you said…!" He must have seen the look on my face. "Naw" he corrected, "I don't like N.C. It came from Army-Navy store!"

We went back in. In retrospect, it doesn't' seem likely that Judge Brewer really listened to the testimony. However, he found reasonable doubt as the watchband, though not as to the sunglasses, and sentenced my client to only 10 days in jail. Barbara couldn't believe it.

A new system

There was that year, as always, a new calendaring system being implemented by the court. The felony attorneys were divided into teams to accommodate it. There was the Occhipinti team, the Moody team, and what Barbara always referred to as Pete's team – Kalamarides.

The lawyers on the Occipinti team vented their spleen by calling him "Ockee-pintee." This they had learned from Larry. I saw that his antagonism toward judges and others had a simple explanation. Larry was extremely gifted intellectually but got frustrated, to put it mildly, when dealing with those of more ordinary ability.

Occipinti once threatened to come down off the bench and duke it out with Larry. The incident offered during a jury selection. Larry as usual had been goading the judge with mistrial motions. Occipinti had just finished explaining why the most recent motion had been denied. Larry remarked, "If you want to call that rationale process reasoning--." Occipinti exploded. "Mr. Kulik, I have a mind to come down off the bench and get you!" There was a pause. "I agree now that you have prejudiced me in this case….I'm going to grant your motion for mistrial." Larry looked deliberately vague. "What motion?" he inquired. "I'm perfectly happy with this jury!" It would have been an interesting match. "They were both over six feet, and Larry was heavy set for a marathoner.

The self-appointed head of the Moody team was Ron Drathman. He and Moody went round the block a few times too, but in friendlier fashion.

Moody once ordered Ron and another lawyer to come backstage because Moody was disgruntled with the way they were dressed. Ron's shirt tails were all stuck out, and the other fellow had no tie. Moody was generously hunting through his office for an extra tie when Ron noticed that the judge himself was padding around in bedroom slippers. "Why we're in a fine fix!" quipped Ron. We've got a P.D. with no coat, a lawyer with no tie, and a judge with no shoes!" Moody just grinned. He could ignore a good point out of court just as well as in!

How to continue, and other tricks

The first thing Barbara taught me to do was how to move for a continuance. The second was how to get it non-opped. This was bedrock strategy. As Phil Weidner pointed out, the State could hardly convict your client if you could keep him out of the courtroom.

Barbara was a master at continuances. I learned the meaning of the term state-of-the-art from her motions. If a defendant's key witness had not been subpoenaed, it was because our funds had been cut. If an investigator had not yet interviewed the victims, it was because they were recuperating in Hawaii the one day he called. If the client were a woman, Barbara had a long list of unmentionable female problems that could be waved in the judge's face. No wonder the D.A.s dreaded getting a case with Barbara on the other side.

It was a snap to get a motion non-opposed back then. We waited for the assigned D.A. to leave the office for a few minutes, then gave the papers to Alice, our secretary, to take up the back stairs to Jim Gould. Our theory was that he would sign anything that Alice brought in because her presence distracted him completely. The one drawback to this procedure was that Alice often stayed up there a couple of hours. We were forgiving. We all liked Jim Gould tremendously, even if he was a D.A.

Rick's specialty was demonstrative evidence. I believe Rick is the only defense attorney in the world to get an onion into evidence in a first degree murder trial.

His female client was charged with stabbing an ex-lover. She claimed that he stormed through the door while she was peeling the onion. (As she shut the door in his face, the knife just happened to go through his checkbook and into his lung.) The key question was who opened the door first. Rick argued that no one could open the door with an onion in one hand and a large knife in the other. Naturally P.D. investigator Bob Kintzele selected a rather large onion for this purpose. The only difficulty was getting the exhibit sticker to stay on – the skin kept peeling off.

Ron Drathman showed us how to get our clients properly dressed for trial. He once urged an elderly black defendant charged with murder to wear his jail clothes to court on the morning of jury selection. Judge Kalamaridies came unglued. "You can't try a man for first degree murder dressed like that!" He sent the jury back downstairs and ordered everyone at the defense table off to the nearest men's store which happened to be Stallone's.

Ron directed the defendant to the $100 suits, but the defendant kept reaching for the $400 imports. When they got back to court, the jury had

Continued on page 32

In memory of Barbara, Larry and Rick: For golden friends I had

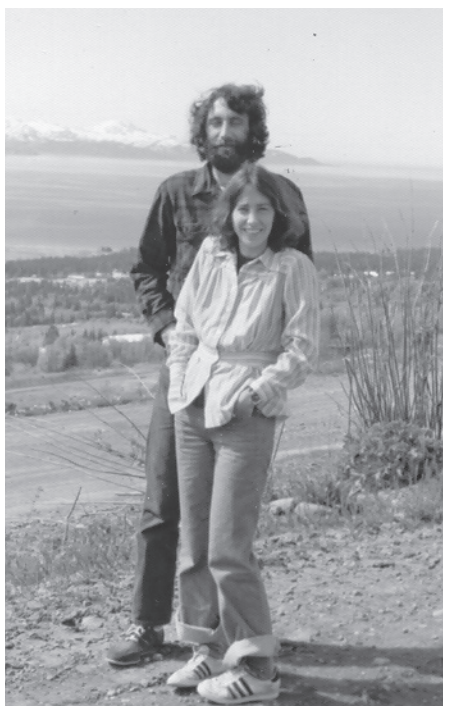
Continued from page 31

to be re-instructed as to who was the defense attorney, and who was the defendant.

It was Larry who taught us how not to spring a trap on the opposition. Once Larry was so tickled with a ploy he dreamed up mid-trial that he started confiding it to everyone in the hallway who would listen. Unfortunately, one person willing to lend an ear was the D.A.'s mother.

Another time, Larry was chomping at the bit to expose prosecutor Bill Mackey, known to carry a gun. He was going to do it while the jury was present. In a case where a defendant recently acquitted of multiple murders was being tried for transportation of dynamite. He requested to approach the bench, with the idea of asking for a censure in a loud whisper, while pulling back Mackey's coat tail to expose the weapon. Upon arriving at the bench, Larry noticed a .45 of the judge's laying inches away, ready for action if needed. Larry sheepishly mumbled that he had nothing after all, and went slinking back to his table.

We always needed tips on what to do when we were unprepared. Rick waxed inventive here too. In one Kenai misdemeanor, where he hadn't time to read the file, he discovered on the morning of the trial that his client had a hearing problem. Rick decided to holler his way through the jury selection. This provoked Magistrate Jess Nicholas, who demanded an explanation. Rick calmly noted that his client could not hear unless he yelled. Nicholas thereupon dismissed the case, declaring that he was not going to tolerate a "yelling" trial.



Larry Kulik and Sue Ellen Tatter

Other P.D. antics

We never lacked for excitement. At one trial of Rick's, the defendant escaped from the courthouse in the middle of the night. It happened after an 11 p.m. verdict, when Judge Kalamardies remanded the poor chap to custody and then decided it was time to go home. The judge left Rick and P.D. investigator Fred Biere in charge until a police officer could get there.

The defendant decided that he had to take a whiz. Fred decided he had to take a whiz too. Together, they went to a place in the courthouse where men do this.

There were two stalls. The defendant finished up quickly and walked out. Fred could not do much about it at the time – he had to "finish up" too. By the time Fred could get to the hallway, the defendant was nowhere to be found.

Some months later, the client turned himself in. He accounted for his absence on record by noting that he had not wanted to miss the intervening fishing season.

It was Rick and Bill Bryson who decided that P.D.'s ought to have some time out too. Together they started the first rotation, on/six-months off. Rick and Liz had an apple farm in California that was their secret retirement haven. Eventually Rick decided the Juneau office was closer for this purpose, and became the head P.D. there. Bryson, of course, just traveled.

While Rick was on his first leave, Phil left to defend George Lustig on a federal drug charge. I think Phil was momentarily tired of dreaming up appellate arguments. Perhaps it was because the State had begun to tape record all drug buys and none of us could think of a way to attack them. (The Glass rationale had not yet been thought of. Most of us would have been too embarrassed to make that argument even if we had thought of it, for fear of getting laughed out of the courtroom! Phil now claims that he raised it several times, and that it was one of the frivolous motions they used to yell at him for.)

Barbara took over appeals from Phil when he departed. Once again, I inherited her files. I watched her finish her last trial, to see if I could get the flavor of her caseload and a handle on her style. Steve came with me to watch.

The charge was rape. It was 6:00 at night in Courtroom G, before Judge Singleton. As we walked in, the judge and lawyers were arguing over the last of the jury instructions.

Barbara was making an objection, probably her 300th of the trial. Singleton asked for grounds. Barbara flopped down in a huff, indignant that any judge would ask for grounds, especially at that hour. "I don't know!" she retorted. "I just object!" Singleton promptly ruled in her favor.

It was a good thing that Singleton couldn't read her thoughts, and that the courtrooms then did not have the sensitive mikes that they do now. A transcript probably would have contained a few four-letter words. Barbara was diminutive in size, but could make real men blush when the going got tough.

New entrant

My friend Mark ended up working at the agency too, having been in the right place at the right time when Ben Esch decided to move on. Mark greatly admired Barbara's audacity. From her he got the gumption to refuse to do misdemeanors, after only three weeks on the job. He couldn't seem to master the art of interviewing clients whose files contained neither a complaint nor a police report. He jumped right into felonies, with Barbara for guidance.

Barbara and Mark both subscribed to the theory that confidence came from having a complete case file, and spreading it all over your office, and the breakfast table. Never mind that the omnibus hearing might start in ten minutes. Once I conceded to Mark that Barbara was living proof that clutter was a sign of genius. I have been paying for it ever since.

One felony that Mark and Barbara collaborated on was a treasure. It was another rape. Three of them, in fact. (Later the case gave the Supreme Court the opportunity to re-educate us about joinder and severance.) Mark and Barbara were optimistic because only the first two counts had been joined for trial.

The defense, to all three, was alibi. In two out of three counts, the victims had said the rapist drove a brown car. In a different two out of three, the victims reported that the rapist was wearing white shoes.

The defendant's wife drove him to court on the morning of jury selection, in a brown car. Needless to say, he was wearing white patent leather shoes.

It was 9:45. They were due in court at 10:00. The only attorney in the office was Chris Rigos, who was more prudish than most. Mark tried to negotiate a trade. Barbara added her enthusiasm. She claimed to have once given her blouse to a hooker before a trial, because hers had buttons in the necessary places and the hooker's did not. Finally Chris gave in with a grin.

Chris spent the rest of the day in his stocking feet, however. He wasn't about to wear the client's shoes. Too bad neither Bruce Abramson nor Craig Cornish was around that day. Either one of them would have relished the opportunity.

Barbara had her own problems with shoes. There were always millions in her office, but two minutes before her Supreme Court argument in Zehrung she could not find two that made a pair. With the clock counting down to 15 seconds, Chris Schleuss found a matching one – in Barbara's in-basket.

Shortell's reign

Brian Shortell took over the agency toward the end of '75. He was a splendid boss, never getting in your way, generally being there when there was a problem. When we were bursting with emotions, Brian remained impassive, almost nonchalant. His sanity came from sneaking out of the office frequently to carouse with Alex and Larry.

Brian attracted a lot of new faces, including Jeff Feldman, Eric Sanders, John Murtagh, and John Suddock. Grant Callow and Brant McGee showed up as interns, and Pete Mysing returned as a real lawyer.

Jeff Feldman was the fist and only P.D. to go home every night at ten of five with his desk clean. He also wrote law review articles on the side. John Suddock and John Murtagh and the rest of us worked on Saturdays because we spent the time from 4:30 till 6:30 every night decompressing – i.e. telling court stories. It was fun, at least until we remembered we had to go to the jail on our way home. On Fridays there was always popcorn and beer. Folks from offices around town would stop by.

Eric was a study in contrasts. He wore a different suit to the office every day, yet managed to portray the resigned, macabre P.D. spirit at its best. He set a record in the department when he planned and hosted something called "Gary Gilmore's Last New Year's Eve Party," inviting all the D.A.'s and half of the Anchorage bar.

Some people got John Murtagh and I mixed up. From the back that is, and only on Saturdays, when I tied my hair in a ponytail too. Naturally we all wore identical faded *Levis*, but only John had a *Wisconsin Indian Legal Services* T-shirt.

Murtagh's shirt prompted us to create a T-shirt for ourselves. With the help of investigator Dave Suwal, we held a contest for this purpose. Mark created the winning design, which featured the scales of justice upsetting a portly police figure plagiarized from a *Monopoly* game "Get out of Jail Free" card. Chris Rigos provided the slogan –"A reasonable doubt at a reasonable price." Second place went to a client of mine. She proposed a fist, with the middle finger uplifted, and the motto "The Public Defender…a helpful hand."

John Suddock was a steadying influence. He also had a forte that allowed him to last more years at the agency than most people. He excelled at taking naps. Some people thought he was just enigmatically quiet. This may explain the fine reputation enjoyed years later by the law firm of Kulik, Suddock & Hart. Frank Koziol already had proved that a P.D. could be quiet yet still effective, but that was because Frank always was working on the Salazar brief.

Days of parties

There were some great parties in those days. Perhaps the most in(famous) was held at Doug Pope's house immediately following the Erickson arguments. The statute of limitations probably has run. Another was Norman Bresman's goodbye, when Colleen Ray met John Murtagh for the first time, just as he passed out face down in our dog's water dish. And there was a Halloween party, where Steve Hart came as Judge Moody, complete with glasses, robe, and bare ankles, and Barbara came as a defendant, dressed in jail blues, handcuffed to him.

Hidden talents came out at some of these events. Bruce Abramson did imitations of judges – Judge Brewer in particular – that merited an Oscar. Larry revealed himself as a gourmet cook. Larry was proud of himself in this regard, and justifiably so. Moreover, he took the presence of junk food as a personal affront, to the point where Barbara would bring the cheapest jug wines just to watch his reaction. Larry was so enamored of good food that while representing Charles Meach in his first case, in the 70's, Larry catered dinners from the Captain Cook to eat in the courthouse holding cell while they went over the trial strategy. (Meach's father paid the bill.) Larry also entertained us with stories about how he had been a yellow cab driver – in Oakland – during law school.

Next issue: Part II — "Moving On, Departures."

THE KIRK FILES

The art of mentoring, according to Screwtape

By Kenneth Kirk

In recent years, mentoring programs have become all the rage with lawyers' organizations, including our pro bono programs here in Alaska. I want to encourage this trend, and perhaps convince the Alaska Bar Association to create a program of its own. With this lofty goal in mind, I dug out a sample mentoring letter to assist lawyers in understanding how these things should be done.

Dear Wormwood, Esq.,

Congratulations on becoming a mentor! It seems like only yesterday that you were a young, idealistic new lawyer, and I was mentoring you. How I struggled with your independent spirit and your tendency to question received authority! And now you tell me that you yourself have been assigned to mentor a new lawyer. Given the importance of your task, I feel obligated to lay out for you a few guidelines for successful mentoring.

At first, your task may seem quite easy. Your mentee has been cowed into submission by three years of intimidation by law professors, followed by the psychological stress caused by the all-or-nothing, only-twice-a-year bar exam. The occasional mention of the desirability of gaining the respect of his peers may be useful, but only because it will feed into the natural inclination he will already have, at this early point in his career, to impress those who are older and more experienced than he.

However, eventually he will reach a dangerous point at which he gains enough self-confidence to begin questioning the received wisdom of his elders. You will recall that when you were only in your second year, you asked me an embarrassing question about whether substantive due process wasn't a contradiction in terms, being quite incompatible with the distinction between substantive law, which is the province of the legislative branch, and procedure, which is left to the judiciary. This dangerous pass generally comes when the young lawyer has won a few small cases against respected older lawyers, and begins to feel that he is not so much less smart than they are. From that point forward, more aggressive strategies must be employed to keep him from straying from orthodoxy and becoming a useless heretic.

An early method, which you might even wish to subtly employ when he is in his early stage, is to remind him that it is pointless to think of what the law ought to be, what matters is that he be able to divine what the judge will think. You describe him as idealistic, so couch this in terms of his responsibility to his clients, toward whom he will be temperamentally predisposed to feel loyalty. This way of thinking will come naturally to him, as he has spent three long years trying to figure out how to anticipate the thoughts of his law professors, in order to avoid embarrassment and humiliation in the classroom. It is only a minor shift to switch from trying to mimic the thinking of the authority figure in the tweed sweater at the raised lectern in the classroom, to trying to mimic the thinking of the authority figure in the black robe at the raised podium in the courtroom.

"Given the importance of your task, I feel obligated to lay out for you a few guidelines for successful mentoring."

For most lawyers, this habit of thinking is enough to keep them tame and productive for their entire careers. However for some, an internal rebelliousness will continue to incline them toward iconoclastic thoughts. For those, you may need to employ the "judicial strategy". It is one of the most ingenious acts in our state's history which makes this possible. When our constitution was being hammered together, with most of the populace concerned about fish traps and taking control away from Washington, our stealth troops at the convention inserted a provision which lets the lawyers control the judiciary, and then passed the whole thing out as a package deal. Among the many other benefits of this arrangement (which our minions on the resultant Judicial Council defend under the term "merit selection") are the fact that no independent thinker has a snowball's chance in Tucson of becoming a judge. Those who would try will find themselves staring forlornly at a sheet of statistics, knowing they have no realistic chance of being selected from anywhere near the bottom of the stack by a council in which half the voters are lawyers selected by the Bar Association, and the tie vote is the justice who has most successfully navigated this very system. They will also wonder how it is possible that forty-two attorneys in Fairbanks claimed to have direct professional experience with them when they have never had a case in the Fourth Judicial District.

For most lawyers, this habit of thinking is enough to keep them tame and productive for their entire careers.

So by all means, if necessary, encourage your mentee to think that he has a shot at becoming a judge someday, but that voicing heretical views will destroy his chances. Now I see from your letter that your mentee is of only average promise, a graduate of the bottom half of the class at a mediocre law school, with nothing in particular to distinguish him, and he thus has no realistic chance of becoming one of the handful of judges in a state with thousands of lawyers. Do you forget the incredible power and reach of flattery? Just as the homeliest woman will beam if you compliment her new hairdo, so will a young lawyer believe you when, after he has just been lambasted, chewed up, and spit back out in court, you tell him that he was "scrappy". Or that his position showed foresight, or that the judge was clearly biased, or whatever compliment will best lead him back to thinking that he is an outstanding advocate, well respected by his peers and sure to be selected by them, someday, to sit on the bench in that very courtroom in which he has just been so unceremoniously shat upon. He will have that chance for glory, that is, unless of course he persists in thinking iconoclastic thoughts, in which case he will never be more than a sad, workaday pettifogger for his entire, quickly forgotten career.

I see that your mentee is already considering moving into solo practice, handling mainstreet cases such as divorces, criminal appointments, and the like. This is a very bad idea, and must be discouraged. In a law firm, he will spend most of his time talking with other lawyers, and even relying on them for case assignments, raises and bonuses, and eventually for partnership. But in a solo practice he will spend most of his time talking to non-lawyers, namely his clients, and other ways of seeing the world will eventually creep into his worldview. He has been taught, in Professor Kingsfield's immortal words, to "think like a lawyer", and he must be encouraged to consider that to be the best and most legitimate way of seeing things. For instance his views with regard to business should always be that the highest concern is minimizing risk, whereas the business executive understands risk as a necessary element of commerce, an element which, properly managed, leads to reward.

In this regard, you may also wish to see to your mentee's love life. You do not mention his marital status, but I will assume that like most recent law school graduates, especially those who would trek all the way to Alaska, he is single and unattached. Very good, now get him hooked up with a female lawyer. That way, even at home he will be protected against other ways of thinking. Imagine the dinnertime conversation in which our mentee tells his spouse who is a nurse, or a technician, or a schoolteacher about a case he had that day, only to be surprised when her assessment of the situation is dramatically different than his. On the other hand if his wife is another lawyer, reared in the same caselaw and patterns of thinking in which he himself trained, the chances of such a diversity of opinion are greatly reduced.

Finding your mentee a female companion from the bar may not be as difficult as you might think. Fully half the new lawyers in Alaska are women. The danger lies in the fact that, as a lawyer, your mentee will be in some romantic demand from the lower classes of women. Suggest to him that his status will be higher if he is married to someone who is "somebody"; i.e. another attorney. In this regard, our agents on the *Bar Rag* have already done yeoman's work in their last issue, glorifying the idea of "lawyers in love".

Wormwood, I cannot stress enough to you how important it is to keep these young lawyers in line. In law practice, change is the enemy of experience, and independent thinking leads to unnecessary change. In addition, our ability to charge high fees depends on a system in which attorneys, not laypeople or legislators, control the law. This system is here for our benefit; we are slowly making it impossible for any person, or any business, or any institution, to function without the daily involvement of their lawyers. By controlling the system, we create the need for our services. And that is an advantage which must never be overturned.

So keep your mentee securely in the fold. This is not a matter of professional duty. Your livelihood depends on it.

Your affectionate mentor,
— Screwtape, Esq.

WIN A MOUSE BUNGEE !

Count the number of names found in this edition of the *Bar Rag*, submit your entry to editor@alaskabar.org by July 4, 2006, and if you're correct, we'll send you a **FREE MOUSE BUNGEE**!

(Restrictions apply. See below.)

(Wanted: 3 volunteers to count & achieve consensus on the actual number of distinct, non-duplicated names in this edition of the Bar Rag. The first 3 volunteers to contact editor@alaskabar.org will receive a FREE MOUSE BUNGEE).

Contest rules: One entry per person. No fair having your secretary or kids count the names. The name or names on the Bar Rag mailing label do not count. Law firm names do not count; only full human-names count. Duplicate names don't count (ie. Jon Katcher is counted only as one name.) The first 5 submitted correct entries will receive A FREE MOUSE BUNGEE !! Winners' names, if any, will be published in the next edition of the *Bar Rag*.

Law Day celebrated May 1 across Alaska

By Barbara Hood and Krista Scully

Law Day was again celebrated this year in communities across the state through the joint efforts of the Alaska Bar Association and the Alaska Court System. This year's theme—Liberty at Law: Separate Branches, Balanced Powers—presented a valuable opportunity for the legal community to address the timely issues of separation of powers and checks and balances. Traditional Law Day events such as courthouse tours and classroom presentations also took place in many locations. Examples of creative local events include the following:

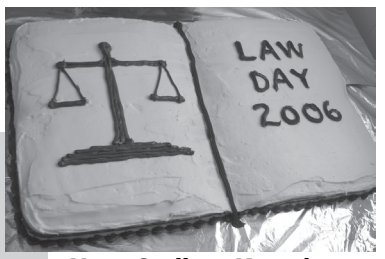
• In Anchorage, attorneys and judicial officers attended joint trainings on how to be effective in the classroom. In Anchorage alone, 35 judicial and attorney volunteers visited over 17 schools classes to present special curricula developed by members of the Bar's Law-Related Education (LRE) Committee. This year, over 1,099 Anchorage students were able to participate in Law Day activities in the schools as a result of this effort.

• In Juneau, Justice Walter Carpeneti, Judge Keith Levy and Assistant Attorney Generals Ethan Falatko and Susan Parkes served as judges for students who presented oral arguments on Boy Scouts of America v. Dale.

• In Kotzebue, the court system sponsored an essay contest on separation of powers and an open house and awards presentation that was attended by many members of the community. Katherine Alteneder of the court's Family Law Self-Help Center attended the events and spoke about the services the FLSHC offers. Court staff also surprised Judge Erlich with a carved ivory mask in honor of his 15th anniversary on the bench.

• In Sitka, the legal community sponsored the Annual Law Day Advocacy Contest for high school students, and the Annual Law Day Poster Contest for 5th Graders.

Law Day continues to be an important celebration of our legal system, and a welcome tradition in our schools. Special thanks for the success of Law Day programs go to the attorneys and judicial officers who offer their time and support each year. Anyone interested in volunteering or contributing to Law Day 2007 is encouraged to contact one of the Co-Coordinators, Krista Scully of the Alaska Bar Association, scullyk@alaskabar.org (272-7469) or Barbara Hood of the Alaska Court System, bhood@courts.state.ak.us (264-8230).



Kotzebue Law Day

Mary Stalker, Kotzebue Clerk of Court, baked a special cake for Law Day.

Judge Richard Erlich and Magistrate Karen Bendler congratulate Whitney Harding, Kotzebue High School Senior, for her Law Day essay, which took fourth place. Judge Richard Erlich speaks to the audience at the awards presentation for Kotzebue's 2006 Law Day Essay Contest. Judge Erlich was later surprised during the presentation by a gift from court staff commemorating his 15 years on the bench.

Sitka Law Day

In Sitka, the court system hosted the 2nd Annual Law Day Advocacy Contest on May 3, 2006. Participants spoke for six minutes each on the topic of whether school uniforms should be mandatory-a topic chosen by contest organizers to foster lively discourse. After a number of enthusiastic presentations, contest judges Theresa Hillhouse (Sitka City and Borough Attorney), Marcia Drake (Mt. Edgecumbe teacher) and David Zerby (Law Clerk) selected the following winners: Skye Joseph, first place; Bobbi Daniels, second place; and Brittaney Steffy, third place. Here, L-R, Theresa Hillhouse and Superior Court Judge Larry Zervos congratulate contest winner Skye Joseph. Photo courtesy Jonie Calhoun.

An annual Law Day Poster Contest for 5th graders yielded a large display in the lobby of the Sitka courthouse. The poster was designed by Rachel Fate, and the contest judges were Rachel Fate, Kelly White (Law Office Assistant) and Brita Patterson (Sitka attorney). All participants received Law Day pencils, and the seven winners will receive certificates from Magistrate Bruce Horton during a presentation at the elementary school. Photo courtesy Jonie Calhoun.

Thanks to statewide Law Day volunteers

Judge William Morse
Dave Carter
Judge Sharon Gleason
Mike Schwaiger
Adolph Zeman
Justice Robert Eastaugh
Judge Patrick Hanley
Justice Dana Fabe
Kevin Anderson
David Baranow
Deborah Periman
Judge John Lohff &
Jon Katcher
Matt Claman
Judge Mark Rindner
Judge Michael Wolverton
Judge Morgan Christen

Judge Nancy Nolan
Barbara Jones
Stephanie Galbraith
Hugh Fleischer
Judge Alex Swiderski
Vic Patel
Judge Sigurd Murphy
Pamela Kelley
Justice Walter Carpeneti
Judge Keith Levy
Susan Parkes
Ethan Falatko
Dan Winfree
Corinne Vorenkamp
Judge Winston Burbank
Barbara Hood
George Skladel

Mary Bristol
Eileen Foley
Krista Scully
Marika Athens
Cameron Rader
Judge Richard Erlich
Magistrate Karen Bendler
Judge Jane Kauvar
Theresa Hillhouse
Judge Larry Zervos
David Zerby
Magistrate Vincent DiNapoli
Magistrate Anna Moran
Judge Eric Smith
Allen Clendaniel
Kathy Keck
Judge Peter Michalski

Fairbanks Law Day

District Court Judge Jane Kauvar visits with a student judge during a Law Day mock trial in Fairbanks.

DID YOU KNOW…

That the members of the Lawyer's Assistance Committee work independently?

If you bring a question or concern about drug or alcohol use to any member of the Lawyer's Assistance Committee, that member will:

1. Provide advice and support;
2. Discuss treatment options, if appropriate; and
3. Protect the confidentiality of your communications.

That member will not identify the caller, nor the person about whom the caller has concerns, to any other committee member, the Bar Association, or anyone else.
In fact, you need not even identify yourself when you call.

Contact any member of the Lawyer's Assistance Committee for confidential, one-on-one help with any substance use or abuse problem.

SINCE 1896
ALASKA BAR ASSOCIATION

Vanessa H. White, Chair
(Anchorage).
278-2386 (work)
278-2335 (private line)
258-1744 (home)
250-4301 (cell)
vwhite@alaska.net

John Reese (Anchorage).
345-0275(work)
345-0625 (home)

Michelle Hall (Barrow).
852-2521

John McConnaughy III
(Anchorage). 343-6445 (private line)

Gregg M. Olson (Sitka). 250-1975
gregg_olson@law.state.ak.us

Nancy Shaw (Anchorage).
276-7776

Clark Stump (Ketchikan).
225-9818

Jay Trumble (Vancouver, WA).
360-576-5139

Runners gather for the starting gun.

Anchorage's Young Lawyers Race draws 150 runners

By Bill Falsey

Nearly 150 hearty souls gathered on a chilly Sunday morning last month to participate in the Young Lawyers' second annual Race Judicata. Racers wended their way five kilometers along the Tony Knowles Coastal Trail - a few clad in ties - before returning to a then still-frozen Westchester Lagoon, where they were met with bounty of snacks and a chance to win one of several (highly desirable) door prizes. Co-director Bill Pearson presented ceremonial gavels to the race's top finishers.

Race Judicata is an annual fundraiser organized by the Young Lawyers Section of the Anchorage Bar for the benefit of Anchorage Youth Court. This year's event raised nearly $2000 and again won national acclaim - race co-director Bethany Pribila recently returned from Portland where she regaled lawyers attending a national meeting of the ABA with a presentation on how to organize fund-raising races of their very own.

Great thanks go out to all race participants and volunteers, and to our many dedicated sponsors (without whom this event would not have been

Hartig Rhodes Hoge & Lekisch, PC
Foley & Foley
Durrell Law Group, P.C.
Preston Gates Ellis LLP
Heller Erhman LLP
inger k. deede, fresh art and design
Pepsi
Great Harvest Bread Company &
Subway.

Signing up for the big race.

Huffing and puffing to the finish line.

Fairbanks Law Day Race Judicata TVBA names Law Day race after Smith

By JasonWeiner

This year the Tanana Valley Bar Association (TVBA) renamed its annual Race Judicata after Ron Smith, who was killed in a car crash last year. The new name is the Ron Smith Memorial Race Judicata.

Ron was an avid runner and was very helpful in setting up the race year after year. He was also a constant participant, and my last memory of him is seeing him run across the finish line yelling with a big smile on his face and his friends cheering him on.

We had over 100 racers, including several attorneys. Local bar members William Spiers (and his family), Lori Bodwell, Gene Gustafson, Jason Gazewood, Gail Ballou, Will Schendel, Dan Callahan, and Mike Kramer were all great support in setting up the race. Paralegal Roxane Rigo kept time and kept things organized on the home front. Joan Wilson gave me guidance and Richard Wilson, her husband, made sure that all safety issues were addressed, including providing help by lending the services of Exclusive Landscaping to loan us the measuring equipment to mark out the course and give us some safety vests, cones and flags to make sure everyone was safe as they ran through downtown.

Ron Smith's friends all came out to support the race and help out with setup. Ron Woods, area court administrator here in Fairbanks, opened up the courthouse for us and made sure there were restrooms for all.

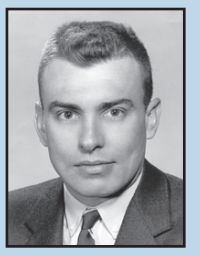
Our sponsors were Goldstream Sports, Beaver Sports and Play It Again Sports, and we truly thank them for going out of their way to give us gift certificates and other prizes for the race. I think it was a great success, and we hope to continue the race in years to come both to celebrate law days and in memory of Ron Smith.

The author is the president of the Tanana Valley Bar Association

L to R: James J. Delaney, Jr., Charles E. Tulin, Jamie Fisher, and President Jon Katcher.

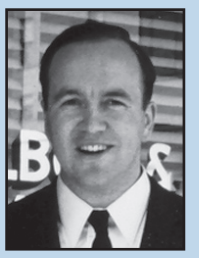
50 Years of Bar Membership

James J. Delaney, Jr.



James E. Fisher

Howard W. Pollock



Charles E. Tulin

Not Pictured: L. Eugene Williams, Lloyd J. Webb

OTHERS RECOGNIZED AT BAR CONVENTION

Lanie Fleischer with husband Hugh and family members. She received the Alaska Bar Foundation Jay Rabinowitz Public Service Award.

Ryan Fortson (left) presents the Benjamin O. Walters Jr. Outstanding Service Award to Annetta Walters, Mr. Walters' widow, accepting on behalf of Judge David Mannheimer.

Photos by Karen Schmidlkofer

Outgoing New Lawyer Liaison Eric Jenkins and Jon Katcher.

New officers elected to Alaska Bar Association board

John Tiemessen was elected president of the Alaska Bar Association at its annual convention held in Anchorage, April 26 – 28, 2006. Tiemessen is a partner in the Clapp, Peterson, Van Flein, Tiemessen and Thorsness law firm in the Fairbanks office.

Matthew Claman was elected as the President-elect of the Alaska Bar Association. Claman is an attorney with the law office of Mendel & Associates.

The other officers elected at the convention are Vice President Sidney Billingslea, Law Office of Sidney K. Billingslea; Treasurer Philip Pallenberg, an attorney in private practice in Juneau; and Secretary Bill Granger, a Senior Vice President of Wells Fargo in Anchorage.

Outgoing Board members Peter Ellis and Jon Katcher.

John Tiemessen (left) presenting plaque to outgoing president Jon Katcher.

Magistrate Paul Verhagen, 4th Judicial District, (left) accepts the Alaska Court System Community Outreach Award from Chief Justice Alex Bryner.