The Alaska BAR RAG

VOLUME 34, NO. 2
April - June, 2010

Dignitas, semper dignitas

Stowers joins Alaska Supreme Court

Justice Craig Stowers was formally sworn in as the newest justice on the Alaska Supreme Court during an installation ceremony held April 16, at the Performing Arts Center in Anchorage. Several hundred colleagues, family members and well-wishers gathered to honor Justice Stowers, who becomes the 21st justice since Statehood. Justice Stowers was raised in Yorktown, Virginia, and received an undergraduate degree in biology in 1975 from Blackburn College. He came to Alaska in 1977 to work as a naturalist and ranger at Mount McKinley National Park. He earned his law degree in 1985 from the University of California Davis School of Law, then returned to Alaska to serve clerkships with Judge Robert Boochever of the U.S. Court of Appeals (Ninth Circuit) and Justice Warren Matthews of the Alaska Supreme Court. After clerking, he entered private practice with the Anchorage firm Atkinson, Conway & Gagnon, and later founded the Anchorage-Fairbanks firm Clapp, Peterson & Stowers. In 2004, Justice Stowers was appointed by Governor

Continued on page 3

Monique Stowers fastens the robe of her husband, Justice Craig Stowers, at his installation ceremony.

Nenana dedicates new regional state courthouse

The Alaska Supreme Court invites all Alaska Bar Association members to a facility dedication event at its new Nenana Regional Courthouse Facility on Friday, June 25, at 3 p.m. The courthouse sits right off the West side of Parks Highway in Nenana and its physical address is 102 West 8th Street.

The new courthouse provides courtroom seating for 80 spectators, a comfortable 12-person jury deliberation room, two attorney conference rooms, and in-custody defendant holding areas. Public spaces include a nice lobby area with computer access. Given the development of the new facility, the court was able to add Nenana to the list of approved trial sites for superior court trials as of May 1.

Communities served by the courthouse include the Healy area; Cantwell; Ferry; the Galena area, which includes Huslia, Kaltag, Koyukuk, Nulato and Ruby; and the Nenana area, which includes Alatna, Allakaket, Anderson, Bettles, Coldfoot, Evansfille, Hughes, Livengood, Manley Hot Springs, Minto, Rampart and Wiseman; and Tanana.

The exterior and interior of Nenana's new courthouse.

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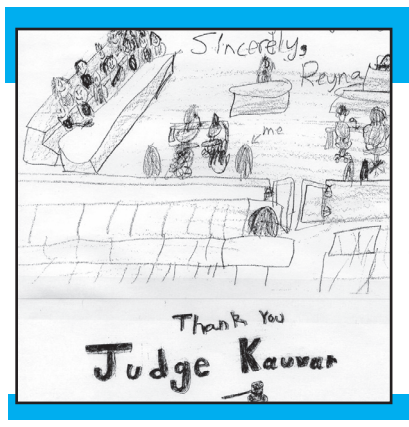

In this Issue

PRESIDENT'S COLUMN

New president has an agenda

By Jason Weiner

It is a great honor to have been selected to be your President for the upcoming year. First, for those of you who may not know me, I came here thirteen years ago to be a law clerk for Judge Niesje Steinkruger in Fairbanks. What was supposed to be a one year visit quickly turned to two years, and before I knew it I was married and bought a house. I then went on to work for a mid-sized law firm, the Fairbanks District Attorney's Office, was in a partnership, and am now the managing partner of a firm of five lawyers in Fairbanks. I hope you will all feel comfortable discussing the issues you face in your practices, regardless of whether you are part of a small or large firm, and regardless of whether you are a public or private attorney. I want the Alaska Bar Association to be responsive to all of its members, and for that, I will need your help.

At the April Board of Governors meeting I announced my initiatives for the upcoming year. I will briefly discuss each of them and will give you more information and updates in my future columns. The first and dearest to my heart is an effort to provide attorneys for all litigants. I am very impressed with the amount of pro bono hours Alaska attorneys put in. However, I am still hearing that approximately 40% of the litigants in family law go unrepresented, and I rarely hear that anyone is pleased with that percentage. The program I would like to see in place will actually be paid for by the litigant seeking an attorney. It would be administered by the Court, and appointments would be made in the same way Rule 12(e) appointments are made. Attorneys would be paid $75 an hour by the court (or whatever the going rate is for Rule 12(e) appointments), and payments would be guaranteed. The difference would be that a litigant who wants an attorney in family law or civil litigation where we currently do not make court appointments would have to be willing first to go through mediation with the other side (unless the case involves domestic violence, and then mediation is only at the litigant's option). Then, assuming they meet income limitations, they would have to be willing to assign their PFD to the state to pay for their attorney fee bill plus an administration fee. PFD would be garnisheed until the bill is paid in full.

"I am optimistic that we can improve services to Bar Members while also improving the Alaska legal system."

At the April Board of Governors meeting I announced my initiatives for the upcoming year. I will briefly discuss each of them and will give you more information and updates in my future columns.

My predecessor, Sid Billingslea, has worked long and hard on addressing court security. However, this was never a one year task, and I question whether it can be accomplished in two. I believe security will actually be improved by allowing attorneys and other courthouse "frequent fliers" to bypass security after presenting a card that can be scanned by security to verify identity and any security concerns. This would allow security to focus on the courthouse visitors they are unfamiliar with and can pose a serious danger to the court. I intend to research these issues and discuss them with the Alaska Supreme Court and Judicial Services.

I believe the State of Alaska should pay attorney bar dues for the attorneys it employs. It is my understanding that unless an attorney itemizes his or her taxes, they cannot deduct their bar dues payments. If the State were to pay their bar dues as part of their employment, attorneys would not be taxed on the payments. I believe budgetary issues can easily be addressed without reducing attorney salaries. I intend to meet with the Alaska Attorney General to discuss this proposal.

I have proposed a mentoring program for new attorneys. Utah just adopted a mandatory program, and they have been thrilled with the results. They are ready and willing to help with our program. At the Western States Bar Conference held this past March I was able to speak with Presidents from other jurisdictions with mentoring programs. What I learned was that the voluntary programs do not work. Therefore, I would like to see a mandatory program that would be a substitute for the first and second year mandatory CLE requirements.

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EDITOR'S COLUMN

Timing is everything

By Thomas Van Flein

There is a trend lately that I think does not reflect well on our profession; namely the rush to court to file a suit while an event is still occurring, or just happened.

If being a trial lawyer has taught us anything—whether you do plaintiffs' work or defense work, or both—it is that finding the true cause of an incident is usually far less obvious than one sees at first glance. Further, most incidents, though not all, involve more than one cause, particularly in industrial accidents, plane crashes, oil spills, and mine explosions. Most industries have safety requirements and redundancies in place so that it often requires a series of errors or failures before a catastrophic event occurs. That is why it seems questionable when there is an occurrence and shortly thereafter someone is providing the "explanation" or pointing a finger for fault.

Take the Upper Branch Mine disaster, the worst coal mining explosion in recent history. The mine exploded on April 5, 2010, and 29 workers were killed. It was reported that "exactly one day before his scheduled funeral, the first lawsuit inspired by the tragic explosion at a Raleigh County coal mine surfaced . . . accusing the mine operator of . . . wrongful death."

That just seems wrong on two levels. First, suing for wrongful death before the decedent has even been laid to rest seems offensive on a purely humanitarian basis. Second, how much due diligence can really have been done as to causation in just a week or so after the explosion, when bodies were just being recovered and mine investigators had not yet been able to assess the situation?

Apparently, ads were taken out in newspapers prior to all the bodies being recovered. One report quoted Richie Heath, the executive director of Citizens Against Lawsuit Abuse, saying "It's really kind of shocking when you see that,' Heath said of the ads, 'this kind of callousness'."

Yet we know as trial attorneys that any number of factors could have led to this result, including poor government oversight, as documented by the U.S. Department of Labor just six days before the explosion, in a report entitled "Journeymen Mine Inspector do not Receive Required Periodic Retraining." The point is, it is both unseemly to be trolling for clients while the bodies are not even buried, and of questionable judgment to be filing suits making allegations about liability and fault when it is probable actual fault will take considerable time and expertise to determine.

"The unfortunate reality is that there is an economic incentive to file fast."

The point is, it is both unseemly to be trolling for clients while the bodies are not even buried, and of questionable judgment to be filing suits making allegations about liability and fault when it is probable actual fault will take considerable time and expertise to determine.

The same applies to the current Gulf Oil spill. The incident started on April 20 and is ongoing at the time of this writing. At least one class action suit was filed on April 28—just barely a week after the explosion, another on May 2, 2010, another on May 7, 2010, and another on May 25, 2010. I know there is a rush to be the first to file a class action suit and to be designated lead counsel. But there is a flaw here where the system compels a race to the court house when the event is still occurring, and the actual causes of the oil spill are far from being determined. And there is certainly reason to question the lack of pause when suit is filed before the bodies are recovered or buried.

Hopefully the courts that are determining lead plaintiff status for class action suits look beyond who was first to file and who signed up the most clients the fastest. The unfortunate reality is that there is an economic incentive to file fast. Until that changes it is doubtful even diligent and highly professional counsel can wait too long on these mass disaster cases.

I don't see this changing anytime soon, but it doesn't mean we have to like it. And I suspect that most plaintiff's lawyers would rather wait until the grieving process has at least gone into phase two before filing suit and allow the family of the victims to focus on issues more important than the status of their civil claim.

The Alaska BAR RAG

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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 9 & 10, 2010
October 28 & 29, 2010
(July Bar Exam results & budget)
January 27 & 28, 2011
May 2 & 3, 2011
May 4 – 6, 2011
(Annual Convention – Fairbanks)

President's agenda

Continued from page 2

Considering that new lawyers must have already watched a mandatory ethics video which they cannot count to meet their ethics CLE requirements and must have passed the multistate professional responsibility exam for admittance, I believe the trade off is not only justified, but will dramatically improve ethics education for young lawyers by developing a relationship with an older lawyer who has "seen it all before."

I am hopeful that any of you who have comments, questions, or want to help with any of the above will contact me or the Bar office.

Finally, I want to discuss an amendment to Alaska Bar Rule 34 that is being published in this issue of the Bar Rug. It would allow attorneys to include a mandatory arbitration provision in their fee agreements "provided that the client has been fully apprised of the advantages and disadvantages of arbitration and the client has given informed consent to the inclusion of the arbitration provision in the written fee agreement." There has been substantial debate on this amendment. On the one hand, the only avenues for an attorney to address a fee dispute with his or her client is to first discuss the dispute with the client and then either send the client to collections or sue the client. Sending a client to collections can damage a client's credit rating. Suing a client is rarely an option a lawyer wishes to take regardless of how they may feel personally about the client. Arbitration, on the other hand, would enable lawyers to address fee disputes with a client without resorting to drastic or damaging measures. It would also allow the client to interact on a more level playing field with the lawyer.

Some concerns raised about the amendment is that the client will not be fully apprised of the advantages and disadvantages of arbitration; that the client will now need an attorney to read the fee agreement; and how this might affect counterclaims for malpractice. I personally am in favor of this amendment. Clients can be properly advised through standard language inserted in the rule. If there is a counterclaim for malpractice, we have been advised by bar counsel that arbitration no longer is an option and the arbitration will be dismissed. If a client wants an independent counsel to review the fee agreement, they can obtain independent counsel. They can also choose not to hire an attorney that includes mandatory arbitration in his or her fee agreement.

I ask that you give careful consideration to the proposed amendment to Alaska Bar Rule 34. I believe it will mean a lot to both attorneys and clients, and could mean an end to laws suit and collection actions against clients to collect fees. However, there may be other disadvantages that have not been considered or addressed by the proposed amendments or from previous comments. I look forward to hearing your opinions.

I am optimistic that we can improve services to Bar Members while also improving the Alaska legal system.

I am optimistic that we can improve services to Bar Members while also improving the Alaska legal system. I hope to talk to as many of you as possible, and want to hear any suggestions and/or concerns. I am looking forward to a very productive year with your help.

Justice Craig Stowers visits backstage with fellow jurists who spoke at his Supreme Court installation, L-R: Judge John Lohff, Anchorage District Court; Justice Morgan Christen, Alaska Supreme Court; Chief Justice Walter Carpeneti, Alaska Supreme Court; Justice Stowers; Justice Dana Fabe, Alaska Supreme Court; Justice Daniel Winfree, Alaska Supreme Court; Judge Sharon Gleason, Anchorage Superior Court; and Judge David Mannheimer, Alaska Court of Appeals.

Justice Craig Stowers joins Alaska Supreme Court

Continued from page 1

Frank Murkowski to the Anchorage Superior Court, where he served for five years. Governor Sean Parnell appointed him to the supreme court in December 2009. Throughout his career, Justice Stowers has served on numerous professional committees and nonprofit corporation boards. However, according to at least one colleague, his most famous activity off the bench is "barbeque." He owns eleven grills and hosts regular feasts that he prepares for weeks in advance. He lives in Anchorage and is happily married to his best friend, Monique.

Letters

Conspiracy??

In response to consistent rumors following the release of a *Bar Rag* issue without a Kirk Files column, I wish to firmly state that at this time I do not yet have conclusive evidence of a high-level conspiracy, aimed at retaliating for my lawsuit against the Judicial Council by deleting my column. Any rumors to the contrary are completely premature.

-- Ken Kirk

(Sally -- Please make sure Ken is listed on the "No Fly" list. And delete this comment. Tom)

Clarifying CASAs

I am writing as a Child Advocacy Supervisor with the Office of Public Advocacy. Under state law every child involved in child in need of aid proceedings is appointed a guardian ad litem to advocate for their best interest. Since the inception of OPA 25 years ago, OPA has provided guardian ad litem services for children in the child protection system. For 22 of those years, OPA's child advocacy services have included the State of Alaska Court Appointed Special Advocate (CASA) program. Through this program, OPA trains and supervises volunteer child advocates or CASAs. There are state CASA programs in Anchorage, the Mat-Su Valley, Fairbanks, and Juneau. Currently, OPA is focused on expanding the CASA program to Bethel to provide additional advocacy for the children in the Y-K Delta.

"Become a court-appointed volunteer for youth" was published in the January – March, 2010 Bar Rag, written by Marie-Elena Walsh of Friends of Alaska CASA (FAC), a private non-profit organization which provides support to the Office of Public Advocacy's CASA Programs as well as other programs and activities.

Through the CASA program, volunteers from all walks of life go through training provided by OPA to serve as advocates for the best interest of children in the child protection system. The article presented a challenge to the legal community to become a CASA – a great way to share your legal experience with the community and make a difference in the life of an abused or neglected child.

Unfortunately, there were some errors in Marie-Elena's article that have prompted me to write this letter. The article indicated that 1 in 4 children in state custody have CASAs. This is not accurate. Currently, there are approximately 2,800 children with child advocates provided by OPA, and approximately, 365 of those children are assigned Court Appointed Special Advocates through our CASA Program.

Additionally, the article suggested that individuals could donate money to sponsor a CASA volunteer and suggested an amount of money based upon the costs for training and supporting CASAs. This information was not accurate.

Because CASA training is offered through OPA with training provided by the local CASA programs and OPA staff, donations to FAC are not used for paying for the cost of the initial training of individual CASA volunteers or for their supervision. However, money donations can be made to FAC that will be used for support of CASA volunteers in continuing education, transportation, and other forms of support for the CASA program. OPA does not direct or control how FAC's money is spent, and therefore, for full information regarding the ways in which FAC money is used please contact: Ryan Zinn at (907) 222-2534

The OPA CASA program and Friends of Alaska CASA are always recruiting new CASA volunteers. I appreciate FAC's ongoing efforts to assist OPA and to improve child advocacy in Alaska. Becoming a CASA volunteer gives you the ability to make a difference in the life of a child who has experienced abuse and neglect. OPA welcomes your interest in the CASA program. For questions on becoming a CASA volunteer contact Jenny Murray at (907) 269-3536.

Anita L. Alves
Assistant Public Advocate
Office of Public Advocacy

Judge Richard Ehlich retires

The judge & his wife Susie pose at the retirement dinner in Fairbanks. Photo courtesy of Sarah Sipe DeMoss.

FAMILY LAW

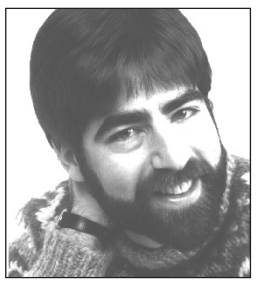
Variations in child support cases

By Steven Pradell

Often in family law cases parents reach agreements on most but not all of their issues. Attorneys are asked to help clients find a way reach an accord, and, ultimately, have a court approve those agreements. More often than not, issues where the parties have trouble reaching consensus involve child support. This article explores a recent case which may make it more difficult for practitioners to negotiate when client's attempt to creatively resolve their child support disputes.

In *Cox v. Cox*, 776 P. 2d 1045, 1048 (Alaska 1989), the Court held that "[p]arents may not make a child support agreement which is not subject to [Rule 90.3]." In *Nix v. Nix*, 855 P. 2d 1332 (Alaska 1993) the Court held that parental agreements concerning child support are not valid until a court approves of them, stating that "a court is 'not required to find that good cause existed merely because the parties had reached an agreement.'"

Turning forward to 2010, the Court in *Laughlin v. Laughlin*, No. 6472 (April 30, 2010) was asked to review a Superior Court Judge's approval of an agreement by divorcing parents to establish a "children's fund" from which they would pay certain children's expenses in lieu of child support.



"A 15-minute hearing can save the court system days of litigation if the parties are able to obtain judicial approval of their agreements. "

Alaska Rule of Civil Procedure 90.3 allows a superior court to "vary the child support award as calculated under the other provision of this rule for good cause upon proof by clear and convincing evidence that manifest injustice would result if the support award were not varied." Good cause "may include a finding that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children."

Palmer Superior Court Judge Vanessa White, a family law practitioner prior to her appointment on the bench, attempted to comply with the detailed requirements of the rule, finding that there were extraordinary circumstances in the case which justified a departure from Civil Rule 90.3.

However, the Alaska Supreme Court vacated these findings, reversed the decision and remanded the case for a calculation of child support consistent with Civil Rule 90.3. The Court held that the Superior Court did not calculate child support but for the variation. The Court found an absence of good cause to vary child support, and held that none of the Superior Court's findings of "extraordinary circumstances" upon which the deviation from the rule was based, viewed independently or together, supported the finding that "manifest injustice" would result if the Civil Rule 90.3 guidelines were followed.

This case sends a strong message to the Superior Court Judges and Masters who attempt to find ways to move custody and divorce cases quickly through the system. Often a Master in a dissolution proceeding is called upon to find a way to make the parties' own agreements pass muster. A 15-minute hearing can save the court system days of litigation if the parties are able to obtain judicial approval of their agreements. Before sending a client into a settlement conference or dissolution hearing, it may be advisable to prepare for the heightened level of scrutiny that is required if anything other than a straightforward 90.3 child support calculation is to be considered by the court.

© 2010 by Steven Pradell. 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.*

The CSI effect

By Dan Branch

Is Judge Judy ruining your civil practice? Do jurors give you a "cut to the chase" look when you try to explain the preponderance of the evidence standard? Did your conviction rate drop when the new season of CSI Miami started last year? Cheer up; things could change thanks to jurists in Ohio.

Recently the committee that drafts jury instructions for Ohio courts adopted a new jury instruction to reduce the impact of new technology and media on the outcome of jury trials. Ohio Jury Instruction Number 3 will warn jurors:

> *"The effort to exclude misleading outside influences information also puts a limit on getting legal information from television entertainment. This would apply to popular TV shows such as Law and Order, Boston Legal, Judge Judy, older shows like L.A. Law, Perry Mason, or Matlock, and any other fictional show dealing with the legal system. In addition, this would apply to shows such as CSI and NCIS, which present the use of scientific procedures to resolve criminal investigations. These and other similar shows may leave you with an improper preconceived idea about the legal system.*
>
> *As far as this case is concerned, you are not prohibited from watching such shows. However, there are many reasons why you cannot rely on TV legal programs, including the fact that these shows: (1) are not subject to the rules of evidence and legal safeguards that apply in this courtroom, and (2) are works of fiction that present unrealistic situations for dramatic effect. While entertaining, TV legal dramas condense, distort, or even ignore many procedures that take place in real cases and real courtrooms. No matter how convincing they try to be, these shows simply cannot depict the reality of an actual trial or investigation.* ***You must put aside anything you think you know about the legal system that you saw on TV."*** *(Emphasis added).*

"Recently the committee that drafts jury instructions for Ohio courts adopted a new jury instruction to reduce the impact of new technology and media on the outcome of jury trials."

The Ohio Court System didn't come with the idea for jury instruction 3 while competing in the annual Lake Erie Steelhead Tournament. They were inspired by a National Institute of Justice paper titled "Does the CSI Effect Exist?" *(VANDERBILT J. OF ENTERTAINMENT AND TECH. LAW* [Vol. 9:2:331]). Judge Donald Sheldon of Michigan wrote the paper, after a couple of university researchers questioned more than 1,000 potential jurors about their TV viewing habits. They were also asked about what kind of scientific evidence they expected to review if they were picked for a jury.

The good news for prosecutors is that Judge Sheldon found no evidence that a steady diet of CSI or other crime related TV shows will make a juror more likely to acquit guilty defendants. However, the judge found, "a significant percentage of all respondent jurors, regardless of whether they specifically watched CSI or its ilk, have high expectations that the prosecutor will present some scientific evidence in virtually every criminal case. And those expectations do translate into demands for scientific evidence as a condition of guilt in some case scenarios, particularly where the charge is serious and particularly where the other evidence of guilt is circumstantial."

Judge Sheldon recommends that court systems and prosecutors provide better explanations to jurors as to why they will not be seeing a high tech evidence show when the state presents it case. Judge Sheldon also advises that law enforcement agencies combat the effect by committing more resources to obtaining scientific evidence. The criminal justice budget in Alaska is already pretty strained. I wonder if Sam Waterston would be willing to work as Assistant District Attorney in Anchorage.

Judge Sheldon recommends that court systems and prosecutors provide better explanations to jurors as to why they will not be seeing a high tech evidence show when the state presents it case.

The Alaska Law Review

The Alaska Law Review at Duke University thanks the Bar for your hospitality and valuable insight during our recent visit to the state. We are currently accepting submissions of article manuscripts for publication in our December 2010 issue. If you have any interest in writing, any suggestions of potential article topics that were not communicated to a staff member in person last month, or any questions about the journal, please contact Jonathan Ross, Editor-in-Chief, at jsr25@duke.edu.

THE KIRK FILES

Lawhide, or the Gunfight at the O.K. Courthouse

By Kenneth Kirk

11:43 am:

Abe Hooper ambled quickly down the main street of the western town, looking in storefront windows as he passed. He looked in the general store, he looked in the horse barn, he looked in the feed store and the saddle shop. The man he was looking for wasn't there.

Finally, down at the end of the street, he poked his head into the old saloon. The only person noticeable was the bartender, absentmindedly polishing the glasses for the umpteenth time. But Abe saw something else, a figure hidden in the shadows in the back of the room. It was the man he needed, the old gunslinger.

Abe shuffled up to the table and stood there, deferentially. Eventually the gunslinger looked up at him, giving him about one second's worth of attention before turning back to the stack of business contracts and real estate deeds on the table in front of him.

"Mr. Pecking," Abe finally said, using his proper name, "you gotta help us. It's the Clanton gang. They're running roughshod over everyone. They're down at the courthouse right now."

"The name of the firm," said the old gunslinger, interrupting him, "is Clanton, McLaury & Claiborne. Say it right."

"But the dadgum firm is the whole dadburn problem," Abe moaned. "Ever since they joined up as partners, they's the only firm in town. Nobody else can get a lawyer no more. Not like folks can get one of them city slicker lawyers from Dodge, that's three days ride from here."

The old gunslinger sighed; he had heard this argument before. "Litigation is a young man's game, Abe," he said patiently. "I haven't seen the inside of a courtroom in three years, not counting that one time last year that I went in to get old Mrs. Gilbertson's will through probate. But that was uncontested. I'm not up to that kind of drama anymore."

"But it ain't fair to the good people of this town," Abe rejoined desperately, "that not a one of 'em can get a lawyer. The mining company, and the bank, and the two big landlords have the Clantons all tied up with retainers."

"Don't forget the insurance company," Pecking reminded him.

"And the insurance company. But nobody else can get a lawyer, because dang near every case in the county involves one of their regular clients. Why, Red Rippington, he had a really good workers' comp claim against the bank, with a third party case against the mining company, and the statute a' limitations ran because he couldn't get no representation."

"I'm sorry, Abe," the old gunslinger finally said. "Five years ago I might've been some help. I was younger then, and quicker on my feet. But the years have taken a toll on me. If I went into court now, I'd get shot down before I got to my opening argument."

11:49 am:

While Abe stood there forlornly, he was joined by Polly Whiteling, a pretty young widow with blue eyes and a bonnet. "Mr. Pecking," she pleaded, "surely you'll help. Maybe you haven't been in court for a long time, but you still know your way around. It's like riding a horse, you don't forget it. Maybe you wouldn't be as quick on the draw as you were years ago, but it's still better to the folks around here than not having any lawyer at all."

"I'm not so sure it is," he said, although he knew what she was saying was true. "Maybe they'll get a little more sympathy from the judge if they don't have a lawyer. And since old Judge Brogan retired, I might be more harm than good. I went up against Buford Snales a few times when he was practicing, before he went on the bench, and he never did like me much."

"I know Judge Snales doesn't have much of a sense of justice," said Polly, "but he's not a corrupt man, or a mean one, and he tries to follow the law. It's just that the Clantons can usually find some technicality to use against people. Why if you were in there, telling the judge laws that favor people, he'd be fair about it. I've never known him to hold a grudge." As she said that she looked over at Abe, who nodded in agreement.

"I appreciate what both of you are saying. But I'm happy being out of contested cases. There may not be much excitement in drafting up wills and business agreements, but it's steady work, and a decent living. And a lot less late nights at the office, to boot. Now I'm sorry if I'm the only other lawyer in private practice in this county anymore, but it's not my responsibility to carry the burdens of all these people. They'll just have to recruit some lawyer from back East, and make do until then." And then the gunslinger tried to turn his attention back to the deed he was working on.

Polly began to blubber. "But they're taking advantage of it. They're down there trying to evict Widow Morgenstein from her farm today, just because she spelled the name wrong on her mortgage check. Then right after that, they want to have Slim Williams' medical insurance canceled after he got injured, on the grounds that he shoulda gone all the way to Amarillo to see a specialist. Later in the afternoon, they have a hearing to try to avoid paying on the contract for when Dan Stubbing sold part of his ranch. And there's more like it tomorrow, right after the in-custody arraignments."

Pecking took a deep breath, then let it out. "That's a foreclosure, not an eviction," he said, "and I already told you, I can't help."

Polly furrowed her brow. "You are not the same man I knew, Mr. Pecking. I recollect when my husband died and you won me that wrongful death settlement. You lowered your contingent fee percentage on the grounds that it didn't take you that much time to get it worked out. That was the Samuel Pecking I knew."

11:54 am:

The Goggins boy, age 11, ran in off the street. "Mr. Pecking, you gotta come quick! The Clantons are trying to have Widow Morgenstein held for full attorney's fees! They have some case from New Mexico, and Judge Snales is looking all confused, and says he's gonna come back for oral argument at high noon! You have to be there for her."

Polly looked at the youngster and shook her head sadly. "I'm sorry, boy," she said, "but Mr. Pecking won't help. He feels like he's too old and washed up to go into court anymore."

"But you gotta! Paw said you was the best he ever seen. He said you got Evan Crane out of a hangin' charge once, down to a three dollar fine, without even calling a witness. And another time you got a jury to award punitive damages more than 10 times the compensatories! And they say Levi's took that extra rivet out of the crotch, because of your cross-examination of their design expert. You're the best, you don't lose them kinda skills. You gotta help the widder."

The old gunslinger looked hard at the boy. "Did you say they asked for full attorney's fees? Full, not just thirty percent?"

"What they said was 'enhanced to 100% of reasonable fees and costs, including paralegal time'," said the kid.

The gunslinger looked off into the distance for a minute. Then he stuffed his papers into his briefcase, closed it with a snap, and strode out through the swinging doors and into the dusty street. He didn't even hear Polly say the obligatory "my hero" as he walked out.

12:01 pm:

The old gunslinger lay on his back in the middle of the street, looking up at the cloudy sky as three angry wounds oozed blood out onto the front of his white shirt. Polly ran out into the street and cradled his head in her hands as the older man gasped for breath.

"What happened, Mr. Pecking?" She asked through her tears. "Were they too fast for you? Did they ambush you? Were there just too many of them?"

It took a few ragged breaths for the gunslinger to gather himself for his last words. "Danged electronic filing" was all he said.

ATTORNEY DISCIPLINE

Court disbars Anchorage attorney

The Alaska Supreme Court disbarred Anchorage attorney Jody P. Brion from the practice of law on March 24, 2010. The Area Hearing Committee and the Disciplinary Board had earlier recommended disbarment as the appropriate sanction for misconduct alleged in 18 grievances against Brion.

Clients complained that Brion would agree to represent the client, usually in a family law matter, and receive a retainer in advance. Thereafter, he would either do no work, or accomplish only part of the necessary work, generally much later than promised. Brion failed to communicate with clients, failed to keep account of client funds, used client funds for personal or other expenses, and then promised to refund the client's money after the client complained or filed a fee arbitration. The refund was usually made later than the agreed-upon date, if made. Regular notices of insufficient funds in Brion's IOLTA account indicated that Brion did not follow basic law office accounting procedures.

As these clients were complaining to the Bar, Brion was already facing discipline for similar issues of neglect and mishandling of monies. In its Hearing Committee Report, the Committee agreed that the volume of grievances against Brion demonstrated his persistence in the offending conduct and confirmed his unwillingness to learn from his mistakes or to abide by the rules of professional conduct. The Committee recommended disbarment, noting that Brion, "blindly ignored warnings dating back to at least 2006 that he was mishandling his law office accounts and that he risked his license if he didn't conform his conduct to safeguard client money. Nonetheless, Respondent continued to accept fees with no intent to perform legal services and disbarment is the appropriate sanction for his deliberate and repeated conversion of client money to his own use."

Brion failed to answer many of the disciplinary charges during the investigation of the grievances and failed to answer the Amended Petition for Formal Hearing. This resulted in the misconduct allegations being deemed admitted and provided additional grounds for professional discipline.

In its disbarment order the Supreme Court adopted the Disciplinary Board's recommendations that Brion meet several conditions in order to seek readmission. Brion must make full restitution of any amounts owed to the Lawyers' Fund for Client Protection, the Alaska Bar Association, and all clients for any unpaid fee arbitration awards; pay for costs and fees incurred in the disciplinary proceeding; pay for a forensic audit of his law firm accounts to determine whether client funds were properly allocated or refunded; pay any losses discovered in the course of the forensic audit; complete six hours of approved CLE credits in attorney ethics, 12 hours of approved CLE credits in law office management, pass the Multi-State Professional Responsibility Examination (MPRE); and, obtain Disciplinary Board approval of Brion's law practice financial procedures, which procedures must include independent monitoring and verification to protect client funds.

Brion was serving a three year suspension (with two years stayed) for earlier neglect at the time of his disbarment. The clerk's files for the Brion disciplinary proceedings are available for review at the Bar's office.

Visualizing the United States Holocaust Memorial Museum

By Jean Bundy

I am eating a chicken/guacamole burrito at Anchorage's Dena'ina Civic and Convention Center. Up front a video is projecting a 1936 photo of German criminal court judges, dressed in velvet with hats resembling fallen soufflés.

Hard to imagine these grandfatherly figures were saluting Hitler. The room grows silent as Dr. William Meinecke, historian from the United States Holocaust Memorial Museum in Washington D.C., spliced German newsreels with photos taken by Allies to emphasize how Hitler pretended to keep democracy in place while slowly removing civil liberties from "life unworthy of life."

My story began a week earlier when I flew to D.C. for The Portrait Society of America's conference and a visit with grandchildren, Tess and Kai. Realizing I had extra time, I became a guest of Will Meinecke, after confessing I was "scared to death" to visit the Memorial. Friends told me I'd freak out when seeing the shoes, the boxcar, and the tower of photos.

The Hall of Witness in the Holocasut Memorial, reflecting a sense of imbalance, distortion, and rupture — characteristics of the civilization in which the Holocaust took place. Photo by the U.S. Holocaust Memorial Museum.

It was almost 10 a.m., and the sun was shining on the Washington Monument as tee-shirted tourists were waiting for security to open the Holocaust Memorial, designed by James Ingo Freed, 1993. As a painter, I wanted to look beyond the material remains, umbrellas and hairbrushes, and focus on the art made in response to unbelievable times.

Architect Freed was born in the Weimar Republic and left for America in 1939. His Holocaust Memorial has a bulbous facade with monotonous square windows resembling the Bastille. The building appeared sinister as it curved away from pedestrians eager to enter its portals, themes of contradiction. I found Will in the cavernous brick courtyard deliberately poorly lit from the roof.

Museum attendees quickly filled the area creating an aura of claustrophobia. Battleship grey trusses fastened with oversized rivets, signal a factory-production environment. Flood lights used to target and shoot prisoners provide light at dusk.

I boarded a freight elevator that delivers 1500 visitors daily to the beginning of a journey along a three dimensional timeline of surreal history. The doors opened to a tight exhibition space suggesting spatial entrapment. I pushed past newsreels of a Germany shattered by losing World War I. A red and white barricade stops visitors from proceeding to the next exhibit, an example of what those accused of fabricated crimes experienced. A row of windows overlooking the courtyard looked crooked, perhaps installed incorrectly—no, symbolic of a world where all is not well.

It was "take your child to work day," a reminder the Memorial is also a business. Meinecke opened a door and suddenly I was no longer in 1930s Germany, but in contemporary office space. Backstage, employees make a huge effort to continue humanity's desperate attempt to create peace and civility on earth. Computers need to be serviced and artifacts have to be preserved just as they were found in 1945. The museum borrows goods from European warehouses which loan objects — provided they are cleaned and returned so more can be rotated. Will's son, Allen, was taking a photography class while other kids were experiencing Daniel's Story, an exhibit about a 14-year-old boy who is forced to leave home, herded into a concentration camp. Daniel is a composite taken from diaries. Tropes of domesticity, a cookie jar and a bicycle can be touched. Funny how fake can make you shiver more than what is real.

After experiencing the second and third floors where onlookers are subjected to Hitler's schemes of political ridicule leading to mass murder, viewers discover sitting rooms where minimal art provides blank space to think about the artifacts, traces of those who perished.

"Memorial" is four Ellsworth Kelly monochromatic white paintings of rectangles and a triangle, all designed to soothe. After I viewed a section of an Auschwitz barracks, complete with enamel basins, used by prisoners for washing and eating, Sol LeWitt's "Consequence" seemed needed. Five grey squares with a hint of color was his attempt at representing absence.

As an artist I was drawn to "Crematorium II," 1992, by Mieczyslaw Stobierski. This plaster diorama details the systematic killing process from the gassing to the ovens. Figures seen removing their clothing or gasping for breath became human the more I focused. The hysterical expressions on these 3,000 doomed mannequins harkened back to imagery of nudity and brutality found in Michelangelo's "Last Judgment," 1536. Stobierski was in the Polish underground and attended war crimes trials to infuse his art with reality. He ignored color and texture--no green grass, no brick chimneys in his concentration camp. Mieczyslaw played with scale as this display resembles a dollhouse. I tried to imagine/not imagine, even fantasized a gingerbread house, the kind seen in department stores at Christmas—how easy to become desensitized. What if the piece had been made life-size, removed from the artificial setting of a museum?

Shapiro's "Loss and Regneration" sculptures outside the west entrance of the Holocaust Memorial in Washington, D.C. U.S. Holocaust Memorial Musem photo. www.ushmm.org.

Sculptor George Segal's "Holocaust Memorial," 1984, at the California Palace of the Legion of Honor, installed bleached white corpses of human proportion, set against cypress trees and the Pacific Ocean.

Heading to the ground floor restrooms I passed Richard Serra's steel box, "Gravity," sharply cutting into a perfectly good set of stairs, why destroy?

Freed also designed the Jacob Javits Convention Center, New York, where a Serra sculpture was removed after protests about ugliness. This much smaller piece shaped like a suitcase is a good reminder that just because you don't like a work of art/ a person is not a good reason to remove it/ or them.

Over the best tuna fish sandwich ever at the Memorial's café, Meinecke stressed the museum's mission of encouraging hope. The restaurant overlooks Joel Shapiro's two bronze sculptures, "Loss" and "Regeneration," dedicated to the children. The abstract expressionist, David Smith, made similar metal structures, but Shapiro goes a step further, bending and lurching his off-balance stick figure. Noguchi, the Japanese sculptor who experienced internment during WWII, played with themes of instability by placing cubes on end just as Shapiro has done here with his upside-down house--a Noguchi cube resides at Yale's Beinecke Library.

I ended my tour at the Hall of Remembrance, which suggests a synagogue but could be any place of worship. Celestial light enters from a dome above an eternal flame. Although the Holocaust Memorial revisits World War II, its post-modern art anchors the museum to the present as it asks the viewers to impose their own thoughts onto everything they experience.

I want to thank the Alaska Bar Association for allowing me to represent it at The U.S. Holocaust Museum Memorial hosted by Dr. William Meinecke, a gentleman who radiates warmth. I left feeling very fortunate to be alive.

Our constitutional logic, Part II: Washington's oath

By Peter Aschenbrenner

Hoofbeats announce the arrival of our guest.

"Should I make myself scarce?" I ask Jefferson.

"I'm not going to call out the cites myself," Jefferson replies.

The three of us settle into the shade of an Albemarle County evening.

"I suppose," The General mops his brow, "we should all be thankful for this hot weather. After that volcano in Iceland blew up – "

"Seventeen eighty-three," Jefferson footnotes this disaster.

"You don't think Congress," the General pulls at his mint julep, "will let Iceland into the union, do you?" he asks me.

"Alaska has more volcanoes," I reply, "but their names can be pronounced without personal injury."

"The floor is yours," Jefferson urges the General.

"You'll remember the Philadelphia convention elected me President. Unanimously."

"May 25, 1787," I whip out the first volume of Farrand's Records. "Page 2, if I may cite to the Journal of the 'Fœderal Convention'."

"And we all agreed," Washington concedes, "that 'nothing spoken in the House be printed, or otherwise published, or communicated without leave'."

"May 29th, if 1 Farrand 15 be our guide," I add and ask the General, "Did you really find a copy of the proposals for the federal constitution in the Pennsylvania State House?"

"Some damn fool left his papers there, and when General Mifflin brought them to my attention I – "

"You announced to the delegates, 'let him who owns it take it.' If I may finish your narrative for you."

"Farrand relates the anecdote in more detail, General," Jefferson cites to 3:86. "You admonished the delegates 'with a dignity so severe that every Person seemed alarmed'."

"I can have that effect on people. Especially when I 'drop the bomb' on them. 'One member of this Body has been so neglectful of the secrets of the Convention – ' and so forth."

Washington drops his head into his hands.

"And now I must suffer the consequences of my own recklessness."

"This brings us to your improvident disclosure of the secret Journal of the Convention," I state. "March 19, 1796. 3 Farrand 370."

"Let's back up," Jefferson counsels. "What exactly did you promise the convention?"

"September 17, 1787," I flip to the end of volume 2. "The President having asked the Convention [what] should be done with the Journals … It was resolved nem: con: 'that he retain the Journal and other papers, subject to the order of Congress, if ever formed under the Constitution'."

"You're off the hook, General," Jefferson tops off our drinks. "Congress ordered the Journal published in 1818."

"That cheap?" Washington stares down Jefferson. "I don't think so."

"In fairness to the General," I pick up the thread, "Washington turned the papers over – "

"On March 19, 1796," Washington adds. "Somewhat in advance of getting permission from Congress." He gathers himself together. "Look, does the name Bertrand Russell mean anything to you?"

"Do you have that much time on your hands?" I ask the General.

"I'm still waiting for my crypt under the Rotunda," Washington replies.

"You want to be buried with Congress?" Jefferson asks.

"A promise is a promise," the General shrugs.

"You're referring to Lady Washington's gift of your mortal remains, at John Adams' request, to the nation?"

"That would have been something," Washington muses, "altho' my will insists that there be no 'parade or funeral Oration'."

"Back to Russell," Jefferson directs traffic. "What have you got, Aschenbrenner?"

"'This sentence is not true'," I reply.

"That applies here," Washington asks. "Doesn't it?"

"Good point, General," I reply. "You want answers to constitutional questions. A worthy American quest. You seek out an oracle. You tip the priests who guard the foggy orifice, and they, so silvered, direct you to the inner sanctum. You tremble your question. The oracle answers. 'I am not an oracle.' That is the answer you receive."

"I figured as much," Washington sighs. "Damnation to Sir Bertrand Russell."

"The Earl," I ahem his correct salutation, "of Russell."

"And that's the answer Madison gave you," Jefferson answers Washington. "Background us," he instructs me.

"Washington got cheesed at Madison's assertion," I read from 3 Farrand 374, "and this is during the debate in the Senate over Jay's Treaty, that the House – well, here's what Madison said: 'Where Legislative objects are embraced by Treaties, dot dot dot, no Treaty shall be operative without a law to sanction it'."

"That's what Madison argued. And what a foolish position that is," Washington exclaims. "Who would contend that a treaty is non-self-executing? That treaties require acts of Congress or executive action to carry them into effect?"

"Mr. J.," I pass the laptop, "take the wheel."

"Let me cite you to 552 U.S. 492 (2008)," Jefferson directs the General's attention to Medellin's case. "At page 528."

Washington studies the text on the shimmering screen.

"The Supreme Court sided with Madison? Whoa, that's rich," the General exclaims. "The Chief Justice cites to Federalist No. 47: '[U]nder our constitutional system of checks and balances, the magistrate in whom the whole executive power resides cannot of himself make a law.' That would, however, seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a [treaty that requires Congressional fulfillment, i.e., a] non-self-executing treaty'."

"The Supreme Court," Jefferson revels in the irony, "quotes Madison's 1788 Federalist essay (above cited), which demonstrates that Madison's 1788 position varies from that which Madison intoned on the floor of the House in 1796."

"Isn't there another problem here?" I ask Washington. "You disclosed the convention's papers on March 19, 1796; your purpose was to premise your argument on this point: the Convention voted down a proposal arguably inconsistent with text it later adopted."

"The fallacy of the excluded middle!" Jefferson guffaws. "If you want to know what text A says, latch onto the convention's rejection of a neighboring proposition, reverse the sense of same, and voilà!, that expands your understanding of A!"

"He's kidding?" Washington turns to me.

"Actually, Mr. J's right, General. It's officially recognized. You can check it out on WikiParadox."

"One at a time," the General rules Jeff 'n' me out of order. "Let's get back to the self-denying oracle."

"Was Madison's reading of the Constitution so unreasonable?" Jefferson asks. "Wasn't the Supreme Court right in Medellin's case? There are treaties of peace, self-executing if you will, and there are non-self-executing treaties, where the President might as well bring forward a bill to fulfill the treaty's purpose at the same time that the Senate considers ratification."

"Wow, Mr. J.," I gush. "You proposed a constitutional amendment as accompaniment to the Senate's consideration of the Louisiana Purchase."

"Which you turned into an article in The Bar Rag, Aschenbrenner," the General notes. "Are you going to the Library of Congress to read the papers I deposited with Pickering?"

"I've got my request on file," I reply.

Jefferson refreshes Washington's drink.

"If I may get back to the oracular theory of constitutional interpretation."

"I don't come out looking very good, do I?" our first President asks our third.

" 'According to my memory & that of others,' Madison lettered me on April 4th," Jefferson replies, " 'the Journal of the Convention was, by vote, deposited with the P[resident of the Convention], to be kept sacred until called for by some competent authority. How can this be reconciled with the use he has made of it?' "

"Great!" Washington wails. "Just great. Upended by the Liar's paradox, and that's thanks to the Earl of Russell."

"Actually," I point out, "St. Paul was unhorsed in the first century."

"On the same grounds," Jefferson winks at me. "Titus, chapter one, verses twelve and thirteen spoil'd his day. That's Liars and Lawyers, right?"

"Allow me," I wave off Jefferson, "as I have my Farrand handy. Here is Madison on the floor of the House, and this is April 6th. 'Neither himself nor the other members who had belonged to the Federal Convention, could be under any particular obligation … to answer ... the intention of the whole body … [T]here would not be much delicacy in the undertaking … '."

"And Madison went on," Jefferson picks up the thread, "to say that as the Constitution emerged from the convention, 'it was nothing more than the draft of a plan, nothing but

Continued on page 9

Pictured here are, L-R: Judge Stephanie Joannides, Anchorage Superior Court; Judge Nancy Nolan (Ret.), Anchorage District Court; Anchorage Superior Court Judge Sharon Gleason, Presiding Judge of the Third Judicial District; Justice Fabe; Judge Donald; Susanne DiPietro, Judicial Education Coordinator for the Alaska Court System; Judge Marty Beckwith (Ret.), Anchorage District Court; and Magistrate Judge Leslie Longenbaugh, U.S. District Court for the District of Alaska. Not pictured: U.S. Magistrate Judge Deborah Smith.

Fabe hosts women judges

Judge Bernice B. Donald, U.S. District Court for the Western District of Tennessee, recently visited Alaska to participate in workshop panels on "Implicit Bias in the Legal System" and "Media and the Courts" at the annual Alaska Bar Convention and Judicial Conference held April 28-30, 2010, in Anchorage. During her visit, Judge Donald, a former president of the National Association of Women Judges, was the guest of honor at a dinner for women judges at the home of the current NAWJ president, Alaska Supreme Court Justice Dana Fabe.

Juneau hosted several Russian visitors in late May, participants in the KAROL (Khabarovsk-Alaska Rule of Law) partnership project. Pictured at the top of the tram in Juneau are the visitors with Juneau attorney Karen Godnick (fourth from left) in a photo shot by attorney Hanna Sebold. In between KAROL work, the group was guided on a whale-watching trip and toured downtown Juneau.

Our constitutional logic, Part II: Washington's oath

Continued from page 8

a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions'."

"Funny you should ask," I blurt, altho' no one asked my opinion. "Not one of the one hundred and eleven justices of the Supreme Court has ever quoted Madison's: 'the sense of [the Convention] could never be regarded as the oracular guide in expounding the Constitution'."

"I'm not out of the woods yet." Washington mops his brow. "What about my my Message to the House of March 30, 1796."

"There's one hit," I bang away at my laptop. "From 1949. National Mutual v. Tidewater, 337 U.S. 582, 631-632."

"You're telling me that in – "

"We're up to 2010," Jefferson helps out the General. "That's 228 years of Supreme Court decision-making, General."

"In all this time, only one crummy Supreme Court decision quotes me?"

"It's only a footnote," I correct the General. "Here it is. 'The propriety of considering the proposals and debates of the Constitutional Convention was long ago considered by those most intimately concerned with its formulation. Washington, in his message to the House of Representatives refusing the demands of that body for the papers relating to Jay's treaty, stated – ' And so back to your Message to the House."

"I break my promise to the Convention in 1787 and I get a citation in 1949?"

"It was a dissent," I offer the best consolation I can, "and written by Felix Frankfurter."

"Hot dog!" Washington sighs. "He turns me into the avatar of propriety even when I blindside Madison. Call it the curse of Washington's 'cherry tree'."

"That was a fable, wasn't it?" I ask.

"It has enjoyed wide circulation," Washington studies his nails. "I surely don't know who could have started such a fantastic rumour."

"You did notice," I point to the National Mutual dissent, "that 'those most intimately concerned with [the Constitution's] formulation' can serve as oracles."

"We've been over this ground. The last man living can speak for his dead colleagues, and without contradiction," Washington sighs. "So how many times did the Supreme Court fall for it?"

"A hundred and eighty three times," I point to the result screen. "Intent! /10 founder! framer!"

"Great," Washington retorts. "Everyone's in on it."

Washington paces along the boardwalk, taking in Monticello's magnificent views of the Blue Ridge Mountains.

"You try to do the wrong thing, just once, and what do you get? Veneration. You'd think Americans – especially lawyers and judges – would notice that I screwed up. Big time. Did Frankfurter have his Farrand at hand?"

"He cites The Records of the Federal Convention," I offer Washington a view of the offending dissent. "He just didn't read it."

"Aschenbrenner," Jefferson instructs me, "go through some of those early citations. Who was the first justice to argue from the founder's intent?"

"That was in Hylton's appeal," I reply. "The case challenging the tax on carriages, opinion by Justice Paterson."

"3 U.S. 171, 176 (1796)," Jefferson ahems the citation.

" 'It was, however, obviously the intention of the framers of the Constitution'," I quote, " 'that Congress should possess full power over every species of taxable property … ' and so forth and so on."

"And the exact date of the decision?" Jefferson winks at Washington.

"That's amazing Mr. J.," I gasp. "That's the day Ellsworth was sworn in as Chief. March 8, 1796."

"So that would be," Washington picks up the thread, "eleven days before I turned the Convention's papers over to Pickering. Your successor as Secretary of State. But where does that get us?" Washington asks me.

"Congress published the Journal papers in 1819. See its resolution of March 27, 1818," I declare. "After that, you're free and clear."

"As far as the Muse of History is concerned," Jefferson adds. "With whom," Jefferson winks at me, "I am on the most intimate terms."

"What do you think, Mr. J?" I ask. "As for redeeming General Washington, I'm going with literary hoax."

"Could be," Jefferson refills our glasses. "But I'm thinking more along the lines of paradox."

"What do you have in mind?" Washington asks. "One Virginian to another."

"Try this angle. You're an arrogant, proud man, aren't you, General?"

"With a lot to be proud of," Washington returns a frosty glare.

"Oh, that's rich," I respond. "You lifted that from Winston Churchill."

"Madison skewered you on two grounds, General," Jefferson ignores my gaffe. "First, you were a promise breaker – the man entrusted with the secrets of the Convention – and, second, you were a fool to believe in the oracular theory of the Constitution."

"You were going to redeem me," Washington answers Jefferson. "If I recall your expressed intentions, sir."

"Eleven days after Justice Paterson, in Hylton's case, relied on the intentions of the convention delegates, and he was one of them," Jefferson lays out his cunning plan, "you corrected him by proving that it was the intention of the framers that a framer's surmise as to other framer's intentions not be treated as oracular."

"Perhaps," the General ponders the angle. "So by disclosing the Journal, I disclosed the delegates' promise – a promise made in secret – not to argue from anyone's – or everyone's – intent."

"You upended your own Supreme Court! And they never noticed it!"

"Well played, sir!" Jefferson grasps Washington's hand.

"That about wraps things up," I blurt.

"But what Madison?" Washington wonders his second thoughts. "A little revenge would be nice."

"You got Jay's treaty through the Senate," Jefferson replies, "on a vote of 20-10. Not a single vote to spare."

"Aschenbrenner," Washington addresses me. "You're an Alaskan. You understand grudges. What'ya got?"

"Following Madison's own ineluctable logic," I explain, "he supported legislation to fulfill Jay's treaty, and saved your administration from defeat."

"Ah!" Washington's face lights up. "Congress fulfilled its obligations under Jay's Treaty by paying British creditors six hundred thousand pounds sterling."

"On account of purchases Americans made before the revolution," Jefferson recounts the sordid history. "In patriotic fervor, they refused to pay for the goods they ordered from British merchants!"

"Free Chippendale for middle-class Americans!" Washington beams.

He fixes me with a steely glance.

"Aschenbrenner," he asks. "You'll make sure this gets around. Right? Especially the part about me being smarter than James Madison."

ESTATE PLANNING CORNER

Disinheriting language

By Steven T. O'Hara

Besides yourself and the taxing authorities, your wealth is nobody's business. In general, you have freedom of contract in terms of naming your beneficiaries in the event of your death.

Freedom of contract, as a concept, is subject to public policy. For example, public policy may include laws that protect certain interests of your spouse or children, depending on the circumstances and the applicable jurisdiction.

Occasionally we lawyers will get a call from a client who wants to remove immediately a potential beneficiary from the client's estate or Trusts. Provisions are offered below as examples of possible language where a client wants to sign a quick Codicil or Trust Amendment to remove someone as a potential beneficiary.

Noteworthy is that although your wealth is generally nobody's business, it may be a good idea to consider having an annual family meeting in a retreat-type setting. At an annual family meeting, you might provide full and fair disclosure of wealth and intent with the goal of achieving harmony over the long term.

At an annual family meeting, you might provide full and fair disclosure of wealth and intent with the goal of achieving harmony over the long term.

The following provisions are for illustration purposes only and must not be used without being tailored to the applicable law and the circumstances of the client:

CODICIL ILLUSTRATION

I, Jane Client, of Anchorage, Alaska, declare this to be a Codicil to my Will dated February 2, 2000.

FIRST: I add the following language to Article I: Notwithstanding any other provision of this instrument:

A. For all purposes of this instrument Joe Bar Rag and all his descendants (whenever born) shall be deemed to be deceased and to have predeceased me;

"Occasionally we lawyers will get a call from a client who wants to remove immediately a potential beneficiary from the client's estate or Trusts."

B. Each and every disposition or appointment of property to Joe Bar Rag or to any descendant of his under this instrument, each and every provision of this instrument conferring a general or special power of appointment upon Joe Bar Rag or any descendant of his, and each and every provision of this instrument appointing Joe Bar Rag or any descendant of his as a fiduciary (or authorizing him or any descendant of his to appoint a fiduciary or to approve accounts) under this instrument, is revoked; and

C. Under no circumstances shall Joe Bar Rag or any descendant of his receive any property or interests whatsoever under this instrument or by reason of my death or serve as a fiduciary or appoint a fiduciary or approve accounts under this instrument.

SECOND: In all other respects, I confirm and republish my Will dated February 2, 2000.

TRUST AMENDMENT ILLUSTRATION

To: Jane Client, as Trustee of the Jane Client Trust Dated February 2, 2000.

Pursuant to the right reserved to me under Article XV of the Declaration of Trust identified above, I hereby amend that Declaration of Trust in the following respects:

FIRST: I add the following paragraph C to Article II:

C. Notwithstanding any other provision of this instrument:

1. For all purposes of this instrument Joe Bar Rag and all his descendants (whenever born) shall be deemed to be deceased and to have predeceased me;

2. Each and every disposition or appointment of property to Joe Bar Rag or to any descendant of his under this instrument, each and every provision of this instrument conferring a general or special power of appointment upon Joe Bar Rag or any descendant of his, and each and every provision of this instrument appointing Joe Bar Rag or any descendant of his as a fiduciary (or authorizing him or any descendant of his to appoint a fiduciary or to approve accounts) under this instrument, is revoked; and

3. Under no circumstances shall Joe Bar Rag or any descendant of his receive any property or interests whatsoever under this instrument or by reason of my death or serve as a fiduciary or appoint a fiduciary or approve accounts under this instrument.

SECOND: I confirm and readopt the remaining provisions of that Declaration of Trust, reserving to myself the right to amend further that Declaration of Trust and this amendment thereto.

The vital but elusive relationship of visitation to reasonable efforts

By Daniel B. Lord

For those newly-initiated in the adjudication of Child in Need of Aid or CINA cases, the practice can appear disjointed. CINA matters include stages in the litigation, and different rights, responsibilities and obligations of the parties, -- which are often in tension with one another. Perhaps at no other CINA litigation stage is this tension more apparent than at the beginning, with the right and responsibility of parents to reasonable visitation with their children, see AS 47.10.084(c), and the obligation of the Alaska State Department of Health and Social Services to provide reasonable visitation between the child and the child's parents. See AS 47.10.080(p).

Visitation is an issue of growing emphasis in the CINA context. This is in large part a result of recent attention paid to research in social work showing that the frequency of parental visiting is a strong predictor of children being united with their parents. See, e.g., Sonya J. Leathers, Parental Visiting and Family Reunification: Could Inclusive Practice Make a Difference?, 81 Child Welfare 595 (2006); see also Jeanne M. Kaiser, Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases, 7 Rutgers J. L. & Pub. Pol'y 100, 137 (2009). Although the research evidence has only recently caught attention, the importance of visitation as a matter of public policy in child protection cases has long been emphasized.

And yet, a question sometimes asked by practitioners, attorneys and judges, is the following: How, under what standard, should it be determined whether the department's obligation to provide reasonable visitation has been fulfilled?

One answer is the best interests of the child standard. An overall purpose of the CINA Rules, after all, is to promote the best interests of the child, see Alaska CINA R. 1(c), and the standard is applied when a denial or restriction in visitations is challenged. The department may deny visitation if there is clear and convincing evidence that visits are not in the child's best interests, AS 47.10.080(p), Alaska CINA R. 19.1, and when a restriction in visitation is challenged, the department must prove by a preponderance of the evidence to the court that the restriction is in the child's best interests. In re A.B., 791 P.2d 615, 618 (Alaska 1990).

For an understanding of the child's best interests, the courts typically turn to the Guardian ad litem (GAL), the person appointed by the court to represent the child's best interests in CINA cases. Alaska CINA R. 11(b). Visitation is an issue of special concern for the GAL. See Alaska CINA R. 11(f)(2)(F) (monitoring "provision and utilization of family support services" as a duty of GAL to child), AS 47.10.990(11) ("family support services" include visitation). The GAL, in fact, is to advise the court on visitation. See Alaska CINA R. 16(a)(2) (GAL to submit "predisposition report" to court that includes "position regarding . . . visitation"); see also Alaska CINA R. 11(f)(3)(C) ("request for specific court orders . . . for visitation" as a duty of GAL to court).

An advantage of turning to the GAL is that the GAL has considerable latitude in advocating for the child's best interests. For example, the GAL may advocate that it is in the best interests of the child not only to have more frequent visitations, but also to have better quality visitations. See Margaret Beyer, Too Little, Too Late: Designing Family Support to Succeed, 22 N.Y.U. Rev. L. & Soc. Change 311, 338 (1996) (citing research evidence that reunification is far more likely when visits occur at the foster home where the parent can engage in normal activities, such as putting the child to bed or feeding the child a meal). But this latitude can cut both ways, as a GAL in a particular case may also be preoccupied with other concerns or have a position inconsistent with reunification or with the research evidence, leaving to a parent advocacy for frequent and better quality visitations with the child.

The better answer is to apply the "reasonable efforts" standard. While there is no statute or case law in Alaska expressly providing that visitation is integral or a part of reasonable efforts, the department is obligated to make timely and reasonable efforts to provide "family support services" that are designed to ensure the safe return of the child to the home. AS 47.10.086(a). Family support services, as mentioned above, include "visitation" with the child's parents. See AS 47.10.990(11), AS 47.10.990(10).

Application of the reasonable efforts standard to visitations, however, is not as straightforward as it seems. The language under AS 47.10.990(11) is permissive, that family support services "may" -- not "must" -- include "visitation with family members." Moreover, in respect to timeliness of the provision of visitation and other family support services, reasonable timeliness is defined as that which "services the best interests of the child" -- not reunification with the parents or the child's best interests and reunification. See AS 47.10.990(28), AS 47.10.990(27).

In Alaska, a key to making visitations a part of reasonable efforts is the case plan. Child protection agencies throughout the county are under an obligation to develop a case plan as part of pursuing "reasonable efforts" at reunification. The federal Adoption and Safe Families Act of 1997 (or ASFA), which provides funding for individual foster care placements, requires that states, among many other things, "provide a written case plan for each child for whom the state claims federal foster care maintenance payments." 42 U.S.C. § 671(c)(16). See also 42 U.S.C. § 675(1) (defining case plan as a document that includes "a plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child"); 45 C.F.R. 1356.21(g)(1) (requiring that case plans be a written document, in a format determined by state and developed jointly with parents); 45 C.F.R. 1356.21(g)(4) (mandating that case plans include "a description of the services offered and provided to prevent removal of the child from the home and to reunify the family"). As noted by one surveyor of state laws, "Most state legislative and judicial definitions of reasonable efforts ultimately require the agency to identify the problems that led to the out-of-home placement, to identify the goals and services that will enable the parent to remedy those problems, and to assist the parents

Continued on page 11

Race Judicata 5K -- Running for Anchorage Youth Court

Attorneys, friends, and other runners from across Alaska converged on Westchester Lagoon on Sunday, May 2 for the 6th Annual Race Judicata 5K. Hosted by the Young Lawyer Section of the Anchorage Bar Association, and underwritten by a number of Anchorage law firms and businesses, the Race is a fundraiser for Anchorage Youth Court.

This year the Race was held on the Sunday following the annual bar convention, and a number of lawyers in town for the convention—from as far away as Nome—stayed an extra day to race up the Coastal Trail and back. The event raised $2,500 for the youth court.

In a race heavy with familiar Nordic skiing names, the men's field was won by UAA skier Max Treinen in 17:25, followed by Chris Seaman (a former Michigan Tech skier) in second and Clay Crossett in third. In the women's field, 2010 Nordic skiing Olympian Holly Brooks broke the tape at 18:42, with newly named Service High School cross-country running coach Danielle Dalton in second, and Victoria Clark in third. All six took home Race Judicata gavels.

Honors for Fastest Lawyer went to Mark Fineman, who finished 6th overall. The participation award once again went to Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC, who not only underwrite the race year after year, but regularly bring attorneys, staff, spouses, kids, and dogs to participate.

Many thanks to numerous volunteers from YLS, the UAA Pre-Law Society, Anchorage Youth Court, and timer Richard Marsolais for all their help. Other sponsors include: Foley & Foley; Sedor, Wendlandt, Evans & Filippi; Davison & Davison; Durell Law Group; Pope & Katcher; and Skinny Raven Sports.

Finally, Bill Pearson—director of Race Judicata for the last five years and former YLS president—is getting a little too old to be a "young lawyer" and is handing over the reins to fresh attorneys. Bill's outstanding organization, attention to detail, ability to attract sponsors, and knowledge of the Anchorage running community have proved vital in setting the standard for such a high quality race year after year. He will be sorely missed, but current Court of Appeals law clerks Emily Whitney and Lars Johnson are already training to direct the event next year. Yes, it really does take two people to replace Bill.

The firm of Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC (along with family members) won the law firm participation prize yet again.

Olympic Nordic skier Holly Brooks (1st) and Danielle Dalton (2nd) display their gavels.

Photos by Ryan Fortson

YLS President Elizabeth Apostola and her Yorkies coming to the finish line.

Getting into the spirit of the race.

The vital but elusive relationship

Continued from page 10

as they seek to correct the problems." Kathleen S. Bean, Reasonable Efforts: What State Courts Think, 36 U. Tol. L. Rev. 321, 345 (2005).

The requirement of reasonable efforts is no different in Alaska. In accordance with the 1998 state statute enacted in compliance with ASFA, the department is to make reasonable efforts, including the duty to

(1) identify family services that will assist the parent or guardian in remedying the conduct or conditions in the home that made the child a child in need of aid;

(2) actively offer the parent or guardian, and refer the parent or guardian to, the services identified under (1) of this subsection; . . . and

(3) document the department's actions that are under (1) and (2) of this subsection.

AS 47.10.086(a). See generally Mark Andrews, "Active" Versus "Reasonable Efforts": The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need Statutes, 19 Alaska L. Rev. 85, 111 (2002) (opining that 1998 state statute "revolutionized the nature of the affirmative duties owed to the parents," that in the past, "the mere existence of case plans with duties to the parents was a rarity," and that the case plan now is itself mandatory, with department's duties defined). By "document" under AS 47.10.086(a)(3), the case plan is implied. See 45 C.F.R. 1356.21(g)(1); Alaska State Department of Health and Social Services, Child Protection Services (CPS) Manual (issued March 31, 1989, superseded July 1, 1999), subsec. 2.9.2.g ("services to the family are derived from the case plan").

Therefore, for visitations to be a part of reasonable efforts, they must be specified in a case plan. Their incorporation can be crucial at latter stages in CINA litigation. For instance, the department may not be able to proceed on a petition to terminate parental rights and responsibilities if visitations were specified in the action plan for a parent, but through not fault of the parent failed to occur. See AS 47.10.088(e)(2) ("the department shall petition for termination of parental rights . . . unless the department . . . is required to make reasonable efforts under AS 47.10.086 and the department has not provided to the parent, consistent with the time period in the department's case plan, the family support services that the department has determined are necessary for the safe return of the child to the home").

Based on the above, attorneys who represent parents in CINA matters would be well advised as a general rule to participate at the case planning conference, and advocate that visitations with the child be incorporated, with sufficient specificity, in the parent's action plan. If such efforts meet with resistance, then the issue may be brought before the court. See Alaska CINA R. 191.1(d) (permitting judicial review on matters not otherwise covered by CINA rules). Less than this in advocating for frequent and quality visitations may fall below an acceptable standard of care in Alaska CINA matters.

2,858 members report 2009 MCLE compliance

Active Bar members are required to earn 3 CLE credits in ethics each year. The Alaska Supreme Court recommended that Bar members also earn an additional 9 voluntary CLE credits. Nearly 70% of active Bar members reported earning at least 12 CLE credits in 2009.

As of May 25, 2010 MCLE reports show 2858 members in compliance for the 2009 calendar year, as follows:

* 1945 reported earning at least 12 credits
* 24 reported earning 11
* 32 reported earning 10
* 83 reported earning 9
* 51 reported earning 8
* 52 reported earning 7
* 121 reported earning 6
* 61 reported earning 5
* 31 reported earning 4
* 458 reported earning the minimum mandatory 3

Go to
https://www.alaskabar.org/servlet/content/2009_mcle_vcle_compliance_list.html#O
for the names of these Bar members.

Law Day 2010: Around Alaska

Dramatic changes, challenges explored in 21st Century

The legal community across the nation celebrated Law Day on May marking the nation's commitment to the rule of law.

This year's Law Day theme – "Law in the 21st Century: Enduring Traditions, Emerging Challenges" – sets its focus on the dramatic changes in the law as it seeks to shape and adapt to new conditions presented at the beginning of this second decade of the century, said the American Bar Association.

"The legal profession is at a transformative stage in its history. We live and work in an increasingly borderless world," said AmBar President Carolyn B. Lamm. "Law Day is a wonderful opportunity to interact with the public, including students – who may one day decide to pursue a career in the law – and ask them questions about the impact of globalization and technology on their lives and the law including ethics, their understanding of Constitutional democracy and their ideas about how our laws address the needs of the people living in the United States."

The association's Division for Public Education also maintains the Law Day Web site, www.lawday.org, that annually offers program planning materials for schools, court houses, civic groups, lawyers and others.

Envisioned in 1957 by then-AmBar President Charles S. Rhyne as a special national day of recognition, the first Law Day was established by President Dwight Eisenhower the following year. Congress issued a joint resolution in 1961 designating May 1 as the official day for celebration.

While Law Day is officially recognized on May 1, many civic groups and bar associations celebrate with month-long programs, presentations and events.

Activities across Alaska featurd mock trials, exhibits and reflections on the law.

Nulato

For an early Law Day in March, Galena Magistrate Chris McLain and Galena Clerk of Court Pam Pitka visited Nulato, Alaska, for a court proceeding and a talking circle.

Pictured here with four students from Andrew K. Demoski School in Nulato (representing 10% of the student body) are, L-R: Mike Gray, District Attorney – Fairbanks Division; Dan Reum, Nulato School Principal; Magistrate McLain; and Pam Pitka. Photo courtesy of Oscar Calvillo.

District Court Judge Jane Kauver hosted mock trials in Fairbanks and received this note of thanks (from a future court artist, perhaps.)

Wrangell

Wrangell resident Ruby Taylor receives her copy of the Constitution on Law Day.

Magistrate Chris Ellis organized a Law Day exhibit for the Wrangell courthouse on the theme "Enduring Traditions, Emerging Challenges." She posted reflections on the theme by national leaders and also collected reflections from representatives of the Alaska bench and bar, namely, Judge Joel Bolger, Alaska Court of Appeals, and Sidney Billingslea, Past President of the Alaska Bar Association. Mag. Ellis also prepared a Law Day quiz and passed out copies of the U.S. Constitution to quiz participants. Photos courtesy of Magistrate Chris Ellis.

Law Day 2010: Around Alaska

Maintaining the rule of law

By Joel Bolger
Judge, Alaska Court of Appeals

I believe that the most significant legal challenge for the 21st century will be maintaining the rule of law through judicial independence. It is important for judges to be independent of political considerations for several reasons critical to our democracy.

In a free market economy, it is important for businesses to be able to consistently forecast their risks in order to make reasonable investment decisions. This means that statutes and regulations have to be interpreted reasonably and that court decisions have to be predictably based on previous decisions.

In a democracy based on majority rule, it is important that laws be interpreted fairly rather than subject to short-term political whims. The poor may need protection from the rich; those in the minority may need protection from ideas that seize momentary popularity.

In a changing society, it is important that the law maintains a fair allocation of the effect of tragedies in our daily lives. When two married people need a divorce, the property must be divided fairly, taking into consideration their income, their children, their future prospects and their health. When an accident happens, the economic impact needs to fall on those who caused the accident or those best positioned to avoid the loss.

In a frontier that cherishes freedom, it is important that judges protect the privacies our constitution guarantees. Courts protect our freedom of speech, our freedom of religion, our right to bear arms, our freedom against unreasonable searches and seizures, our right to fair procedures in criminal and civil cases, and our protection against excessive punishments.

Despite these factors that support judicial independence, there are political changes proposed in many states that would make judges more subject to political influences.

Individual states have a great deal of freedom to choose the method of selection of judges, even when the method is based on party politics.[1] In some states there have been proposals to change from systems of appointed judges to judges elected for relatively short terms. In other words, state legislatures are proposing that judges would be elected based on political popularity rather than appointed for merit.

In addition, judges have the same freedom as other political candidates to say whatever they want during election campaigns.[2] This means that a judge may make promises about how they would decide certain issues without even knowing the facts of the case. And a candidate may attack a sitting judge who has to make a tough decision on a case involving a controversial issue like abortion or same sex marriage.

These two factors have led to increasingly high expenses for judicial campaigns.[3] And the Supreme Court has recently recognized that corporations have the right to spend money on political campaigns.[4] So high campaign expenses may disqualify judicial candidates who cannot compete against campaigns financed by well-funded political interests.

Well-funded campaigns can unfairly affect court decisions. In 2004, a company named Massey Coal contributed more that three million dollars to elect a new justice to the West Virginia Supreme Court. The new justice cast the critical vote to overturn a $50 million jury verdict that Massey Coal had been ordered to pay to a much smaller competitor. The U.S. Supreme Court decided that the unfairness in this situation violated the competitor's right to due process of law.[5]

Alaska now has a fair system for judicial selection that avoids the political influence inherent in partisan judicial elections. Judicial candidates are first subjected to a poll on their qualifications and then screened by an independent state commission. The commission nominates the most qualified candidates for appointment by the governor.[6] After serving an initial term, the appointed judge stands for a retention election, where the only question is whether that judge should continue to serve.[7] This system has avoided the costly and political campaigns that have marred the justice systems of some of our sister states.

As this century continues, it will be an ongoing challenge for the citizens of this state to hold onto this system that protects our common interest in judicial independence.

Footnotes

[1]*New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

[2]*Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

[3]Sample, Jones & Weiss, "The New Politics of Judicial Elections," Brennan Center for Justice (NYU 2007).

[4]*Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

[5]*Caperton v. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

[6]Alaska Const., Art. IV, § 5.

[7]Alaska Const.,Art. IV, § 6.

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From the Wrangel Law Day exhibit.

I think that the 21st century will bring with it a continuation of the challenges of the 20th century. Notably, the legal system will be taxed with more users and fewer resources to accommodate them. This I hope will lead to an expansion of creative alternatives to court system litigation. Mediation is a growing field in civil court, and I see it expanding. The criminal justice system will be challenged by the tension between rehabilitation and isolation of offenders, overburdened public agencies, and ever increasing numbers of brain injured, drug addicted and mentally ill offenders. Interesting developments will come as neuroscience seeks to answer in a concrete way the questions of human behavior. The confluence of neuroscience and law is an expanding one: it will no doubt be fascinating and maybe a little scary, as the lawyers and the doctors make new paths together.

Sidney K. Billingslea
President, Alaska Bar Association

Tok

In celebration of Law Day, the 3rd grade class at Tok School participated in the mock trial The Three Bears v. Goldie Locks. Court officials report that the jury was hung, so a mistrial was declared. The 4th & 5th classes at Tok School also went to court in honor of Law Day, where they tried the case US v Paul Bunyan.

Yakutat

First District Presiding Judge Patricia Collins, Juneau District Court Judge Keith Levy, and First District Area Court Administrator Neil Nesheim visited Yakutat on April 1st for an early Law Day celebration at Yakutat schools. At the local elementary school, students in grades 1-6 participated in a mock trial of Goldie Locks, and found her guilty of criminal trespass and criminal mischief. At the local high school, Mary Jones stood trial for criminal mischief and was also found guilty.

High school students present their case while Judge Levy (far left), Yakutat Magistrate Mary Kay Havens (center), and Judge Collins (far right) observe. The superintendent of the school district commended the mock trials as "an amazing experience for our student body." Photo courtesy of Mag. Mary Kay Havens.

The Alaska BAR RAG

SUBMITTING A PHOTO FOR THE ALASKA BAR RAG?

DO

- Ensure it is in high resolution (aka, "fine," "superfine," "high res" or "best") setting on your digital camera, scanner, or photo-processing software.
- Rename all digital photo filenames with the subject or individual's name!!! (Example: lawfirmparty.jpg or joe_smith.jpg)
- Include caption information or companion article with it in a separate Word or text file with the same filename as the photo. (Example: lawfirmparty.doc or joe_smith.doc or joe_smith.txt)
- If the photo is a simple mug shot, include the name of the individual on the rear of the photo if a hard copy, or in the body of your e-mail.

DON'T

- Send photos with numbers for filenames, such as IMG-1027, DSC-2321, IMG08-19-08, etc.

L-R: John Tiemessen, Hanna Sebold, and Mike Baylous.

L-R: Michelle Nesbett, Ken Eggers, Jim Leik, Sarrah Badten, and Paul Wilcox.

Outgoing Board members Chris Cooke and Allison Mendel.

Sid Billingslea passes the gavel to incoming president Jason Weiner.

Charlie Cole and Judge Douglas Blankenship.

2010 Bar Convention Highlights

Photos by Karen Schmidlkofer

Bar community gathers in Anchorage

John Erickson presented a plaque commemorating the 50th anniversary of the U.S. District Court, Alaska, to Judge John Sedwick.

Justice Dana Fabe presentsthe Alaska Court System Community Outreach Award to Judge Stephanie Joannides for her work as Chair of the Color of Justice Planning Committee for the past eight years.

Chief Justice Walter Carpeneti receives a surprise Community Outreach Award presented by Justice Dana Fabe. The award recognizes his efforts to initiate the Alaska Supreme Court's new "Supreme Court Live" educational outreach program.

FOUR RECEIVE BAR'S ANNUAL AWARDS

The Distinguished Service Award was presented to Russ Winner by President Sid Billingslea. Winner received the award for his active participation in the Environmental/Natural Resources and Alaska Native Law Sections and his leadership in the Martin Luther King Day of Service initiative.

The **Distinguished Service Award** honors an attorney for outstanding service to the membership of the Alaska Bar Association.

Professionalism Award presented to Mark Ashburn by President Sid Billingslea.

The **Professionalism 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.

Cynthia George (L) receives the Layperson Service Award from Sid Billingslea. George has served for many years on the Fee Arbitration Committee.

The **Layperson Service Award** honors a public committee or Board member for distinguished service to the membership of the Alaska Bar Association.

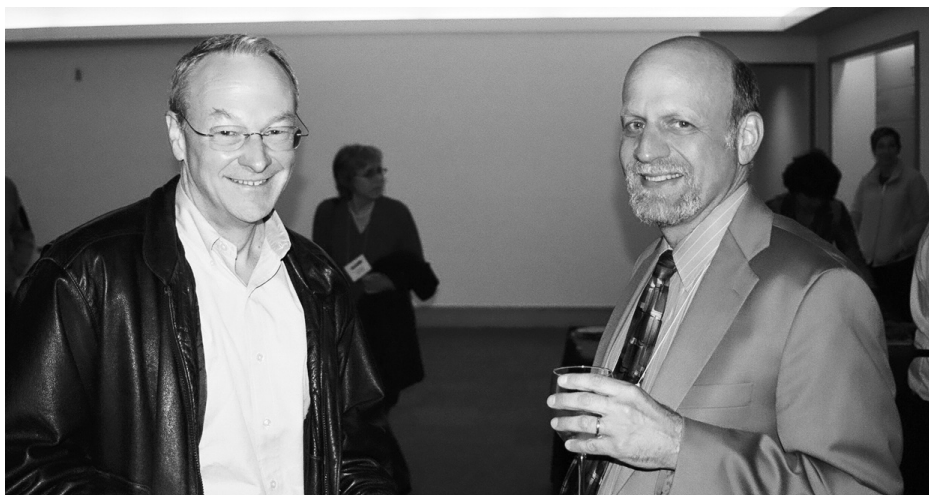
John Hickerson, son of Robert Hickerson, presented the Robert Hickerson Public Service Award to his godmother, Carol Daniel. Daniel's career in protecting the legal rights of low income Alaskans began in 1985 at Alaska Legal Services.

The **Robert K. Hickerson Public Service Award** recognizes lifetime achievement for outstanding dedication and service to the citizens of the State of Alaska in the provision of Pro Bono legal services.

Barbara Hood received the Jay Rabinowitz Public Service Award and posed with husband, and others. L-R: Leticia Fickel, Mary Bristol, Steve Ex, her husband Dirk Sissin, Barb Hood, Chief Justice Walter Carpeneti, Annie Rabinowitz, Barb Jones, and Mara Rabinowitz. The honor is awarded annually by the Alaska Bar Foundation

L-R: Judge Deborah Smith, Judge David Mannheimer and Carol Moonie, and Marge Feldman.

Around the Convention



Gregg Miller (L) and Jon Katcher.

Kristin Bryant, Rod Sisson, and Peter Diemer.

Tom Daniel, Shirley Kohls and Gordon Evans.

Mary Geddes and Doug Miller.

Outgoing Bar President Sid Billingslea gets a thank-you.

Alaska Bar Association 2010 CLE Calendar
MARK YOUR CALENDAR!

Date	Time	Title	Location
June 23	2:00 – 3:00 p.m.	Business Development Webinar Series: Building Your System – Making a Plan & Sticking to It CLE# 2010-044 1 general CLE credits Price: $35	Webinar/Online
June 24	8:30 a.m. – 12:00 p.m.	Residential Landlord – Tenant Law CLE: #2010-032 3 general & 0.5 ethics CLE credits Price: $115	Anchorage Hotel Captain Cook
June 30	2:00 – 3:00 p.m.	Presentation Skills Webinar Series: The Power of a Well-Crafted Message: Your Key to Influencing Audiences CLE# 2010-037 1 general CLE credits Price: $35	Webinar/Online
July 7	2:00 – 3:00 p.m.	Presentation Skills Webinar Series: World-Class Delivery Skills from the Boardroom to the Courtroom CLE# 2010-038 1 general CLE credits Price: $35	Webinar/Online
July 14	2:00 – 3:00 p.m.	Presentation Skills Webinar SeriesPut the Power Back in PowerPoint – Creating Visuals that Motivate CLE# 2010-039 1 general CLE credits Price: $35	Webinar/Online
July 15	8:30 – 11:45 a.m.	Making Attorneys Stronger and Improving Critical Skills CLE: #2010-035 3 general CLE credits Price: $125	Anchorage Hotel Captain Cook
July 21	2:00 – 3:00 p.m.	Presentation Skills Webinar Series: Virtual Magic: Making Great Presentations over the Phone/Web CLE# 2010-040 1 general CLE credits Price: $35	Webinar/Online
July 27	TBA	"9th Circuit Off The Record" CLE: #2010-045 TBA CLE credits Price: $TBA	Anchorage Dena'ina Civic & Convention Center
July 28	TBA	"9th Circuit Mediation Program" CLE: #2010-046 TBA CLE credits Price: $TBA	Anchorage Dena'ina Civic & Convention Center
August 18	TBA	"Medicare Secondary Payer Act: Part 2" CLE: #2010-033 TBA CLE credits Price: $TBA Sponsored by: Torts/Personal Injury Section	Anchorage Hotel Captain Cook
August 24	TBA	"Ethics @ the 11th Hour" CLE# 2010-005 3 Ethics credits Price: FREE	Anchorage Hotel Captain Cook

Go to www.alaskabar.org for more CLE info.

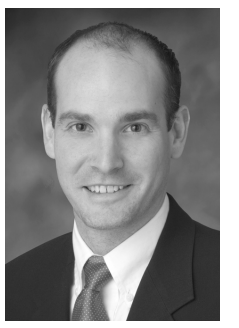
Bar People

Danielle Ryman joins Perkins Coie's labor practice

Perkins Coie is pleased to announce that **Danielle Ryman** has joined the firm's Labor & Employment practice as an of counsel. She joins the firm from De Lisio Moran Geraghty & Zobel and will be based in Perkins Coie's Anchorage office.

Ryman focuses her practice on employment litigation and tort law matters. "Danielle is a great addition to our already strong Labor practice," said Eric Fjelstad, Anchorage managing partner. "With her broad experience in both employment law and tort matters, she will help us support our clients in areas most vital to their business success."

Evans Joins Stoel Rives



Evans

Stoel Rives LLP, a U.S. full-service business law firm, is pleased to announce that **John R. Evans** has joined its Anchorage office as an associate in the Litigation group. Evans maintains a broad-based real estate and construction practice, principally on behalf of clients in the oil and gas industry. His practice encompasses the variety of issues faced by energy producers and transporters, including permitting, contract negotiation, dispute resolution and litigation.

Before joining Stoel Rives, Evans was an associate at Sonnenschein Nath & Rosenthal LLP in St. Louis, Missouri. He is a graduate of Washington University School of Law (J.D., 2008, summa cum laude), City College of the City University of New York (M.S., 2004), Fordham University (M.A., 2002) and Seattle Pacific University (B.A., 1999, summa cum laude). He is admitted to practice in the states of Alaska and Missouri.

Stoel Rives has offices in Alaska, California, Idaho, Minnesota, Oregon, Utah, and Washington. www.stoel.com.

NEWS FROM THE BAR

BOG invites comment on liaison, discipline, arbitration rules

The Board of Governors invites member comments regarding the following proposed amendments to the Alaska Bar Rules. Additions have underscores while deletions have strikethroughs.

Bar Rule 10(f). Board Discipline Liaison. The Board Discipline Liaison fulfills several key duties in the attorney discipline process by reviewing bar counsel's requests for petitions for formal hearing and reviewing appeals of bar counsel's decisions not to open a matter for investigation.

A number of complainants have availed themselves of this "intake review" since Bar Rule 22(a) was amended and, as a result, the workload for the Liaison can be significant.

This proposal would allow the president to appoint one or more members of the Board to act as Board Discipline Liaison, thereby reducing the number of matters an individual Liaison would review in the course of the Liaison's appointment.

Further, since a Liaison must be excluded from a disciplinary matter if the Liaison approved the filing of a formal petition, this proposal would reduce the number of disqualifications for an individual Liaison. In other words, if Liaison A approved the filing of a petition for formal hearing, Liaison B would not be disqualified and vice versa.

(f) **Board Discipline Liaison.** The president will appoint on an annual basis one or more ~~a~~ members of the Board to serve as the Board Discipline Liaison to Bar Counsel and Bar Counsel's staff. The Board Discipline Liaison will

(1) provide guidance and assistance to Bar Counsel and Bar Counsel's staff in implementing the Board's policies;

(2) have the duties provided in these Rules and as assigned by the President;

(3) be excused from sitting on any grievance or disability matter in which The Liaison has knowledge of the matter arising from the performance of the Liaison's duties;

(4) not be considered a member of the Disciplinary Board for the purposes of establishing a quorum when excused from sitting on a grievance or disability matter;

(5) have access to any grievance or disability matter necessary to perform the Liaison's duties or to assist Bar Counsel in making a decision on a grievance or disability matter;

(6) maintain the confidentiality of Bar Counsel's files as required by Rule 21(c).

Bar Rule 36(a). Powers and Duties. Under the fee arbitration rules, bar counsel performs a number of supervisory and administrative functions. When a major re-write of the original fee arbitration rules occurred in 1987, the term "arbitration counsel" was used rather than "bar counsel".

The title was changed back to "bar counsel" in 1989, but apparently a global replacement of the title or some other editing error resulted in the elliptical language in Bar Rule 36(a) that "bar counsel" (rather than the Board) will appoint "bar counsel".

This proposal corrects that error.

(a) **Powers and Duties.** The Board of Governors ~~Bar Counsel~~ will appoint an attorney admitted to the practice of law in Alaska to be the Bar Counsel for the Alaska Bar Association (hereinafter "Bar Counsel") who will serve at the pleasure of the board. Bar Counsel will:

…

Bar Rule 40(f)(11). Notice of Arbitration Hearing. Under the fee arbitration rules, the parties are entitled to have the fee arbitration hearing recorded.

With the advent of digital recording, these proceedings have been taped "electronically" on a digital data card so that the recording can be easily placed on a CD or DVD or e-mailed to the parties.

This amendment reflects the change in technology and is recommended by the Fee Arbitration Executive Committee.

(f) Notice of Arbitration Hearing. Bar Counsel will, at the time the arbitrator or arbitration panel is assigned, and at least twenty days in advance of the arbitration hearing, mail written notice of the time and place of the hearing to the petitioner and respondent. The notice of arbitration hearing will indicate the name(s) of the arbitrator or panelists assigned to hear the matter and will advise the petitioner and respondent that they are entitled to:

…

(11) have the hearing recorded ~~on tape~~ electronically.

Bar Rule 34(b). Mandatory Arbitration for Attorneys. American Bar Association Formal Opinion 02-425 opines that it is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given informed consent to the inclusion of the arbitration provision in the retainer agreement.

Since American Bar Association opinions are persuasive rather than binding authority in Alaska, an equivalent Alaska Bar Association ethics opinion or a rule change would be required to implement this arbitration provision.

The Board considered a proposal by the Fee Arbitration Executive Committee to incorporate the language of the ABA Formal Opinion into Bar Rule 34(b) regarding general principles and jurisdiction in fee arbitration. The proposal would allow an attorney to incorporate a provision requiring arbitration under Alaska's fee arbitration rules in a written fee agreement provided that the client has been fully advised of the advantages and disadvantages of arbitration and has given informed consent to the inclusion of the provision in the written fee agreement.

The Committee's proposal also clarified the definition of "client" to refer specifically to the person who is legally responsible *to the attorney* rather than a person who may be required to pay a fee pursuant to a court order. Although Bar Rule 34(c) already excludes fees determined pursuant to court rule, order or decision, the proposed addition is a useful clarification.

(b) **Mandatory Arbitration ~~for Attorneys~~.** Arbitration pursuant to these rules is mandatory for an attorney when commenced by a client or when the attorney and client agree to arbitration pursuant to these rules in a written fee agreement provided that the client has been fully apprised of the advantages and disadvantages of arbitration and the client has given informed consent to the inclusion of the arbitration provision in the written fee agreement. For the purpose of these rules, a "client" includes any person who is legally responsible to the attorney to pay the fees for professional services rendered by an attorney.

Bar Rule 39(d)(2). Notice of Right to Arbitration; Stay of Proceedings; Waiver by Client. Under Bar Rule 34(c), the Bar Association has no jurisdiction over: "(2) disputes where the client seeks affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct[.]"

Similarly, under Bar Rule 39(d): "A client's right to request or maintain an arbitration is waived if: (1) the attorney files a civil action relating to the fee dispute, and the client does not file a petition for arbitration of fee dispute within twenty (20) days of receiving the "client's notice of right to arbitrate" pursuant to paragraph (a) of this rule; or (2) after the client received notice of the fee dispute resolution program, the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute, except an action to compel fee arbitration, or seeking affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct."

In a recent fee arbitration matter, the panel chair believed that the two rules were in conflict. While Rule 34(c)(2) excludes damages for malpractice being considered in a fee arbitration proceeding, the chair read Rule 39(d)(2) as permitting the petitioner to proceed with both a fee arbitration and a malpractice action in state court because the chair read the following phrase as if there wasn't a comma after the word "arbitration":

… except an action to compel fee arbitration, or seeking affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct.

This amendment splits the clauses to avoid the problem.

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

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

(2) after the client received notice of the fee dispute resolution program, the client commences or maintains a civil action or files any pleading:

(i) seeking judicial resolution of the fee dispute, except an action to compel fee arbitration, or

(ii) seeking affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by August 27, 2010.

Bar People

4 join Patton Boggs

Patton Boggs LLP is pleased to announce the addition of associate **Molly C. Brown** who will be working out of the firm's Anchorage office. Ms. Brown, a graduate of University of Kansas School of Law, practices in the areas of Native American affairs, natural resources, and litigation and dispute resolution at the firm.

Patton Boggs LLP also announces the addition of associate **Nicole A. Corr** who will be working out of the firm's Anchorage office. Ms. Corr, a graduate of Gonzaga University School of Law, practices in the areas of employment law, government contracts, and litigation and dispute resolution at the firm.

Patton Boggs LLP announces the addition of senior counsel **Nancy S. Schierhorn** who will be working out of the firm's Anchorage office. Ms. Schierhorn, a graduate of Williamette University College of Law, practices in the areas of real estate, bankruptcy and business at the firm.

Patton Boggs LLP announces the addition of associate **Benjamin A. Ellison** who will be working out of the firm's Anchorage office. Mr. Ellison, a graduate of University of Texas School of Law, practices in the areas of administrative and regulatory law, litigation and dispute resolution, and environmental law at the firm.

Stock receives commendation

Lt. Colonel Margaret Stock, an Alaska Bar member since 1993, has been awarded a commendation medal for her service in the United States Army Reserve at Mac Dill Air Force Base, Forida in 2008-09. She was cited for her "untiring and selfless contributions" . . . and "expert advice in immigration and constitutional law and policy."

Stock

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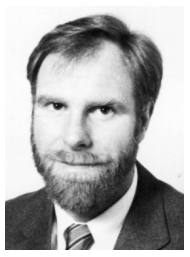
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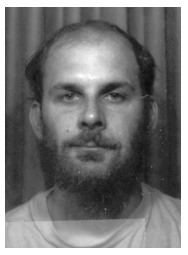
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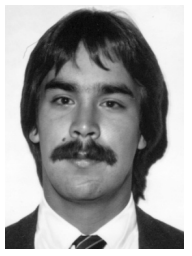
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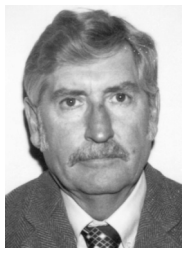
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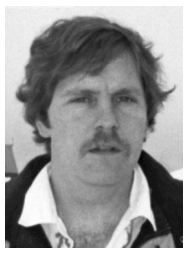
Theodore W. Aschenbrenner


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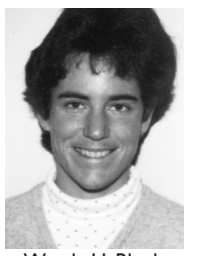
Pamela T. Basler


Deborah E. Behr


Phillip E. Benson


Brian D. Bjorkquist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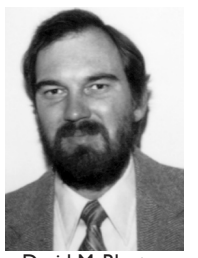
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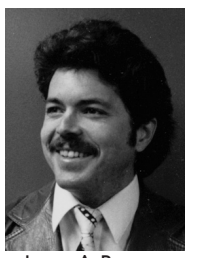
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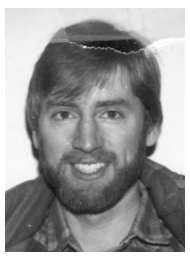
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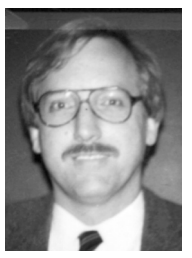
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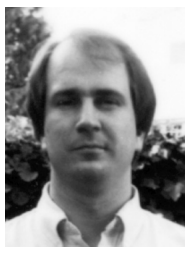
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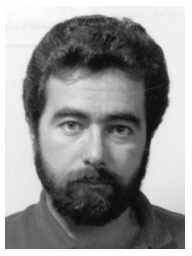
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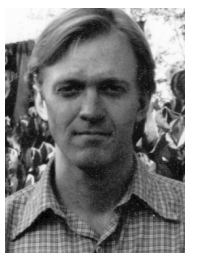
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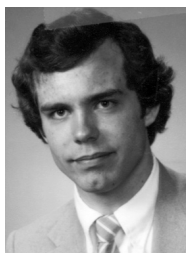
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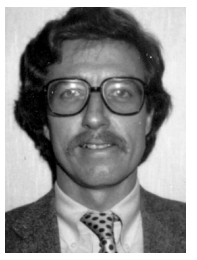
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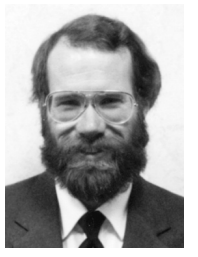
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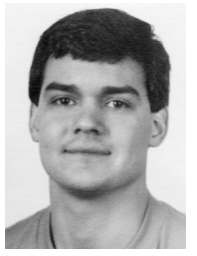
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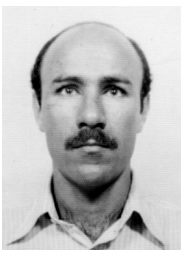
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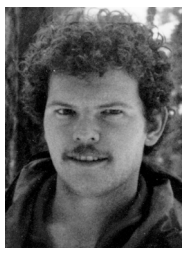
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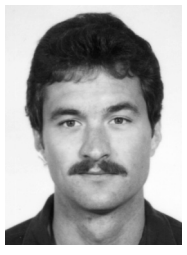
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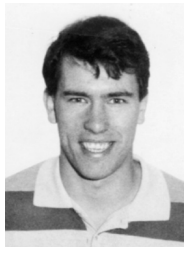
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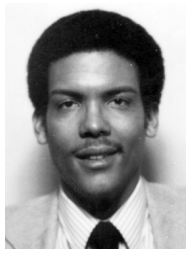
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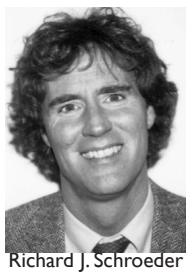
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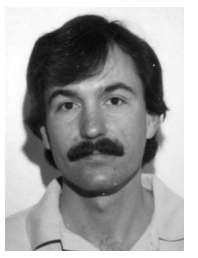
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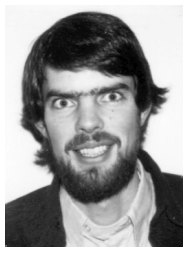
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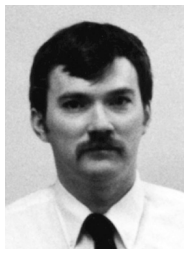
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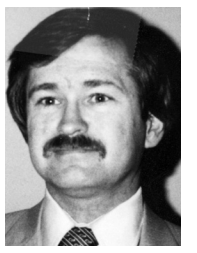
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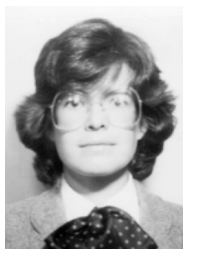
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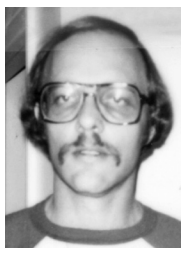
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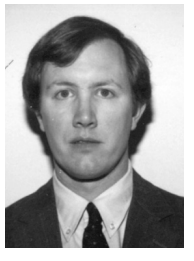
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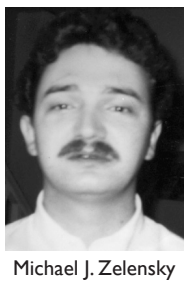

Michael J. Zelensky


L-R: Hugh Wade, Grace Schaible, and Virgil Vochoska joined the convention crowd.

Harris sends wishes from Arizona

My "then" picture is a copy of a program from "My Three Angels" in February 1960. I am the one at the top with the silly smile, and below me is John (Jack) Roderick, a distinguished member of the Bar. (Jack later was elected as the last Greater Anchorage Area Borough Mayor before the City of Anchorage and the Borough merged.) The one on the bottom is Harry Groom, deceased. Harry was suspected of being a Communist spy and so Jim Chenoweth, then Deputy U.S. Marshall, turned out for a play with the Anchorage Community Theatre so he could keep an eye on Harry. Harry wanted to be buried in the River Clyde in Scotland, but he kept floating to the surface, as related to me by Jack Roderick, who knows all the details.

By the way, who came up with the brilliant and whimsical moniker, "Bar Rag"? My guess would be Harry Branson.

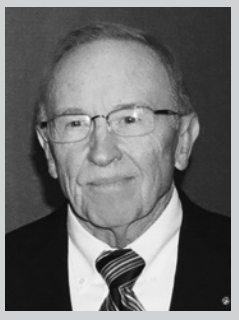
Thanks again for listening to my self serving ramblings.

--R. Everett Harris

50 years of Bar Membership


R. Everett Harris


Grace B. Schaible


Virgil D. Vochoska

Hugh G. Wade

Not pictured:
Eugene R. Belland
James D. Nordale
Senator Ted Stevens

No surprises: Making third party investigations pay off for you

By Lynne Curry, SPHR

A client calls you with a problem. They've received a letter from a law firm retained by a former employee accusing them of a racially hostile environment. You notify the law firm to deal with you. You start interviews, move into depositions and proceed.

Could you have done anything better?

One of your clients faces a union organizing attempt. You meet with the company's executive team and give them wise counsel. You provide all managers and supervisors a training session on NLRB regulations. Could you have done anything else to help your client?

A client lets you know a newly hired employee cornered a senior manager in the hallway and alleged a coworker sexually harassed her when they traveled together on a company project. Do you counsel the client to have his human resources officer handle the interviews internally?

In recent years, attorneys handling these and similar situations elected to engage neutral third-party investigators. What led them to make this decision? And how did they avoid any unpleasant surprises?

Investigate right away

According to attorney Tom Van Flein, "Investigating serious allegations is good business and good legal protection." Without the investigation, you don't know where you stand or what you're up against. By promptly investigating issues, management shows both good faith and adherence to anti-discrimination and fair treatment policies."

Use a neutral third party

Although you could investigate the situation yourself, "You've got to use an independent investigator," says attorney Nelson Page. "If you don't, every conclusion drawn from the investigation is subject to question by those involved and by enforcement agencies. In any except the most simple or basic situations you need to find someone who is both independent and perceived as independent."

Could the client's HR officer investigate – or someone from your law firm?

"Although the HR department can sometimes investigate in less complex matters," says attorney Lee Holen, "the attorney needs to consider how close the investigator is to the individuals to be investigated and the incident. If there is any doubt that the interviews and investigation appear completely impartial, it is better to use an independent third party investigator."

Attorney Van Flein adds that neutral third party investigators can be direct and honest without worrying about offending management.

Further, says attorney Kim Colbo, "Unless the employer has a large HR department, it may not have anyone experienced enough to conduct a quality investigation. Employers who use their own staff to handle complaints internally may face additionally allegations their investigation was neither neutral nor fair. If the complaint ends up in litigation and an independent investigator conducted the investigation a jury may view an independent investigator's testimony as more credible. Also, if we as attorneys conduct the investigation, we risk becoming a necessary witness and disqualified from representing our client in litigation."

"An outside investigator is valuable is," notes Attorney Bob Stewart, "when you want to raise a Farragher/Ellerth defense with a claimant who is still employed by arguing that you took reasonable remedial actions based upon a good faith investigation." Further, says attorney turned HR consultant Andy Brown, interviewees interviewed by a non-attorney often relax and offer more information to someone not presented as an attorney.

Avoiding surprises

Like an FAA air traffic controller, as the attorney you retain responsibility for the investigation "flight" without personally handling the controls. What helps you avoid unpleasant surprises?

Assignment clarity

"By definition," says Attorney Page, "an independent investigator comes to independent conclusions. Attorneys who want to reduce unpleasant surprises makes sure their assignments are clear and that all necessary information has been clearly and accurately transmitted to the investigator."

The attorney needs to make sure, adds attorney Colbo, "the investigator understands to whom to report and whether to make an oral or a written report. Not every investigation warrants a written report. While written reports can be very powerful tools, a sloppily prepared report can prove to be an employer's worst nightmare."

According to attorney Holen, "if you want the investigator to only conduct interviews, state so clearly. If the investigator believes he or she was hired to make a determination of some sort, you can be surprised by written conclusions on issues you did not anticipate or intended to determine for yourself."

Experience

"Pick someone experienced," as attorney turned HR consultant Andy Brown. "You can't afford the learning mistakes a green investigator makes."

Experienced investigators know how to get sufficient rapport to get most interviewees talking, how to probe harder when necessary, how to ask questions without putting ideas into an interviewee's head and how to recognize when a manipulative interviewee plays a game, and how to make the dozens of judgment calls necessary to do a thorough, unbiased investigation.

Experienced investigators know how to let those requesting confidentiality know they can't promise it without scaring interviewees into silence.

Does one of your clients face an allegation or a union organizing attempt? Consider retaining a neutral independent investigator – and avoid surprises by taking reasonable precautions.

State the obvious

Never take your investigator's process for granted. Let your investigator know to write "attorney work product" at the top of each investigative interview – or risk your investigator being forced to turn documents over to your opposing attorney.

Let you investigator know if you want any interviews taped. Make sure your investigator checks with you before widening the investigation or cutting it short, given the risks involved in both courses.

Getting the information fast and accurately

Finally, "in terms of unpleasant surprises learning what actually happened in the client's company is crucial. The sooner management knows what happened, the more effectively the attorney and management can assess the problem and resolve it before litigation results. If litigation occurs despite management's best efforts, the neutral third party's detailed, factual report and findings may vindicate the company."

Any written report may ultimately become fair game

Finally, adds attorney Holen, do not expect your attorney client or work product privilege to ultimately shield the investigator's interviews or other products. If litigation ensues, the employer may have a battle on its hands and be forced to turn over the report an interviews, particularly if the attorney and client use the investigation to show good faith. If your client opens the door concerning the report, the jury may read every word in the investigator's report."

Does one of your clients face an allegation or a union organizing attempt? Consider retaining a neutral independent investigator – and avoid surprises by taking reasonable precautions.

The author regularly conducts third party investigations for Alaska attorneys and also serves as an expert witness on workplace issues.

TALESFROMTHEINTERIOR

Happy ending

By William Satterberg

Several years ago, I learned about therapeutic massage. A now-retired Superior Court judge, Richard Savell, told me about it during one of his rare, compassionate moments.

During his years as a judge, Dick used to undergo noticeable mood swings while in the courtroom. At times, Dick would be in a jovial, carefree mood. Other times, he could be downright cranky. Eventually, it became rumor around the Fairbanks legal community that Dick's cranky personality was attributable to a bad back. Of course, many people disagreed. But, a bad back was still a more socially acceptable excuse than male menopause.

Ordinarily, when Dick's back would act up while on the bench, he would either take time off, or purportedly take some prescription muscle relaxants or other medication to cope with the pain. To local counsel, this explained Dick's unpredictable mood swings. Within an hour, Dick's attitudes could range from cranky to giggly. Still, the judicial ponytail which Dick grew in his final years on the bench succeeded in defying explanation until after his retirement, when Dick moved to Eugene, Oregon. Then, it began to make sense. But, I digress.

Dick is not the only person with a bad back. I, too, have a sore back on occasion. I blame it on lots of things but not male menopause. One day, as I gingerly lowered myself into a chair in his courtroom, Dick observed that I, too, was in agony. To my surprise, the jurist uncharacteristically inquired about my discomfort. I confessed that my lower back was bothering me. It was at that time that Dick shared that lower back pain was one of the biggest complaints of most middle aged men, without elaborating further on the predominate cause of such. Some people say it might result from the rigors of sex, but, as attorneys, I suspect that both Dick and I realized that the claimed likely cause of most lower back problems was not the root cause of our own maladies. Most likely, it was from jumping up too fast from the couch to run to the refrigerator during a commercial break.

Sensing an opening, I timidly asked Dick if he had any drugs to share. After all, like modern day males, we were now bonding weren't we? Dick was not forthcoming. Instead, Dick suggested to me that I consider massage as a remedy for my discomfort. At that point, I began to think that he was taking the male bonding thing a bit too far, too fast, and almost said so. Dick hastened to clarify that he meant to say "therapeutic massage," possibly sensing my thoughts from the smile on my face. Until then, I had thought of massage only as a stress relief method designed to relieve stress located in only certain limited parts of the body. Good massage was practiced mainly by ladies with names like Charity, Fifi, Love, and Mimi.

"In my opinion, "deep tissue massage," is a deceptive synonym for "torture."

Apparently not wanting to earn a bad reputation, Dick quickly corrected my misconceptions. According to Dick, therapeutic massage was quite different. Dick volunteered that I should see his "massage therapist." She was a lady named "Tarika." I told him I would add Tarika to my list of names. Alphabetically, Tarika could come right after Mimi. So much for misconceptions. Still, I was skeptical. I politely declined the offer, not wanting to publicly accuse a sitting judge of improprieties. After all, such accusations are more fun if made privately, especially in Fairbanks. (Note: As for being a sitting judge, even when Dick was standing, Fairbanks granddaddy attorney Dick Madsen would still regularly accuse Dick of sitting). Later, I was to learn that Tarika was the founder of a reputable therapeutic massage school in Fairbanks. But, at the time, the name, alone, caused me to think otherwise.

Several months later, Matt, a friend of mine, suggested that I receive a massage from his wife, Barbara. Again, I had concerns. After all, Matt was a family friend, as was his wife. Although we had a good friendship, I was not into "that type of thing." Sensing my trepidation, Matt assured me that it was all above board. I had nothing to be concerned about. Barbara even worked out of a private clinic. I was promised that Matt's wife was safe. So much for fantasies. It looked like it was time to find some new friends. I scheduled an appointment with Barbara. It would be my first time.

At the intake, I was surprised. Contrary to my expectations, Barbara's clinic had a very professional appearance. It was not the type of clinic I was expecting, since, in my college days, I had grown accustomed to free clinics, where ex-boyfriends and girlfriends would all end up in the same room, glaring accusingly at each other while flirting at the same time with the closest person of the opposite sex. Barbara was going to charge me for her services, according to Matt. After greeting me with a friendly hug, Barbara first asked me a number of personal questions about my general health. I declined to leave out the parts about my law school sex life. Besides, there was little to talk about, regardless. Once I looked relaxed, Barbara told me to take off my clothes and to climb on a strange looking table. I was ordered to cover my behind with a towel. To my relief, Barbara then left the room, allowing me to get organized as best as I could. Apparently, the towel thing was to be done privately. I had jumped the gun, once again. Thirty minutes later, I announced that I was ready. Barbara entered the room, dimmed the lights, turned on some soothing music, and began the session.

Admittedly, I have also had bad massages. The worst massage I ever encountered was in England.

At first, I was tense. Fortunately, as time progressed, I relaxed. That is, I relaxed until Barbara told me it was time to roll over. The tension quickly returned. Up until then, the massage table had been my best friend. Now, however, my only protection was lost.

Barbara held up the towel and discretely averted her gaze, honoring my male modesty. Sensing the moment, I quickly flopped over and almost fell off the table, hoping that I would not make a spectacle of myself. Apparently, I did not stand out. If I did, Barbara certainly did not notice. Thirty minutes later, the massage was completed. I was relieved, but in a completely legal way. Not only did I feel much better, but I could still look Matt in the eye. As an added extra, I was hopelessly hooked on massage therapy.

It has now been well over fifteen years since my first visit with Barbara. I have experienced well over one hundred massages involving multiple styles in several states and in many countries. Over the years, I have been manipulated by both female and male therapists who have ranged from gentle "oil spreaders" to ones who can elicit profound cries of pain. Many of the massages are not memorable, but others have stood out. But, as my first, Barbara became the standard to judge by. I will always have a tender spot for Barbara.

Initially, I spent several sessions with Barbara, who viewed massage holistically, claiming to treat both the body and the mind. Matt enjoyed joking that Barbara was into "hocus pocus," since she also believed in things like pyramid power, and various energy centers and pathways in the body. I was quick to explain to Barbara when she suggested a massage one time that involved simply holding her hands above my body to draw out the "bad energy" that such a technique clearly could not work on me. After all, I was a confirmed Republican. I was also a Presbyterian. Given that knowledge, Barbara readily agreed that I would not be receptive to such esoteric techniques. Eventually, I decided to try other styles with other therapists.

My next therapist was into "deep tissue" massage. In my opinion, "deep tissue massage," is a deceptive synonym for "torture." As a word of caution, when a therapist suggests deep tissue massage, one should not contemplate a restful session. Deep tissue massage is to Swedish massage as CIA waterboarding is to surfing. Still, such therapy does have distinct advantages. One nice thing about deep tissue therapy is that most male subjects do not have to worry about the risk of any embarrassing moments popping up. Still, I have actually grown to enjoy deep tissue massage, if done on limited occasions.

Admittedly, I have also had bad massages. The worst massage I ever encountered was in England. At the time, I was staying at the posh London Hilton Hotel. I decided to kill some time by checking out the spa facility located in the basement. As I entered the room, I was met by an attractive therapist. I was next asked about the style of massage I would prefer. I responded as to my preferred Swedish style, being a Satterberg. After being ushered into the studio, I proceeded to lie on the table fully expecting a professional session. After all, there was a gym on the same floor. Instead, I received what I was later told was an "oil spreading" massage. Not that the massage was sexual in nature. It

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Happy ending

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wasn't. In retrospect, maybe it should have been. At least, I would have received some value for my hard-earned pounds, and also for the money I spent. Rather, I was simply liberally smeared with a scented massage oil during the session and left one hour later to slide off of the table, try to dry off, and return to my room smelling horribly like a lilac bush while paying an exorbitant fee for the honor. At least I was able to repel the London rain for several days.

In contrast to London, one of my best foreign massages took place in Khabarovsk, Russia, when I was on a trip to the city. The Intourist Hotel offered two services. One was billed as a therapeutic sports massage. The other had more personal implications. Not being totally naïve, I selected the sports massage session.

Entering the room, I fully expected to be greeted by a female therapist. I was wrong. Instead, I was met by a large male. He could have been a heavyweight cage fighter from the look of his nose. I frantically looked for an exit, but he blocked my way. Clearly, I was to be his victim that day. In broken English to match his nose, he brusquely ordered me to "Take off clothes! Lie on table!" Not wanting to risk a resurgence of the recently ended Cold War hostilities, I meekly complied. I felt awkward. Towels were nowhere to be seen. Naked as a jaybird, I contemplated how this Russian would later describe his American guest to his buddies. "Hey, Boris! Americans have small missiles. Must be very fast!" After all, for years, Russia had prided itself on being the largest country on earth, with the biggest aircraft, spaceships, and other national pride symbols. I did not like the fact that I likely would add even more to his Motherland's boasting about size. As such, I decided to blame things on my Swedish ancestry. It was the least I could do as a patriotic American.

To my surprise, the massage was excellent. Compared to my London experience, the Russian session was a whole other world. Clearly, the therapist was professionally trained. Furthermore, rather than using massage oil, the therapist used talcum powder to reduce friction. The use of talcum powder worried me a bit at first, recalling my childhood days in elementary school. Fortunately, there were no diapers in sight. In addition to the standard massage of muscle, the therapist also did some stretching exercises and minor joint manipulation.

Eventually, the session concluded. Whether the therapist had an opinion or not about the relative comparisons to Americans, at least, he was kind enough to keep them to himself. Then again, like Alaska, Khabarovsk is a cold region, as well. Maybe the Russian and I had much in common, after all. Besides, I could not understand what he was saying during the session anyway, although the laughter when I rolled over, in retrospect, was a bit rude.

The male therapist in Russia was an exception. Generally my massage therapists have been females. This is because more females study massage than males. Admittedly I also prefer female therapists. It is a motherly sort of thing. In addition, it is a "guy thing."

For males, I suspect that there is always a concern in a massage that "something" might happen. Women, as designed, likely do not have that same fear since, even if "something" happens, it is not as pronounced. At least, that is my suspicion. For guys, however, some things cannot necessarily escape detection. Unless, of course, a person is of Swedish descent. Needless to say, one does not want "anything" to happen during a massage therapy session. However, if "something" were inadvertently to happen, in my opinion, most guys would likely prefer that the event occur with a female therapist as opposed to a male therapist. Something about phobias. Fortunately, professional massage therapists are trained to professionally deal with such occurrences, I'm told, which are actually quite rare, I'm also told. So, too, however, are unprofessionally trained massage therapists equipped to deal with such occurrences in an unprofessional, albeit much more expensive manner.

Call it "performance anxiety," but, in massage therapy sessions, the difference is that one does not want the same performance issues as in other locations. Generally speaking, fortunately, very few massage sessions have had embarrassing moments. I have been fortunate in not having encountered any on a personal level. Then, again, maybe the failure to experience such moments is an embarrassing moment, in itself.

In Thai massage, a practitioner usually half the weight of a customer stretches and throws the customer around on a floor mat like a rag doll.

Not that I haven't been embarrassed in other ways during a massage. I have found that it is also embarrassing to be thrown around as if in a professional wrestling match, but that has been my impression of Thai massage, a style I also enjoy. In Thai massage, a practitioner usually half the weight of a customer stretches and throws the customer around on a floor mat like a rag doll. Still, when the session is concluded, the effects are quite relaxing if one can overlook the humiliation of being repeatedly body slammed by a ninety-eight pound girl.

Recently, on an overseas trip to Saipan, I experienced a series of Chinese massage sessions. During one session, the therapist told me in broken English that she would be doing "Chinese Medicine." Something was then attached to my back. It was a large suction cup. Shortly thereafter, I felt a strong vacuum being created as the therapist pumped air out of the device. Several more cups were then quickly applied to my back. Eventually, as I lay on the table, I began to realize that, although the suction cups might have had a therapeutic value, there would be a distinct drawback. Recalling my high school days, I remembered that suction heavily applied to certain areas of the body would leave temporary bruising otherwise known as "Hickeys." My memories served me well.

When I returned to the hotel, I asked my wife, Brenda, to examine my back. Sure enough, I was festooned with over a half dozen brightly colored, two inch circular bruises. The technicolored brands took over a week to fade. Needless to say, I scrupulously avoided the beach during that period of time, since I looked like I had been hopelessly snared in the tentacles of a giant octopus. In addition, I had Brenda's reputation to protect.

I suspect that it is my familiarity with massage that resulted in my handling a case recently in Fairbanks which had different connotations for the business.

Specifically, I had been contacted by the owner of a facility in Fairbanks who had been charged with allegedly operating a house of prostitution, subtly disguised as a massage parlor, according to the local constabulary. The facility had operated for several years, in competition with another location in Fairbanks whose owner eventually became a long time resident of the federal correctional system and was no longer a factor.

As fate would have it, contact had been made one evening by the local police force with the owner of the business. Reportedly, the establishment was doing a brisk trade following the return of soldiers from the Iraq war. Apparently, the owner and a local state trooper had become sideways with each other, figuratively speaking. Either that, or the trooper was just looking for someone to bust to impress a rookie that evening. The end result was that a search warrant was issued. The resulting search of the premises disclosed various items of evidence which the troopers maintained suggested that less than therapeutic massage activities were taking place on the premises. The owner was accused of having therapists who gave soldiers massages with "happy endings", for a price and a generous tip. As I viewed it, the establishment was just doing its patriotic duty.

Regardless, in the end, all of Fairbanks enjoyed a "Happy Ending"— in one form or another.

According to reports, the user fees at the facility were far more than one would ordinarily pay at other therapeutic massage studios throughout Fairbanks. Then, again, one of the reasons for the additional charges, I suspected, was because the operation was "user friendly" and believed in customer service. In addition, it was open twenty-four hours a day. After all, when a massage business operates beyond ordinary working hours, certain things can rise, including the cost of overhead. It was logical, therefore, that the cost of a massage at this facility would somewhat exceed that of a similar location which offered massages only during traditional working hours. A mere $150 for thirty minutes plus a tip was, in my opinion, not that exorbitant, even if some claimed it led to occasionally uncontrollable inflation. And, who could really care if the lonely, returning soldiers from the desert wanted to tip some extra money for the massage? After all, America is a free country. Creative capitalism is a breeder of our nation's success.

Following some rather explicit discovery in the case consisting of assorted photographs, videotapes, audiotapes, and reluctant witness statements, the case proceeded towards trial. Legal research by myself and co-defendant's counsel, John Franich, also a massage addict, that the charging statute was not applicable as a matter of law to the alleged offenses in the case. Rather, the case had been overcharged, as apparently had allegedly been the soldiers. As a result, a last minute motion to dismiss the indictment was successful in getting the charges to be dismissed.

In explaining the outcome to my client, I indicated to her this time, that it was the lawyer, and not the client, who was giving the "Happy Ending". Needless to say, the client was ecstatic, and complimented me highly as a fellow professional. Apparently, we had much in common.

Several months later, the client's business burned down. The cause of the fire is still under investigation and the case may not be closed for several years, if ever. I personally suspect that the cause of the fire was a multitude of factors, and quite likely not the owner. Perhaps, it was a neighborhood effort at urban renewal. Perhaps, it was a disgruntled employee. Or, perhaps, a dissatisfied customer, or a whole platoon of dissatisfied customers on a special mission. Then, again, it could have been a combination of all of the above. Regardless, in the end, all of Fairbanks enjoyed a "Happy Ending"— in one form or another.

The aftermath of terrorism:
Rule of law applies to detainees in U.S. and U.K.

By Robert H. Wagstaff

On September 11, 2001, four jetliners were hijacked by nineteen non-Iraqi Middle Eastern terrorists, resulting in the deaths of almost three thousand innocent persons in New York City, Pennsylvania, and Arlington, Virginia. The ensuing panicked responses in the United States and the United Kingdom generated ill-conceived, discriminatory, and disproportionate legislative and executive actions that resulted in the detention of thousands without charge or trial. They were subjected to denial of habeas corpus, to secret evidence, to abuse, and to outright torture.

Since 2004, the U.S. Supreme Court and the U.K.'s highest court (the Appellate Committee of the House of Lords, or the "Law Lords") each issued four decisions to halt the illegal and unconstitutional actions taken by their respective legislative and executive branches of government, thereby both recognizing and enforcing the rule of law. The court decisions followed different but parallel paths to achieve the same results. The respective court rulings are consistent with the separation of powers, judicial competence, and the appropriate role of the courts in constitutional democracies.

Judicial Review

Since *Marbury v. Madison*[1] in 1803, the U.S. Supreme Court has had the authority to adjudicate the constitutionality of congressional acts and to say "what the law is." But in England, after the seventeenth century civil wars and the execution of King Charles I, parliamentary sovereignty became the touchstone of English law. The majority party in Parliament selects the prime minister, thus inextricably intertwining Parliament and the government. But a significant shift away from parliamentary sovereignty occurred when Parliament enacted the Human Rights Act of 1998 (HRA), which directly adopted the European Convention on Human Rights (ECHR) as domestic law. The HRA gives British courts the power to declare acts of Parliament incompatible with the ECHR, but the courts cannot yet directly hold parliamentary legislation to be unconstitutional. It is then the prerogative of Parliament to modify the incompatible law, and Parliament has always made modifications after a finding of incompatibility. The HRA is considered to be constitutional. The U.K.'s unwritten constitution is based upon the Magna Carta, the common law, the post Glorious Revolution 1688 Declaration of Rights, and various acts and treaties of Parliament. It has been facetiously suggested that the British constitution is not worth the paper it is not written on.

Parliament subsequently enacted the Constitutional Reform Act (CRA) of 2005, legislation that accomplished a direct constitutional restructuring and created a new Supreme Court, thus overtly acknowledging and endorsing the reality of imminent U.S.-style judicial review. Since October 2009, the highest court in the U.K. is no longer part of Parliament. The Law Lords are now Supreme Court justices and have moved out of Parliament into their own building, the historic Guildhall, which was comprehensively redesigned for the new, separate, and distinct Supreme Court of the United Kingdom. The CRA recognizes both the importance of the Rule of Law and the independence of the judiciary. There has thus been a voluntary divesture of absolute parliamentary sovereignty and recognition of the increased role of the judiciary.

The CRA said, "This Act does not adversely affect (a) the *existing* constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle."[2] The act further specifically guarantees continued judicial independence: "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the *continued* independence of the judiciary."[3] (emphasis added). This change to the judiciary occurred after the Law Lords' landmark decision in *A v. Secretary of State* for the Home Department (Belmarsh I).[4] British historian Anthony King said, "The divorce between the judicial branch and the other branches of government is thus now, or soon will be, total—or at least as total as is humanly possible."[5]

Post-9/11 Decisions of the U.S. and U.K. Courts In their December 2004 *Belmarsh I* ruling, the Law Lords declared that under Section 4 of the HRA, Section 23 of the post-9/11 Anti-terrorism, Crime and Security Act of 2001 (ATCSA) was incompatible with the equality provisions of the European Convention on Human Rights, to which the U.K. is a signatory. ATCSA provided for the indefinite detention of nondeportable aliens suspected of associating with suspicious persons or organizations. HM Belmarsh Prison, southeast of London, was the detention venue. The Law Lords held that it was impermissibly disproportionate to single out noncitizens for such disparate and discriminatory treatment. In June 2008, after a series of preliminary statutorily based decisions and in a parallel landmark decision, the U.S. Supreme Court ruled in *Boumediene v. Bush*[6] that noncitizen detainees held by the U.S. at the Guantanamo Bay Naval Base, Cuba, were entitled to habeas corpus review as a matter of U.S. constitutional law. *Belmarsh I* and *Boumediene* represent a renaissance in both countries of the judicial recognition and enforcement of the rule of law. The Belmarsh I decision was based upon the requirements of the HRA, the ECHR, and the common law. Boumediene was based on the habeas corpus clause and the due process of law requirements of the Fifth Amendment to the United States Constitution.

Albeit emanating from different sources, these remarkably parallel decisions addressing post-9/11 U.S. and U.K. executive and legislative antiterrorism responses present a dramatic departure from the historical tradition of judicial nonintervention in matters of national security.[7] Both decisions are positive and forceful examples of courts actively identifying and enforcing the rule of law upon the other branches of government. Since 2000, the effective date of the HRA, the Law Lords (now Supreme Court justices) have come to recognize that the U.K. is a rights-based democracy and, insofar as the right to a fair trial is concerned, have in effect adopted the appellate judicial philosophy and rule of the United States.

The rule of law is seen by both the U.S. and U.K. courts to emanate from the Magna Carta of 1215 ("No freeman shall be seized or imprisoned, or dispossessed, or disseized, or outlawed, or exiled … save by the lawful judgement of his peers or by the laws of the land.") and to have matured through the common law so as to be specifically articulated and entrenched in the Human Rights Act of 1998, the first ten amendments to the U.S. Constitution, and the establishing and controlling documents of the European Union and the United Nations. It is correctly said that:

> The "rule of law" refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[8]

Guantanamo Bay, Cuba

Four post-9/11 United States Supreme Court cases (*Rasul*,[9] *Hamdi*,[10] *Hamdan*,[11] and *Boumediene*) address the issues of what rights the detainees at Guantanamo Bay possess and what actual constitutional detention authority the president has. Guantanamo Bay was selected by the Bush government as a de jure black hole where neither domestic nor international law, including the Geneva Conventions, applied. President George W. Bush maintained that the United States federal courts had no jurisdiction over the U.S. Naval Base at Guantanamo, and that international treaties prohibiting torture and mistreatment likewise had no application. Bush also declared that the Geneva Conventions did not apply to the detainees in Guantanamo inasmuch as they were not prisoners of war, but rather "unlawful combatants"—a term used by the U.S. Supreme Court in *Ex parte Quirin*[12] to describe German non-uniformed military saboteurs who landed by U-boats in New York and Florida during World War II.

Rasul established that the federal habeas corpus statute was applicable to Guantanamo, and *Hamdi* established that a U.S. citizen detained as an unlawful combatant is constitutionally entitled to habeas corpus and must be given a meaningful opportunity to challenge any evidence against him. In response, Congress passed the Detainee Treatment Act of 2005[13], seeking to nullify *Rasul*. *Hamdan* held that the Detainee Treatment Act did not apply to pending cases and that only Congress—not the executive branch—had the authority to create military tribunals and that such tribunals must be compatible with the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. Congress's response was to promulgate the Military Commissions Act of 2006[14], which essentially endorsed the Bush executive tribunals and eliminated habeas corpus for pending cases. Finally, the court directly ruled in *Boumediene* that alien detainees in Guantanamo have a right under the U.S. Constitution to habeas corpus, and that detention in Guantanamo without habeas corpus or due process and the Military Commissions Act itself were unconstitutional.

The majority opinion in *Boumediene* holds that the case presents a distinct separation of powers issue and "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers … [and] must not be subject to manipulation by those whose power it is designed to restrain"[15]. The majority was concerned that an unchecked executive could outsource detention to alien legal black holes and thereby avoid habeas corpus review and judicial oversight.

The determining quartet of decisions is quite reasoned and reasonable: federal courts have jurisdiction on a U.S. military base and aliens detained there are constitutional persons who have the benefit of habeas corpus. Before being found to be terrorists, the detainees are entitled to a due process fair trial. Given the reality of claimed unitary executive detention seasoned with abuse and torture, without charge or end, the justices of the Supreme Court acted to enforce the rule of law. If they had not, they would have allowed a lawless black hole to exist and would have become complicit in this constitutional terror.

While both the Law Lords and the U.S. Supreme Court have ultimately performed in similar fashion and share the same habeas corpus heritage and principles, the current U.S. Supreme Court differs significantly in its internal workings —a reality apparent in the high degree of contentiousness among the justices that is reflected in the Court's opinions. In contrast, in the U.K. there is unanimity or near unanimity, and always mutual respect and collegiality amongst members of the judiciary.

HM Belmarsh Prison

In *Belmarsh I*, eight of the nine Law Lords were satisfied that the alien detentions were unlawful and found the detentions to be a disproportionate and discriminatory response to what was strictly required by the exigencies of the situation, in that citizens and noncitizens are treated differently without rational objective justification.

The Law Lords spoke broadly with strong language:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.16 (Lord Hubert Hoffman)

> The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.[17] (Lord Thomas Henry Bingham)

> Indefinite imprisonment … on

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The aftermath of terrorism:
Rule of law applies to detainees in U.S. and U.K.

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> grounds that are not disclosed … is the stuff of nightmares, associated whether accurately or inaccurately with … Soviet Russia in the Stalinist era and now … with the United Kingdom.[18] (Lord Richard Rashleigh Folliott Scott)
>
> It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely…Executive detention is the antithesis of the right to liberty and security of person.[19] (Baroness Brenda Hale)

As with the U.S. Supreme Court, these comments went well beyond the narrow discrimination issue presented and, while arguably dicta, they demonstrate the strength and depth of British judicial hostility to the concept of indefinite detention without charge. The detentions were found to be disproportionately inconsistent with liberty and equality and to actively discriminate against aliens, because British terror suspects thought to pose a similar risk were not detained without trial.

Lord Hoffman held that there was no basis for determining that there was a public emergency. "Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda."[20] He emphasized that "nothing could be more antithetical to the instincts and traditions of the United Kingdom" than indefinite detention without trial.[21] For Lord Hoffman, "[f]reedom from arbitrary arrest and detention is a quintessentially British liberty."[22]

On December 8, 2005, the Law Lords issued their unanimous decision in *A v. Secretary of State for the Home Department (Belmarsh II).*[23] At issue again was ATCSA, here focusing upon section 44(3) that permitted the trial court to consider evidence that was not admissible in a court of law. The question presented was whether this section of ATCSA permitted consideration of evidence from a third party obtained through torture in a foreign state. The trial court held that such evidence was now admissible and that the court should examine it to determine the weight that it should be accorded. The Court of Appeal agreed. The Law Lords reversed, ruling unanimously that such evidence was inadmissible as it was inherently unreliable, unfair, offensive to ordinary standards of humanity and decency, and incompatible with the principles on which courts should administer justice. Consequently, torture evidence cannot be used in the United Kingdom irrespective of where and by whom torture had been inflicted.

Lord Hoffmann commenced his speech with some British history:

> On 23 August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35-year-old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I, who asked the judges whether Felton could be put to the rack to discover his accomplices. All the judges met in Serjeants' Inn. Many years later Blackstone recorded their historic decision:
>
> "The judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England."
>
> That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of suspects to countries where they would be tortured: see Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House 105 Columbia Law Review 1681-1750 (October, 2005).[24]

The U.K. has thus determined that torture cannot be successfully outsourced. The decision draws from the common law, international law, the Torture Convention, the ECHR and the HRA.

In *Secretary of State for the Home Department v. MB and AF (Belmarsh III),*[25] the Law Lords held that the compromise to due process associated with secret evidence is subject to the right to a fair trial. Lord Simon Denis Brown said:

> I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control.[26]

On June 10, 2009, the Law Lords issued their opinion in *Secretary of State for the Home Department v. AF (Belmarsh IV)*[27] ruling that it was unlawful to use secret evidence to place any persons under the judicial restrictions of control orders inflicting house arrest. The ruling by nine-Law Lord panel was unanimous in finding that it is a fundamental right to have disclosure of sufficient material to enable an answer to an accusation to effectively be made in defense. The ruling specifically held that unless a terror suspect was given "sufficient information about the allegations against him to enable him to give effective instructions to the special advocate," the right to a fair trial would be breached.[28] As Lord James Arthur David Hope said, "The slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him."[29]

Despite the resonating strength of the courts' decisions, most detainees in both the U.S. and the U.K. remain detained without charge. However, the attorney general's announcement of November 13, 2009, that five suspected 9/11 terrorists will be transferred from Guantanamo to New York City for charge and trial in civilian court is a positive first step towards a rule of law resolution of this problem created by the Bush administration. It was also announced that five other detainees alleged to be involved in the 2000 USS *Cole* attack will be charged and tried before an unspecified military tribunal. But despite the recognition that fair trial and due process is required by the rule of law, the government holds that some indefinite detentions will nonetheless continue to be administered through an as yet undisclosed process.[30]

It has also been announced that no new legislation for the Guantanamo detainees will be sought, and post-*Boumediene* habeas corpus cases will be allowed to go forward. Of thirty persons whose release has been judicially ordered, twenty remain at Guantanamo in custody because no country has been found to take them. Congress objects to any release in the U.S. or to accepting any other responsibility, notwithstanding that the U.S. caused the detentions to occur. As for the other detainees who have been designated for prosecution, it remains undetermined whether these trials will be in front of military tribunals or in civilian courts, and what rules will apply.[31] The Department of Defense has stated that a judicial finding of lack of proof of guilt does not necessarily mean that release will actually occur. The final words have not yet been spoken. The U.K. in turn continues for the moment to use renewable control orders. The home secretary has released two controlees from house arrest rather than disclose any secret evidence.[32]

The battle to determine if the King is law or the Law is king continues.

Endnotes:

[1] 5 U.S. (Cranch 1) 137 (1803).

[2] Constitutional Reform Act 2005 Chpt 4, Part 1(1).

[3] Constitutional Reform Act 2005 Chpt 4, Part 3(1).

[4] [2004] UKHL 56, [2005] 2 AC 68.

[5] Anthony King, *The British Constitution* (Oxford University Press 2007) 148.

[6] 128 S.Ct. 2229 (2008).

[7] *Korematsu v. United States*, 323 U.S. 214 (1944); *Liversidge v. Anderson* [1942] AC 206 (HL).

[8] "The Rule of Law and Transitional Justice in Conflict and Postconflict Societies. Report of the Secretary-General' UN doc. S/2004/616. 23 August 2004, para. 6.

[9] *Rasul v. Bush*, 542 U.S. 466 (2004).

[10] *Hamdi v. Rumsfeld*,542 U.S. 507 (2004).

[11] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[12] 317 U.S. 1 (1942).

[13] Pub. L. 109-48, 119 Stat 2680 (Dec 30, 2005).

[14] Pub. L. 109-366, 120 Stat 2600 (Oct 17, 2006).

[15] *Boumediene* (n 6) 2259.

[16] *Belmarsh I* (n 4) [97].

[17] Ibid [42].

[18] Ibid [155].

[19] Ibid [222].

[20] Ibid [96].

[21] Ibid [86].

[22] Ibid [88].

[23] [2005] UKHL71, [2005] 2 AC 221 http://www.bailii.org/uk/cases/UKHL/2004/56.html

[24] Ibid [81-82].

[25] [2007] UKHL 46, [2008] AC 440 http://www.bailii.org/uk/cases/UKHL/2007/46.html

[26] Ibid [91].

[27] [2009] UKHL 28, [2009] 3 WLR 74 http://www.bailii.org/uk/cases/UKHL/2009/28.html

[28] Ibid [80].

[29] Ibid [84].

[30] D Linzer and P Finn, "White House Weighs Order on Detention," *Washington Post* (27 June 2009).

[31] P Finn, "Administration Won't Seek New Detention System," *Washington Post* (24 September 2009); P Baker, "Obama to Use Current Law to Support Detentions," *New York Times* (24 September 2009); R Bernstein, "A Detainee Freed, But Not Released," *International Herald Tribune* (24 September 2009).

[32] R Ford, "New Blow to Terror Control Orders as Second Suspect Released," *TimesOnline* (25 September 2009).

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Judge Zwink sworn in March

Long-time Palmer Magistrate David L. Zwink was sworn in on March 30, 2010, as the new District Court Judge in Palmer. Although new to a judgeship, Judge Zwink is by no means new to the bench. Since 1990, he has handled district court cases as both a magistrate and a district court judge pro tem, presided over superior court cases as a Standing Master, and participated actively in magistrate conferences and trainings. He is familiar to many in both the court system and the communities he serves and brings a wealth of knowledge and experience to his new role. Judge Zwink received his law degree from the University of Oregon in 1985 and has lived in the Mat-Su Valley since 1986. Photo courtesy of Teresa Shaw.

Legal research on the cheap: Options for services

By Greg Lambert

Most solo and small firm lawyers would love to find a legal research product that has the content of a Westlaw or LexisNexis for the price of Google Scholar. Of course this is a dream that will probably never come true as the premium legal research providers demand a premium price for their service.

Usually when you compare the categories of content, editorial process, citatory service and secondary resources, most products earn the label of "you get what you pay for." The high end providers such Westlaw, LexisNexis or the new Bloomberg Law all have excellent coverage in all four areas, but with a high-end price. Could there be a low-cost legal research provider that gives its subscribers excellent content along with value-added services for a more reasonable cost? We'll take a look at four low-cost providers, Loislaw, Casemaker, Fastcase and Google Scholar and determine which one gives you the most value for the price.

Loislaw is a mid-cost provider. One might think Loislaw would have leveraged its relationship with its parent company, Wolters Kluwer, to produce a product that rivals the high-cost providers. However, when you actually do the comparison, Loislaw tends to look more like the lower-cost providers like Casemaker and Fastcase. With Loislaw, you're paying a higher price for a product that doesn't deliver much on the value-added side.

Fastcase is a low-cost provider. Certain bar associations provide access for free, or it can be purchased by solo attorneys for around $995 a year. Fastcase is also available through national third party providers like Trial Smith, Law.net, or even part of the database made free through Public Law Library. Fastcase has good content coverage, but offers very little when it comes to editorial process, citatory service and secondary resources, the other categories being reviewed. Therefore, Fastcase falls in the low-cost / low-value category.

Google Scholar is a no-cost provider of basic primary case law material. Scholar offers no statutory material which is critical to the practice of law. It does, however, index secondary sources through its arrangement with third party vendors like Hein Online. Accessing these secondary resources, however, requires paid subscriptions to the other vendors. Google Scholar, even if you add the benefits of its indexing secondary sources still falls into the low-cost / low-value category.

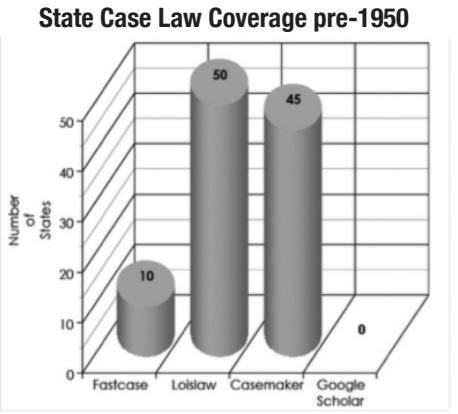
Casemaker is a low-cost provider. Casemaker is available through 28 state bar associations (including Alaska) as a free service to the members of each of those bars. Casemaker has very good content coverage of primary case law and statutes, plus it has additional services such as editorial staff review, a legal digest service, access to secondary resources like CLE and bar publications, plus the biggest value-added service of a true citator service that all practicing attorneys need. Casemaker, then, falls into the low-cost / mid to high value category.

Content - Primary Law Coverage

Attorneys rely upon case law and statutes as their primary resources when practicing law. The better the coverage is in the jurisdiction they practice, the better they can research and practice within that jurisdiction. All of the low-cost providers start with a core set of Federal cases that cover most or all of the US Supreme Court cases and a significant collection of Federal Circuit and District Court decisions.

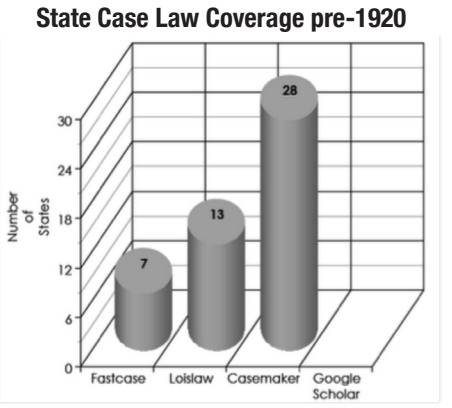
For state cases, most low-cost provider collections started with a standard set of cases from 1950 to present.

State Case Law Coverage pre-1950



When you start looking at how the different providers cover pre-1950 state case law, it becomes apparent that Casemaker provides better historical coverage than Fastcase or even Loislaw. In all categories but one, Casemaker had more coverage than Fastcase, Loislaw or Google Scholar. Loislaw had five more states with pre-1950 coverage than Casemaker, but the further back you go the better Casemaker starts to look.

State Case Law Coverage pre-1920

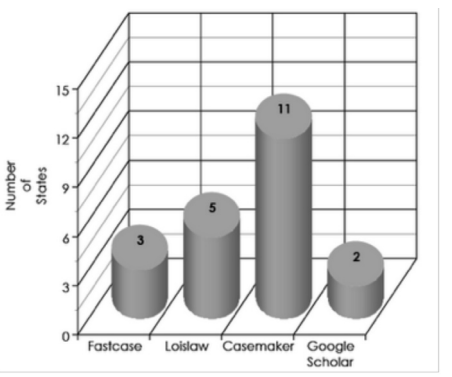


Casemaker had over twice as many pre-1920 states than Loislaw (28 vs. 13).

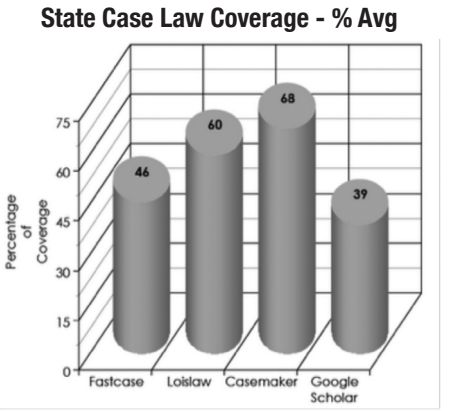
State Case Law Coverage pre-1899

Casemaker had four times as many states with pre-1899 coverage than Loislaw (28 vs. 7); and Casemaker had over twice as many states with complete case law coverage (11 vs. 5).

State Case Law Coverage 100%



State Case Law Coverage - % Avg



Fastcase and Google Scholar ran a distant third and fourth place with Fastcase only having 10 states with pre-1950 coverage, and Google Scholar having zero. The overall percentage of case law coverage for all states and the District of Columbia also went to Casemaker (68%).

Red Flags on Content Quality

There are a couple of services which raised red flag issues that should be addressed with regards to case law coverage. First of all, Google Scholar will not disclose from whom they received their cases, and how they will be updating the case law as it comes out. A random sampling of cases indicate that Google Scholar may be as much as a month behind in posting new cases. While Fastcase's database does not always use the correct National Reporter Citation (A.3d, P.3d, etc.). In a recent review of Fastcase's citations, there were literally tens of thousands of cases in Fastcase's database which are missing the proper citation. This not only causes problems with pulling a case by citation, but also with cross-referencing a case based upon that citation so complete citation checking cannot occur. No such issue was found in either the Loislaw or Casemaker databases.

Content - Statutory Coverage

Unlike case law, statutes are much more dynamic in nature. Maintaining a database of Federal and State statutes takes a great deal of effort and dedication. Because of this complexity, Google Scholar has decided not to host any statutes. Fastcase hosts the US Code, plus statutes for 43 states and the District of Columbia, plus Fastcase hosts a number of state session laws. There are seven states that Fastcase links to the official state site. Both Casemaker and Loislaw host US Code and all 50 states plus the District of Columbia. In addition to statutory coverage, Casemaker and Loislaw also cover the US Public Laws, and Code of Federal Regulations, plus state session laws, Attorney General opinions, Administrative Codes, Jury Instructions and more. Casemaker also includes a service of seeing upcoming statutes that are awaiting their effective dates.

Editorial Process

There are a few things that you just don't expect to find at a

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Legal research on the cheap

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low-cost legal research provider. Out of the providers reviewed here, only Casemaker has a staff of legal editors who review, edit and produce digests as a value-added product. A group of former editors from Michie Publishing have brought their talents over to Casemaker and is proving that top-quality legal editors are not just available through the high-cost providers. In fact, Casemaker's editorial staff is breaking a number of stereotypes of what low-cost legal research services can provide to its customers.

The new legal digest product called CasemakerDigest provides a summary of recent decisions based on area of law, court or judge. The Casemaker editors write the summaries, categorize them by topics and make the summaries available through the online service, email or even RSS feed. Currently, CasemakerDigest covers 36 state court decisions plus the Federal Court decisions. The service if free through some state bars. But even if you have the pay the $3.99 per month for your state and federal digest or $5.99 for the full product (all states and all federal circuit), that is just something that you cannot find on any other low-cost provider. In addition to the CasemakerDigest product, the editors at Casemaker work on updating state and federal statutes, including adding historical information as the statutes are updated, and providing links to the public acts in US and state codes.

Citator Service

There have been inventive methods to create an automated legal citator service by creating lists of cases that cite the case you are looking at. Loislaw, Fastcase, Casemaker and even Google Scholar use this type of automated citator service. The idea behind these types of automated services is that the researcher can determine on their own which cases are still "good law" or "bad law." In reality, lawyers and legal researchers still want a premium citator services where trained lawyers and editors compile this information for them and let the researcher know immediately if the case they are looking at is still "good law." Automated citator services simply do not measure up to the type of service that a Shepard's or KeyCite product offer.

A true citator service like Shepard's or KeyCite has always seemed like something that was too much of a challenge for low-cost legal research providers to create. Casemaker is the only low-cost legal research provider that now offers a viable alternative to Shepard's and KeyCite. When Casemaker launched its CaseCheck+ premium citator service, it broke the myth that only the high-dollar legal research providers could provide a service to identify the current status of a case. The fact that CaseCheck+ is available at $.99 cents per citation, $4.95 for a 24 hour unlimited use, and $19.95 a month unlimited also breaks the myth that a subscription to a true premium citation system is outside the means of many solo and small firm attorneys. CaseCheck+ is managed by the former Michie Publication editors that handle the CasemakerDigest product, and they have the final say in whether a case is labeled as having any negative treatment.

The reason that many attorneys do not want to use low-cost legal research services is the lack of a true citator service. With the launch of CaseCheck+, and the high quality staff of editors overseeing the process, Casemaker is ready to step in and fill that void and let attorneys know that you do not have to go to the high-cost services in order to see if the case you are citing is still good law.

Conclusion

The common arguments that attorneys use for why they are not using low-cost legal research tools are that there is not enough coverage in the jurisdictions in which they practice, that they are unsure of the accuracy of the information, and that there is not a true citator service that will let them know if the case is good law or not. The only product that we found that stands up to these arguments is Casemaker. With Casemaker, you get the largest overall case law, statute and primary law coverage for state and federal sources. In addition, Casemaker has top-notch legal editors on staff that review new content, add editorial comments and historical information, create digests, and most importantly provide a true citator system that all legal researchers need. Casemaker proves that you don't have to be a high-cost legal research provider in order to provide a quality product. Attorneys that have access to Casemaker through their state bar associations should take advantage of this resource and evaluate whether it could replace some of the high-cost resources they are currently buying.

The author is a law librarian & law Blogger at geeklawblog.com

Mind Games tests facts, raises money

Mind Games, the annual fundraiser for the Alaska Immigration Justice Project (AIJP), was held April 22 at Snow City Café. Ten teams of eight were sponsored by local law firms, individuals, and businesses. They tested their knowledge of trivia in a wide range of legal subjects.

Winners of each of the 7 rounds received prizes donated by local businesses, and the overall winning team received the grand prizes: hand made "World Champion" crowns and gift certificates to Sacks Café and the Spenard Roadhouse.

This year's champion was the "Picayune Paralysis" team, organized by AIJP board member Geeta Kolean. The AIJP is the only non-profit law firm in the state providing legal representation to immigrants and refugees.

Grace Danborn, AIJP Rural Domestic Violence Coordinator, models a Mind Games World Champion crown at the start of the competition.

Grace Jang, Channel 11 News anchor and AIJP board member, introduced the event with Robin Bronen, AIJP co-founder and executive director.

The staff of the Alaska Immigration Justice Project takes a break for a group shot while the trivia competition in underway. Front row, L-R: Robin Bronen; Mara Kimmel, AIJP co-founder and board member; Barb Jacobs, program director for the AIJP's Language Interpreter Center. Standing, L-R: Hannah Torkelson, Grace Danborn, Jason Baumetz, Carmen Markovich, Anna Dudek and Dulce Vinales.

Photos by Barbara Hood

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We will
- Provide advice and support;
- Discuss treatment options, if appropriate; and
- Protect the confidentiality of your communications.

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. We will not identify the caller, or the person about whom the caller has concerns, to the Bar Association, or anyone else.

Anchorage

Michaela Kelley Canterbury
276-8185

Dale House
269-5044

Mike Lindeman
245-5580

Suzanne Lombardi
771-8300 (wk)

John E. McConnaughy
343-6445 (wk)

Brant G. McGee
830-5518

Michael Sean McLaughlin
269-6250

Michael Stephen McLaughlin
793-2200

Greggory M. Olson
830-9792 (cell)

Anchorage

John E. Reese
345-0275
345-0625 (hm)

Jean S. Sagan
263-5414
929-5789 (hm)
952-1785 (cell)

Moira Smith
276-4331

Fairbanks

Valerie Therrien
388-0272

Palmer

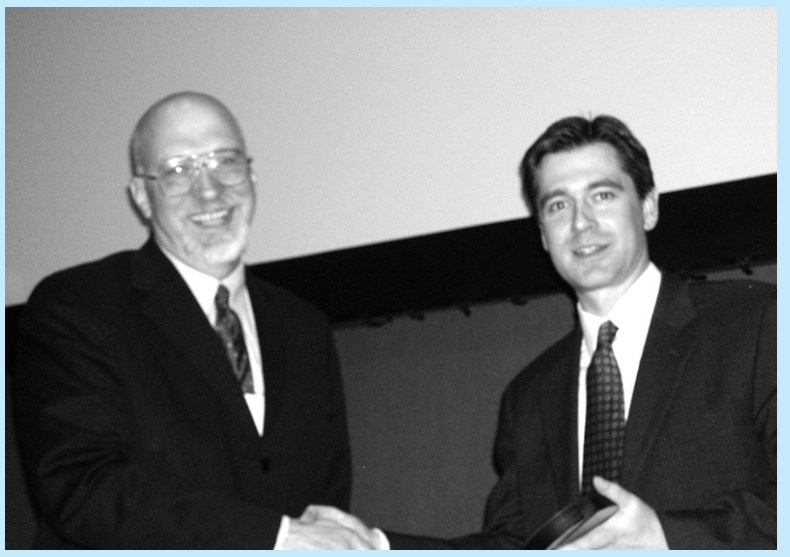
Vanessa H. White
746-8170

Justice Walter Carpeneti presents the annual Pro Bono Awards*

Erik LeRoy-Solo Practitioner

Erik is a solo practitioner in Anchorage and has been extremely involved with helping low-income Alaskans with consumer protection and bankruptcy issues. Erik routinely assists more than a dozen pro bono clients in court each year concurrently with his pro bono case load of 20 clients. He has also taught the Chapter 7 Bankruptcy clinic with Paul Paslay (a 2006 Pro Bono Award recipient) for more than a decade.

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.



Chris Brecht-Private Practitioner

Chris Brecht is an associate with Bankston Gronning O'Hara PC and was selected this year because of his pro bono service to the Alaska Pro Bono Program over the past two years. Logging more than 400 hours on a divorce action for a disabled individual and the second Habitat For Humanity Wills clinic, Chris gives generously each year despite having a young family and growing practice.

Walker & Eakes LLC-Law Firm

This is the second time that the a small firm of partners Stacy Walker and Laua Eakes has won the pro bono firm award. In 2009 Walker and Eakes has taken on five family law matters helping victims of domestic violence and sexual assault and one immigration case for the Alaska Immigration Justice Project. This was on top of the six cases they took on in 2008, many of which were still pending. These matters have included protection orders, divorce and custody cases and civil litigation on behalf of sexual abuse survivors. This year's work included helping a family afflicted by cancer get safety from an abusive father and litigating not one but two child sexual abuse cases. Walker and Eakes generous "can do" attitude has created safety and security for many vulnerable Alaskans.

Dan Rodgers-Lifetime Achievement

Dan Rodgers came to Alaska in 1977 and spent over thirty years as an in-house attorney at ARCO and Conoco Phillips. Since retiring in 2007, Dan has volunteered as a full-time staff attorney for the Alaska Immigration Justice Project. But Dan's volunteer work hardly began with the onset of his retirement; he's been dedicated to giving back his entire life and career. Dan's kindness knows no global boundaries. His volunteer work has also extended to Peru where Dan has volunteered for various projects to help the poor and under-privileged through Cross Cultural Solutions and other aid groups. Whether he is litigating a complex asylum claim or cutting hair for abandoned elders in Peru, Dan serves each individual with equal dedication and care.

**The justice is on the left in photos*

25 year members get pinned

22 Bar members received their 25-year pins at the convention, and gathered for a group photo after lunch.