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Dignitas, semper dignitas

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Alaskan attorneys litigate tough case in Texas court

About a year ago, Jeff Feldman and Susan Orlansky took on a pro bono death penalty case in Texas. The defendant, Elroy Chester, was on death row, having committed five murders over six months in 1997-98 in the east Texas town of Port Arthur.

In July 2001, the U.S. Supreme Court held, in Atkins v. Virginia, that execution of mentally retarded individuals violates the Eighth Amendment ban on cruel and unusual punishment. School and prison records suggested that Elroy Chester is mentally retarded, so, after filing a series of procedural motions, Feldman and Orlansky found themselves in state court in Beaumont, Texas, litigating Chester's mental retardation claim. What follows are reports that Feldman sent back to Anchorage during the trial.

By Jeff Feldman

Dispatch from Beaumont

Warm and sunny in Texas, the smell of honeysuckle in the air. The bailiffs closed the glass partition that separates the courtroom from the gallery before we arrived. They are very nervous about security, although it's never clear to me whether they are concerned about Chester doing harm to the judge and lawyers, or about the risk of spectators doing harm to Chester. I think it's the former. I'm not sure the bailiffs are much concerned about harm befalling Chester, since the State already has decided that he should be executed.

Still, the spectators are not to be ignored. Representatives of the five families of the victims filled the gallery, each carrying a sign or large photo of a victim. It looked like an assembly of family members of 9/11 victims, and it added something of a haunting presence to the courtroom as they sat there silently. When Judge Charles Carver took the bench, he admonished them that any outburst would be met with a contempt citation and that the signs had to be removed from the courtroom. And they were.

Opening statements were short, consistent with what seems to be the expectations of Judge Carver, a man I've described as taciturn. We called our first witness, Dr. David Ott, a psychologist from Ohio. Dr. Ott did a good job

Continued on page 32

NAVIGATING THE EUROPEAN COUNTRYSIDE — page 34 "TURN LEFT. RMERICAN IMPERIALIST! SCHNELL! DIE!"

WWII tour explores Trinity fallout

By Jim Kentch

Introduction

There were three of us this time: Radioactive Man and the Fallout Girls. ¹ We were headed for The Trinity Site on The White Sands Missile Range, some 180 miles from Santa Fe. ² On July 16, 1945 The Manhattan Project exploded the world's first atomic bomb there. ³ Now it is a National Historical Monument open but twice a year.

Omens

Reasonable people would not have ignored the omens; they would have turned back. The three surveyor's markers in the road looking like explosions; the loss of the car keys; the three thunderstorms; the wind and hail; the trio of ravens, and another of vultures; the duo of motorcyclists followed by seven more (2+7=9, the square of three); the forgetting of the picture ID; the dying of the camera's batteries; the handout from The Radiation Protection Division; the billboards for "loose slots"; the Cadillac with South Dakota plates; two black dogs; the necessity of passing through San Antonio (finder of lost objects). But we did not turn back. South of Albuquerque we drove through the mother of all thunderstorms and emerged cleansed, baptized. It was The Stargate. We Riders on the Storm had proved ourselves worthy. ⁴ We were in The Landscape of Zeros.

The Stallion Gate at the Missile Range

The guard asked us if we had any weapons, as weapons on a missile range were apparently anathema. 5 We had none, and so drove on. Security

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FEATURED IN THIS ISSUE

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President's Column

Pro bono is an obligation for all the Bar

By Keith Levy

"Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists... it is fundamental that justice should be the same, in substance and availability, without regard to economic status."

— Lewis Powell, Jr., U.S. Supreme Court Justice (ret.), during his tenure as President of the American Bar Association

During the past year, the Board of Governors has struggled with the question of what role the Alaska Bar Association should play to support the goal Justice Powell articulated. Without exception, Board members agreed we have unique obligations in this regard, both as an association and as individual attorneys. Where the debate broke down was in trying to

find common ground on how to fulfill those obligations.

The Bar's Pro Bono Service Committee, with backing from Chief Justice Alex Bryner, urged the Bar Association to create an inhouse position to coordinate pro bono efforts statewide. The incumbent would not replace existing pro bono service entities, such as the Alaska Legal Services Corporation, the Alaska Pro Bono Corporation, the ANDVSA Pro Bono Mentoring Project, or the Immigration and Refugee Services Pro Bono Asylum Project. Rather, the primary goal

of this position would be to support equal justice by coordinating with these entities to increase the num-



"In April of this year, Krista Scully became the Alaska Bar Association's first Pro Bono Program Director."

ber of attorneys doing probono work in Alaska and to heighten awareness of probono needs and activities. The Board discussed this request over the course of an entire year. In the end, after several stops and starts, the Board accepted the ProBono Service Committee's recommendation and agreed to fund an in-house position to support probono efforts in Alaska.

In April of this year, Krista Scully became the Alaska Bar Association's first Pro Bono Program Director. Krista has a B.S. in criminal justice from

the University of Idaho, has done post-graduate work in mediation and conflict management at Woodbury College in Vermont, and is an adjunct professor at the University of Alaska Anchorage in the conflict resolution certificate program. The Bar Association persuaded her to leave her position as executive director of the United Youth Courts of Alaska. Krista grew up in Anchorage and is one of Alaska's 2003 "Top 40 Under 40." If you have met her, you know she has the energy and determination to make a significant contribution to equal justice in Alaska.

The need for pro bono services is not hard to quantify. According to the Legal Services Corporation, Legal Services funded programs are barely able to meet 20 percent of the legal needs of eligible clients nationally. The statistics in Alaska are no

Continued on page 3

EDITOR'S COLUMN

Abstinence and the birth of a tort

By Thomas Van Flein

Recently, in Kinzel v. Discovery Drilling, Inc., 88 P.3d 1099 (Alaska 2004), our court recognized a new tort for the termination of an employee in violation of public policy. Now, if an employer terminates an employee and the termination is predicated upon a violation of public policy, the employee can be compensated with the full panoply of tort damages. Public policy violations traditionally include actions such as retaliatory discharge for filing a workers' compensation claim, discharge in retaliation for whistle-blowing and reporting misconduct to government or regulatory agencies, or discharge for reporting sexual harassment, etc. For years, it has been an open question whether tort damages would be available in these circumstances instead of just contract damages.

Adoption of this tort was long in coming, and not unexpected at all. It is interesting, however, to look back and see how this little new tort was born. Like many relationships, this one started with a flirtatious glance across a smoky room (this was before smoking was banned in public places). The allure of this tort is strong and some courts gave in to temptation early and easy. I am not questioning the virtue of these other courts; well maybe I am, since they jumped into bed with this theory after a cheap meal and a bottle of wine. California (of course) shed all discretion and decorum as early as 1959 and hastily consummated the relationship relative to retaliatory discharge for engaging in union organizing activities. Petermann v. International Bhd. of Teamsters, 174 Cal.App.2d 184, 344 P.2d 25, 27 (1959). It followed up with a landmark decision in Tameny v. Atlantic Richfield Co. 610 P.2d 1330 (Cal. 1980).

Alaska was able to resist its charms far longer than our sister states. Many states recognized this doctrine in the early and mid-1970's. The 70's (I am told) was a time of indiscretion, disco ballrooms, and "new ideas." So perhaps those state courts that engaged in flamboyantly wild theories can be forgiven during a decade known for its youthful in-

discretion.

But what about the 80's? Sure it was a time of "big hair," but wasn't it also about "big ideas"? Many more state courts gave in to temptation in the 1980's, submitting to their institutional weakness, able to resist no more. Even those states that appeared reserved, conservative and wise to the ways of a sexy doctrine let their guard down and were taken in by the moment. 3

But not Alaska. Alaska continued to flirt with the notion throughout the 1980's, but it always found a way to say good night at the door step. For example, in Knight v. American Guard

& Alert, Inc., 714 P.2d 788 (Alaska 1986), the court refused to "reject or accept" this attractive little idea. Then, still determined to play the tease, the court in ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153 (Alaska 1988), gave a wink and a smile but said it would not "decide the issue in this case" because the claimant failed to articulate "that his termination violated an explicit public policy." A frustrated and grumpy federal court expressed its impatience with the uncertain state of affairs. Sever v. Alaska Pulp Corp., 931 P.2d 354, 357 (Alaska 1996) ("the claim of discharge in violation of public policy has been neither accepted nor rejected" by the Alaska court).

As late as 1999, the Alaska Supreme Court, in *Veco v. Rosebrock*, 970 P.2d 906, 918 (Alaska 1999), acknowledged the pheromones emitted by this theory but still resisted going all the way, explaining that "[w]e do not reach the issue of whether a public policy tort should be recognized in the circumstances of this case or whether such a claim would support an award of punitive damages."

But this theory was a persistent suitor. Not one to take rejection, "the little theory that could" kept showing up with flowers, candy and breath mints and one or two appear-



"Adoption of this tort was long in coming, and not unexpected at all. It is interesting, however, to look back and see how this little new tort was born."

ances on a reality show. It finally worked. The court in Kinzel v. Discovery Drilling, Inc., 88 P.3d 1099 (Alaska 2004), ruled that in situations where there are "violations of explicit public policies--protection of whistleblowers who file safety complaints or workers who file workers' compensation claims" for example, "it is appropriate to allow a tort remedy to more effectively deter prohibited conduct. We thus join the numerous authorities that have so ruled." Finally, it is done. After 20 years of toying with the doctrine, the court decided to go all the way. And the rest of us feel like

proud parents, expecting that this day would come and hoping one day, one day soon, the court would make an honest partner out of the doctrine and that the birth of the little tort would be welcomed into the existing family of redresses.

(Footnotes)

¹Indiana in Frampton v. Central Indiana
Gas Co., 297 N.E.2d 425 (Ind. 1973)); Pennsylvania in Geary v. United States Steel Corp., 319
A.2d 174 (Pa. 1974); Oregon in Nees v. Hocks, 536 P.2d 512 (Or. 1975)); Michigan in Sventko
v. Kroger Co., 245 N.W.2d 151 (Mich. 1976);
Idaho in Jackson v. Minidoka Irrigation Dist., 563 P.2d 52 (Idaho 1977); Illinois in Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978); and
West Virginia in Harless v. First Nat'l Bank, 246 S.E.2d 270 (W.Va. 1978).

² New Hampshire in Howard v. Door Woolen Co., 414 A.2d 1273 (N.H. 1980); Montana in Keneally v. Orgain, 606 P.2d 127 (Mont. 1980); New Jersey in Pierce v. Ortho Pharm. Corp., 417 A.2d 505 (N.J. 1981); Kansas in (Murphy v. City of Topeka, 630 P.2d 86 (Kan. Ct. App. 1981); Maryland in Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981); ${\bf Wisconsin\,in}\, Brockmeyer\, v.\, Dun\, \&\, Bradstreet,$ 335 N.W.2d 834 (Wis. 1983); New Mexico in Vigil v. Arzola, 699 P.2d 613 (N.M. Ct. App. 1983); Connecticut in Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980); Illinois in (Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981); and Hawaii in Parnar v. Americana Hotels, Inc., 652 P.2d 625 (Haw. 1982).

³ Like Connecticut, certainly considered a matriarch of states being one of the original 13, and not a state that has a reputation for being fast and loose. But Connecticut was charmed in 1980. Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980).

The BAR RAG

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Contributing Photographers Barbara Hood

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Bud Root

Design & Production: Sue Bybee & Joy Powell

Advertising Agent:
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[Editor's Disclaimer: As with all Bar Rag articles, advertisements and letters, we do not vouch for, stand by, or support most of what we publish. Nor have we cleared any of this with either the FDA or the Department of Homeland Security (fka Interior Ministry). We sure as hell won't be responsible for your hurt feelings or misguided reliance on anything we publish).

President's Column

Pro bono . . .

Continued from page 2

different. The Alaska Supreme Court Civil Access to Justice Task Force Report states that approximately 50 percent of Alaska's 80,000 low income citizens are likely to face a need for legal services in any given year. In 2003, Alaska Legal Services opened nearly 3,000 new cases, but had to turn away many eligible clients. And a significant number of Alaskans earn just enough to make them ineligible for Legal Services, but are still unable to afford a private attorney. One of my main goals as President is to ensure that the Pro Bono Program Director receives ample support to help us make strides in addressing these needs.

One other consideration relevant to our special obligation to ensure equal justice is Alaska Rule of Professional Conduct 6.1. That rule sets an aspirational goal of rendering at least 50 hours of pro bono services a year. Many who are not family law attorneys gasp at the thought of spending 50 hours a year doing divorce and custody work. While family law is one of the areas of greatest pro bono need, low income Alaskans need a variety of other legal services as well, including consumer protection and bankruptcy. In addition, while representing low income Alaskans is the most significant pro bono need, there are a variety of ways to satisfy our professional obligation to provide pro bono services. These include teaching legal clinics; representing individuals and organizations seeking to protect civil rights; and representing charitable, religious, civic, community, governmental, and educational organizations.

It is probably true that supporting equal justice in Alaska by itself won't bring world peace or even put an end to insipid lawyer jokes. It is also true that equal justice under law is a societal obligation, not just the responsibility of lawyers. But, as Justice Powell said, equal justice is an inspiring ideal and a fundamental purpose of our legal system. As lawyers we play a unique role in that legal system, and draw unique benefits from it. We therefore have a unique obligation to see that equal justice is available without regard to economic status. I hope you will join me in working with Krista Scully, our new Pro Bono Program Director, to support the cause of equal justice in Alaska.

Women In Law explore excellence



The 6th Annual Women in Law Luncheon, co-sponsored by the Alaska Bar Association's Gender Equality Section and the Anchorage Association of Women Lawyers, was held March 30, 2004, at the Captain Cook Hotel in Anchorage. The luncheon drew over 80 people and featured a panel presentation by Alaska women lawyers who have achieved Martindale-Hubbell's "AV" rating-the highest attainable. Here, Justice Dana Fabe, L, the first woman attorney in Alaska to achieve the "AV" rating; and current co-chair of the Gender Equality Section, joins (L-R, back row) panelists Heather Kendall-Miller, Kathryn A. Black, Patricia L. Zobel, Heather Grahame, Diane F. Vallentine, and Susan Orlansky; and (L-R, front row) luncheon chair Natalie Landreth, AAWL; and panel moderator Susan Reeves, who is also "AV" rated. Photo by Barb Hood

Results from law school Bar poll

Should Alaska have its own law school?

YES 24%

NO 72%

4% would support a medical school.

Comment:

Should Alaska have a law school?

Should Alaska have a medical school? Yes. But wait, you did not ask that question.

—Jon M. DeVore

New Bar poll

If the election were held today, for who would you vote?

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ALSC President's Report

Robert Hickerson Partners in Justice Campaign: A primer

By Greg Razo

What is the Robert Hickerson Partners in Justice Campaign?

Those of us on the Board of Alaska Legal Services Corporation, who work so closely with the Campaign from October through June, sometimes assume that the typical Alaskan attorney is thoroughly familiar with this. But just in case, here is a quick primer.

Alaska Legal Services Corporation is a private non-profit charitable organization whose mission is to provide meaningful access to high-

quality legal services in the pursuit of justice for as many low-income people as possible. Its eight offices around the state vary in size from one part-time paralegal

(Ketchikan) to twelve attorneys (Anchorage).

Financial ceilings for eligibility are set according to federal poverty levels. ALSC does no criminal work.

Robert Hickerson was ALSC's Executive Director for a remarkable seventeen years, a record among ALSC Executive Directors that never has been and probably never will be equaled. He and his wife Elizabeth moved to Alaska in 1981 when he became ALSC's Chief Counsel; he became ALSC's Executive Director in 1984 and served ALSC in that capacity until his untimely death in 2001 from a brain tumor, at age 50. His wife Liz and their son John still grace Anchorage with their presence, where Liz works for the Attorney General's Office.

The Bar Association established a special award in his honor, given the first year to Robert himself posthumously and the second year to Christine Pate, pro bono mentoring attorney with the Alaska Network on Domestic Violence and Sexual Assault. This year's recipient was Susan Orlansky, who received this coveted award at the recent Bar Convention. Robert's name is also memorialized in the Pierce-HickersonAward established by the National Legal Aid and Defender Association, a nationwide award given annually to a recipient making a particular contribution to the advancement of

Native American Law.

ALSC's Board is committed

to sustaining ALSC's mission

brought to his work, and for

with the same dedication

and diligence that Robert

that, we need your help.

The Partners in Justice Campaign was launched by ALSC under Robert's leadership in 1997, to facilitate firm gifts and individual gifts in support of ALSC's mission. Following his death, ALSC's Board voted to name the campaign in his honor, in recognition of the invaluable contributions he himself had made to ALSC over the years.

This year's campaign is more crucial than ever. With IOLTA funding at its lowest level ever due to low interest rates, and ALSC facing an uphill climb to maintain a meager appropriation

in the state budget, some on our Board are finding it difficult to see how we can make it through 2004 without having to close one or more offices.

Some of Robert's saddest days were in 1996 when he had to close several of ALSC's Bush offices, and some of his happiest were in 1998 when he was able to re-open some of those offices, with substantial local support.

ALSC's Board is committed to sustaining ALSC's mission with the same dedication and diligence that Robert brought to his work, and for that, we need your help.

Traditionally, we wrap up the campaign at the annual Bar Convention, but this year's Convention was held a little earlier than in previous years. Contributions can still be made to this year's campaign through the end of June, by mailing them to ALSC at 1016 West 6th Suite 200, Anchorage AK 99501, or by donating on-line through www.partnersinjustice.org.

A presumptive 10% of all contributions goes into a permanent endowment for ALSC, but each donor can specify a smaller or higher amount to be dedicated to the permanent endowment.

If you've contributed to the 2003-2004 campaign already, thank you. If you have not, please take a few minutes now to make your donation. A complete list of campaign donors through June 30 will appear in the next issue of the Bar Rag, but I want to acknowledge the following major donors who, through May 4, have contributed so generously to the current campaign:

CIRI (\$10,000)

Dillon & Findley (\$6,000 in honor of Art Peterson)

Birch Horton Bittner and Cherot (\$2,500)

Andy Harrington (\$2,210)

Dorsey & Whitney Foundation (\$2,075)

Heller Ehrman White & McAuliffe (\$2,000) Law Offices of Michael Schneider

(\$2,000) Marie C. & Joseph C. Wilson

Foundation (\$2,000) Juneau Bar Association (\$1,549

in memory of Dick Regan)
The Carr Foundation (\$1,000)
Clayton & Associates (\$1,000)

Charles Cole (\$1,000)
John Conway (\$1,000)
Carol and Tom Daniel (\$1,000)
Saul Friedman (\$1,000)
Beth Heuer (\$1,000)

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Peter and Jo Michalski (\$1,000)

Myra Munson (\$1,000)
Art Peterson (\$1,000)
Jim and Susan Reeves (\$1,000)
Jim Torgerson and Morgan
Christen (\$1,000)

Special mention needs to be given to ALSC's own Bethel staff attorney Mark Regan, who selflessly donates a huge percentage of his salary to the campaign and for the second year in a row is the campaign's largest contributor.

Legal Services in the 21st Century

ALSC places a priority on seeking, and obtaining, foundation and grant funding for projects that integrate technology into the practice of law and the delivery of legal assistance to the low-income community. ALSC and the Alaska Court System's

ALSC's newest technology

received a grant from the

Beaumont Foundation of

Legal Learning Lab (LLL).

initiatives are headquartered

in the Fairbanks office, which

America for the creation of a

Family Law Self-Help Center have worked together for over a year on a project that placed courthouse self-help workstations in Anchorage, Palmer, Kenai, Kodiak, Juneau, Ketchikan,

and Fairbanks. The workstations are designed for self-represented family law litigants and provide Internet access, a printer, basic reference materials, and a telephone to reach the Family Law Self-Help Center, the nearest ALSC office, CSED, or other resource agencies. The ALSC/ACS collaboration also produced a series of self-help modules that present complex topics in a series of step-by-step instructions.

Work continues on the statewide web site, AlaskaLawHelp.org, on which ALSC is partnering with a number of other Alaska legal and social services providers. The next enhancement is an advocate area, offering a library of legal resources for poverty law advocates and pro bono attorneys assisting the low-income community. We will be providing updates on the development and launch of www.AlaskaAdvocates.org in future ALSC Report columns.

ALSC's newest technology initiatives are headquartered in the Fairbanks office, which received a grant from the Beaumont Foundation of America for the creation of a Legal

Learning Lab (LLL). The lab, which is designed for low-income users who do not have access to computers, word processing, or the Internet, can accommodate up to ten visitors at a time and is equipped with notebook computers, a file server, printer, and wireless network. ALSC was one of only seven community-based organizations in Alaska to receive a Beaumont grant during the 2003 competition (the other recipients being Boys and Girls Clubs and the Minto School) and was chosen as a recipient based in part on the replication potential of its project. The Legal Learning Lab, staffed by volunteer paralegals and VISTAs, has three objectives. The first is to provide a place where visitors can access AlaskaLawHelp.org and the Court System's extensive collection of online forms and instructions. The second is to increase the client community's awareness of - and proficiency in the use of - online legal education and self-help resources accessible from any Internet-con-The third is to nected computer. make available electronic versions of self-help class materials, thus providing access to people unable to attend the attorney-taught clinics offered in several Alaska communities.

The Legal Learning Lab, which was introduced in February to the legal and social services community at an open house in Fairbanks, served as the pilot location for ALSC's Earned Income Tax Credit project. The EITC (or EIC) provides tax reductions and wage supplements for low-income working families. For tax year 2003, the EITC returned as much as \$4,204 a year per family - money that helps more children out of poverty than any other government program. The EITC has been widely praised for its success in supporting employment and reducing poverty. Nationally,

some 4.8 million people, including 2.6 million children, have been removed from poverty as a result of the federal EITC. It has also been proven effective in encouraging

work among welfare recipients. Studies show it has a large impact in inducing more single mothers to work.

Although the credit can make a tremendous difference in the lives of low-income Alaskans, it remains under-utilized. Many who are eligible for the EITC do not know about it or do not know how to claim it. Those who do claim it often use paid tax preparers who encourage refund anticipation loans, which can take up to half of the refund in fees and interest

ALSC's tax credit pilot project offered EITC filing assistance to low-income Fairbanks residents through an online module, I-CAN! EIC, developed by the Legal Aid Society of Orange County (California). I-CAN! EIC allows low-income wage earners to prepare their federal tax return, claim the EIC, and e-file their return for free. I-CAN! EIC is written at the fifth grade level, is offered in English and in Spanish, and allows filers with limited computer proficiency to suc-

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ALSC PRESIDENT'S REPORT

Robert Hickerson Partners in Justice Campaign

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cessfully complete their own returns. Feedback from states that piloted the module for tax year 2002 indicated that elements key to the success of the project were (a) providing an access point, where people can use an Internet-connected computer, and (b) having someone to help the users as they work their way through the program. ALSC's Legal Learning Lab provided the access point; the paralegal and VISTA volunteers provided assistance in the use of the module.

Alaskans who used the I-CAN! EIC module as part of the pilot project received total federal tax refunds in the amount of \$32,632, of which \$25,814 was the Earned Income Credit. Alaska ranked ninth in the nation in number of I-CAN! EIC tax returns filed, well above morepopulous states such as New York, Georgia, Florida, Pennsylvania, and Ohio. ALSC staff are already at work on next tax year's community education effort so that more low-income Alaskans and the service providers who assist them can utilize this free tax preparation tool.

ALSC's technology initiatives and pilot projects benefit the client community by providing access to information about the legal system and, in the case of the EIC project, by putting money back in the pockets of the working poor. All of ALSC's technology initiative work is grantfunded or supported by foundations. This dedicated financial support is essential to ALSC's efforts and ongoing work, but it cannot fill the budget gap that ALSC faces. As members of the legal community, we also need to support - with our actions and our monetary contributions - ALSC so that low-income Alaskans are not denied representation by an attorney simply because they cannot afford one.

What's Up With ALSC's Pro Bono Program?

In one of the shorter concurring opinions on record, Justice Stewart in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 wrote, "It is gratifying to note that my report of the demise of Fuentes v. Sheven, 407 U.S. 607, see Mitchell v. W.T. Grant Co., 416 U.S. 600, 629-636 (dissenting opinion), seems to have been greatly exaggerated. Cf. S. Clemens, cable from Europe to the Associated Press,

Did You File Your Civil Case Reporting Form? Avoid A Possible Ethics Violation

A reminder that civil case resolution forms must be filed with the Alaska Judicial Council as required by the Alaska Statutes and the Alaska Court Rules. The failure of an attorney to follow a court rule raises an ethics issue under Alaska Rule of Professional Conduct 3.4(c) which essentially provides that a lawyer shall not knowingly violate or disobey the rules of a tribunal. Members are highly encouraged to file the required reports since compliance avoids the possibility of a disciplinary complaint.

quoted in 2 A. Paine, Mark Twain: A Biography 1039 (1912)." (Twain is reported to have responded to rumors of his own death by cabling "reports of my death have been greatly exaggerated.")

Just so, rumors of the demise of Erick Cordero as ALSC's Pro Bono Coordinator are exaggerated.

The recent hiring of Krista Scully by the Alaska Bar Association as its new Pro Bono Program Director is a

very welcome development, and I'm told there will be more information on her well-suited experience and energy elsewhere in this issue of the Bar Rag, so



Krista Scully

I won't reiterate that here (aside from noting that her work as the Executive Director of Alaska Youth Courts, her work as an adjunct professor at UAA in the Conflict Resolution Certificate

THOMSON

WEST

Program, and her selection as one of Alaska's 2003 "Top 40 Under 40" all make her ideally suited for this position!).

But the point is that Krista's work with the Bar Association won't replace Erick's work with ALSC; they'll be working together, coordinating carefully to avoid duplication. Krista's job is not to place cases, but to work on recruitment, coordination, advancement and overall heightening of the profile of pro bono in Alaska.

And another new member of Alaska's pro bono team has also just come on board. APBP Inc. has hired Kara Nyquist as its new Executive Director, succeeding Bill Cotton, who during his own tenure did a great job for APBP. APBP's position is parttime, so Kara will also be maintaining her current position as Director of Youth Advocacy at Covenant House. A 2000 graduate cum laude from the Seattle University School of Law, Ms. Nyquist worked as a law clerk for nine District Court judges after

graduation and then worked at Birch, Horton for two years before joining Covenant House.

Erick, in the meantime, has been given the signal honor of being selected as a member of the Executive Committee of the National Association of Pro Bono Professionals. This is an independent organization of probono professionals, created in 1987, supported in part by the American Bar Association's Standing Committee on Pro Bono and Public Services. Erick will represent the Mountain Pacific Region (Alaska, Hawaii, Idaho, Montana, Oregon and Washington). Congratulations Erick!

Erick, Kara, and Krista, along with Christine Pate (mentoring attorney of the Alaska Network on Domestic Violence and Sexual Assault) and Robin Bronen (director of the Immigration and Refugee Services Project of Catholic Social Services) are all looking forward to working together to make Alaska a pro bono model for the rest of the country.



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NOTICE TO BAR MEMBERS: UPDATE YOUR CONTACT INFORMATION JULY 1

In order to facilitate maintenance of the attorney table in the new case management system currently being used by the Anchorage and Palmer trial courts, the Alaska Court System will be downloading attorney addresses, telephone and fax numbers, bar numbers and email addresses directly from the statewide database maintained by the Alaska Bar Association.

Please ensure that the address you have given the Bar Association is the same as the one you wish to have court orders mailed to.

Once the download is completed, the court will not accept address changes from any source other than the Bar Association's database.

You are encouraged to notify the Bar Association, if you need to change your address, within the next few weeks as this download will take place in approximately 1-2 months.

For more information contact:

Lora Newby CMS Analyst Alaska Court System (907)264-8201

lnewby@courts.state.ak.us

NOTICE OF PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO LOCAL RULES U.S. DISTRICT COURT, DISTRICT OF ALASKA.

Comments are sought on proposed amendments to Local (Civil) Rules

16.2; 37.1; 59.1; and Local Civil Form 37.1 (New) and Local Criminal Rule 47.1 All Comments received become part of the permanent files on the rules.

Written comments on the preliminary draft are due no later than August 5, 2004

Address all communications on rules to:
United States District Court, District of Alaska
Attention: Court Rules Attorney
222 West Seventh Avenue, Stop 4
Anchorage, Alaska 99513-7564

OI

e-mail to AKD-Rules@akd.uscourts.gov

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

Covenant House receives intern

Covenant House Alaska is one of three recipients in the United States of the John J. Curtin, Jr. Justice Fund summer internship. Tristia Bauman, a first year law student at the University of Washington, will join Covenant House in June. Ms. Bauman will work directly with Kara Nyquist, Esq. Director of Advocacy on both legal assistance and advocacy efforts. Ms. Bauman will conduct client interviews, analyze legal issues raised by the youth, conduct legal research, and provide legal information and referral. She will also recruit local attorneys to provide direct pro bono civil and criminal representation. Furthermore, she will engage in advocacy projects focused on policy initiatives and legislation affecting this client population.

Congratulations to Tristia Bauman and Covenant House!

Peterson receives Rabinowitz award

Juneau attorney Arthur H. Peterson was honored as the second recipient of the annual Jay Rabinowitz Public Service Award, during the bar's annual convention in May.

Nominated by Vance Sanders--with letters of support from Tom Findley, Bruce Botelho and Will Condon—Peterson was honored for his "professional and personal contributions for the past 37½ years. Art has consistently demonstrated an uncompromising commitment to public service in the State of Alaska. And it is that commitment that best honors the life and contributions of the late Justice Rabinowitz."

Peterson received a crystal plaque and a \$1,000 honorarium. The Award is funded through generous gifts from the public in honor of Justice Rabinowitz.

Art came to Alaska in 1966. From 1966 to 1973, he was on the staff of the Alaska Legislative Affairs Agency, serving one year as Legislative Councel

In 1967, he was appointed the Alaska Reviser of Statutes responsible for publication of the Alaska Statutes. He produced two editions of Alaska's Manual of Legislative Drafting. During this entire period, he also served as the counsel for the House Judiciary Committee and for one legislative session concurrently served as the counsel to the Senate Judiciary Committee. He also produced the first edition of Alaska's Drafting Manual for Administrative Regulations.

From 1973 to 1990, Peterson was an assistant attorney general and regulations attorney in the Alaska Department of Law, primarily handling administrative law and governmental issues. He wrote the 6th through the 10th Editions of the state's Drafting Manual for Administrative Regulations and edited the 1st and 2nd Editions of the state's Hearing Officers Manual.

Art has been in private practice since 1990. He has served on the National Conference of Commissioners on Uniform State Laws from 1975 to the present; was appointed and reappointed by four governors as one of Alaska's Uniform Law Commissioners; and was elected to life membership on the National Conference in August of 1995. Peterson also served on the Alaska Code Revision Commission from 1978 to 1981; served on the Alaska Commission on Judicial Conduct from 1995 to the present; and served on the Access to Civil Justice Task Force Steering Committee from 1998 to 2000.

Art also has served on the Board of Directors of the Alaska Legal Services Corporation from 1974 and on the Board of Directors of the Alaska Pro Bono Program, Inc. since 2000.

His early work experience included clerking in a drug store, clerking at a bookstore, serving as a camp counselor, being a U.S. mailman and driving a truck for a coffee company.

The Jay Rabinowitz Public Service Award is given each year by the Board of Trustees of the Alaska Bar Foundation to an individual whose life work has demonstrated a commitment to public service in the State of Alaska.

The public service award carries the name of a man whose life in public service for the State of Alaska is legendary. Raised in New York and educated at Syracuse University and Harvard Law School, Jay Rabinowitz accepted a job as law clerk to U.S. Territorial Court Judge Vernon Forbes in Fairbanks in 1957. After his clerkship with Judge Forbes, Justice Rabinowitz worked as Assistant U.S. attorney in territorial Fairbanks, then as chief of the Alaska Department of Law's Civil Division in Juneau. In 1960, at age 33, he was appointed to the Superior Court bench in Fairbanks by Governor Bill Egan. Five years later, when barely 38 years old, he was appointed to the Alaska Supreme Court, upon which he served for more than 30 years. Justice Rabinowitz wrote more than 1,200 opinions including almost

200 dissents. After retirement in 1997, he continued to serve the State of Alaska as a pro tem trial judge in Juneau until his death in 2001. In 1980, the Anchorage Daily News recognized Justice Rabinowitz's extraordinary contributions to the state and the nation when he was named the Anchorage Daily News' 'Citizen of the Decade.' Justice Rabinowitz served as a mentor for countless attorneys, public servants and judges who can trace their roots to his Fairbanks chambers.

The first recipient of the Jay Rabinowitz Public Service Award announced at last year's bar convention was Mark Regan. Nominations for this year's Award were considered by a committee chaired by Mary Hughes with members Mara Rabinowitz, Becky Snow and Susan Burke.

—Excerpted from Ken Eggers' comments at awards ceremony



Arthur H. Peterson

"Throughout his legal career, as well as his personal life, Art has sought to protect and promote the public interest. Whether through the simple act of picking up trash along the roadside, running...along Juneau's roads for charity events, or helping establish and maintain systems for providing legal help to the indigent, Art has been motivated by an intense desire to make the world a better place."

--Bruce Botelho

"Art's legal work has plainly benefited Alaskans and has consistently demonstrated a commitment to public service to the State of Alaska, But Art's public services transcend his career."

--Vance Sanders

"What is remarkable to me about Art's dedication to this work and his work with Alaska Legal Services is that it is not work that benefits Art in any way. He never sought or received any monetary or societal benefits from working behind the scenes to help poor people gain access to the legal system."

--Thomas Findley

"Those of us who know Art well know that he didn't serve 30 years as a member of the Alaska Legal Service board of directors to fill out his resume. He did it because his is committed to the mission of Legal Services...and justice for needy Alaskans who would otherwise go without legal representation."

--Wilson Condon

Gifting can increase taxes in certain LLC conditions

By Steven T. O'Hara

Gifting usually reduces tax for clients who face estate tax. Gifting often provides at least a twofold reduction in the amount of property subject to tax at the donor's death. First, the gifted property avoids estate tax and. second, the appreciation on the gifted property avoids estate tax.

Gifting can have significant non-tax benefits as well, such as teaching asset-management skills. Unfortunately, gifting can also have a significant cost in the form of increased income tax. This cost is particularly unfortunate in estates that are not subject to estate tax.

Consider a client with three adult children. The client resides in Alaska. She has never made a taxable gift, and her only asset is a share of stock. Although she purchased the stock for \$100,000, it is now worth \$1,500,000.

The client forms an LLC and contributes the \$1,500,000 of stock to the

Initially the client is the only member of the LLC; so she does not recognize

gain when she contributes the stock to the LLC (Cf. IRC Sec. 721(b)). So long as the client is the sole member of the LLC, the LLC is ignored for federal income tax purposes. In other words, the LLC is disregarded as an entity separate from its owner (Treas. Reg. Sec. 301.7701-2(a) and 301.7701-3(b)(1)(ii)).

Later, when the client brings her children in as members, the LLC is then, absent an election, treated as a partnership for federal income tax purposes (Treas. Reg. Sec. 301.7701-3(a), (b)(1)(i) and (f)(2); <u>Cf</u>. IRC Sec. 721(b) and Treas. Reg. Sec. 1.351-1(c)(5)).

Over the balance of her lifetime, the client gives her children interests in the LLC totaling 13.3% per child. The value of the client's gifts each year are less than \$11,000 per child, and

thus the client takes the position that the gifts are not taxable (IRC Sec. 2503(b)). The client is careful to file an annual gift tax return -- with adequate disclosure -- in order to preclude the Internal Revenue Service from raising any valuation or other issue in later years (Treas. Reg. Sec. 25.2504-2(b) and 301.6501(c)-

At all points in time the LLC's only asset is the stock, worth \$1,500,000. The client makes no other

At the time of the client's death, her only asset is the remaining 60% interest in the LLC. Under her Will or Revocable Living Trust, the client gives this remaining property to her children in equal shares. So now

each child owns one-third of the LLC. The LLC's only asset is the stock, which is still worth \$1,500,000.

If the client had not formed the LLC and instead had con-

tinued to own the stock until her death, under the law applicable in 2004 her children's tax basis in the stock would have been stepped-up to \$1,500,000 (IRC Sec. 1014). So the children could then have sold the stock for as much as \$1,500,000 at absolutely no tax cost.

Here, with the LLC owning the stock and with the gifts of the LLC interests, the donees have basis substantially less than \$1,500,000. In other words, if the stock is sold for \$1,500,000, there will be taxable gain.

Specifically, under the law applicable in 2004 the tax-basis analysis is as follows:

First: The client's basis in the stock is her cost of \$100,000 (IRC Sec. 1012). When she contributes the stock to the LLC in return for



"The upshot is that gifting could increase income tax down the road."

100% of the LLC interests, the LLC takes a carryover $basis of \$100,\!000 \, in \, the \, stock$ (Cf. IRC Sec. 723). The client receives a basis of \$100,000 in her LLC interests (Cf. IRC Sec. 722). Although the LLC is initially disregarded as an entity separate from its sole owner, the LLC becomes a partnership for federal income tax purposes on the day the LLC has two or more members.

Second: Over the years the client gives 40% of the LLC interests to her children. The client does so

without ever making a taxable gift. The children receive a carryover basis of \$40,000 in those interests (IRC Sec. 1015).

Third: At the time of her death, the client owns 60% of the LLC interests. Although the LLC owns stock worth \$1,500,000, the value of 60% of the LLC interests is less than 60% of \$1,500,000 (or \$900,000). The valuation expert assisting with the client's estate believes that a discount of at least 10% is applicable in this case (i.e., 60% times \$1,500,000 equals \$900,000; 90% times \$900,000 equals \$810,000). In any event, the valuation expert believes the value of 60% of the LLC interests was roughly \$810,000 on the date of the client's death (*Cf.* IRC Sec. 2032). Thus the children receive a stepped-up basis of \$810,000 in the LLC interests they inherit from

their mother (IRC Sec. 1014).

Fourth: The children now own 100% of the LLC and their basis in those interests is \$850,000 (i.e., \$40,000 carryover basis plus \$810,000 stepped-up basis).

Fifth: By reason of the client's death, the LLC is allowed to elect to step-up 60% of its basis in the stock to \$810,000 (IRC Sec. 743). So now the LLC's basis in the stock is \$850,000, which is the same as the children's basis in their LLC interests (i.e., \$40,000 carryover basis plus \$810,000 stepped-up basis).

Sixth: If the LLC sells the stock for \$1,500,000, it will have taxable gain of \$650,000 (i.e., \$1,500,000 sale proceeds minus \$850,000 basis equals \$650,000). Assuming an applicable capital gain rate of 15%, the LLC members would owe \$97,500 in tax (IRC Sec. 701).

Again, if the client had not formed the LLC and had owned the stock until her death, under current law her children's basis in the stock would have been stepped-up to \$1,500,000. So the children could then have sold the stock for as much as \$1,500,000 without incurring any tax -- a savings of nearly \$100,000 under the facts of this case.

The upshot is that gifting could increase income tax down the road. This possibility needs to be figured into the analysis of whether the advantages of gifting, especially with a family business entity, outweigh the disadvantages.

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American Bar Association wins key case:

Privacy law inapplicable to attorneys

Unfortunately, gifting can

also have a significant cost

particularly unfortunate in

estates that are not subject

in the form of increased

income tax. This cost is

to estate tax.

By Valli Goss Fisher

Attorneys across the country are breathing signs of relief following a much-awaited ruling that the Gramm-Leach-Bliley Act's privacy provisions do not apply to attorneys. On April 30, 2004, in a suit brought by the American Bar Association ("ABA") against the Federal Trade Commission ("FTC"), the U.S. District Court for the District of Columbia sided with the ABA, ruling that the FTC's decision to subject attorneys to the GLBA's privacy provisions was arbitrary and capricious and went beyond the FTC's rulemaking authority.

Passed in 1999, Title V of the GLBA requires financial institutions to provide detailed privacy notices to their customers. The ABA filed suit against the FTC following the FTC's insistence that "financial institutions" which must follow the GLBA's privacy provisions include law firms and attorneys who engage in such activities as: leasing real or personal property or advising in such leasing; debt collecting; financial advisory activities, including management consulting and counseling activities; and tax planning.

The ABA strenuously opposed the FTC's interpretation of the Act, on grounds including that state ethical rules protecting client confidentiality already provide client confidentiality protection, and that the FTC's enforcement of the Act's privacy rules against attorneys could interfere with the attorney-client privilege.

The FTC has sixty days to file an appeal.

A copy of the April 30, 2004 order and related information can be found at the ABA's website at: www.abanet.org/poladv/glbfactsheet.html.

Bar People

Drew H. Peterson, Attorney

at Law and Mediator announces that he has moved his office into the Pacific Office Center, at 310 K Street, Suite 200, Anchorage, AK 99501. His telephone number



remains the same: (907) 561-1518. Mr. Peterson has been a practicing attorney in Anchorage since 1979, and a practicing mediator since 1987. He continues to take referrals in the areas of divorce, family and general mediation; personal injury law; and family law.

The law firm of Guess & Rudd P.C. is pleased to announce that Jonathan A. Woodman and Aisha Tinker Bray have become shareholders

of the firm. A former aerospace engineer, Jon practiced for six years in Columbus, Ohio before joining Guess & Rudd in 1999. He is a graduate



and insurance defense. He lives in Eagle River with his wife, Cheryl Duda. Aisha is a 1987 graduate of West Valley High School and a 1991 graduate of the

of MIT and the Ohio State University

College of Law. Jon practices in the

areas of aviation, products liability,

University of Alaska Fairbanks where she was the recipient of the Marion Frances



Boswell award for the outstanding graduating female. Aisha obtained her Juris Doctor from the University of California Hastings College of the Law, graduating in 1994. Aisha then clerked for the Honorable James E. Barrett, Senior Judge, Tenth Circuit Court of Appeals in Cheyenne, Wyoming before returning to Fairbanks with her family in 2000 to join Guess & Rudd P.C. Editor's Note: Aisha is also courteous, professional and nice to work with.

One fax, \$500. Priceless

Junk faxes could cost bowling company \$1 million in fines

By Steven H. Pollak

A bowling business that sent out as many as 352,000 unsolicited faxes will settle a class action for up to \$1 million cash and \$1.5 million in coupons. The settlement came under criticism from a lawyer with his own fax case against the bowling company, AMF Bowling Centers, who said the company was getting off too easily.

But plaintiffs attorney Lance P. McMillian said the settlement was "within the high range" for such cases. McMillian handled the case with Stephen A. Camp. Both lawyers are with McMillian & Camp in Newnan, Ga. Under the terms of the settlement, which must be approved by Fulton County (Georgia) Superior Court Judge Stephanie B. Manis, AMF will pay up to \$1 million to class members who kept a copy of the fax from November 2002. Each of those members is eligible to receive \$500 per fax.

Those who cannot produce an actual fax but are willing to swear in an affidavit that the Richmond, Va.-based company sent them one will receive \$250 in bowling coupons.

Any money not collected after

eight months will go back to AMF, minus \$100,000 to be split between the Atlanta Legal Aid Society and the Georgia Legal Services Program. The leftover coupons will be given to a local children's charity.

The plaintiffs in the case sued under the Telephone Consumer Protection Act of 1991 (47 U.S.C. 227). a law that entitles each recipient of unsolicited, faxed advertisements \$500 per fax. Judges may use their discretion to raise those fines to a maximum of \$1,500 per fax.

According to the statute, AMF could have been liable for fines ranging from \$176 million to \$528 million if it was proved that the company sent 352,000 unsolicited faxes.

Robert R. Biggerstaff, a retired engineer who is not an attorney but has written articles on the Telephone Consumer Protection Act for the Connecticut Law Review and the Federal Communications Law Journal, called the AMF settlement a "piece of garbage."

He said, "The attorneys who prosecuted that case should be ashamed of themselves."

From the Fulton County Daily Report

John Thorsness is on the move

John Thorsness has left Hughes, Thorsness, et al. to join Clapp, Peterson & Stowers. With the recent retirement of Randy Clapp, John saw an empty office and an expensive leather chair as an opportunity for advancement. "I can't fill Randy's shoes, but I can sit in his char," says Thorsness. John will continue to focus on products liability defense. You can call John at 272-9272 to ask him how he likes his new chair.

Paul Davis joins Preston Gates

Preston Gates & Ellis LLP announced May 13 that Paul L. Davis will join Preston Gates & Ellis as a partner in its Anchorage office. A seasoned trial attorney with national litigation experience, Davis' decision to join Preston Gates is an affirmation of the success of the firm's growing litigation practice.

With more than 30 years of litigation experience, Davis successfully handles a wide variety of civil matters, including complex tort, product liability, business, professional liability, premises liability and construction law claims. Additionally, his practice includes appointment as a mediator and arbiter. Over his career, Davis also has represented businesses and individuals before many state and federal administrative agencies.

"We are delighted that Paul has joined us," said Doug Parker, managing partner of Preston Gates & Ellis' Anchorage office. "It is important to our clients that we provide top notch lawyers to address their legal needs. Paul fills that need as he has handled a broad variety of complex and challenging litigation assignments. We are extremely pleased to add his considerable experience to



our firm's national litigation practice and especially to our Alaska practice." Davis' litigation experience includes serving as successful lead counsel for a number of important cases before the Alaska Supreme Court, and as the lead attorney in numerous complex trials in employment, environmental, construction and tort law cases. Davis was an early advocate of alternative dispute resolution and one of Alaska's first trained mediators. He has taught numerous continuing legal education programs and has also served as a part-time teacher at the University of Alaska Anchorage.

"I am excited to be part of Preston Gates' growing national litigation practice," said Davis. "I believe my trial and litigation experience integrates well with the firm's practice, enabling me to better serve my clients and add value to the counsel of the firm's other clients. It's a great opportunity to be part of a firm with a stellar international reputation."

Davis takes an active role in the community. He advocates that challenging serious social issues begins with a good education and building core values in our youth. Further demonstrating this commitment, he chaired the Anchorage Mayor's Task Force on Youth Violence. Davis presently serves on the Municipality of Anchorage Board of Ethics, is a member of the American Society for Law Enforcement Training, past president of Downtown Anchorage Rotary and co-founder of Anchorage's innovative multicultural organization, Bridge Builders of Anchorage.

Prior to joining Preston Gates, Davis practiced labor and employment, complex litigation, personal injury litigation, environmental law, criminal law, and construction litigation as a sole practitioner. He holds a Juris Doctorate degree from Baylor University and a Master of Laws degree from the National Law Center at George Washington University.

Founded in 1883, Preston Gates & Ellis LLP has long been recognized as one of the premier, full-service law firms in the country. Preston Gates provides clients with sound legal counsel and trusted representation from the best talent in the industry, handling complex business transactions, litigation, intellectual property and technology, as well as governmental and public policy work. The more than 400-attorney firm has nine strategic locations worldwide. For more information, visit www.prestongates.com.

-- Press Release

Juneau Bar minutes

The Juneau Bar Association (JBA) met at noon on Friday the 4th of June 2004 in the Gold Room at the Baranof Hotel. This luncheon had been previously designated as an opportunity to welcome summer associates to ${
m June}$ au as guests of the ${
m JBA}$, and those in attendance shared their names and law school affiliations, as well as their places of summer legal employment. ice Carpeneti also introduced Bianca Carpeneti as a guest.

A delicious summer meal of ribs, corn, and beans was served, along with the now customary summer iced tea with lemon slices.

Under New Business Phil Pallenberg moved, and Gordon Evans seconded, the election of new officers for the coming year, those officers being Zach Falcon as JBA President, Benjamin Brown as JBA Treasurer, and Hanna Sebold as JBA Secretary. This motion carried unanimously and the new officers were installed.

Representative Beth Kerttula spoke about the recently concluded legislation session with particular attention to education funding and workers compensation, and also mentioned the upcoming special session at which the Percent of Market Value approach to managing the Permanent Fund and an increase in the State's tobacco tax are likely topics.

Please attend the JBA luncheon on Friday the 11th of June 2004 at which Margaret Pugh, Chairman of the Juneau Performing Arts Center Advisory Council, and Sybil Davis, Executive Director of the Juneau Arts & Humanities Council, will speak about progress toward creation of a new artistic venue in downtown Juneau.

These being my last minutes as JBA Secretary, I thank all members for enduring my prose, and wish my successor Ms. Sebold all the best in this position. I add that now that I am JBA Treasurer, you will be hearing from or seeing me if your dues are unpaid.

— Respectfully submitted, Benjamin Brown, JBA Secretary



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Legislature passes new stalking statute

By Steven Pradell

A new law was recently passed by the Alaska legislature which is similar to the domestic violence statutes with one important difference. Normally, to obtain a domestic violence petition, a claimant must file a case against someone with whom he or she has been in a prior domestic relationship.

However, the new stalking law allows the court to issue a no contact restraining order against anyone without the requirement of a prior domestic relationship.

The laws are set forth at A.S.18.65.850-870. Under the new laws, "stalking" means a violation of AS 11.41.260 or 11.41.270. To qualify as "stalking," a person's acts

The new stalking law

requirement of a prior

domestic relationship.

allows the court to issue a

no contact restraining order

against anyone without the

must meet all of the following requirements. The acts must be:

• repeated acts of contact without petitioner's consent;

 involving a petitioner or a family member;

·done knowingly; and

• that place the petitioner in fear of either his own death or physical injury or the death or physical injury of a family member.

Under AS 11.41.270 (b)(3), "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond

the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued. "Nonconsensual contact" includes:

(a) following or appearing within the sight of that person;

(b) approaching or confronting that person in a public place or on private property;

(c) appearing at the workplace or residence of that person;

(d) entering onto or remaining on property owned, leased, or occupied by that person;

(e) contacting that person by telephone;

sending mail or electronic communications to that person;

(g) placing an object on, or delivering an object to,

property owned, leased, or occupied by that person

A petitioner may file an action in the district or superior court for a stalking protective order against a respondent who is alleged to have committed the stalking. A parent or guardian may file a petition on behalf of a minor.

The process for obtaining a stalk-



"A peace officer, on behalf of and... may request an emergency protective order from a judicial officer."

six months. The protective order may

(1) prohibit the respondent from threatening to commit or committing stalking:

ing restraining order is

similar to that of other

domestic violence mat-

ters. Once a petition for

protective order is filed,

the court schedules a

hearing and provides at

least 10 days' notice to the

respondent. If the court

finds by a preponder-

ance of evidence that the

respondent has commit-

ted stalking against the

petitioner, the court may

enter a protective order

which is effective for up to

(2) prohibit the respondent from telephoning, contacting, or otherwise communicating directly or indirectly with the petitioner or a designated householdmember of the petitioner specifically named by the court;

(3) direct the respondent to stay away from the residence, school, or place of employment of the petitioner, or any specified place frequented by the petitioner.

Under A.S. 18.65.855, an exparte emergency protective order for stalking may be entered, if the court finds that the petition establishes probable cause that the crime of stalking has occurred; that it is necessary to protect the petitioner from further stalking, and that the petitioner has certified to the court in writing the efforts that have been made to provide notice to

the respondent.

An ex parte protective order expires 20 days after it is issued unless dissolved earlier by the court at the request of either the petitioner or the respondent after notice and, if requested, a hearing. If the court issues an exparte protective order, the court shall have the order delivered to the appropriate law enforcement agency for expedited service.

A peace officer, on behalf of and with the consent of a victim of stalking that is not a crime involving domestic violence, may request an emergency protective order from a judicial officer. If the court finds probable cause to believe that the petitioner is in immediate danger of stalking based on an allegation of the recent commission of stalking, the court ex parte shall issue an emergency protective order which expires 72 hours after it is issued unless dissolved earlier by the court.

A Stalking Protective Order packet has been created containing the following forms:

• CIV-751 Instructions

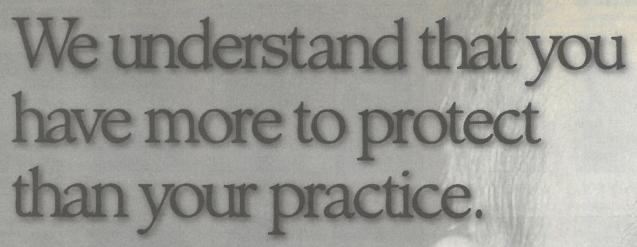
· CIV 752 Petition

•DV 125 Request For Service

•DV-127 Law Enforcement Information Sheet

These forms are available directly from the court or from the court system's website: www.state.ak.us/courts/forms.htm.

©2004 by Steven Pradell. Steve's book, "The Alaska Family Law Handbook," (1998) is available for attorneys to assist and educate their clients regarding Alaska Family Law matters.



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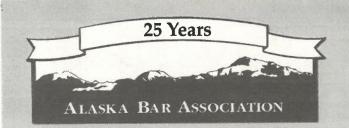
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David A. Devine



Jan Hart DeYoung



David Arthur (Dave) Donley



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Mark L. Figura



Scott H. Finley



Michael Ford



William T. Ford



Teresa L. Foster



Richard H. Friedman



Giles Galahad



Charles M. Gibson



Kenneth J. Goldman



David P. Gorman



James E. Gorton, Jr.



Peter E. Gruenstein



Shannon D.



Andrew Harvard



Sara S. Hemphill



Craig S. Howard



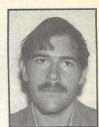
James E Hutchins



Thom F. Janidlo



Phyllis C. Johnson



Mike Jungreis



Marilyn J. Kamm



Kristin S. Knudsen



Kathryn M. Kolkhorst



Robert W. Landau



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Gabrielle H. LeDoux



Lessmeier





Joseph R. D. Loescher



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Robert B. Mason

Lloyd B. Miller



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Mary Louise Molenda



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David L. Monson



Dwayne W. McConnell





Larry A. McKinstry



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Liam J. Moran



M. Francis Neville



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Jeanne Ames Riley



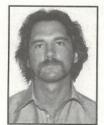
Thomas C. Roberts



Elise Rose



John B. Salemi



Walter J. Sczudlo,



Mitchell A. Seaver



D. Randy Simmons



Julie Simon



Alfred T. Smith



Wm. Ronald Smith



Wm, Grant Stewart



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Timothy E. Troll



Lawrence R.



Deborah Vogt



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William K. Walker



Michael J. Walleri



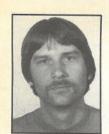
W. David Weed



Daniel W. Westerburg



Michael D. White



Geoffry B. Wildridge



Deborah L. Williams



Stephan H. Williams



Teresa E. Williams



Richard H. Wollenberg



Michael H. Woodell



Steve K. Yoshida



Larry C. Zervos

25 YEAR PIN RECIPIENTS RECEIVE AWARD AT CONVENTION



Receiving their 25-year bar anniversary pins at the convention were (from left) Joe Perkins, Susan Wright Mason, Blair McCune, Deborah Williams, Loni Levy, Lawrence Trotter, Judge Joel Bolger, Judge Larry Zervos, Rick Friedman, Thom Janidlo, Peter Gruenstein, Bob Landau, Walter Sczudlo, Nelson Page, Dave Donley, Penny Zobel, Frances Neville, and Jan Hart DeYoung (rear row).



Patricia Zobel

NOT PICTURED Robert H. Wolfe

Was Brown really about scholarly jealousies?

By Peter J. Aschenbrenner

I am interviewing Col. Rufus T. Beauregard to get a good look at *Brown v. Board of Education*, 50 years out. The Colonel pours a julep. We take in the countryside that drops away from the roll-out porch of his manufactured home. "How did you take the decision?"

"Right from the first reading," he replies, "I was delighted. Especially with Footnote 11."

"I beg your pardon?"

"The text at Footnote 11 roused segregationist opinion, naturally."

"So how could it strike you with such favor?"

"Let me quote the text, for I know it by heart. 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children.' 347 US 483, 494 (1954). May I editorialize?"

"I have all the time in the world," I assured the Colonel.

"We switch now to the singular number: 'A sense of inferiority affects the motivation of a child to learn.' It is the only such sentence in the entire opinion. If I may continue, for here the Supreme Court has been quoting from the three judge panel in the Kansas case. "Segregation with the sanction of law, therefore, has a tendency to

[retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

"And so to Footnote 11?"

"Not yet, my boy. The Supreme Court then rejected "any language in *Plessy v. Ferguson* contrary to this finding," and then there's Footnote 11 with your social science."

"But in your opinion --?"

"I saw it this way. Take Hans, a mighty fine chess player. His talent and ability in play just stands out. Now assume that all the Swiss young'uns are shunted off, or pedestalled, same difference as you shall see, to some elementary school where Hans is only going to be associatin' with the little Swiss boys and girls."

"I see. All Hansels and Heidis. But they have their own schools on account of being Swiss-like."

"Well, it's plumb obvious what will happen. The rest of the school children will be marked out as inferior."

"That's not exactly what the court was saying."

"Now wasn't it?"

Before I could interrupt, the old stereotype was off again. "Our offspring could not take it, goin' to school and havin' Hans being superior

in chess and shown up to us as worthy of a separate school building for to showcase his skills, for that's how they would take it. Our children would end up seein' themselves as laggards and cowards. The desperate ones might even turn to lawyerin'. So taking some talented children and shutting them off, not by their talent, but by their color or race, is only going to make the rest of us feel plumb bad about ourselves as soon as a one of them has the talent we lack."

"So you're assuming that there's talent in all colors?"

"I'm a racist, son. I'm not stupid. Now back in the old days, I was in there with the rest of them, cheering on Plessy (or was it Ferguson? well, no matter) and assuming, with the rest of the white folk, that separating them would make us feel better."

"Yes, indeed. But *Brown*'s focus was the impact on Negro children."

"Right and proper, I say, for they were the plaintiffs. But look at the loss to the white children. Sure a few of them might brag it out and feel superior and all. But sooner or later there would be colored children of talent and then the second thoughts would begin."

"Wouldn't your natural feelings of white superiority be enough to overcome," I struggled for the right word, "this obstacle?"

"No, you're not getting it. There would always be the risk, the chance of snickering and finger pointing that we were segegrating white children because whites were chicken and lilly livered and our children couldn't compete with children of any race. If I may stand the Chief Justice's words on end: 'A sense of superiority affects the motivation of a child to learn."

I took a minute in the glow of this strange world, so new and so upside down, to ponder this point. "But if you tell a child —"

"And you've used the singular," the Colonel gently corrected me so I

"If you treat children as a group, and ignore their individual talent but tell them they're all superior on account of something other than their talent," I started. Col. Beauregard was snappin' his fingers to the rhythm of the rhyme.

"Yes, yes, yes, my yes." The Colonel and I fell silent.

"Now at the time, let me assure you, I was convinced it was a curse, Sam Clemens at work, in one of his playful inversions that make us look like fools talkin' slow and drinkin' pot likker. But then there was a little boy (or girl, for my recollections are dim) that had some talent to best my dear child, and my child said to me, how come I can't be in school over there. And I answered, because we're better. And my own offspring answered me back, but he's (or she, can't recollect exactly) the one better than me at -----, and I can't call to mind that skill but it was a prodigious talent, a singular talent, and my young'un took it upon himself to pout and fuss that he was being protected and coddled so that his feelings wouldn't be hurt at having to be associatin' with school mates gifted since childhood and superior in respect to what his Ma and I had given him."

"So stands *Plessy* on its head."

"You can bet your bottom dollar on that. Made us out to be a folk afeerd and askeered of our own shadows, like our children couldn't be good at something without jumping out of their

britches on account of some other child was good at something else. And as for the seats on the trains?"

"Which is the public accommodations issue," I added.

"Do you always talk like your interviewees are idiots?" the Colonel grunted, and then went on. "Aren't white folk tough enough to take a seat anywhere on the bus or stand on the streetcar if there isn't a seat? So the smart ones, and that includes me, figured out that separate was unequal per se. Meaning unequal to us. If the white race is goin' to be segregated then there's no way I can explain it away to my offspring as a good thing. If we weren't afraid of being alive, we'd just go out and compete with everybody on earth, head to toe, school yard to lunch counter.'

"Sounds a little Darwinian."

"Now, son, that's not been adequately pointed out, by my reckoning. Back to 1896. On the one hand, you had the steel hand in the velvet glove that reached out to coddle the white race and make sure that their children were not exposed to talent that might make them feel inferior. That was Jim Crow, and everybody but that Harlan, the only one with his wits about him, saw it (though we didn't see it that way, at the time). On the other hand, there was nature red in tooth and claw, that's those Englishmen, Darwin or Spencer. The idea being people of all races were free to jostle themselves about and the individual was going to make of himself what he could."

"That became quite an article of faith. The fate of the individual in his own hands."

"I suppose you're going to cite Lochner v. New York, 198 US 45 (1905). They can't be reconciled, Plessy and Lochner. Trains, schools, restaurants, jobs. Government is supposed to be shutting up folks here and there, on some measurement of who the government says you is, and then, on the other hand, government is trying to give the working man a helpin' hand, based upon its assessment of the situation he was in, and was all of this "paternalism" (and I adopt Holmes' sneer at 76) consistent? I ask you."

"Perhaps the state should have more room to experiment with the motivations of workers then those of school children."

"And perhaps," the Colonel replied, "there should be 'a liberty of [learning] which cannot be violated even under the sanction of direct legislative enactment" (at 68).

To which I replied that in the companion case of *Bolling v. Sharpe*, 347 US 497 (1953) the court spelled out how "liberty under law extends to the full range of conduct which the individual is free to pursue ..." (at 499)."

But this only inspired the Colonel. "And you are back to the state's attentions to the student as one, one who seeks learning even as the state seeks to draw it out of the child. In public education there's a much larger problem, which is that people do not want to pay to educate other people's children. And it becomes more painful when it turns out that other people's children have more talent than your children. But it's really excruciating if it turns out that one of your children has more talent than some other child. If your little Sally has a

DISCIPLINARY BOARD DELIVERS REPRIMAND

On April 27, 2004, the Disciplinary Board issued a private reprimand to Attorney X for misconduct involving poor financial recordkeeping.

Attorney X represented a personal injury plaintiff in a lawsuit. Prior to trial, a conflict of interest required Attorney X to withdraw and new counsel to appear. The new counsel questioned some of the fee disbursements so the client requested an accounting from Attorney X.

Alaska Rule of Professional Conduct 1.15 requires an attorney to render a full accounting regarding funds that the lawyer holds on behalf of the client. Despite the client's request for a full accounting, Attorney X was slow to turn over records. Incomplete records were turned over to the new lawyer and the client filed a bar complaint alleging that Attorney X had misappropriated funds.

After investigation bar counsel determined that Attorney X had not misappropriated or commingled funds, but discrepancies in the office accounts were uncovered due to bookkeeping errors and a failure to track disbursements carefully. Monies were reimbursed to the client.

Bar counsel and Attorney X entered into a stipulation for discipline of a private reprimand for the Rule 1.15 violation. Attorney X had already made changes to office staffing and office case load so that this incident was isolated and not repeated in other matters handled by Attorney X.

The Board approved the stipulation and reprimanded Attorney X for the violation.

FAIRBANKS LAWYER GARY FOSTER SUSPENDED

The Alaska Supreme Court on February 5, 2004 suspended Fairbanks lawyer Gary G. Foster for three years. The court adopted the recommendation of the Disciplinary Board of the Bar. The Board's recommendation, in turn, was based on the findings of a Hearing Committee that Foster neglected clients, failed to communicate with them, violated court orders, acted deceptively, and failed to respond to disciplinary grievances.

Foster neglected four clients. Twice the neglect resulted in liability orders against his clients. He failed to communicate in three cases, causing serious injury when he failed to tell two clients about the adverse rulings against them. In four cases Foster failed to comply with court orders and deadlines. In one case he misrepresented to the court that he had authority to settle for a specific amount, then later attempted to obtain the authority from his client without mentioning that he had already settled the case.

The Supreme Court suspended Foster effective March 6, 2004. The court stayed one year of the suspension, allowing him to apply for reinstatement in two years, on the condition that he attend continuing legal education courses in office management and legal ethics, that he pay attorney fees to the Bar Association, and that he pay restitution to a client financially harmed by his misconduct. The court's disciplinary order further specified that if Foster is reinstated to practice he will be on probation for one year, during which he must complete additional CLE courses, take the Multistate Professional Responsibility Examination, maintain malpractice insurance, and report to a supervising lawyer, among other conditions.

Continued on page 13

Brown

Continued from page 12

talent for soccer, you think her teammates should be passing the ball to her, every play. You think all of the school's resources should be funneled into proving up your Wolfgang to be the century's next Mozart."

"I hadn't really thought about it like that."

"It turns out there is the competition between the children in the classroom, which is what the emphasis on the "motivation of a child to learn" is all about. But the parents have got their oar in, because they're not ready to unleash children's talent."

"I'm afraid I don't follow," I put in.

"Because it's all about jealousy," said the Colonel. "Once you start talkin' about development of talent child by child in public education, why, next thing you're questioning all sorts of rules that do not promote the development of talent and might even be hindering the motivation of any particular child to learn."

It started to dawn on me.

"Everybody's horse might get gored," said the Colonel continued. "You have local financing of schools, national testing of students, teachers' unions, vouchers. My goodness, the list just does go on and on. What does promote motivation? What retards it? Maybe prime time TeeVee should go."

"You mean turn it off?"

"Couldn't adults read to their children or take a walk or play backgammon from six to ten?"

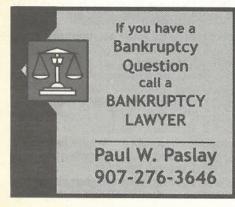
"Sounds vaguely socialistic," I countered.

"Oh it's much worse than that," the Colonel muttered, apparently losing interest in sparring with such a dullard as me. "It's way beyond the best interests of the parents."

At this point I woke up and assured myself that I had merely experienced a reverie, a dream-like look back at history as it might have been. The Colonel's porch was the veranda of an elegant condo development. As I wandered down the fairway on my return to the clubhouse, I worked up an appetite for Michelin starred cuisine and fine wine. Looking back up the hill, all seemed to settle into the proper order; the evening's last golfers were driving to the eighteenth hole.

Had Brown really been aimed to bring America into touch with its hidden burden of family-to-family jealousy? This would be a place where each of us takes pleasure in hobbling another family's children? Do we wish that other kids fall down so that our child might win the race? Is it all about us? Or about our children?

I turned for a last look at the players on the Olde Course and I recognized the Colonel from his elegant linen suit, devilishly unwrinkled. He dispensed from his hip flask, his partners imbibed and shared the humour in the situation. It was a very mixed foursome.



Court convenes interpreter summit



(L-R) Chief Justice Alex Bryner, Robin Bronen (Immigration & Refugee Program, Catholic Social Services), Malcolm Roberts (Bridge Builders), Stephanie Cole (Administrative Director, Alaska Court System), and Yvonne Chase (Executive Director, Catholic Social Services) share their experience with non-English-speaking clients.

On April 26, the Alaska Court System convened a meeting of public and private groups and individuals concerned with the availability and quality of language interpreter services in Alaska.

The purpose of the meeting was to better understand the language interpreter needs of businesses and government agencies, and to discuss how those needs might be better met. In addition, William Hewitt of the National Center for State Courts spoke to the group about the skills, knowledge and abilities necessary to become a competent language interpreter.

The Alaska Court System announced at this meeting that it has received a technical assistance grant from the State Justice Institute to study the economic feasibility of creating a single point of referral that any agency could call when it needed an interpreter. The study will involve all interested entities, and the court system will provide the results of the study to the groups and individuals who participated at this event.

—Beth Adams

Code of Conduct for Interpreters? Comments due July 1

The Alaska Court
System's Fairness and Access
Implementation Committee
has recommended that
the Alaska Supreme Court
consider adopting a code of
conduct for interpreters in
court proceedings. If such a
code is adopted, interpreters
who are called upon to
interpret in court proceedings
will be asked if they are
familiar with the provisions
of this code, and if they can
comply with these provisions.

The model code was developed by the National Center for State Courts. The full text of the code can be found on the Alaska Court System website at: http://www.state.ak.us/courts/intcode.pdf.

The Alaska Supreme
Court is now soliciting
comments on this model code
of conduct to assist it in its
consideration of the code for
adoption. Comments are due
by Thursday, July 1, 2004.
Please direct your comments
to Susanne DiPietro, Alaska
Court System, 820 W, 4th Ave.,
Anchorage, Alaska, 99501 or
sdipietro@courts.state.ak.us.



(L-R) Cathy Satterfield, Dept. of Law; Dennis McMillan (Foraker Group); and Karleen Jackson (DHSS) at interpreter conference.



(L-R) Richard Curtner (Federal Defender); Susanne DiPietro (Judicial Education Coordinator, AK Court System); Barbara Brink (Public Defender); Stephanie Cole (Administrative Director, AK Court System); and Lisa Nelson (Assistant Attorney General) join interpreter discussions.

The Association of Legal Administrators elects officers

ANCHORAGE—The Alaska Association of Legal Administrators (ALA), the professional society for law firm and corporate and government legal department managers, announces the following new officers:

| Name | ALA Office | Firm Name | |
|-------------------|-------------------|---|--|
| Patti Simmons | President | Perkins Coie | |
| Lee Reed | President-Elect | Delaney, Wiles, Hayes, Gerety, Ellis & Young | |
| Jennifer Grinnell | Vice President | Jermain Dunnagan & Owens | |
| Debbie Swinney | Secretary | Guess & Rudd | |
| Karen Ponsness | Treasurer | Heller Ehrman White & McAuliffe | |
| Shirley Kelly | Director at Large | Matthews & Zahare | |
| Sheri Lopez | Director-at-Large | Unaffiliated | |
| Jennifer Palacio | Past President | Hughes Thorsness Powell | |
| | | Huddleston & Bauman | |
| | | man Property of the August States | |

The Association of Legal Administrators was formed in 1971 to provide support to professionals involved in the management of law firms. Today, ALA provides educational opportunities and services to more than 8,500 members in 21 countries.

Mediation's big secret is coming out in the mass media

By Drew Peterson

Mediation has finally hit the mainstream of American journalism! The March 28, 2004 issue of Parade magazine includes an article on divorce mediation, entitled "A Saner, Smarter Way to Say Goodbye." The article is well written, by Lynn Brenner, who starts with the observation that the average American divorce costs \$20,000 to \$50,000, in contrast to a typical cost of successful divorce mediation of \$4,000 to \$5,000.

I don't know where such numbers come from, nor is a source cited, though I have heard similar numbers before and believe they are roughly accurate. Of concern, however, is the fact that such numbers reveal the primary secret of mediation which those of us in the field have conspired to keep hidden, especially from our brethren in the Bar. The Secret is that the mediation movement is counter-productive to maximizing profits from the practice of law. The more that mediation succeeds in supplanting litigation as a method of resolving disputes, the more money that is going to be lost by the legal profession overall. When one looks at the costs involved, as explained by the Brenner article, and looks at the number of divorces that occur in the United States every year, it is apparent that the numbers involved are phenomenal.

This reduction in overall legal profits is particularly significant in the area of family law. Family law has been one of the biggest growth areas of mediation. It is also an area where the damage caused by litigation to ongoing relationships, especially those of innocent third parties, is most clear.

Research on the effects of divorce on children has found that it is in the children's best interest to maintain quality relationships with both parents, who in turn need to be able to communicate with each other on issues involving the children's welfare. Mediation is ideally suited to facilitate this communication during the earliest and most emotionally difficult negotiations between separating parents.

Moreover, the style of mediation used in family law cases by most mediators minimizes the use of lawyers. Lawyers are generally not included in the mediation sessions. Instead, they are consulted between sessions and perhaps included in limited sessions on topics emphasizing legal

Indeed mediation with attorneys involved throughout the process may not save money, but lead to increased attorneys fees overall. I suspect this is one reason that mediation is catching on so quickly with the personal injury and insurance defense components of the Bar.

As a general rule, however, mediation is

most effective at a stage earlier rather than later. This is certainly true if the goal is to decrease litigation costs, to reach earlier and more private resolutions, or to find resolutions which will enable the parties to deal with each other effectively in the future.

The big secret of lost overall profits caused by mediation is not really that well hidden from the Bar, of course. It is the real reason behind many of the most common complaints about mediation by attorneys:

"My clients simply do not want to mediate", we are often told. But why would attorneys encourage clients to do something that would cost the attorneys their usual hefty fees? And attorneys, of course, are the professionals of choice for most people involved in conflict, and thus the counselors who are most often first contacted for advice as to how to proceed in a dispute. We are ethically required as attorneys to advise our clients fully about litigation alternatives, but how many of us really do so in any comprehensive and encouraging way?

"My client is not assertive enough, and will lose out in mediation", we are also told. Mediators know that there all kinds of power that come into play in the negotiation process. However, apparently non-assertive parties often do very well in mediation; frequently even better than would be the case in court. And this is without even considering the cost of the litigation itself, which few can afford. Mediation is non-binding, and parties can always withdraw, upon the advice of counsel, if they are getting a bad deal. How often are they discouraged, however, from even giving it a try? They have little to lose, and much to



"Mediation is non-binding, and parties can always withdraw, upon the advice of counsel, if they are getting a bad deal."

attorneys who stand more

"Mediation is inherently a bad thing for women and children" we are occasionally still told. Hogwash! The overwhelming evidence on family mediation shows exactly the opposite. Attorneys who continue to make such broad generalizations are either extremely ignorant or they are dishonest and callously seeking to encourage and profit from the misery of others. It

is true that there are cases that do not belong in mediation, but the critical decision is to use a properly trained mediator who will recognize and screen out such cases.

It is true that there are many factors balancing out this loss of legal profit in the family law area, and even making it a good thing. Few individuals can afford \$20,000 to \$50,000 for a divorce without financial ruin, at least temporarily. A more efficient and less costly family law system is a good thing for society as a whole, to say nothing of the individual families going through the divorcing process.

Moreover, most lawyers themselves don't like family law cases, especially the emotional and long drawn out cases. Where they are involved the attorneys would rather be involved as advisers on the law and financial aspects of the case, rather than getting caught up in the day-to-day emotional turmoil of the cases. Mediation leads to a more satisfactory practice of law. It allows the parties to deal with the

gain. In contrast it is the more emotional aspects of the case in the mediation room. The lawyers are thereby allowed to concentrate on the part of the cases which they most enjoy and do best.

> By giving the parties what they want and are most satisfied with, namely a dignified way of maintaining control of critical decisions in their own lives, those lawyers who encourage mediation are providing the highest quality legal services to their clients. The clients, in turn, will appreciate the attorneys for this, and will refer other quality clients. Thus the reduction in per case fees can be offset by a higher volume of satisfied, well paying, high quality clients.

> So the secret is out: the increased use of mediation, especially the facilitative, early intervention style of mediation which is increasingly being used in the family law field, will ultimately lead to earlier resolution of cases and less legal profits overall.

> In my opinion it is a good thing that the secret is no longer secret. As mediators, we should be honest about the effect of our services, not only on our clients, but on the legal field as a whole. Lowering overall legal costs provides a benefit for society, even if not for the legal profession. We should not be ashamed to admit this reality to even our most lawyerly friends, and to tout it to our clients.

> For those of us who are practicing law, especially but not limited to family law, it is not too early to plan for a less adversarial future. We can all be looking for new and perhaps non litigation related areas of specialty. We can also get involved ourselves in some aspect of this exciting new field of mediation or other form of appropriate dispute resolution.

Alaskan wins Yugoslav genocide case acquittal

By Andy Haas

There have been two recent developments in the Yugoslavian genocide prosecutions, one case in which an Alaskan criminal defense attorney is winning judgments of acquittal on about half of the charges.

Alaska's Michael Karnavas represents V. Blagojevic, who was the Commander of the Bratunac Brigade of the Bosnian Serb Army, which had its defense lines by Srebrenica. The Brigade's headquarters were used as the forward command posts of both the Main Staff (headed by General Mladic) and the Drina Corps (headed by General Krstic).

Blagojevic was charged by the International Criminal Tribunal for the former Yugoslavia (ICTY) at the Hague with three different theories of genocide: that he was personally involved in the murder, that he was guilty through command responsibility of his troops, and that he was guilty through complicity. Mr. Karnavas successfully made a motion for judgment of acquittal to the 3-judge trial panel on the charges of direct involvement.

This is the first case in which a defendant in the ICTY has been acquitted of charges relating to personal involvement. The acquittal rests in part on the in-court admission by a key prosecution witness that as part of his plea deal he had lied about his involvement.

When the Court dismissed half the charges, it warned the defense that Blagojevic might still be convicted "for the crimes of murder as [an] aider and abettor." After 10 months of the prosecution's case, the defense stage of the trial has just begun, with 11 weeks allotted for Blagojevic and 6 weeks for his co-defendant.

The second case upheld the conviction for genocide of Radislav Krstic, a Bosnian Serb Major-general of the Drina Corps army that was in charge of Srebrenicia. In Krstic, the Appellate Court unanimously affirmed his guilt on one theory, expanding the definition of genocide. Under the ICTY statute, when someone intends to destroy a substantial part of a minority group (even when the even when the target is entirely men of military age), they are guilty of genocide.

Srebrenicia was an especially vivid example of genocide. The town had been designated by the UN Security Council as a "safe area." The subsequent murder in Srebrenicia of about 7500 Muslim men shocked and angered the world.



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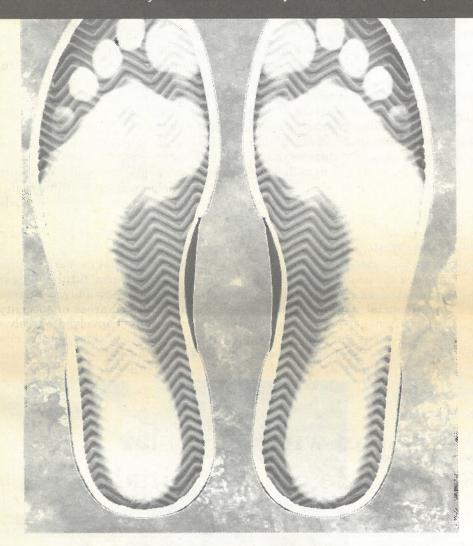


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Are footprints as foolproof as fingerprints?

The prosecutor in a capital offense case wanted to submit footprints taken inside a shoe as evidence. Two nights before the trial, the defense attorney received a Mealey's E-Mail News Report about a case that questioned the admissibility of this evidence.



The Mealey's E-Mail News Report notified the defense attorney of a recent court decision from the highest court in a neighboring state. He was surprised to find the prosecution's expert witness had also testified in that case. But the court held that footprints from inside a shoe were not a recognized area for expert testimony under the Daubert standard. As the defense attorney continued his search of analytical sources from Matthew Bender, including *Moore's Federal Practice* on the LexisNexis™ services, he quickly found further supportive commentary and analysis. When you need to go a step beyond cases and codes in your research, use the LexisNexis™ Total Research System—It's how you know.



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2004 BAR CONVENTION HIGHLIGHTS

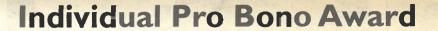
Bryner announces winners of 2004 Pro Bono Awards

Chief Justice Alexander Bryner presided over the annual Pro Bono Awards luncheon during the 2004 convention, expressing thanks to the four pro bono program directors who worked together for the second year in the selection of awardees.

The awards recognize outstanding service to clients without means who otherwise would not receive quality representation.

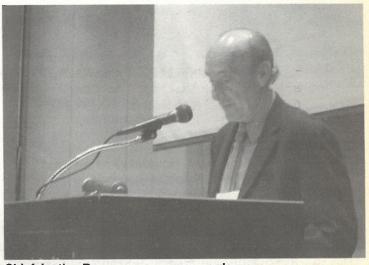
Law Firm Award

For their overall dedication to the delivery of pro bono legal services, Ashburn and Mason is the recipient of the firm award. - Bill Saupe began work with the Pro Bono Asylum Project in 1999 and has since volunteered hundreds of hours representing three Salvadorans and one client from Gambia fleeing persecution in their countries of origin. He has used his own financial resources to fly to Kodiak to meet clients and paid the immigration filing fees for his clients. Three of these clients have successfully received legal status in the United States. In 2003, Ashburn & Mason agreed to implement the Special Immigrant Juvenile Project to provide pro bono representation to undocumented immigrant children who have been abused, neglected and abandoned, and need immigration documents to prevent their deportation. They are currently working with two children who have extremely complicated immigration cases. Bill Cummings and Dani Crosby, firm members of Ashburn & Mason, have also worked dozens of hours with children to secure their immigration status in the U.S. Dani has also represented victims of Domestic Violence through the ALSC Pro Bono Program. It's not just clients the firm extends their generosity. They also have donated office space and resources to the Alaska Pro Bono Program and assisted ALSC with their annual Robert Hickerson Partners in Justice Campaign.



Jonathon Katcher - Jonathon has donated hundreds of hours to ALSC, APBP, and ADVSA clients. He has represented victims of domestic violence and other individuals that would otherwise go unrepresented in Family Law matters. Jon is so committed to pro bono services that he will go out of the way to help recruit other attorneys and even place some cases on behalf of the four pro bono agencies. Last year, he assisted five ALSC clients and donated over 100 hours.

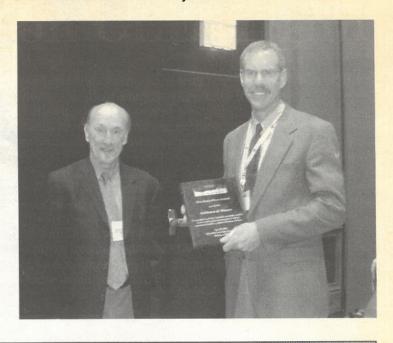
Dan Rodgers - Dan has volunteered with the Pro Bono Asylum Project since 1999. He has successfully represented six clients from El Salvador and Colombia who fled their countries of origin because of persecution and torture. All have achieved lawful status in the United States. He is currently representing a client from Ethiopia. In addition to volunteering hundreds of hours to the Project, he has used his own financial resources to meet with clients in Fairbanks and Kodiak. Dan was not able to attend the convention this year.



Chief Justice Bryner announces awards.



Jon Katcher (above) and Bill Saupe (below) accept their awards from Chief Justice Bryner.



Juneau Bar Association

At the April 9 JBA meeting, ALSC and ANDVSA honored Keith Levy for his work in making Equal Access to Justice a reality in Alaska. ALSC board member Art Peterson presented a plaque to Keith.

Erick Cordero attended as representative for the Volunteer Attorney Support Pro Bono Program and Kari Robinson represented ANDVSA.



Keith Levy, Kari Robinson & Erick Cordero



Art Peterson & Keith Levy

Photos by Erick Cordero

2004 BAR CONVENTION HIGHLIGHTS

BAR ELECTS OFFICERS & PRESENTS ABA AWARDS

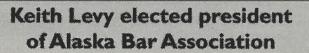
Awards presented at Alaska Bar Association Convention

Anchorage attorney **Scott Taylor** was the recipient of the the Alaska Bar Association's Distinguished Service Award, which was presented during the Bar's annual convention held April 28 – 30, 2004 in Anchorage. This award honors an attorney for outstanding service to the membership of the Alaska Bar Association. Taylor, who is with the Anchorage firm of Sonosky, Chambers, Sachse, Miller & Munson, has been very active with the Law Examiners Committee which drafts and grades the bar exam and is currently Chair of that committee.

Anchorage attorney **James Gilmore** received the Alaska Bar Association's Professionalism Award. This award recognizes an attorney who exemplifies the attributes of the true professional, whose conduct is always consistent with the highest standards of practice, and who displays appropriate courtesy and respect for clients and fellow attorneys. Mr. Gilmore, who is with the firm of Gilmore & Doherty, has been in practice in Alaska since 1967.

Susan Orlansky was the recipient of the Robert K. Hickerson Public Service Award. This award recognizes outstanding dedication and service to the citizens of the State of Alaska in the provision of Pro Bono legal services. Ms. Orlansky, a partner in the firm of Feldman & Orlansky, has been in practice in Alaska since 1981. The firm is currently handling a death penalty case in Texas pro bono.

Linda Garrett was the recipient of the the Alaska Bar Association Layperson Service Award. The Layperson Service Award honors a public committee or Board member for distinguished service to the membership of the Alaska Bar Association. Ms. Garrett has served as a public member on the Bar's Fee Arbitration committee since 1990. An Anchorage resident for 35 years, she presently has a bookkeeping service.



Keith Levy was elected president of the Alaska Bar Association at its annual convention held at the Hotel Captain Cook in Anchorage, from April 28 – 30, 2004.

Mr. Levy is an Assistant
Attorney General with the State
of Alaska in Juneau.

The other officers elected at the convention are President-elect Jonathon Katcher, an Anchorage attorney and partner in the firm of Pope & Katcher; Vice President Joseph Faulhaber, a real estate broker in Fairbanks and lay representative on the Board; Treasurer John Tiemessen, partner in the Clapp, Peterson & Stowers firm in the Fairbanks office; and Secretary Peter Ellis, owner of Ellis Law Offices in Ketchikan.



Incoming Bar President Keith Levy (left) presents outgoing Bar President Larry Ostrovsky (right) with a plaque.

Photos by Karen Schmidlkofer

National Association of Women Judges Presents Color of Justice 2004 Conference July 16

A one-day conference to encourage minority high school students to pursue professions in the law and judgeships will be held Friday, July 16, 8:30 a.m. - 4:30 p.m., in the Alaska Supreme Courtroom in Anchorage. The NAWJ's Color of Justice conference is sponsored by the Alaska Court System, Alaska Native Justice Center, the Southcentral Foundation RAISE Program, and the Law School at University of Seattle, Gonzaga and the University of Washington.

This is the second year for the Color of Justice conference in Alaska. Last year's program brought 66 Rural Alaska students, featured 14 speakers, plus breakout sessions in the courtrooms of the Nesbett Courthouse, at which judges and lawyers in practice encourage students to participate in debates, mini-moot courts and other exercises that depict true-to-life experiences in the law.

Founded in 1979, the National Association of Women Judges (NAWJ) provides committed judicial leadership to ensure fairness and gender equality in American courts through fair administration of justice in areas of domestic violence, child support and child custody, and the treatment of women in the courts of America. NAWJ educates judges on bioethics, elderly abuse, the sentencing of women offenders with substance abuse problems; improving conditions for women in prison; and the problems facing immigrants in our court system.

For additional information, call Silvina Barreiro at 264-0466 or sbarreiro@courts.state.ak.us



Scott Taylor, Distinguished Service Award recipient, (left) chats with Judge Mark Rindner.



Jim Gilmore, (left) Professionalism Award recipient; son Chester Gilmore, recently admitted to the Alaska Bar; and spouse Katy Gilmore (right) celebrate the award together.



Susan Orlansky accepts the Hickerson Award.



Bar President Larry Ostrovsky (left) and Linda Garrett, recipient of the Layperson Service Award.

2004 BAR CONVENT

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A view of the exhibit area. Staff photo

MORE THAN 500 ATTEND ANNUAL (



Outgoing Board members Rob Johnson (left) and Larry Ostrovsky (right) with Dan Winfree (second from left) and Ken Eggers (second from right).



Virginia 31st Judicial Circuit Judge Leroy Millette & Beth Millette join members on the bus to the Fly By Night Club. Photo by Krista Scully

Photos by Karen Schmidlkofer unless noted



Chief Justice Bryner (left) presents the Alaska Court System Community Service Award to District Court Judge James Wanamaker, of Anchorage for his work on therapeutic courts.



Outgoing Boa Ostrovsky.

Sandra Schubert, Bar President Larry Os Harris chat at the Awards Banquet.

N HIGHLIGHTS



VENTION IN ANCHORAGE



bin, CNN senior legal analyst and staff writer for the "New Yorker," (left) chats r President-elect Jonathon Katcher, (right) after Toobin's keynote address at Awards Banquet.



bers (I to r) Rob Johnson, Mari Long, Sheila Selkregg (public member), and Larry



Incoming Bar President Keith Levy chats with Executive Director Deborah O'Regan about the convention and about the 2005 convention in Juneau.



Jeff Feldman (right) stands with U.S. District Court Senior Judge and Mrs. James von der Heydt.



Judge Elaine Andrews, Maryann Foley and Marty Beckwith visit at the banquet.



(left to right): Sherry Clark, Lori Colbert, and Elizabeth Ziegler enjoy dinner.

Convention CLE Highlights

CLE program attendance at the Bar's annual convention broke records, and three sessions drew standing-room-only crowds—sessions on an inside look at the trial of the Virginia Sniper; status and controversies of the Patriot Act; and Paul Lisnek's insights into influencing behavior in litigation.

Course materials from all sessions will be posted on the Bar website.

The Virginia Sniper: Managing a high-profile trial

"We're next in line for a capital case, I can see it coming," said Judge LeRoy Millette, Jr. to his wife, as accused sniper John Muhammad was arraigned and several jurisdictions began to plan and negotiate his trial venue.

In the end, the notorious case ended up in the 31st Judicial Circuit of Virginia, in Prince William County—in the courtroom of Judge LeRoy Millette, Jr. As he contemplated the long proceedings ahead, "I felt like Indiana Jones, with the boulder rolling down the hill on top of him," says Millette. "My

wife said, 'Lee, just don't screw it up'," Millette quipped at the bar convention.

Preparation for the October, 2003 trial began more than a year in advance—juggling family birthdays, his wife's bar exam scheduled days before the trial's start, and

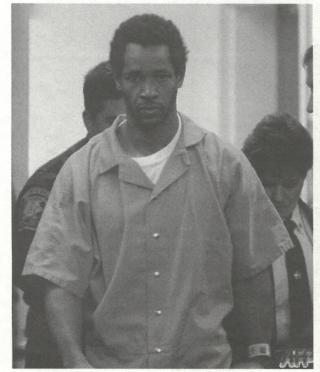
"two dobermans fighting over me; after resolving to keep a calm home life," said Millette.

trial

The convention CLE topic was "Courtroom Control, Decorum, and Civility," and as he described the trial management process that ranged from changing locations to counsel negotiations, Millette punctuated his comments with numerous details of the trial: "This is the first opportunity I've had to talk about this trial," he said. (Following the jury's recommendations, Millette sentenced Muhammad

Construction of the second of

Judge LeRoy F. Millette, Jr., 31st Judicial Circuit, presiding judge in the John Muhammad trial; and his wife, attorney Elizabeth Milletterelax in the Captain Cook.



John Muhammad leaves court after change of venue hearing in this media pool photo taken by Jahi Chikwendiu for AFP and Clarinet in 2003.

to death in March, 2004).

The convention CLE topic was "Courtroom

Control, Decorum, and Civility," and as he

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counsel negotiations, Millette punctuated

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And in the hindsight of its completion, his overriding impressions were the critical importance of planning ahead ("delegate all that you can"), and the high quality of cooperation among counsel (involved in 60 pre-trial motions), the Virginia Beach community that was overrun with hundreds attending the proceedings, and even the media. (The exception to the cooperative atmosphere was the defendant, who would not cooperate with state psychiatrists and removed his attorneys to represent himself two days into the trial.) Millette's first decision in the case was the appointment of the 2 defense attorneys, Jonathan Shapiro and Peter Greenspun. Millette was looking for counsel experienced in litigation, willing to conduct aggressive investigation on behalf of defendants, experienced in dealing with the media, reputed for excellent client relations, and skilled in post-trial capabilities that most assuredly would be required in any capital conviction. His selection of the two defense attorneys "was my best decision in the case," said

Millette.

"My second best decision was changing the venue to Virginia Beach, 200 miles away" from the scene of the sniper attacks, Millette commented. The community cooperated in renovating its property room to increase security;

providing sheriff's deputies as court bailiffs; and hosting the non-sequestered jury, which was bused as a group to and from the trial and took all meals together.

Jury management was critical, in Millette's view. To improve efficiency (and minimize court-room histrionics, perhaps), Millette worked with counsel to develop a written jury questionnaire for all candidates chosen in the pre-trial pool, reserving three issues for the final voir dire in the courtroom: views on the death penalty; level of exposure to pre-trial publicity; and any incidents, or fears, of having been terrorized by the sniper.

But perhaps Millette's management of the media was among the major factors that enabled the trial to proceed smoothly. Swarming the small community, he said, were 599 credentialed media personnel from around the world, representing 109 media organizations; 21 remote-transmitter media vans and trucks; and 20 media tents pitched for broadcasts around the courthouse. Allocated to these spectators were 29 media seats in the courtroom.

Millette also set clear rules for the media in he trial:

- No live TV, but all media had access to an external remote circuit feed of the proceedings. (A private, closed feed was provided for families of the sniper victims.)
- Limited photography was allowed in the courtroom, but only with muffled cameras.
- No recording, live broadcast, or rebroadcast of the proceedings was allowed and media representatives were prohibited from talking to jurors.

And, he made the decision to post all transcripts, clerk's notes, and other data on the Internet each evening—relieving pressures from media inquiries by phone or document requests.

Millette said he is satisfied that Muhammad received the fairest trial possible. "I cannot say enough about the quality of representation in this trial, with a very difficult and often uncooperative client," he said. "And I find it commendable that these attorneys showed the highest level of professionalism—both are Jewish. Muhammad is Muslim."

Myth, Reality, and the Patriot Act

Even conservative Rep. Don Young is among those in Congress who are seeking to amend provisions of the 2002 Patriot Act that potentially could infringe on the civil rights of American citizens.

In a lively Bar Convention session, three experts squared off to discuss whether the act goes too far in its intent to protect the nation from



Paul Lisnek, Chicago-based nationally known communications expert, trial lawyer, consultant and author, addresses the convention.

terrorism: from foreign nationals like those who perpetrated the 9-11 attacks, and those in the U.S. and elsewhere who harbor and financially enable their operations.

Moderated by CNN legal analyst and *The New Yorker* journalist Jeffrey Toobin, the panel included Patrick Fitzgerald, U.S. Attorney for the Northern District of Illinois, Professor Nadine Strossen (New York Law School), president of the ACLU, and Professor Michael Avery (Suffolk University Law School), president of the National Lawyers Guild.

Strossen's ACLU and Avery are vocal critics of the act and its implementation, and Fitzgerald led off the discussion by defending what he frequently cited as the act's critical removal of the walls of communication that prevented federal agencies from discussing intelligence cases, comparing notes, and coordinating investigations. Another important provision, he said, increases the government's opportunity to pursue the money trails—much like the government has successfully done in organized crime investigations.

Strossen and Avery raised a series of issues on the potential for government abuse of citizen's rights through the non-public activities of the federal court established under the Foreign Intelligence Surveillance Act—especially, said Strossen, provisions that allow the government to detain foreign nationals and U.S. citizens without counsel; delay notification for (thus secret) federal search warrants; and gag attorneys from discussing foreign intelligence cases publicly on behalf of clients. (Two days before the April 30 Anchorage session, the courts cleared the way for the ACLU to discuss its lawsuit against the government for the Jose Padillo detention in Chicago.)

By the session's end, the panel appeared to agree that a relatively narrow group of provisions within the act are in contention between the government and civil libertarians—those found in Sections 505 and 215 and frequently cited in the convention discussion. "The Patriot Act has 350 pages and 158 provisions, but only a dozen are criticized," commented Fitzgerald, adding that some of these controversial provisions were previously codified in other federal law He acknowledged a disting tion in the act between criminal and intelligence investigations involving American citizens, with more proscribed standards for investigation of Americans. And he defended the incommunicado detention authority on grounds that it prevented the compromise of ongoing investigations.

Nonetheless, Avery criticized the "secret" federal court established under the Foreign Intelligence Surveillance Act, for which there is little oversight except through congressional intelligence committee review. "The distinction in the Patriot Act and prior law is that a person can't go to court to quash a subpoena, and the gag order (power)," he said. "In the intelligence court, 15,000 warrants have been requested...and 15,000 have been approved."

Whether the act requires an overhaul to rein in an abusive government will be up to Congress—and the courts—to decide.

ECLECTIC BLUES

Cell phones would be better off . . . off

By Dan Branch

Each summer the Juneau waterfront turns into a weird circus for stunned cruise ship tourists. Depending on the tide, they struggle up or down gangways to docks jammed with tour buses and shills for shore excursions. Princess Cruise Company positions Australian nationals dressed as moose and bear (pronounced "beer" by the men wearing the suits) at the end of their gangways. Another Australian insures that each departing passenger is photographed with one of these Princess mascots.

After fighting through the buses and bustle of South Franklin our cruise ship visitors raise their eyes above the T-shirt shops and connect with Mt. Juneau. Then, thousands of cell phones bloom. The visitors reach into their fanny packs, liberate a cell, and speed dial the number of their most important person. Before they can tell Aunt Martha that they have mountains in Juneau, the cell phone net crashes.

The Juneau infrastructure just can't handle the stress created by 5,000 cruisers simultaneously struck with the need to call home. When the communications net crashes, our visitors start searching their pockets for change and rush over to the pay phone nest over by the library. They find that members of their boat crew are already there using the pay phones to call their families in the Third World. Since the tour-

ists can't call home to tell their grandchildren that most Alaskans do speak English they search South Franklin Street for a place to exchange their U.S. greenbacks for Alaska money.

I'd like to think that at this point the tourists have a chance of really appreciating Alaska. Without a cell phone bubble around their heads, they can feel the soft sea air on their faces. They might look up to find the peak of Mt. Jumbo stark against an azure sky

while listening to gulls fighting over fish scraps behind Taku Smokeries. Unfortunately, the cell phone net comes back up after enough of their fellow travelers tumble onto buses for transport to helicopter pads or the Mendenhall Glacier. Too bad.

Cell phones adversely impact non-users by putting out the aural equivalent of second-hand smoke.

My first cell exposure is typical. It occurred at the SeaTac Denny's at 4 in the morning. I was sipping weak coffee while trying to measure the heart attack risk factor for the Grand Slam Breakfast when a guy at the next table shouted, "Guess where I am?" into a wireless phone. That was the high point of the man's monologue.

Every summer day on Chicken Ridge, tourists walk past the mansion housing the law Offices of



"Cell phones adversely impact non-users by putting out the aural equivalent of second-hand smoke."

George, Nave and Menendez, searching for Judge Wickersham's old house. Many use a cell phone to give a blow by blow account of their journey of discovery.

Here's the high points of a typical cell phone report from Chicken Ridge:

"Alice, you wouldn't believe how many Subarus there are in Juneau...Oh look---there's another one....Wonder where that House of Wiberforce is.....Hey,

flowers grow here.... Ah, another Subaru...."

Sometimes hardwired guys walk by, shouting into a tiny head set phone. They act like homeless people with excellent tailors. They're conversations go something like this:

"What...oh, Juneau....no, no rain....Get me Alexandra....Alex, after Vancouver I take the red eye to O'Hara....I'll need coffee and a decent bagel....make sure there is someone to meet me at the gate with both....make it happen."

Thirty years ago I heard similar one way conversations on the fringes of San Francisco's Tenderloin District from scary looking folks wearing finger-less gloves and six layers of clothes. Then the conversations raised concern and caused a change of route. Today, cell phones have rendered the exotic in this behavior

mundane. Street rants are more likely to emanate from a high priced lawyer than the homeless.

Indeed, the other day I heard a manin downtown Juneau conversing with a Big Mac and fries. He was wearing finger-less gloves and six layers of clothes. My first instinct was to search for the cell phone. He didn't have one. I was almost swept away by nostalgia.

Cell phone noise is everywhere--restaurants, planes on taxiways, Costco (Honey, do we need three gallons of Catsup or will two gallons do?), and the street.

But, there is one place where cell phones should not go. Most cell phone users seem to recognize this. However, once I did see a guy cross the line---he fired up his cell in the men's room at the Juneau Airport. It was just wrong. Cell phones and urinals don't mix.

[Man. Editor Note: These cell phone updates just in. North Korea in early June banned all use of mobile communications devices (ie. cell phones) by the citizenry. News reports commented that there apparently is too much risk for remote detonation of bombs.

And, the Kim Komando radio program reported June 5 that the Next Big Cell Phone Thing will be...an Elvis phone, coming to stores near you this year. Custom-designed Elvis theme case. Rings with his songs. Little color Elvis clips in the view screen. And other Elvisomania.

The time has come to ask, "Should Alaska collect all cell phones and torch them off in a bonfire on Alaska Day?"

Convention CLE Highlights

Continued from page 20

Dr. Lisnek communicates... communication

If you're an attorney and need to brush upon communications skills to empathize with and influence clients, colleagues, courts and juries, Dr. Paul M. Lisnek has prescriptions for practice, through training, published books, and the national lecture circuit.

A natural lecturer and author, Lisnek reminded his audience that 90% of effective communication comes not come from profound briefs,

Powerpoint pizazz, or dramatic videos.

In short, it's all in nonverbal signals (body language, if you will) that reveal the underlying motivations and perceptions of the human species. Some quick take-aways from the triallawyer doctor:

- Create overlap and shared meaning with your subject—cultural, sociological, or psychological.
- Brush up on NLP (Neurolinguistic programming) and the art of body rapport. (Example: The direction of eye movement is the cue for how a person processes and recalls information.)
 - Understand the "map of reality," the per-

ceptions and experiences people use to filter information, whether by race, gender, politics, family values, or politics. "That's a person's reality, not

- the 'facts' that are reality itself."

 "Memory isn't a record, it's an interpretation," Lisnek said (can you say fish-tale?). "People will invent memories of causes," he said, citing University of Washington research by Dr. Elizabeth Loftus on the change of memory of an event over time
- Put yourself in your subject's place, and model their nonverbal signals to build rapport and effective communication.



"Courtroom Control, Decorum and Civility" panel awaits its session: (L to r) Mary Anne Henry, D.A.'s Office; Roger Holmes, Biss & Holmes; U.S. District Court Judge Ralph Beistline; 1st Judicial District Superior Court Presiding Judge Larry Weeks; Rex Butler, Law Offices of Rex Lamont Butler; and keynote and moderator Judge LeRoy F. Millette, Jr.



(L to r) Professor Michael Avery, Suffolk University Law School, U.S. Attorney Pat Fitzgerald, Chicago; Professor Nadine Strossen, New York Law School and ACLU President; and Jeff Toobin, CNN Senior Legal Analyst and staffwriter, "The New Yorker" magazine, prepare to spar.

Lawyer helps code talker receive benefits, medal

By Miriam Rozen

Until the release of the 2002 movie "Windtalkers," there was little talk of Native Americans' vital role in World War II. But Texas lawyer George Parker Sr. has made sure at least one Navajo veteran will not only be talked about, but also recognized and compensated for his invaluable aid to the United States and its allies.

In March, Teddy Draper Sr., an 81-year-old former Code Talker, received a Purple Heart -- six decades after being injured in the war, and two years after meeting Parker who, along with his paralegal Penny Robinson, logged some 500 pro bono hours to help Draper receive the medal and veteran's benefits.

During WWII, a group of 400 Native-Americans enlisted in the U.S. Marine Corps and helped the Allies fight the Japanese in the South Pacific by relaying messages from the front lines using the Navajo language as a basis for an unbreakable code. They were known as the Code Talkers. For decades, the U.S. government kept the Code Talkers' mission a secret. Then the Code Talkers' historic contribution to the war effort was "cruelly ignored" by the government and Hollywood, as the Sunday Express in London reported at the time of the release of the movie that detailed the Code Talkers' role and starred Nicholas Cage.

In mid-January, Draper and Parker, of counsel at Bracewell & Patterson in San Antonio, received a decision from the Department of Veterans Affairs in Phoenix officially acknowledging that the agency made a "clear and unmistakable error" in 1946 by overlooking material facts of Draper's record. A mortar shell blast on Iwo Jima left Draper temporarily blind and deaf and later caused permanent hearing loss in both ears, a disability the VA at first failed to recognize. In addition, he suffers from post-traumatic stress disorder (PTSD). As a result of Parker's advocacy for Draper before the VA, Draper will receive \$20,000 a year in benefits effective immediately and an additional \$68,000 in retroactive benefits. Draper was honorably discharged as a corporal from the Marines in 1946.

"I guess I'm going to be recognized," says Draper, who continues to lose hearing. Parker plans to attend the ceremony -- which has yet to be scheduled -- to award Draper his Purple Heart.

"This is the most rewarding work I've ever done in my career," says Parker, who is board certified by the Texas Board of Legal Specialization in labor and employment law and usually represents management. "Here was an 80-year-old man who had fought the system for years, and I was able to help."

Parker, who made a lateral move to Bracewell & Patterson from Strasburger & Price five years ago, says the firm supports his pro bono efforts and he could not imagine getting the job done without its support.

David Addlestone, a lawyer with the National Veterans Legal Services Program in Washington, D.C., a nonprofit advocacy group for veterans, says Parker's efforts on Draper's behalf stand out as remarkably effective. "Parker busted his ass to help that guy out. You can tell he really got into this case," Addlestone says. Addlestone adds that it is "really rare" for Veteran Affairs to acknowledge "clear and unmistakable error" -- especially after so much time has passed. The VA acknowledged that it had erred in rejecting Draper's initial claim of combat-related hearing loss.

The horror

Parker first met Draper when he went to hear the Native-American speak at an Indian heritage center in Cortez, Colo., about his code-talking days. Parker owns a vacation home in Cortez. Impressed by Draper's story, Parker offered his pro-bono assistance to help Draper in his then-decade-old struggle to receive benefits for wartime injuries.

"It was Teddy's whole demeanor, seeing how much his experience at Iwo Jima affected him," Parker recalls about that first meeting with his client. "He would put his head down and you could see he was re-living everything. Here was a man if anybody needed help he needed help."

Before meeting Parker, Draper had been relying on the help of a nonlawyer friend, who fixes guitars as a profession and helps veterans as an avocation.

Addlestone and Parker say that, in theory, the VA benefits application process is not supposed to be adversarial. "But in reality, any time you try to get money out of a government social service agency, it's adversarial," Addlestone says. Veterans who come to the agency with lawyers typically get better results, he says — particularly when they have advocates as focused as Parker.

Larry Clark, a decision review officer at the VA office in Phoenix who issued the decisions in Draper's case, did not return a telephone call seeking comment before presstime on Feb. 26.

For Parker, the offer to help Draper meant learning fast about the Byzantine world of VA benefits, he says. Once he had briefly helped a neighbor with a VA-related matter, but otherwise, he says, the process of representing someone before the VA was a first for him.

Draper's biggest obstacle was the lack of a record of the injuries he suffered from the mortar blast on the island of Iwo Jima as well as a failure to establish that he had suffered post-traumatic stress disorder. To persuade the VA that it made a mistake by not awarding Draper benefits, Parker searched for medical records from as far back as the 1970s, and provided the VA with affidavits from two other veterans who had served with Draper and witnessed the blast, as well as a report (from Draper's son, who is a clinical psychologist) detailing his father's PTSD symptoms.

The petitions

In August 2003, after Parker started getting some positive response from the VA and the agency agreed to hear Draper's case, Parker began to petition (separate from his efforts at the VA) the U.S. Marine Corps to award Draper a Purple Heart. Parker submitted the affidavits of two veterans who served with Draper and witnessed the blast that injured him.

In his own declaration submitted to the VA, Draper clarifies the cause of his post-traumatic

When we landed on the beach at Iwo Jima and enemy fire was coming at us, I saw many marines die there on the beach. I saw marines with blood in their faces, some with no arms and no legs, and some with open skulls where you could see the brain matter on the ground. I saw a lot of howling and injured marines calling for help. ... I had the blood from my friend on my uniform for 36 days at Iwo Jima. When I closed my eyes, I would cry long after the end of the war.

As a Code Talker, Draper wrote in a declaration submitted to the VA that he was forbidden from sharing his secret mission even with his family until 1968, after the Marines had declassified the Navajos' special missions. He told prospective employers that he had baked bread or peeled potatoes

"Periodically, I have gone through Navajo purification ceremonies to try and block the bad memories from Iwo Jima," Draper wrote in the same declaration.

Parker hopes that the pro bono work he has done to help Draper receive the veteran's benefits and a Purple Heart will help even though the purification ceremonies haven't alleviated his pain.

When Draper finally was able to share his story, Parker recalls, a Navajo medicine man scolded the Code Talker and told him that his use of his native language to help kill people in WWII amounted to a sin in Christianity.

"I would dream about" all the deaths witnessed, Draper wrote in the declaration, "and wake up with tears running down."

From Texas Lawyer magazine, March 2004.

Trivia Contest benefits Immigration Services Program



Mind Games 2004's winning team was the well-dressed "Trailer Park Trash Heap" from the law firm of White & Reiss. (L to R) Karen Reiss, Vanessa White, Michael White, team captain; and Jack Reiss.

Photos by Barb Hood

"Mind Games: Life, Liberty and the Pursuit of Trivia" fund raising event at Snow City Café to support Immigration & Refugee Services Program of Catholic Social Services. A total of 14 teams competed for the coveted 1st Place Trophy. In the end, it was the "Trailer Park Trash Heap" team that rose to the top of the pile. Second place went to the "Sprockets"

April 1, 2004 marked the Second Annual

which included two Board of Governor members, Larry Ostrovsky (then-president) and Jon Katcher (now president-elect).

This year's unique and creative first and second place trophies featured Godzilla Summa and Magna Cum Laude, respectively. They were the brain child of the talented duo, Barbara Hood and Dirk Sisson.

The Immigration and Refugee Services



The Mind games 2004 second place team was "Sprockets, (L to R) Jonathon Katcher, team captain; Wendy Feuer; Nathaniel Rubin, Jeffrey Rubin; and Larry Ostrovsky. Ostrovsky was clearly stunned by their success. "Last year we didn't know anything," he said.

Program provides low cost legal services to individuals facing deportation, people fleeing persecution and torture, immigrant victims of domestic violence and people seeking to reunify with family members living outside of the United States. The IRSP is the only statewide program in Alaska to serve indigent and low-income refugees and immigrants.

Teaching Justice Network launches first conference



Eileen Foley, (L) a social studies teacher at Service High School in Anchorage, served as program co-chair for the Educating on Law & Democracy conference and helped present the workshop "Teaching about the U.S. Supreme Court." Here she visits with Judge Fred Torrisi, Dillingham Superior Court, (center) who participated in the conference workshop Building Community Partnerships for Law-Related Education: The LAW DAY Example; and Marjorie Menzi, (R) of the Alaska Humanities Forum.



Rich Curtner, Federal Defender for Alaska; Barbara Miller, Center for Education on Law and Democracy; and Timothy Burgess, U.S. Attorney for Alaska; presented a workshop entitled "What Should Be the Future of the U.S. Patriot Act?"



Jake Metcalfe, (C) Anchorage attorney and President of the Anchorage School Board, visits with student hosts for the conference from Service High School, Colin Haughey, (L) and Sunny Peters, (R).



Mary Ann Aguirre, (L) Program Attorney for the National Judicial College, made a presentation on NJC's Courage to Live program, an award-winning judicial outreach program to combat underage drinking and driving that is designed for the middle school audience. She followed the Anchorage conference with visits to Fairbanks and Juneau to meet with local judicial officers and educators about the program. Judge Ray Funk (R), Fairbanks District Court, helped arrange Ms. Aguirre's trip to Alaska and is currently working with a Fairbanks steering committee to implement the Courage to Live curriculum in Interior middle schools.

The Alaska Teaching Justice Network sponsored the first statewide conference on law-related education, Educating on Law & Democracy, on March 1, at the Alaska Court System's Anchorage court campus.

More than 120 teachers, lawyers, judicial officers, juvenile justice officials, Youth Court representatives, justice professors and others gathered for a day of workshops on a wide range of law-related education (LRE) topics. More than 50 members of Alaska's legal and educational communities, and four national LRE experts, presented the workshops to attendees from more than 25 communities across the state. More than 250 people attended the conference luncheon, which featured a panel discussion commemorating the 50th anniversary of the *Brown v. Board of Education* decision. The conference was a great success, and plans are underway for next year.

Special thanks go to the major conference sponsors: Preston, Gates & Ellis LLP; Wells Fargo; Alaska Airlines; Arctic Slope Regional Corporation; Chugach Electric Association; CIRI; ConocoPhillips Alaska, Inc.; Heller Ehrman White & McAuliffe LLP; Justice Dana Fabe; and the Alaska Bar Foundation. For more information about the conference or the Alaska Teaching Justice Network, please contact Barbara Hood, Alaska Court System, at 907-264-8230, or bhood@courts.state.ak.us.

Photos by Barb Hood



Panelists for the conference luncheon panel entitled Equal Education Through Law: Commemorating the 50th Anniversary of Brown v. Board of Education, were, L-R: Christopher Cooke, Joyce Bamberger, Molly Hootch Hymes, Steve Heimel of APRN (Moderator), Gilbert Sanchez, and Rex Lamont Butler.



Justice Dana Fabe, Chair of the Alaska Teaching Justice Network, meets with national presenters at the closing reception for the Educating on Law & Democracy conference. (L-R) Justice Fabe, Alaska Supreme Court; Laurel Singleton, Constitutional Rights Foundation, Chicago; Barbara Miller, Executive Director, Center for Education on Law and Democracy, Denver, CO; and Lee Arbetman, Director of U.S. Programs, StreetLaw, Inc., Washington, D.C.

Hit the Jackpot: How one small firm builds its brand

The content of a Web site

relevant it is to the query of

using targeted headlines and

keywords, the Web site's

ranking can improve.

helps determine how

the researcher. By

By Trevor Delaney

Editor's note: The following is an excerpt from "Hit the Jackpot," from the inaugural issue of Small Firm Business. This article profiles several law firms that have creative, innovative marketing campaigns.

Sprenger & Lang is a 14-lawyer firm that has secured more than \$200 million in awards and settlements since it was founded in 1989. With offices in the Loring Heights section of Minneapolis and in the Dupont Circle area of Washington, D.C., it ranks among the top 25 firms on The National Law Journal's 2003 Plaintiff's Hot List of top litigators. So its marketing plan must be on fire, right? Well, not necessarily.

Focusing on class action litigation, most of Sprenger & Lang's work is conducted on a contingent-fee basis. In the past, the firm relied on tried and true methods to attract plaintiffs, such as a Yellow Pages directory advertisement that highlighted its class action specialty, and active networking with members of the National Employment Lawyers Association.

But the firm's leaders weren't satisfied. They wanted a more sophisticated, accessible way to convey their passion and personality. Clearly their efforts were producing results -- the firm's revenues have been at least \$4 million for the last six years. However, when you combine working for contingency fees with cases that can take years to resolve, any firm has to be especially savvy about continuing to build its practice to ensure a

relatively stable cash flow.

Historically, the firm had good luck working with a public relations firm to generate positive press. "One of the best ways for us to get the right people to call us is through good publicity about cases that we're actually doing," says Minneapolis partner Susan Coler. "This gets people to identify us with class work and it's one of the reasons that we work with a PR firm."

But class actions need just the right confluence of clients and cause

of action, and Sprenger & Lang faced some challenging dilemmas when vetting possible clients. Coler estimates that up to 90 percent of the inquiries do not bear fruit. They are from people who either

don't have actionable claims, or don't have claims that could rise to the level of a class action.

To help improve that ratio, last year the firm decided to focus on its Web site, and revamp it to be a key branding element of its marketing campaign. The firm ponied up nearly \$30,000 for the project. But that figure is probably a bit lower than the real cost. "We did a lot of the writing ourselves, which saved a lot of money," says Coler, "so that amount doesn't include my time as well as that of several other attorneys."

The goal of the redesign was

twofold. The first aim was to have the Web site pop up near the top of the results list when a potential plaintiff ran a Google search. To help the firm improve its search engine results, Sprenger & Lang is working with a "site optimizer" who is offering advice to improve the firm's ranking.

For instance, the content of a Web site helps determine how relevant it is to the query of the researcher. By using targeted headlines and keywords, the Web site's ranking can improve. Search engine optimization (SEO)

is an important consideration

-- because potential clients are unlikely to scroll through several pages of results. But SEO is an evolving science. As search engine developers discover

common techniques that are used to manipulate rankings, they adjust their methodology. (See searchenginewatch.com.)

Sprenger's second objective was to create a site that appeals to both clients and potential referral sources. They enlisted the help of Web designer Amanda Troyer and programmers at Echo Alley, a Web development company based in Fort Vancouver, Wash. While helping the attorneys articulate what was distinct about their practice, Troyer noticed that a common theme of persistence arose in her conversations. She suggested using the Winston Churchill quote that is now central to the firm's branding: "Kites rise highest against the wind, not with it."

Kite imagery now appears on every page of the firm's Web site. To see how far the Sprenger Web site (sprengerlang.com) has come, use the Wayback Machine search engine at archive.org to view prior versions of the homepage.

Maintaining the site is not inexpensive, but the lawyers keep things in perspective. "One of the things we keep reminding ourselves is that we do really large cases, and one really good case pays for the Web site or the cost of our PR person for a year," says Coler. "So you could nickel and dime this stuff or you can think broadly."

Trevor Delaney is managing editor of Small Firm Business, and is based in New York City. E-mail: tdelaney@amlaw.com.

— Small Firm Business

Working the Web

Greg Siskind, of Memphis-based Siskind & Susser, is a power-user. His Web tools include everything from a listsery to Internet-based voice and video conferencing. His web site, Visalaw.com, is packed with information, and gets about three million hits per month.

Siskind's advice:

- Find a niche. Weigh whether your site has lost its focus. "If I was starting this today," says Siskind, "rather than trying from scratch to develop a broad immigration law Web site, I'd pick an area within my practice."
- Identify your target market. Decide whether you're aiming to attract new business, develop business from existing clients, or if you want to take a less obvious route (such as developing a Web resource that can be used by the media or court officials).
- Start out modestly. Begin with the basics: attorney biographies and a few links. You can retool later. Be sure the site reflects the image of the firm and doesn't look like it's been designed by a high school kid.
- Try it out. To judge the site's effectiveness, play the role of the person you'd like to visit your site. Weighing whether you should create an animated homepage for the site? Think of it in those terms and you'll probably decide against it.

--Trevor Delaney

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The role of superstition in the legal system

By Rick Friedman

"In this legal world of words, over 90% of the impact is in our nonverbal communication." - Alaska Bar Association Brochure describing a seminar for the Bench and Bar on "Powerful Communication Inside the Courtroom and Out."

Trial lawyers and judges are a superstitious lot. Here is how the superstition gets started.

A lawyer works on a case, learning the facts and the law. But this is not a neutral, dispassionate, scholarly search for knowledge and understanding. The lawyer is looking for weapons. He is looking for facts, law and arguments that will help win the case.

Of course, being human, the lawyer falls in love with the facts, law and arguments he found or "created." (I can speak with authority on this subject, having succumbed to it in a big way just a few weeks ago.) When the jury rejects his views, he can only conclude that something irrational has occurred. If the jury is irrational, where can the trial lawyer turn? To the modern religion of social science and the growth industry of jury consultants.

There the trial lawyer will learn that a blue suit signals authority and power, a brown suit, credibility. He will learn that jurors can be programmed like Pavlov's dogs. If he stands in the same place every time he makes a particular point, pretty soon he can stop saying anything, and simply stand at his "anchor point" to communicate to the jury. And yes, he learns that 90% of communication is nonverbal.

(What would the speaker at above-cited lecture communicate if he spent 90% of his time at the lectern with his mouth closed and his body contort-

The unspoken message is that if we simply dress right, get the right gestures, stand in the right

place, and have the right tone and graphics, we will win, no matter what nonsense comes out of our mouths.

The problem with these superstitions is that they not only make lawyers do silly things, they make judges do silly things.

Judges, being lawyers, have been taught all of the fashionable superstitions. They have also viewed life from a rarified and fairly unique perspective. They pride themselves on their rationality. If someone views the facts differently, it must be due to a lack of rationality.

If a judge thinks social science supports the view that a particular verdict might be the result of a lawyer wearing a blue suit or standing in a particular spot in the courtroom,



With a mix of people, and thus, a mix of "programs" at its disposal, the jury has resources no single individual could ever hope to match."

> effective for certain problems than others. With a mix of people, and thus, a mix of "programs" at its

comfortable overturning

cognitive psychology

supports a non-supersti-

tious view of the jury—the

same view held by the

framers of the Constitu-

tion. We are all the sum

of our life experiences.

Certain backgrounds,

genetics and experiences

"program" us to look at

facts in certain ways,

and to solve problems in

certain ways. Some of

our "programs" are more

Trial practice is not only

applied psychology, but also

applied philosophy and ap-

plied political science. The

fact that we very bright

outcome is irrational.

people cannot control or

even always predict a jury

outcome does not mean the

In fact, neuro and

the jury's decision.

disposal, the jury has resources no single individual could ever hope to match.

I may use different arguments trying to persuade my wife, my adult daughter, mother, or a fisherman in Cordova. That does not

mean any of them is irrational. The better I am at understanding a point of view different than my own, the better I will be at persuading someone with that point of view. To do that, I must let go of my fundamentalist certainty that I have the only correct perspective. Most of us have trouble doing

he or she will feel quite that. It takes a lot discipline, a lot of thought, a lot of work. Superstition can be much for satisfying.

An effective advocate must have a genuine respect for the perspective of others. Feigning that respect is the road to disaster. A good judge must have a genuine respect for the wisdom of the jury. To feign that respect is not only hypocritical, but means all of the judge's efforts are simply dishonest. A judge who doesn't truly believe in the system should get out.

Of course lawyers can be taught to be better communicators. Graphics, voice, gestures and eye contact can be improved. I am a voracious reader of social science literature on juries, group decision-making and communication. Much can be learned from this body of thought, but only if it is reviewed carefully and critically.

> Most of the lessons are subtle. There is no silver bullet.

Trial practice is not only applied psychology, but also applied philosophy and applied political science. The fact that we

very bright people cannot control or even always predict a jury outcome does not mean the outcome is irrational. It just might mean we are not as bright as we think we are. That's why I always wear a brown sports coat when conducting voir dire.

Supreme Court Orders

In the Supreme Court of the State of Alaska

In the Disciplinary Matter Involving Supreme Court No. S-11436 Order Jody W. Sutherland Petition for Reinstatement Date of Order: 6/1/04

AMA Membership No. 8212168 ABA File No. 2004R001 Disciplinary File No. 1996D112

Before: Bryner, Chief Justice, and Matthews, Estaugh, Fabe, and Carpeneti, Justices

On consideration of the Verified Petition for Automatic Reinstatement filed on 4/7/04, and the Bar Association's non-oppostiion filed on 5/5/04,

It is Ordered: the Petition for Automatic Reinstatement is Granted. Jody Sutherland is reinstated from the suspension date 6/1/02.

Entered by direction of the court.

Clerk of the Appellate Courts /s/Marilyn May

In the Supreme Court of the State of Alaska

In the Disciplinary Matter Involving) Supreme Court No. S-11284 Order Date of Order: 3/11/04

AMA Membership No. 8301002 ABA File No. 2003D157

Before: Bryner, Chief Justice, Matthews, Estaugh, Fabe, and Carpeneti, Justices

William S. Labahn has been disciplined by the Supreme Court of Oregon with a 60-day suspension in an order dated August 1, 2003. Pursuant to Alaska Bar Rule 27(a), Labahn responded to a notice asking him to show cause why reciprocal discipline should not be entered in Alaska.

IT IS ORDERED:

Reciprocal discipline is Granted. Labahn is hereby Suspended for a period of 60 days, effective 4/12/04.

Entered by direction of the court.

Clerk of the Appellate Courts /s/Marilyn May

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HI-TECH IN THE LAW OFFICE

We're all confronted by the mobile security sieve

By Joseph Kashi

devices are rapidly Mobile becoming a tool of choice for the modern lawver and gain most of their power through their ability to remotely interact with the law firm's principal data repositories. In order to do so, wireless technology is essential but also essentially insecure. As security threats to mobile devices increase in scope and power, we must ask ourselves whether the term PDA should now stand for Portable Disaster Area.

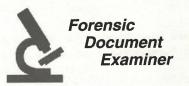
Mobile devices have always been inherently less secure than full-size computers which are usually located in locked law offices, monitored by employees, generally protected from By the theft or direct intrusion. very nature of their portability, mobile devices are more susceptible to theft and to other forms of intrusion and compromise. When you factor in an inherently insecure wireless data link to the mobile device, removed from any security hardware which the law office might implement, then the security vulnerabilities and hacking potential of portable computing and communication devices become quite severe, potentially compromising both our ethical and legal duties of confidentiality. I have explored in more depth the potential vulnerability of wireless networking in my companion submission for Friday's Wireless Woes session and would refer you to that article for a more in-depth discussion of wireless networking security problems than presented here in shortened form below.

Varied device is vulnerable

Mobile devices vary in their vulnerability and so we'll discuss them separately. Let's first delineate commonly used mobile computing and communication devices:

- cell phones
- notebook computers
- · tablet and pocket PC comput-

- Palm and other PDA devices.
- Blackberry and similar messaging devices
 - Wi-Fi wireless networking
 - · Bluetooth wireless device con-



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nection and networking.

Remembering that wireless technology becomes more prevalent, communication and computing devices essentially converge into some intermediate "life form" which more often than not has the security vices of both sides of the family.

The problem is substantially more severe with generic technologies such as Bluetooth, wireless Ethernet 802.11b and GSM cell phones

than it is with a proprietary technology such as RIM's Blackberry. That's because generic devices need to conform to a relatively loose standard that allows easy connection and operation with devices made by many manufacturers while a proprietary product can design stronger security into the basic product design without worrying about interoperability.

Cell phones

Traditionally, cell phones were simply telephones. When analog cell phones were predominant, the interception of those voice calls was rather easy. In fact, I once saw a teenager do so with an old TV set tuner and a homemade antenna. The move toward digital cell phones improved that security situation, particularly when federal law made in the sale of digital cell phone scanning and tapping equipment criminal except to specially approved agencies and police departments. One problem, however, with the traditional cell phone was in that its unique identity code could be captured, cloned, and transferred to another phone not in the possession and control of the billed party. Overall, though, digital cell phones were generally secure enough, provided that the user ensured that he or she always remain in physical possession. That situation, however, is beginning to change.

Recently, a group of Californiabased security experts claim to have cracked the security algorithm used in the new GSM digital cell phone communication standard that currently is used in Europe and Asia, although many U.S. wireless communication companies are beginning to introduce advanced the GSM-based networks here. GSMphones use smart identity cards to establish a user identity and authentication. However, the security algorithms used in these so-called smart cards used in GSM phones have been proven to be systemically insecure and some GSM experts are predicting that phone fraud and confidentiality problems with GSM digital phones will be comparable to the serious fraud and security problems facing first generation analog phone users. At this point, though, GSM phone encryption cannot yet be cracked by simple passive reception and decryption - the would-be hacker still must obtain at least some physical possession with the GSM phone or smart card to create a bond and capture the encrypted ID and authentication data. Once that's done, it's merely a matter of



"We must ask ourselves whether the term PDA should now stand for Portable Disaster Area."

using standard digital decryption techniques. The scary part is GSM decryption took less than a day in the hands of competent computer scientists, who were able to deduce the security algorithms rather easily. One can only presume that a similar effort would provide a road map for decrypting the TDMA digital cell phone standard more commonly used in the United States. Once a generally

workable decryption or hacking approach has been identified and published, it's not that hard for the less knowledgeable to work out the details, particularly when techniques are widely available using a simple

Internet search.

With the rollout of public high bandwidth Internet-capable cell phone networks, such as those already announced by Verizon, I expect that convergent cell phone/ computing devices will be increasingly used for confidential legal communications and work away from the office. Although cell phone insecurity has not yet reached crisis proportions, its vulnerability has now been demonstrated and we should anticipate increasing attempts to decipher such transmissions, whether done legitimately by governmental agencies or by hackers. Fundamentally, the relatively brief period when we have a legitimate expectation of digital cell phone privacy may be ending rather

As cutting edge cell phones begin to adopt the Bluetooth direct interconnection and networking standard, cell phone vulnerabilities will increase even more, potentially exposing the entire law office network to data and confidentiality compromise through the cell phone's Bluetooth networking. Both Bluetooth and wireless Ethernet (Wi-Fi) are inherently insecure networking technologies that will be discussed in greater detail below. In the short term, though, my security recommendation is to avoid any Bluetooth-enabled cell phones.

Cornell University recommends these practices to reduce cell phone vulnerability at least a bit. Remember that cell phones are essentially small radio broadcast stations that vulnerable to remote interception. This point was apparently lost on some illicit groups who were located and captured because they used their cell phones without concern. Avoid or at least limit your use of cell phones for confidential communications, particularly document or text transmission. Where possible, turn off the roaming features of your cell phone service-this will make it more difficult to intercept personal information about your own cell phone and that phone's identification information. Check your cell phone bills for apparently illicit calls-this is a good indicator that someone has access to your personal phone information, even if there are only a few illicit calls. Finally, be sure that you retain clear physical custody of your cell phone.

Portable Computing Devices

Traditionally, the biggest single threat to the confidentiality of materials kept on notebook and other portable computers was simple theft. Unless your data was actually strongly encrypted on your system, it's easy for someone who gains physical access to your computer to retrieve the data, particularly if they have even rudimentary computer knowledge and access to a few data recovery and password cracking tools. If a thief really wants access to your data badly enough, he or she merely need to disassemble the portable system, remove the hard disk, and install it as a secondary hard disk in another system to which he or she has administrator privileges. That is, unless you strongly encrypt Even then, encryption the data. merely slows a competent computer specialist down - many security algorithms have been shown to have fundamental weaknesses that can be exploited by a determined and knowledgeable person. Don't lose physical control of your portable computing system! Don't loan it, even briefly, to someone whom you don't trust. Even limited use by a malicious person can be enough to plant cracking tools, get passwords or encryption keys, or plant known plain text documents to be later compared against an encrypted

The loss of a single notebook computer can be potentially devastating in an environment where high security is necessary. need only recall British military's loss, just prior to the start of the 1991 Gulf War, of a single notebook computer that contained all the Coalition's air strike and land battle plans for the Gulf War. the data contained in that notebook computer had fallen to the wrong hands, hundreds or thousands of lives would have been at great risk. Most likely, the data contained on our portable computing devices isn't quite so critical, but its confidentiality is still very important.

With the introduction of wireless remote networking, notebook, tablet and Pocket PC computers are quite vulnerable, particularly those equipped with either Bluetooth or Wi-Fi wireless networking technology. Where a portable computer system contains either a wireless networking technology such as 802.11b Wi-Fi Ethernet or is configured to work with your law firm's main hard wired network, the loss of a single notebook can compromise your entire network computing environment unless strong steps are promptly taken to plug any resultant vulnerabilities by changing access authentication, remote access numbers, passwords, and network access protocols. This is labor-intensive and tedious, as so is not done nearly as often as good security practices might recommend.

Remember too that portable computers are subject not only to unique vulnerabilities that arise as a result to be used with a wireless networking or Internet technology but also to the same operating system vulnerabilities as any other Windows PC. Thus, you'll need to take

Continued on page 27

HI-TECH IN THE LAW OFFICE

We're all confronted by the mobile security sieve

Continued from page 26

into account three different sorts of security vulnerabilities: known Window and Internet Explorer security holes, theft, loss or other physical compromise, and the vulnerability of wireless networks to remote hacking and passive compromise.

There are many physical security devices available for Portable computers, particularly from accessory manufacturers such as Targus. These devices provides cabling and other physical attachment devices, hidden "call-home" devices that can help a user or law enforcement agency locate a stolen system, and more esoteric, James Bond-style security devices such as HP's fingerprint scanning cards that prevent a protected computer from booting up unless the user's scanned fingerprints match the fingerprint maps stored in a portable computer as authorized users. Still, if you forget your portable computer on a plane or taxicab, or otherwise fail to ensure that you retain continuing physical custody of it, you're a prime candidate for data loss and possible network compromise.

Reducing Windows inherent security vulnerability is straightforward. Regularly run the Windows Update feature and insure that you download and install all applicable security patches. You'll be surprised how often this does not occur, even in supposedly sophisticated IT environments. Also, ensure that you run up-to-date security firewall and anti virus programs to prevent a silent infection by data theft or data damaging Worms, Trojan Horses, viruses and other silent data compromise and hacking programs. These recommendations are simply sound computing practice for everyone but they're easy to overlook when focusing upon more esoteric security threats such as remote Wireless hacking. Be wary about any computer system that does not use a secure, regularly changed password. Although that's not quite to deter a determined hacker, a non-obvious, regularly changed password and password-protected screen saver will at least slow down the casual data

The most insidious portable computing threats arise in connection with implementation of wireless technologies, both Bluetooth and Wi-Fi. These are discussed in some detail below. They're insidious because you'll probably not ever become aware if your data becomes compromised. Bluetooth and Wi-Fi - enabled Palm and similar PDA products have essentially the same security vulnerabilities as any other portable computer using these wireless technologies unless additional third-party security products are implemented. Among the well-known third party data security products for Palm, Blackberry, Pocket PC and similar PDAs is PDA Defense Enterprise, which implements a multilayered authentication and firewall protocol to limit to the potential of third-party penetration and compromise of the overall network. You can get further information at pdadefense.com

Blackberry users have a choice

of security providers, either Blackberry Enterprise Server by RIM, Blackberry's developer, or PDA Defense Enterprise. RIM's Blackberry Enterprise Server comes in several variants that work specifically with Microsoft Exchange or Lotus Domino. Blackberry Enterprise Server provides controllable authentication of the Blackberry device attempting connection with the network server through a more-secure outward connection initiation. All communication is encrypted in triple DES format, which is relatively secure and there's no unencrypted data stream that's sent insecure radio transmissions accessible to third party monitoring and hacking. Because Blackberry Enterprise Server will accept only commands that are already properly in corrected in Triple DES format, it is generally safe from spurious third-party commands and connection attempts.

802. I Ib Wi-Fi Wireless Ethernet Networking

Wi-Fi technology is a broadcast radio technology that works on the same 2.4 gigahertz microwave radio band as modern cordless telephones and Bluetooth wireless devices built into many notebook computers. As a result, Wi-Fi has the same advantages and disadvantages as any radio technology. On one hand, as with any radio signal, Wireless Ethernet technology is susceptible to interference from such simple obstructions as the foil backing of fiberglass wall insulation and susceptible to innocent but annoying jamming and degradation from such mundane items as a bad florescent light ballast, lightning, a sparking electrical motor or an older automobile with a bad ignition, all of which can cause "static" electrical noise which can degrade a Wi-Fi networking signal or even render it unusable. Conversely, Wi-Fi's networking transmissions are broadcast indiscriminately so that they may be directly accessible by an intruder or hacker whom you'll never notice in your parking lot, across the street or in a different part of your building. Wireless hacking is so common that there are many web sites and discussion groups devoted to the practice from which the barely computer literate can download enough freeware programs that overwhelm most small wireless networks.

Wireless networking technology is inherently much more susceptible to intrusion and to hacking than an equivalent hard wired network where signals are not radiated indiscriminately to drive-by hackers and where the network server and cabling are, or at least should be, physically protected from casual intruders. In contrast, a wireless network is potentially available anywhere within the range of its radio broadcast signals, which can range anywhere from 20 or 50 meters to as much as 500 meters when sensitive equipment is used on the other end. Even given a 50 meter signal radius, an intruder can be driving by or sitting in a car across the street intercepting your signals - and you'll likely be totally oblivious to such activity unless forewarned to implement sophisticated hacking detection technology.

The danger of defaults

Feel better because your wireless access point box states that the product includes 128 bit WEP encryption? Even that's of potentially little use. A 2001 drive-by survey of 808 different London Wi-Fi networks using current 802.11b Wi-Fi found that a staggering 67 percent of those networks were totally unprotected against even the most casual intrusion and data theft because they did not use any encryption at all, probably because the network installer was either too lazy to work through the resulting configuration complications or because the wireless access point manufacturer simply did not turn on encryption as the default configuration. Most users accept the default unprotected configuration or a non-secure configuration in any event because that makes for faster, easier installation and that's how Wi-Fi networking has been promoted, as a faster, easier means of connecting computers.

Beyond the propensity of most users to stick with insecure setup defaults, there are other, less obvious but still gaping security holes. Typically, in all but the larger cities, only one or two brands of Wi-Fi wireless access points and routers will be readily available and the default password needed to access administrator privileges and complete control of these readily available wireless access points probably will not be changed.

Hacker Freeware

There is a great deal freeware software available for immediate download that provides even a novice with substantial tools to remotely intercept wireless network data transmission packets and, after having collected enough of your "encrypted data packets", crack your encryption vector for 128 bit WEP. That allows a hacker to remotely read your files and transmissions as if the hacker was directly connected to your network, which a very real sense he or she is. One of the more sinister aspects of wireless hacking is that it doesn't necessarily leave footprints. To use such programs. one need not be a deeply experienced computer engineer but merely have some basic computing knowledge. Finding and downloading cook-book Wi-Fi hacking programs takes about 10 seconds using any standard Internet search tool. Wi-Fi hacking software is available for Windows systems, Mac, Linux/Unix and Pocket PC based systems.

The 802.11b Wi-Fi encryption algorithm is now widely considered to be a systemically flawed implementation of the more general RC4 encryption algorithm. Once flaws are known in the algorithm, then specific decryption techniques can be devised to efficiently crack the encryption without the need for slow brute force cracking efforts. As a result, a longer encryption bit length does not necessarily provide additional protection. Unfortunately, because this is a systemic problem, it is not susceptible to easy solution. In other words, the principal Wi-Fi security protocol is fundamentally flawed. Commercial vendors essentially try to provide rather complicated patches to a flawed product.

Further, because devices on a basic Wi-Fi network use the same encryption key and SSID, then the compromise or physical loss of any connected device, particularly a laptop computer, compromises the entire networks and its encryption security. An alternative to basic hacking is to simply sniff the media access address (MAC) that is a fundamental part of every Ethernet network card and then hack to that specific network device. To do this, you don't necessarily need to intercept radio packets. In fact, getting a notebook computers MAC address can be as simple as turning the notebook computer upside down and reading the Wireless MAC address sticker the that is often attached to the bottom of many notebook computers.

Bluetooth Wireless Connections

Bluetooth was originally a method by which portable computing devices such as a notebook computer and a portable printer could silently and unobtrusively establish short range, wireless connections with each other. Originally, Bluetooth had a very short range, on the order of 30 feet, and thus was less susceptible to remote hacking and intrusion. Bluetooth uses a radio frequency connection in the same 2.4 gigahertz microwave band that's also used by Wi-Fi Ethernet. Wi-Fi and Bluetooth devices may conflict and jam each other if used in close proximity.

The original concept of Bluetooth as a short range means to avoid a table of messy cables connecting peripheral devices or networking nearby computers was more or less benign. More recently, higher powered versions of Bluetooth have connection ranges up to 100 yards and are designed to connect with many more types of devices, such as Bluetooth enabled cell phones. As a result, Bluetooth security risks are equal to or perhaps even greater than those associated with Wi-Fi wireless Ethernet. Several theoretically valid approaches to hacking into Bluetooth have been openly published. The simplest of these derives from Bluetooth's requirement that all devices share the same identify a number. However, when "stranger" Bluetooth devices are first connected with each other by been brought into close proximity, these devices exchange identification and authentication information with each other and thereafter treat these devices as "trusted". Obtaining Bluetooth identification and authentication information is not that difficult either by remote monitoring of the initial authentication process or by obtaining physical possession of a device already authenticated to the Bluetooth network and obtain authentication information from that device, which may be apparently casual as a Bluetooth-enabled cell phone, printer, etc.

Even Bluetooth developers candidly that the current specification has several well-known security holes. Until a more secure

"May I have my electronic discovery in paper please?"

Who could forget the first

judges in Fairfax County,

Virginia received his first

computer and promptly

time one of the Circuit Court

picked up the mouse, inquir-

ing "Is this the end I speak

Lawyers inch their way toward a paperless practice

By Sharon D. Nelson and John W. Simek

Legal technology commentators wring their hands in frustration and ask: Why have lawyers been so slow to abandon paper in favor of the electronic world? How can we get them there?

The first time we heard an attorney ask us to convert all his electronic discovery materials into paper, we gasped. This resulted in several boxes of paper that could handily have been burned to a single CD-ROM. Now, after many similar requests, we have grown jaded, and dutifully perform this senseless task after a patient and usually ineffectual explanation of why their request doesn't make any sense. As we often sigh to one another, it is

a long and windingroad to change the deep-rooted practice of paper generation.

Why have lawyers been so slow to adapt to the paperless world? Is the reason no better than the one Tevya gives in "Fid-

dler on the Roof" about the customs of Anatevka? "We do it because it's a tradition!" Most practicing lawyers, especially at the upper reaches of the profession were weaned on paper, and weaning them off has been painstaking, as a multitude of bankrupt legal software companies can attest.

into?"

Naturally, part of the problem is lack of time. When you are frantically trying to keep up with actually practicing law, there isn't a lot of opportunity to test, much less master, the latest technology. The practice of law has always changed slowly and cautiously, which may have its good points, particularly that law tends not to embrace things that are trendy and may quickly fall out of favor. Nonetheless, it is fair to say that lawyers have the reputation of being hidebound. The legal profession has a tendency to cling to its traditions with veneration and is not quickly persuaded to abandon them. Some cynics have suggested that there is little motivation to accomplish things more quickly when one is billing by the hour.

Anecdotes of resistance abound. Who could forget the first time one of the Circuit Court judges in Fairfax County, Virginia received his first computer and promptly picked up the mouse, inquiring "Is this the end I speak into?"

Then there was the senior partner who proudly announced that he had "conquered" e-mail. "Here's how I do it," he explained patiently. "My e-mail goes to my secretary, she prints it off, gives it to me, I dictate an answer to her, and then she responds via e-mail." The fact that this procedure was woefully inefficient, not to mention very "ungreen," did not seem to occur to him.

Two years ago, Fairfax County engaged in an electronic filing project – the technology worked fine, but participation was low. As court officials and developers agreed, lawyers were simply not going to make

the switch to electronic filing until it was mandatory. Where electronic filing has been mandated, the systems tend to work very well, at least after initial birthing pains. Virginia lawyers have been quite accustomed to the electronic filing of bankruptcy cases in federal court, and without much complaint, but then they had no choice. The Virginia Supreme Court appears very reluctant to impose mandatory electronic filing in state courts, which does not bode well for its success.

Tradition is all well and good, but the necessity for change has been demonstrated many times. Remember all the lawyers who clung fervently to their IBM Selectrics® and refused to buy a computer? And the lawyers who insisted they would never own

a fax machine? Even today, there is still a small percentage of lawyers who absolutely refuse to use e-mail, though their numbers are dwindling. In Fairfax County, roughly 95% of our attorneys

now use e-mail to conduct business – a dramatic change from five years ago.

The numbers are likely much less in Southwestern Virginia, where we recently had the opportunity to make an electronic evidence presentation to the region's Circuit Court judges. Let us hasten to add that they were gracious hosts who listened intently, asked a great many questions, and were eager to learn. But when we asked them to raise their hands if they had any experience with electronic evidence in their courtrooms, not a single hand went up. When we demonstrated fairly common courtroom technology, including computer animation, the reaction was blunt and universal: "Not in my courtroom."

Our longtime friend, IT consultant Ross Kodner, has long been the proponent of the PaperLESS Office TM. He equably understands that paper cannot disappear from the practice of law but preaches its diminution — its extreme diminution. Though this article certainly proselytizes the minimization of paper, readers would be well advised, if they have not yet had the pleasure, to hear Ross' full-blown version of the whys, wherefores, benefits, and how-tos of achieving paperless goals.

There are drivers that make it impossible for lawyers to stand rooted in the mud, however much that might be their inclination. Clients are the strongest driver-most companies are far ahead of their attorneys on the technological curve and they are demanding electronic correspondence. document exchange and collaboration, encryption, digital signatures, and everything else technology offers. In several instances, we have been called by panicked law firms that had just been told bluntly by a client to upgrade their technology or get axed. Now that's a driver.

Courts will of course continue to move in the direction of mandating electronic filings, albeit that process

is moving somewhat slowly at the state level, partially due to budgetary constraints and partly due to the failure to resolve public access vs. privacy issues. At the federal level, the courts are within a couple of years of nationwide electronic filing, which will undoubtedly have a huge ripple effect across the legal profession.

Efficiency seems to be the very last reason that most lawyers will willingly make a change, but again, clients are demanding efficiency and a more sensible expenditure of legal fees. They are not happy with the antiquated paper systems, because they inevitably take more time and result in higher bills. As many a solo or small firm lawyer has delightedly discovered, all this electronic efficiency can really pay off, as they are now able to compete with larger firms on a more level playing field. Those who truly master the technology add significantly to their bottom line, a keen economic incentive to move from the realm of paper.

Want a practical incentive? There is no doubt in our minds that technology easily saves a bare minimum of 30 minutes a day (and that's an extremely modest number). With a billing rate of \$200/hour, that translates into another \$100 of billable time per day, \$500 per week, and \$24,000 per year. If you are in a firm, multiply that number by the number of lawyers and the revenue increase is dramatic. Many lawyers are finding that either they no longer require a secretary or that a secretary can easily be shared between two or more lawyers because the lawyers are

doing so much document preparation themselves.

The use of templates, macros, document and case management programs, electronic time and billing systems, online legal research, area specific software of all kinds, etc. has made the actual practice of law much, much faster. Simply finding things electronically is much easier than hunting down files and particular pieces of paper within them, especially if they are archived offsite. When a client calls looking for case status, popping the case up on your monitor is infinitely faster than shuffling through files, especially since the file is rarely conveniently on your desk. Collaboration with colleagues is a snap compared with the old days of passing paper back and forth, annotating one another's drafts. Most of all, the ability to work remotely by having an electronic connection to your e-mail and documents while on the road has transformed the profession of law into a law office without walls.

Though the legal profession is still creeping toward becoming paperless, most attorneys are slowly accepting the trend and inevitability, however grudgingly. It may not be the future they wanted, but it is the future that has become inexorable. As Yogi Berra once noted in his inimitable fashion: "The future ain't what it used to be."

The authors are the president and vice president of Sensei Enterprises, Inc., a legal technology and computer forensics firm based in Fairfax, VA.

Mobile security

Continued from page 27

Bluetooth version is developed and widely used, all Bluetooth devices should be treated as substantially insecure. There are, however, some steps which you can take to minimize Bluetooth security vulnerabilities. Firstly, do not use unit trusted device authentication keys. Instead, combination authentication keys. Secondly, use the longest feasible passkey PIN number in order to increase the complexity of any attempted decryption computation. Thirdly, never attempt to pair new devices in public for the first-time, for example in a courtroom or tense negotiation. Any Bluetooth device that's turned on, even if not visible, can easily capture the authentication information. In a sense, this is comparable to not discussing confidential information over your cell phone in a place crowded with

Fourthly, there are some general protection tactics that Bluetooth shares in common with Wi-Fi. Always change installation defaults and always enable security layers. Always use devices with equivalent security layers enabled - otherwise, then security of all devices will be reduced to lowest common denominator. Never connect with an unknown or unauthenticated device.

Communications between any Bluetooth device and a head set or audio device should choose Blue-

tooth Baseband [1] authentication and encryption. Doing so required the use of a secure intermediate device. Never allow someone else to use your Bluetooth-enabled telephone and be sure that someone else's card is not used in your phone, which can create a trusted bond or pairing with an unknown device that can later be used to hack into your Bluetooth accessible network.

In any event, security and access control policies must always be implemented. As a practical matter, all confidential and important with all network data should be behind a trusted hardware firewall. Bluetooth-enabled devices should always be outside the firewall and unable to access confidential information without manual user input.

These are only stopgap measures, however. The IEEE 2001 Bluetooth security workshop at the United States Military Academy at West Point delineated so many holes in the current Bluetooth standard that I personally would never consider trusting confidential data access to any Bluetooth-enabled devices. It's simpler, any event, to just connect a portable printer and notebook computer with a USB cable. Remember, if you're not at least a little paranoid, you're not being careful enough.

The author originally presented this analysis at the American Bar Association's Tech-Show 2004 in Chicago in March.

News From The Bar

Board of Governors action items April 26 & 27, 2004

- · Approved 5 reciprocity applicants.
- Approved a Rule 43 (ALSC) waiver for Lisa Lang.
- Tabled the issue of MBE score reporting to the tenth place, and staff to get more information on costs.
- Voted to accept Duke Law School's proposal for a modified contract.
- Approved the minutes of the January meeting and the March conference call meeting, as corrected.
- Voted to approve the Board of Governors awards: Professionalism: Jim Gilmore; Distinguished Service: Scott Taylor; Layperson Service: Linda Garrett; Robert K. Hickerson Public Service Award: Susan Orlansky.
- · Voted to appoint Doug Baily to the Alaska Judicial
 - · Voted to appoint Maryann Foley as ABA Delegate.
- Voted to appoint to the ALSC Board: 1st District: Regular Janine Reep and Alternate TBD; 2nd/4th District: Regular Adam Gurewitz and Alternate Ethan Schutt; 3rd District: Regular Bob Bundy and Alternate Carmen Clark; At-large: Regular Vance Sanders and Alternate Brant McGee.
- Approved payment of \$46,119.35 from the Lawyers' Fund for Client Protection.
- Heard the report of the Area Hearing Committee in a discipline matter. The Board accepted the Findings of the AHC, but rejected the recommendation of a 30 day suspension. The Board would impose a 90 day suspension.
- Voted to accept the stipulation for a private reprimand in a discipline matter.
- Voted to approve the ethics opinion entitled, "May an Attorney Contingently Agree to Pay Attorney's Fees Assessed Against a Client if the Client Loses on Appeal?"
- Voted to accept the stipulation for a public censure in a discipline matter.
- Voted to send a proposed amendment to Bar Rule 2(3) which would allow a graduate of a foreign law school, in which the principles of English law are taught, and which is equivalent to an ABA accredited law school, to take the Alaska Bar Exam if they are admitted in another state.
- Voted to increase the fee for Section Informational members to be the same as attorney members, and to allow Inactive Bar members to belong to Sections.
- Voted to publish an amendment to Bar Rule 37(k) which would prohibit representation of Fee Arbitration clients by area division members during the member's term, as redrafted.
- Voted to table action on the published Bylaw to raise the amount of Bar dues until the next regularly scheduled meeting in the fall.
- Voted to remain neutral as a Board on the three resolutions to be presented at the annual business meeting.
- Voted to accept the proposed slate of officers: President Keith Levy; President-elect Jon Katcher; Vice President Joe Faulhaber; Secretary Pete Ellis; Treasurer John Tiemessen.

Proposed Bar Rule Amendment

The Board of Governors invites member comments concerning a proposed amendment to Bar Rule 37 that would add a new subparagraph (k) that would prohibit a fee arbitration panel member from representing either petitioners or attorneys in fee arbitration matters during the member's term unless the opposing party waived objection in writing.

(Additions underscored, deletions have strikethroughs)
Rule 37. Area Fee Dispute Resolution Divisions; Arbitration Panels;
Single Arbitrators.

(k) Representation of Clients and Attorneys Prohibited. A member serving in an Area Fee Dispute Resolution Division will not represent a client, as defined Rule 34(b), or an attorney in fee disputes filed under these rules during the member's term unless the opposing party waives any objection in writing. This rule applies only to the member and not to lawyers with whom the member is associated.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by September 1, 2004.

Courts sponsor children's forums statewide; next in July

The Alaska Court System, with assistance from the State Justice Institute, is hosting five regional forums across the state on the theme Children in Alaska's Courts.

The goal of the project is to bring members of the children's justice community together for an afternoon of roundtable discussions on what's working and what isn't in the court system's responses to cases affecting children, and what proposed solutions would be feasible and effective.

The roundtable discussions are followed by a public reception and public forum, at which the recommendations of the children's justice community are presented and public comment is taken.

The first program was held in Barrow on April 9, 2004, and focused on state-tribal relationships in children's cases. In Anchorage, the program took place on May 19, and focused on the four types of cases most likely to affect children-Child in Need of Aid, Juvenile Delinquency, Domestic Violence, and Divorce/Custody proceedings.

The Juneau forum is scheduled for Monday, July 12, and will be followed by forums in Bethel and Fairbanks at dates to be announced.

A final report summarizing the recommendations from all regions will be compiled and made available to the public this fall. Interested members of the legal community are encouraged to attend the forums and offer their insights. For more information about how you can participate, please contact project coordinator Barbara Hood at bhood@courts.state.ak.us, or 907-264-8230.



The Children in Alaska's Courts forum in Barrow focused on state-tribal relationships in children's cases and was subtitled "State and Tribal Courts Working Together for the Future of Our Children." Tribal court judges from the Native Village of Barrow (NVB) joined with state judges from both the Barrow Trial Courts and the Alaska Supreme Court to discuss a range of issues of mutual concern. (L-R) Judge Dorothy Edwardsen, NVB; Judge Ellen Sovalik, NVB; Judge Michael Jeffery, Presiding Judge of the 2nd Judicial District, Alaska Court System; Judge Mabel Panigeo, NVB (front); and Justice Warren Matthews, Alaska Supreme Court.



More than 30 members of the Barrow children's justice community, including attorneys, judicial officers, juvenile justice representatives, social workers, teachers, counselors, police officers, tribal representatives and others, gathered for the Children in Alaska's Courts roundtables, which were held at Hopson Middle School on April 9, 2004. The roundtables were followed by a reception and public forum at the same location.

Pilgrimage to Trinity

continued from page 1

was more permeable back in the day. When The Manhattan Project wanted to speak of Top Secret matters, they used a radio frequency they shared with local taxicabs, the railroad switchyard in San Antonio, Texas and KCBA in Delano, California. The plants looked like Dr. Seuss had created them; they appeared to be humans on their knees with arms upraised, outstretched—praying, suffering, surrendering, dying. Perhaps they had isotope issues. No surprise; we were in La Jornada del Muerto-The Deadman's Journey. The soldier directing traffic wore camo and a bright orange vest; were we supposed to see him, or not? His hand signals were incomprehensible. 6

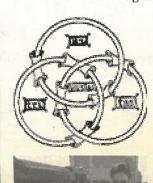
John Donne to the Rescue

Why is this locus named "Trinity"? The Minister of Information offered two explanations, and admitted that one was fabricated. The remaining explanation, by reductio, must hold: Oppenheimer (more about him later) ended the confusion over nomenclature by fiat. "This site shall henceforth be called 'Trinity' as I am reading a poem by John Donne about the Trinity."

Trinity

But there are other theories. Three cubed is 27, apparently the age at which Kurt Kobain, Jim Morrison and Janis Joplin all died. Roger Maris was 27 when he hit 61 home runs; Joe DiMaggio was 27 when he hit safely in 56 consecutive games. And then there are these masterful evocative images:





Julius Robert Oppenheimer

J. Robert Oppenheimer was born in New York City in 1904. After graduating from Harvard and studying at cambridge University, he received his Ph.D. in Germany in 1925.

Robert grew up in a Manhattan apartment whose walls were decorated with paintings by van Gogh, Cézanne, and

Gauguin. His father toughened him by sending him out West, where he rode horses and delighted

In the 1930's, Oppenheimer became drawn into left-wing politics. "I began to understand how deeply political and economic events could affect men's lives." He began making an annual donation of about \$1,000 to various funds associated with the Communist Party. When he joined the Manhattan Project he admitted in his security questionnaire that he had been "a member of just about every Communist Front organization on the West Coast."

man, "Mr. President, I have blood on my hands." "Never mind," Truman replied. "It'll all come out in the wash," In 1953 Openheimer was accused of opposing the building of the hydrogen bomb. Although he was not found guilty of treason, his security access was taken away.

July 12, 1945

The plutonium was delivered to General Farrell at Trinity. He hefted it and recalled, "I felt it growing warm, I got a certain sense of its hidden power. It wasn't a cold piece of metal, but it was really a piece of metal that seemed to be working inside. Then maybe for the first time I began to believe some of the fantastic tales the scientists had told about this nuclear power." Plutonium. As in Pluto, God of the Underworld.

Upcoming CLEs: June - October 2004

Soldiers had built a 100 foot tower and hoisted "The Gadget," full of TNT and Plutonium, to its top.

in the outdoors. He grew especially fond of the broad mesas of New Mexico.

In 1946 Openheimer told President Harry Tru-

1,000,000.

The crater is mostly filled in. Hot dogs, Tshirts and Pepsi are sold. A monument marks (the original) Ground Zero. Low gray clouds obscure the mountains. The presence of Japanese tourists is conclusive proof that they are EVERYWHERE. We do not detect the supposed bubble of goodness over the site. To the contrary, the atmosphere is creepy, spooky, spectral. Residual radiation was becoming a metaphor. We could hardly leave fast enough. We were ready for A Fluffy Bunny Tour: hot air balloons, petting zoos, water slides. All to The Sound of Music.

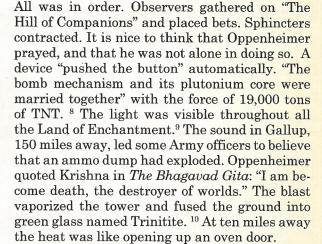
not (yet) have enough material for a third bomb. It is estimated that American casualties in an

invasion of Japan would have approximated

July 16, 1945

Location

| Date | 1 IIIIe | 1 Itte | Location |
|----------------|---------------------------|---|---|
| July 7 (NV) | 4:00 – 5:00 p.m. | An Informal Discussion with the 9th Circuit Court of Appeals CLE #2004-013 1.0 General CLE Credit | Anchorage Downtown Marriott Hotel |
| August 20 | 8:30 a.m. – 12 noon | The Digital Law Office - with Joe Kashi CLE #2004-012 CLE Credits TBA | Anchorage Hotel Captain Cook |
| September 8 | Half-day | How to Perform Internet Legal Research: Finding Free and Low Cost Resources - with Carole Levitt CLE #2004-018 CLE Credits TBA | Juneau Centennial Hall |
| September 14 | Half-day | How to Perform Internet Legal Research: Finding Free and Low Cost Resources - with Carole Levitt CLE #2004-019 CLE Credits TBA | Anchorage Hotel Captain Cook |
| September 22 | Full Day | Cross Examination and Impeachment - with Terry McCarthy and Ray Brown CLE #2004-011 CLE Credits TBA | Anchorage Hotel Captain Cook |
| October 12 | 8:30 a.m. – 12:30 p.m. | What Every Alaskan Lawyer Needs to Know about Alaska Native Law CLE #2004-020 3.75 General CLE Credits | Anchorage Hotel Captain Cook |
| October 22 | 8:30 a.m. – 12:30 p.m. | 11th Annual Workers' Comp Update CLE #2004-022 3.75 General CLE Credits | Anchorage Hilton Hotel |



Then they had gone swimming in a stock tank.

August 6, 1945

Three (!) weeks later to the day we dropped the atomic bomb on Hiroshima. 11 About 66,000 people died and 69,000 were wounded-just in the first minute. A newspaper headline read, "May Be Tool to End Wars." Three (!) days later, we dropped our second atomic bomb on Nagasaki. About 39,000 people died and 25,000 were wounded—again just in the first minute. Five days later, Japan surrendered. We did





April 3, 2004

Conclusion

We listened to Sympathy For the Devil on the way home and found new significance in it. But we could not find words to express the sober, somber and just plain creepy feeling we had. We did understand, however, why Oppenheimer found the event worthy of the words of Krishna. Maybe Allen Ginsberg could have succeeded where we have failed. Maybe he could write a poem, Trinity Vortex Sutra. But he is closer to Pluto than we are.

(Footnotes)

Special thanks to Fallout Girls Tish Bastian & Stepha-

² The Missile Range is 3,200 square miles, as big as Delaware and Rhode Island combined.

³The official patch of The Manhattan Project has symbols representing the universe; the (then) unknown results; secrecy; atomic fission; and the expected success of the enterprise.

One benefit of this worthiness was the Vision of The Roadside Rest Stop, appearing like nothing so much as an Ewok Village. Driver, where you taking us?

⁵ Cf., Dr. Strangelove: "Gentleman! You can't fight here! This is the War Room!" ⁶ His female comrade had a weapons belt worthy of Lara

Croft, Tomb Raider. ⁷ Probably the sonnet beginning "Batter my heart three personed God!"

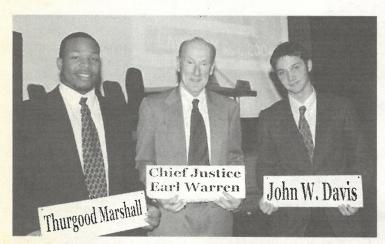
⁸ The bombs we possess in Biblical numbers today are approximately a gazillion times more powerful.

From 20 miles away observers noted, "A ball of light about three or four hundred yards in diameter was clearly evident about a thousand feet above the ground. It turned yellow, then red, and then beautiful purple. It blasted; it pounced; it bored its way right through you. It was a vision which was seen with more than the eye. It was seen to last forever. You would wish it would stop. It was that beauty the great poets dream about. No one who saw it could forget it, a foul and awesome display. The strong, sustained awesome roar warned of doomsday and made us feel that we puny things were blasphemous to dare tamper with the forces heretofore reserved to The Almighty. It was as though the earth had open and the skies had split.

¹⁰ Trinitite was advertised for sale about 17 miles down the road. We declined to purchase any. The report that the same chemical compound exists at Sodom and Gomorrah

remains unconfirmed.

Law Day commemorates Brown statewide



Law Week activities in Anchorage included a re-enactment of the oral arguments and decision in Brown v. Board of Education at West High School. West student Daniel Tomlin, (L) presented excerpts from the oral argument by attorney Thurgood Marshall, who led the NAACP legal team that brought the five cases that were consolidated into Brown. Alaska Supreme Court Chief Justice Alexander Bryner, (C) read excerpts from the U.S. Supreme Court's unanimous decision, which was originally presented on May 17, 1954, by the late Chief Justice Earl Warren. West student Zach Patrick-Riley, (R) played the role of John W. Davis, the attorney who argued against Marshall and in favor of segregated public schools on behalf of the State of South Carolina.

The Wrangell court celebrated Law Day with a visit and presentation by, (L-R): Neil Nesheim, Area Court Administrator for the First Judicial District; and Judge Larry Zervos of Sitka Superior Court. Their presentation was followed by a community reception in the courthouse lobby.

Judicial officers and members of the legal community celebrated Law Day 2004 with a variety of activities across the state co-sponsored by the Alaska Court System and Alaska Bar Association. This year's Law Day theme, "To Win Equality by Law: Brown v. Board at 50," commemorates the 50th Anniversary of the U.S. Supreme Court's landmark decision in Brown v. Board of Education, which struck down the "separate but equal" doctrine that had allowed segregation based on race in our nation's public schools

In Barrow, Craig and Sitka, local courts sponsored student poster contests on the theme of equality that drew wide participation; Sitka's contest was featured on statewide public radio.

In several communities, including Anchorage, Nome, Seward, and Wrangell, judicial officers participated in presentations on the Brown decision, which in some locations included re-enactments of Brown using a script and Powerpoint presentation developed by the court system.

Across the state, judicial officers and lawyers visited classrooms or invited school groups to courthouses for skits, mock trials, and other interactive programs designed to foster understanding of our legal system and the rule of law. For more information about Law Day, or to learn how you can participate, contact Barbara Hood, Law Day Coordinator, Alaska Court System, at 907-264-8230, or bhood@courts.state.ak.us.



Kodiak Magistrate Anna Moran, (back row), hosted two groups of home schooled children at the Kodiak courthouse during Law Week. This group of K-3rd grade students participated in a Law Day exercise about basing decisions on facts instead of opinions. They followed their courthouse tour with a tour of the police department.



Sitka Magistrate Bruce Horton and Bev Gillaspie, Principal of Keet Gooshi Heen Elementary School in Sitka, visit with the winners of Sitka's Law Day Coloring Contest. (L-R): Kailee Cunningham, Richelle Ramil, Raquel Dumag, Eva Fish, Mag. Horton, Paden Meabon, and Gillaspie.

Kids Say Thanks

Dear Judge Peck:

Thank you for the amazing slideshow on Brown vs. Board. I had never heard of that before you did the slideshow...Those black people were brave standing up for their right about being equal. Linda Brown deserved the right to go to a white school...Black people deserve all the rights that white people do. Everyone is created equal and should be that way...I'm glad that you came to our school for the presentation.

- Sincerely, Austin G.

Excerpt from letter to Seward Magistrate George Peck after his Law Day presentation to a 5th Grade class at Seward Elementary School.

Dear Mrs. Ellis and Mrs. Clark:

Thank you for giving us that tour. I learned a lot. Here is a small list. The mayor is on the executive branch and the judge is in the judicial branch. Thank you for the snack.

- Sincerely, Erin

Excerpt from letter to Craig Magistrate Christine Ellis and Clerk of Court Kay Clark after they hosted tours of the courthouse and a coloring contest for local elementary school students.

(Editor's Note: The Bar Rag is encouraged that 5th graders understand separation of powers. Perhaps one day legislators will as well.)

Alaska attorneys litigate tough case in Texas

Continued from page 1

covering the background on mental retardation, after which we went through Chester's various IQ scores. We'll pick up in the morning with his testimony on adaptive functioning. The state's expert, Dr. Edward Gripon, sat through Ott's direct. Dr. Gripon seems a bit smug and was dressed much better than anyone else in the courtroom. He's the local psychiatrist and has testified in front of Judge Carver many times; no wonder he's more comfortable in his courtroom than we are.

Susan spent most of last night visiting the extended Chester family in Port Arthur. These folks are of very modest means, but they went out of their way to put on a little spread for Susan. One might think Susan's dedication to the cause is reflected by the time or money we've pumped into this case. Not so. It's most clearly reflected by the fact that Susan, although a vegetarian for 32 years, politely ate some spinach dip that had meat in it. I'm told that she passed on the chicken wings, however. Apparently, even Susan's commitment has limits.

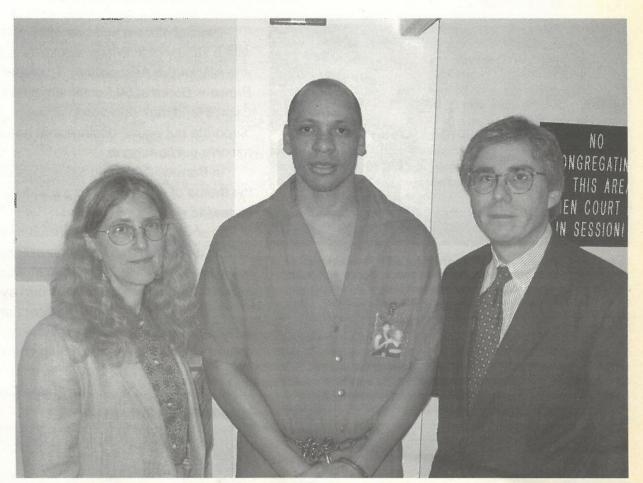
Dispatch 2 from Beaumont

The Chester case has drawn a good deal of local press attention. Reporters from TV stations and newspapers from Beaumont and Port Arthur (where the crimes occurred) are covering the case with florid prose. The lead in the Beaumont story yesterday was: "A killer is coming to town today." In an uncharacteristic moment, Susan agreed to a TV interview this afternoon, a gesture I suggested was akin in this town to putting a bullseye on her back.

We picked up today with Dr. Ott, the psychologist. Ott is a large man, probably 6'3" and at least 275 lbs. He has a crewcut and a face that looks younger than his age (38). So, standing next to one another, we tend to look a bit like the Jolly Green Giant and Little Sprout. Needless to say, I don't spend a lot of time standing next to him. Ott's age is probably his greatest weakness. It's always nice to see some gray in an expert witness. But he's got a deep knowledge of mental retardation and has a nice way about him as a witness. Midway through, I figured out that the local custom here in Beaumont apparently doesn't include objections to leading questions, so I was able to open up the examination some with questions that would have been objectionable in Anchorage. Susan was kind enough to remind me from time to time to maintain a reasonable balance that left considerably more "Dave" than "Jeff" in the examination.

The thrust of Ott's testimony was that Chester is mentally retarded because he has an IQ under 70, and has significant deficits in adaptive functioning. Chester was tested 5 times over 20 years with scores of 69, 59, 77, 64, and 69. Ott explained why the 4 scores between 59 and 69 offer a reliable measure of Chester's intelligence and why the outlying score of 77 is invalid. The State will contend the converse and advance the 77 score as the most reliable measure. It's not an argument without teeth. False negatives (unreliably low IQ scores) are more common than false positives (unreliably high ones). On the adaptive functioning element, Ott pointed to a long history of Chester's behavioral deficits -- including second-grade reading and writing levels and failures to obtain a driver's license, a meaningful employment history, and other inadequacies in independent living -- all of which support his conclusion that Chester has significantly subaverage adaptive functioning. He also drew on evaluations from the Texas prison system's Mentally Retarded Offender Program ("MROP"), which Chester was in at a time when the State of Texas DID think he was mentally retarded.

Ott held up reasonably well on cross-examination. We grilled him last night in preparation for today's court session. Still, the State scored points by forcing Ott to acknowledge that his diagnosis was different than was the Port Arthur School District's, which consistently diagnosed Chester as learning disabled, not mentally retarded. The DA also took the opportunity to suggest how various aspects of Chester's crimes (wearing a mask, cutting telephone lines, wearing gloves) reflected sophistication and "good" adaptive functioning on Chester's part. This testimony was



(L to r) Defense attorney Susan Orlansky, defendant Elroy Chester and defense attorney Jeff Feldman prepare for the Beaumont court.

tough to sit through and, as quiet as the courtroom usually is, it got 10 decibels quieter when
Ott recited the details of each of the homicides. It
was as if everyone stopped breathing. I cleaned
up some of the testimony with a short re-direct
and we were done with Dr. Ott. Almost. Judge
Carver had a few questions of his own. They
seemed to imply that he may be looking for an
exit ramp that would find that Chester may once
have been mentally retarded but may have, in his
adult life, gained sufficient adaptive functioning
skills to no longer be an appropriate candidate for
a mental retardation diagnosis. I don't think the
evidence or the science supports that view, but
I'll confess that the questions make me nervous.

Through it all, Elroy Chester sits at counsel table in a red jumpsuit, with his hands in manacles attached to a chain around his waist, and a chain and leg irons binding his feet. It's difficult to assess how much of what is being discussed in the courtroom he absorbs. He knows we are fighting for his life, and he knows that we are attempting to prove that he is mentally retarded. He wants to live, but he is unhappy with the MR label, as he's been teased all of his life, and in prison, about being mentally retarded or, as he framed it, "tarded". It's interesting that, unlike the DA and its retained expert, the prisoners and guards on death row don't seem to have any difficulty diagnosing Chester as mentally retarded. Maybe we should have called one or two of them as experts.

After Ott got off the witness stand, Susan put on two of Chester's sisters, Zelma and Gloria. They painted a sad picture of poverty and neglect in the Chester home and it was apparent that they found having to testify publicly about such matters painful and embarrassing. Zelma was nervous and offered short, oftentimes one-word answers to Susan's questions. Gloria, the younger sister, was more animated and actually was a very strong witness, testifying about how Chester had difficulty doing almost everything. She took him to the store, and taught him to buy the salsa with the yellow label, since he couldn't read the word "mild". She taught him how to his wash clothes. And then taught him again. At one point, the judge cautioned her to wait for the question to be completed and not to talk on top of Susan, following which she shot the judge an angry, almost nasty look. On cross-examination, the DA questioned her about that look and why she got angry at Judge Carver. It was hopelessly irrelevant, but succeeded in making Gloria look a little rougher around the edges. With that testimony, we ended the day.

Tomorrow we'll put on Dr. Orloff, the psy-

chologist who ran the Texas Mentally Retarded Offender Program, and Elizabeth Segler, one of Chester's former teachers. Both, I expect, will be strong witnesses and, with some careful preparation this evening, probably can be persuaded not to give Judge Carver the evil eye.

Dispatch 3 from Beaumont

I haven't figured out whether "y'all" is singular or plural. I've heard both, although I think the plural is usually intended, even when you're alone. It's as if Texans assume that you have a lot of friends and, whatever they're telling you, you're going to go home and tell the others, so they're actually talking to all of you. Unfortunately, Susan and I don't have any friends here, so when people say "y'all" I always hear it as an odd way of addressing Susan and me.

A theme that has run through this case from the outset, and has continued through the first days of trial, is that nothing is easy in this case. Facts, law, witnesses, environment...it's a harder case than I can recall having in a long, long time. After several hours of cross-examination of Dr. Ott yesterday, culminating in Judge Carver's questions, I told Susan I was beginning to feel a bit like Sisyphus.

Our next witness, Dr. Orloff, flew in yesterday from Palestine. That's Palestine (pronounced Pales-teen), Texas, not Palestine, the land of milk and honey. Orloff is a transplanted New Yorker who has spent the last 30 years in Texas and is quick to tell you that he doesn't think too much of the place. As soon as his wife, who is from Texas, retires, he plans to leave the state. Unfortunately, that's not for another 11 years, so he still has some time left to serve on his sentence here before he gets paroled. Orloff went to Cornell and made his way to Texas for graduate school. Despite his 30 years here, he still looks and talks more like a New Yorker than a Texan. Palestine is in northeast Texas and, with 18,000 people, apparently is small enough that, despite his New York roots, Orloff was pretty excited when we found an Olive Garden Restaurant for dinner. Apparently, he has to drive 60 or 70 miles to get to Tyler, Texas, and the nearest Olive Garden.

Orloff is smart and knowledgeable about mental retardation. He spent 18 years working in the Texas prison system. We wanted him to testify so he could explain how the MROP functioned, the standards it used in admitting individuals to the program, and how the several evaluations the MROP performed support a mental retardation diagnosis for Chester. The MROP evaluation records are very supportive, but contain one unfortunate

Dispatches from Beaumont, Texas

Continued from page 32

notation. The records document a low IQ and a low level of adaptive functioning, both of which are consistent with mental retardation, but the diagnostic code assigned to Chester was Borderline Intellectual Functioning. It's a different diagnosis than mental retardation and implies slightly higher functioning. The diagnosis was wrong because it is limited to individuals with an IQ over 70, and the MROP measured Chester's IQ at 69. But we were stuck with the good and the bad from the MROP records.

I'd spent a lot of time on the phone from Anchorage talking to Orloff, trying to persuade him to testify. But it was a slow process, and then it took some time to get him to review the prison records from 17 years ago. So, we never got an opportunity to run through the testimony. I saved that for his arrival on Tuesday evening. It made for a long night. Or loff is a sweet man with a good sense of humor. He also tends to speak aloud as he thinks and, in effort to be precise, can perceive ambiguity in a question that would elude most people. I'll confess that, by the time we sat down with him after dinner on Tuesday, we were tired and my questions may not have been sharply framed. But even when I worked off of the notes he had sent me, and pitched questions that repeated them verbatim, Orloff would spin out rambling answers that frequently departed, sometimes 180 degrees, from what he'd previously said. So it was a slow, painful process to go back through it all, piece by piece, to try to find the wording for the questions that would elicit the response we needed him to provide. When we quit at 11 p.m., I had my doubts how useful his testimony would be.

Orloff took the stand first thing this morning. Overnight, he had metamorphosed into a great witness. He was smart, thoughtful, and articulate. The State made very little headway on cross-examination. It was one of those lessons in trial practice that reminds you that sometimes the unpredictable, unscripted nature of the process tilts in your favor.

I got a lesson in local trial practice when I made a perfectly correct objection when the DA strayed far afield on re-cross-examination: "Objection, your honor," I said, "Beyond the scope of re-direct."

To which the DA responded, "This is Texas, your honor."

"Overruled."

Damn. I forgot about the "This is Texas" rule. What was riveting was how the judge responded as if the "This is Texas" response was the perfectly appropriate thing to say in response to an objection.

Orloff was followed by Elizabeth Segler, one of Chester's special ed teachers from almost 18 years ago. It was a minor miracle that we found her. It was a major miracle that she was willing to testify. She still lives in Port Arthur and it's not hard to understand that standing up for Chester is not likely a popular thing for a Port Arthurian to do these days. Segler was the model of the devoted, straight-as-an-arrow, compassionate yet firm, special ed teacher. She inventoried all of Chester's various deficits and detailed the special ways in which she had to teach him. She also offered as how she was friends with one of the victim families, and then teared up slightly. It was a momentary insight into the tragedy of the killings in Port Arthur and how emotionally complicated testifying was for her. She was a strong enough witness that, when we took a break, the DA turned to me and said, "Would it be sufficient if I just stipulated that she's killing me?"

After we completed Segler's testimony, we rested and the State commenced its case with an educational diagnostician from Beaumont. Her view was that the Port Arthur School District had correctly diagnosed Chester as learning disabled. We were able to dent her testimony a good deal on cross-examination, mostly by establishing that the Texas educational criteria for mental retardation and learning disabilities differ from those that the court is required to use, and by obtaining her concession that the four IQ scores under 70 were

consistent with one another and the score of 77 was the anomaly. The State then put on its main expert, Dr. Edward Gripon. He is a smooth, experienced expert witness, and, I suspect, he had the judge's ear.

On balance it was a good day in a hard case with bad facts in a tough forum.

Dispatch 4 from Beaumont

For those who have never been here, Beaumont seems to sit in a transition zone where the uplands become maritime. It's inland enough to heat up nicely. And it's close enough to the Gulf that the air holds the humidity. As a result, today it was 86 degrees and 100% humidity. I didn't know humidity could get to 100%. I thought that was called rain.

In yesterday's cross-examination of the State's educational diagnostician, I endeavored to drive home the point that Chester's IQ did not change as he got older and that, as a result, his early IQ scores were accurate measures of his adult intellectual functioning. It produced the following exchange:

Q: Ms. Pittman, does IQ change?

A: What do you mean?

Q: Does a person's IQ increase as he gets older? In other words, am I getting any smarter?

A: I don't think so, sir.

Q: Yeah,...that's what my kids tell me, too.

Thus, after the better part of a week, and nearly 20 hours of testimony, I succeeded in triggering a smile from the otherwise taciturn Judge Carver.

Last evening, as we were preparing for today's court session, we learned that the Texas Court of Criminal Appeals had just issued a decision affirming a mental retardation finding in another capital case. The new case involved facts that were strikingly similar to Chester's and I spent much of the evening studying the decision and re-writing my closing argument to build on the court's most recent pronouncement. The arrival of the decision on the eve of closing arguments was as helpful as it was fortuitous. Another lesson in how the unscripted dimension of trials sometimes has the breaks falling your way.

Today's court session began with cross-examination of the State's psychiatrist, Dr. Gripon. Easily the best dressed person in the courtroom, he appeared each day in a crisp double-breasted blazer, gray or camel slacks, tassel loafers, and neatly styled hair. Our first exposure to him was the transcript of his testimony in the *Penry* case, another death penalty case in Texas. There, when he was asked about his fees and whether it was true he charged \$800 an hour, he denied it, said he didn't charge anywhere close to that, then admitted he billed \$795 for the first hour of testifying. So, we expected him to be a facile witness.

Susan was up late last night and had prepared a very tight and focused cross-examination. It lasted only an hour, but when she was done I passed her a note that said it was the single most devastating hour of cross I can recall. Dr. Gripon conceded that an individual with an IQ of 69 and an adaptive behavior score of 57 (Chester's 1987 scores) is properly diagnosed as mentally retarded. He conceded that he's not an expert in mental retardation. He conceded that it's possible for an individual to be able to do all of the things that the State argues Chester can do, and still be mentally retarded. He conceded that Chester has significant deficits in academic functioning. And he conceded that the test measures that were used for Chester were reliable and appropriate. To his credit, Gripon answered Susan's questions directly and honestly and, as a result, the cross was efficient and effective.

The State had planned to call the investigator who arrested Chester and took his confessions. He was going to testify about his perceptions of Chester's level of functioning and ability to understand and communicate, and opine that Chester didn't seem mentally retarded to him. The investigator, of course, was not qualified to express an opinion on that subject, but after my experience/geography lesson yesterday ("This is Texas"), I'm not sure if I'd have lodged an objection. It didn't matter, though. The state pulled him from the witness list at the last minute. Thus, having called just two witnesses, the State rested. We caucused and decided that the State hadn't raised anything that demanded a response, and so we waived rebuttal.

We broke for lunch and returned for closing arguments. I spoke for about 45 minutes and tried to tie together the threads we'd weaved over the course of the week and make sense of them. The DA followed with a closing that consisted largely of a recitation of the admittedly grisly facts of each of the five killings. The facts of the crimes, as I've mentioned, have been and remain the State's most potent evidence, at least emotionally, if not legally, and the DA injected the facts whenever and wherever possible all week long. In the main, it was effective. Still, in this moment, in the closing, I'd have found a different tack. The DA's recitation seemed too duplicative of earlier moments in the case and did not illuminate the arguments or evidence in a way that could have been of much assistance to the judge.

At the conclusion of the closing arguments, Judge Carver took a few moments and said some very nice things to Susan and me. He said we'd done a fine job, as good as any he'd seen in a capital case, that we were always welcome in his courtroom, and that Mr. Chester was fortunate to have had our help. He went on to note that strong representation in death penalty cases was vitally important, and that our taking the case without compensation reflected the highest service that a lawyer can perform. After his stoic and enigmatic presence all week, I was stunned and, I'll admit, touched by his comments. Judge Carver then took the matter under advisement. The court reporter will prepare a transcript for us within the next 30 days. We then are to submit proposed Findings of Fact and Conclusions of Law, following which Judge Carver will render a decision.

I don't have much of a sense of what the outcome will be, save to acknowledge what I've said repeatedly: tough case, tough facts, tough law, tough forum. But Judge Carver conducted a fair hearing. While it may be optimism born of a tired mind and body, or the denial that is the hallmark of every defense lawyer, I can't tell whether Judge Carver has any leanings one way or the other. The odds remain very decidedly against us. But if the decision were made on where the preponderance of the evidence presented this week truly weighs, Elroy Chester will be spared a trip to the death chamber at Huntsville. If Judge Carver rules against us, there will be further proceedings before the Texas Court of Criminal Appeals and then the federal district court and the Fifth Circuit, but my sense is that the likelihood of success gets smaller at each further stage of the process. We have preserved several legal issues for appeal. but Chester's best chance is to prevail on the facts. And the process of finding the facts now very much rests in Judge Carver's hands.



The Perfect Getaway

The Bear Creek Winery Suites are luxurious elegant rooms with views of KACHEMAK BAY and GLACIER

- Private entrance/bath
 Refrigerator
- · Microwave
- · Complimentary Captain's Coffee
- · Satellite TV Gas Grill

Unwind in the extravagant cedar hot tub or steam bath Relax on large covered decks and waterfall cascading into elaborate fish pond with underwater lights

Enjoy delicious country wines: rhubarb, raspberry and fireweed Horseshoe/fire-pit surrounded by landscapered gardens is

perfect for wedding or other special events. $(907)\overline{235-8484}$

Bear Creek Dr. · Homer

European Road Warrior survives navigation menace

By William Satterberg

It was to be the great European/Satterberg Grand Prix. I had planned it for several years. I had finally hoarded enough financial resources to be able to rent a decent car and to truly enjoy the famed European auto routes.

For several years, I have done business in Europe. Traditionally, my clients have been based in Luxembourg, although I have also had clients in Russia, Hungary, Iceland, and England. I have even had one or two in Germany, as well as a few in Alaska.

Although there was a period of time when I did not travel to Europe, most of that changed after 1991, and I found myself regularly taking trips to the Continent. Some years, I literally traveled almost every other month.

Despite my many trips to Europe, however, it still took me a period of time to develop bravado with respect to driving. To say I was timid was an understatement. Rather, I avoided driving at all costs. I would spend hours upon hours, instead, engineering my approaches to the respective countries in order to optimize the best availability of trains or other public transportation, including medieval footpaths.

Part of this was because I had been told many times of the horrors of driving in Europe, including high speed "crashes" (as plaintiff's attorney Ward Merdes likes to call them), massive city congestion, total navigational upheaval, and the occasional purloined vehicle. In fact, a common joke in Europe asks, "Why don't you buy a Mercedes in eastern Europe?" The answer: "Because it is probably your Mercedes." The same anecdote would apply not only to virtually every "eastern" European country, but also to some southern European countries, most notably Italy, as well. In fact, Italy is listed on the precluded country list for many types of rentals, including Ferraris.

My initiation into European driving was benign. Upon my arrival in Luxembourg approximately eight years ago, one of my clients took me for a country drive in his luxury BMW. I was impressed with the vehicle, especially with its superb appointments and its "high number" designation. It clearly had a strong engine and virtually every gimmick known to exist at the time, including an elaborate cellular/stereo system which would allow a driver to speak into the cockpit of the vehicle when phone calls were made or received and which would also cut out any airplay at the same time. The vehicle also had remarkable navigational capabilities and anti-skid, anti-drift, anti-theft, and just about everything else that was "anti-."

In short order, our country drive concluded and we transitioned to the famed German autobahns. It was then that I had my first experience of sustained, high speed driving at speeds well in excess of 130 mph. Although the vehicle's speeds registered in kilometers, it did not take me long to do the mathematics, multiplying the indicated kilometer speed by .6 to arrive at the miles per hour. For example, 100 kilometers per hour is really only 60 miles per hour. And, 280 kilometers per hour is a lot more than 60 miles per hour.

Or maybe it's the other way around. Unfortunately, at that speed, my math skills were left far behind.

My driver seemed unconcerned about the inherent dangers posed by German motorists. As if it were a planned joke, he scared the daylights out of me more than once when he would turn around to talk to me in the backseat while taking his eyes off the road. A European, he was into personal eye contact, even if he obviously could not focus. My anxiety was further heightened when I

saw that the other passengers in the car did not seem to care at all about the driver's techniques. In retrospect, I suspect that this might have had a lot to do with the fact that we had already hit more than one Biergarten to prepare for the trip. It was then that I vowed to learn how to drive in Europe.

Over the next several years, I slowly immersed myself into the mystique of European driving. Occasionally, my clients would loan me one of their vehicles so I could venture into downtown Luxembourg to do some shopping. When time permitted, I would sneak out onto the high-speed motorways and pick up some exhilarating speed in order to get the true feel for the open road. At times, on the autobahns, I would bravely open the vehicle up to almost 50 kilometers per hour. I also began to learn the subtle rules of European etiquette for highway driving. Essentially, stay in the right lane unless you can drive over 300 kilometers per hour on sustained speeds and do not think that the car which is rapidly closing in behind you with its headlights on is blinking wildly because it is your friend. It probably is just a lost Volkswagen Beetle.

Rules still come slowly to me, even at my age. Still, I do remember some rules.

For example, there is a rule I learned from my dad in flying known as "Avigate, Navigate, Communicate." The same applies to European driving. I recognized early on that the most important thing is to drive the vehicle and concentrate on driving technique. Then, when time permits, the next step is to try to figure out where one is located. The ability to speak and understand several European languages simultaneously is also a distinct benefit. That is where the communication portion comes in. Communication also comes in helpful if one has a cell phone in order to inquire of somebody, somewhere, who speaks English, of one's location. However, because cell phones are illegal to use while driving in Europe and English is common only in Amsterdam, one often remains lost, unless one is in Amsterdam, whereupon it does not matter.

As the years passed, I became more and more adept at European driving. I actually began to look forward to the experience. In time, I was even able to find the rental car agencies at the Frankfurt International Airport and could actually leave and enter the terminal areas at will, without necessarily getting lost, and without having too many experiences involving the international gesture of



"Despite many trips to Europe, however, it took me a period of time to develop bravado with respect to driving."

contempt.

As such, in the summer of 2003, I decided that it was time to put my experiences to the test and rent a "really hot" car to take my wife, Brenda, on a whirlwind tour of southern Germany, France, and Switzerland. I intended to impress Brenda with my astute European driving skills.

Shopping the Internet, I made arrangements to rent a British Jaguar Sedan. I placed a substantial credit card

deposit on it and had it spec'd out for all of the modern amenities. The rental car agency boasted that the vehicle had a large engine, all of the creature comforts, and a sophisticated onboard computer, not to mention a bunch of good anti-stuff, just like my rich friend's car contained. I specifically verified that the vehicle would be awaiting my arrival and repeatedly confirmed the reservations via several long distance calls to Germany.

Following the eight-hour flight to Frankfurt, I eventually found the rental car counter. In short order, I was met by an officious German gentleman who informed me in no uncertain, German-type terms, that "Vee haf no Jaguar."

I politely reminded him that the vehicle was guaranteed by credit card. I stated that I had specifically requested a Jaguar. He said to me that he understood entirely my request, but, again, that "Vee haf no Jaguar!" He then firmly explained that the company reserves the prerogative to decide what car to give me within the same class regardless of my desires.

It reminded me of something right out of Hogan's Heroes. "Und, you vill like it!" In short, I was given an option. I could either wait indefinitely with the hopes that a Jaguar might magically appear at the airport or I could take an upgrade to a BMW which was immediately available. Logic prevailed. I took the BMW. Besides, if local Fairbanks/Hawaii attorney Al Cheek could drive a BMW, so could I.

After filling out a book full of paperwork, including promising that I would never take the BMW to Italy or any other eastern European countries, or even think of it, Brenda and I were allowed to leave with the vehicle. As soon as I entered the car, I noticed that some things were different.

First of all, the car had a funny little window in the roof. I had never seen anything quite like it before. None of my pickup trucks had one. I figured the window was some sort of German device for either escaping or a hatch for signaling drivers behind you. Later, I found that I was correct about the signaling hatch, especially when drivers in some countries passed me and then expressed their concerns by extending their arms through the opening in their vehicles to point at unseen aircraft.

The next thing the car had was a unique electronic system. The familiar AM radio to which I had become so used to at home was strangely absent. Instead, there was some little opening, which Brenda later explained to

me was for cassette tapes. "What a marvelous idea!" I thought.

Of greater fascination, however, was the onboard computer system. Consulting the German manual, I eventually was able to decipher that the vehicle had a navigational computer, allegedly pre-programmed for every country in Europe. As intriguing as the computer was, it had one major flaw. As far as I could tell, it did not speak English. Given this language barrier, it was worthless. Then again, in my book, all computers are worthless. (It was not until I arrived in Luxembourg that I learned that the computer could be quickly educated to speak English simply by pushing a button.)

Our luggage safely stuffed in the vehicle, Brenda and I climbed into the car, belted up, and roared out of the parking garage with squealing tires that would have made any foreignborn American car rental attendant proud. I was elated. I was behind a supercharged machine ready to tackle the legendary German highway system. The beast within me stirred noticeably. For once, the fact that I had left my Viagra prescription in Alaska no longer seemed to matter.

After several impromptu and unplanned laps around the terminal area, we finally left the Frankfurt Airport. It was not long before I saw ominous thunderclouds in all four quadrants of the sky. In less than 20 minutes, the entire country was inundated in a torrential monsoon which lasted for the entire afternoon. Traffic was slowed to less than 30 mph. Thunder clapped and lightning flashed all around us. This was to be my long-awaited initiation into highspeed driving in a high-performance machine on a highly-engineered German highway.

Several hours later, we docked in Luxembourg. The drive, which ordinarily takes approximately two and one-half hours, took well over double the time. So much for impressing the Europeans with my American driving skills. I would have done better in Frank Stagno's airboat, which still holds the Fairbanks airboat land speed record for Frank's famous drunken cruise down Airport Road from Pike's Landing one balmy summer's evening.

Upon our arrival in Luxembourg, I proudly drove up to my friend Marc's house. I wanted to impress Marc with my BMW rental car, so I parked behind his two Mercedes. He seemed suitably impressed and was clearly happy to see me driving a car for once, as opposed to having to pick me up at the railway station, culling me out from the other panhandlers.

After dinner, I explained embarrassingly that I had a problem with the car's computer system. First of all, it spoke German and I spoke English. Secondly, I could not understand anything about it and was totally lost. Marc, who is always the gentleman, politely explained that the computer could easily be taught to speak English by pushing a single button. After all, it was German and a quick learner. Marc then explained his various proven techniques of navigation and how to program into the computer not only the existing destination, but desired destinations, as well. Upon complet-

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European Road Warrior

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ing dinner, Marc generously asked where we wanted to go. I answered that Brenda and I simply wanted to go back to the center of the city.

"No problem," Marc explained.
"Just type in 'dash-Luxembourg' and push the 'enter' button."

I did as instructed. The car immediately barked an order at me, telling me to "turn around!" It was then that I began to realize that my new relationship with the computer was already in a dive. Even though the computer had a gentle female voice, I still do not take orders lightly. Nevertheless, rather than argue, I promptly spun around. The order completed, I was now facing exactly in the opposite direction. Marc then gently pulled me aside and suggested to me that I had to get in the car and then turn the vehicle around. "Of course, I knew that! I was just testing you, I responded. Wanting to be a polite guest, I humored Marc and did as

Bidding fond farewell, Brenda and I humbly departed the scene, letting the computer skillfully navigate our way out of Marc's quaint little village in the northern part of Luxembourg. During the trip to the city, we only got lost twice and had to do an unprogrammed U-turn in a slippery cow pasture, much to the computer's dismay.

The next morning, after raiding the breakfast table, Brenda and I belted ourselves into the BMW and set out for the south of France. We had been told that that the Alsace region of southern France was a relatively easy region to locate and that it was beautiful and fun driving. Although we were briefed on the locale, apparently nobody ever told the computer.

On the departure from Luxembourg, I had my flash picture taken by some other computer located on a bridge. At the time, we had already entered France, and I still believe to this day that the French thought that I was famous. Later on, I was told by Marc that the picture represented a traffic citation that likely is still trying to find me in the mail. Something about speeding and radar tickets. I am not particularly worried, however, since I figure that I can go over and defend myself in French court and prove to our NATO partners that photo-radar tickets are no longer enforceable in Alaska. Faced with a decision of an Anchorage District Court judge, I am confident that the French authorities will immediately surrender. Besides, the French are not known for their defenses, after all. Just ask the Germans.

In the beginning of our journey, admittedly, the computer worked relatively well. After all, we were proceeding in a generally straight line from Luxembourg to the French Alsace region. There were not many turns that had to be made. Occasionally, the computer would tell me about an off-ramp that would have to be taken, but I decided early on to ignore it and to make my own decisions. After all, the road signs seemed to do a pretty good job of directing me to the locations which we desired.

At some point during our trip, the computer became upset with my American arrogance. In short order, it was no longer loving and kind, but began to remind me of my second grade teacher--the cranky one with

the ping pong paddle that had the holes drilled in it. I obviously was not following directions.

Perhaps, being German, the computer decided to teach me a lesson. The abrupt change in personality happened as we were driving south along the Rhine River, with the riverbank immediately to my left. Out of nowhere, the computer barked a stern, no-nonsense command, "Turn left!"

Although inclined to follow blindly, I fortunately glanced to my left and saw the swiftly flowing expanse of the largest and deepest river in Europe. "Not a wise idea, Bill," Brenda promptly suggested. I agreed. We continued southward at a relatively high rate of speed, being passed by the occasional Peugeot and bicyclist. Just as I was beginning to relax, once again, the computer ordered me to, "Turn left!" And, once again, Brenda and I promptly disobeyed. It was shortly thereafter that I realized that this homicidal computer not only had a death wish, but a brain, as well. It also seemed to have some logic behind its commands.

As we entered one picturesque village in southern France, the computer loudly declared that I had missed my turnoff to the "city center." I was confused. We were not really in a city at all. We were clearly on the outskirts of a small village. Still, the computer wanted us to go back to the point of the beginning and re-enter the "city." When I did not follow its first demand, it sternly barked another order, "Turn around." This order, as well, made no sense, since we already were where we wanted to be. Still, several times, the computer ordered us to "turn around." Eventually sensing, however, that we had absolutely no intention of obeying its latest series of commands, the computer next gently instructed us to "turn right." At the first intersection, I politely did as ordered, figuring that the computer had finally relented and was now responsibly taking us to a public parking area. In about a minute, the computer then nicely asked us to "turn right" again, which I did. It then gave another pleasant "turn right" order shortly thereafter. I followed the advice again, whereupon the computer finished its directions when it radically reverted to its old style and smugly ordered me to "turn left." Shortly thereafter, both my wife and I realized that we were obviously now back on the road out of the village. It was painfully apparent that the computer had effectively negotiated a large U-turn without ever telling us that such was always its intention.

That is when all trust was lost between myself and the deceitful computer. Our deadly relationship began in earnest.

Despite the continual battle with the rapidly turning psychotic computer, our time in the French Alsace region was enjoyable, although there was one errant motorcyclist who probably wishes that we had left the area earlier. Not that our vehicles ever actually impacted, but it was close, I must admit. I still for the life of me cannot figure out why the rider felt that he had the right to go down a one-way street in my direction. After all, he had a motorcycle and I had a car. One of these days, I will begin to figure out all of these crazy road signs and convoluted French

right-of-ways.

Brenda and I eventually left France, crossed the Rhine River, and entered southern Germany. In short order, we raced through the Alps, truly enjoying the advertised, high-speed handling characteristics of the BMW, negotiating treacherous mountain roads, while a very long line of vacationing caravans snaked slowly behind us. I figured that we were involved in some sort of a parade, because of all the honking and finger waving which was taking place. Fortunately, by then, I had become used to the finger waving and realized that it was simply some sort of universal sign reserved especially for foreign drivers in Europe.

The next several days were spent exploring the Swiss and German Alps, verbally tussling with irate Swiss border guards, who were upset because I could not speak either French or German to their liking, and desperately trying to find suitable lodging with space for two bleary-eyed, paranoid travelers. Through all of this, my daily battle with the satanic computer waged relentlessly onward. No longer a nuisance, it had become an epic battle of inherent good versus unbridled evil. The only issue remaining to be decided was which of us was "good" and which of us was "evil." To my dismay, the computer seemed to be winning more often than not on that issue, as well.

On one occasion I became particularly incensed with the computer. My patience exhausted, I openly engaged in computer abuse. In short, I lost it. Repeatedly slamming my fist on the dash of the car, I screamed in desperation for the computer to be quiet. My knuckles throbbed and my head ached, but my time-proven tactic worked. Finally, the cybermenace actually understood me and did not speak for the rest of the day. Noting the computer's uncharacteristic extended silence, Brenda remarked that I had hurt the computer's feelings. The computer was "pouting." As an aside, Brenda quietly suggested that I had better treat it with more respect in the future or it might abandon us completely, or worse yet, try to kill

The next day, however, when I started the vehicle, the demonic computer was back in full power, once again instructing us to drive either into a river, a lake, or off the side of a cliff. No doubt about it: it

clearly was possessed. From then on, I propped a chair underneath the hotel doorknob each night before going to sleep--just in case. Not that I actually ever believed in evil computer spirits, of course. But, then again, why take chances in foreign countries, especially Germany?

Eventually, our exciting adventure came to a close. On the trip back to Frankfurt, I was able to "open the car up" and actually enjoyed the thrill of a high speed drive, being passed only by the occasional vanload of nuns. Surprisingly, as we approached its home, the car almost naturally picked up speed.

Arriving in the Frankfurt airport parking garage, which was a feat in itself, we eventually located the turn-in area for the rental car. As I killed the engine one last time and Brenda unclenched her fists from the armrests, we were met by a very keen-eyed parking lot attendant who immediately attempted to argue with me that a scratch which had previously been on the car was a new one created by me. I was successful in my defense and decided not to point out to him the other scratches that I had artistically created, or the tuft of wild animal fur that somehow got tightly stuck under the front suspension. For once, we were ahead in the game.

Quickly snatching up our baggage, Brenda and I left before the attendant could turn on the vehicle. I did not want the computer disgorging a long list of complaints, only to find myself later being charged in some German court, trying to explain that the injuries to the crazed computer had been inflicted in selfdefense only. Moreover, had I had been held accountable, I fully expect that I probably would have been contemptuously accused by the Germans of sleazy American "computer-bashing" techniques. Then again, when pressured by a courageous German cyber-defense attorney, I was confident that the computer likely would tearfully recount its version of the attack. If so, I undoubtedly would be able to have my charges reduced to a non-computer bashing offense in exchange for attending expensive computer education classes. After all, only through attending such compulsory re-education would I ever be able to break the growing cycle of vicious computer violence which has been handed down to me through my prior generations.



The height of frivolity in filing appeals

By Kenneth Kirk

Hit me again, Jimmy. Know what's been bugging me? Frivolous appeals, that's what. No, no, not that there's too many of them. That I might have to do them, that's what

See here's the deal: a criminal defendant's got a right to a lawyer, okay? Federal constitutional law and all that. Yeah, it's actually in there, this isn't something they made up out of penumbras and crap. The Sixth Amendment says they have the right to assistance of counsel. I suppose the courts have taken that a little farther than what the text says, since it doesn't actually say they get a free lawyer if they can't afford one on their own, but they read it that way anyway. And, the guy gets a free lawyer on appeal, too. That came down from the U.S. Supreme Court¹. At least for one appeal anyway, not necessarily forever.

So what do you do, as an attorney, when you look over the record and there just aren't any grounds for appeal? I mean, the client doesn't care, he's not paying for your time anyway, he wants you to file something. Maybe he even wants you to file it just so he can tie everybody up in knots; some of these guys are like that, you know. Pissed off at the system, want to make everyone dance for them, even if it gets them nowhere. Yeah, give me another one Jimmy, less water this time.

So you're thinking, the lawyer's gotta have some say in this, right? Tells the judge he can't do it, withdraws, lets somebody else worry about nounce you in court? Darn straight it. Nope. They say the judge has to make the final decision whether it would be a frivolous appeal. By the way, did you know there's a difference between a frivolous appeal and a meritless appeal? Well, you do now. Meritless just means it's a sure loser. The convict gets his appeal, and his lawyer, if it's just meritless,. The lawyer can only get out of it if it's completely frivolous. Well, apparently they think there's a difference. When you figure it out, you tell me, okay?

So the lawyer can withdraw, right? Just tell the judge there aren't any good grounds for appeal, it's frivolous, and the judge agrees, and lets you off the hook? Wrong again. Since the judge has to decide whether it's frivolous, the attorney now has to brief all those issues to show the court there aren't any good grounds. He has to make the argument against what his own client is wanting to argue. Well that's what I said! You're switching sides, selling out your own guy! How is that "zealous representation"? But that's what the U.S. Supreme Court says you have to do, either that or come up with a better solution². And Alaska just swallowed it whole, said if you want out, you have to file an "Anders brief" arguing against all your client's possible appellate arguments³. How do you explain that to a client: "I don't think you have any grounds for appeal, and if you insist on appealing anyway, I'll write a brief against you". That'll foster a lot of confidence in the criminal justice system. I mean, what is this, the Soviet bloody Union, where your own lawyer could get up and de-

it ain't! Go ahead and freshen that up for me.

So that's where we are now, Jimmy. Either you talk the guy out of appealing, or you turn coat on him and squish his case like a bug. No inbetween. But they're thinking about changing this. Well, hold on before you say that, it might not be so good. There's a proposal bouncing around between the various rules committees, that says the lawyer should just soldier on. Do the frivolous appeal anyway. Pretend there are some grounds.

There's a couple problems with that. You ever seen an appellate oral argument? Of course not, sorry. It's a pretty interactive event. You don't just make a speech to the court, they ask you questions. Lots of questions. Hard questions, about your case, the law, the facts, everything. Sometimes even stuff nobody brought up in the brief. I mean, how do you respond to those questions when the whole appeal is frivolous? "Well, gee your honor, that's a good point. Did you hear the one about the blonde stewardess?"

And they say you can pick and choose your points on appeal. How do you do that in this situation? Do you thoughtfully weigh the argument that the court is an unconstitutional court of admiralty because of the gold fringe on the flag in the courtroom, and decide that it's less frivolous than the argument that the U.S. doesn't exist because the constitutional convention was only supposed to revise the Articles of Confederation? Do you have to choose your client's frivolous points, or can you make up your own? And

what does it do to your soul, Jimmy, to sit around all day making arguments you know are crap? Wouldn't that do something to you? Would you spend three years in law school if you knew your professional life would be reduced to that?

There's one more problem. Under the ethics rules, a lawyer isn't allowed to make an argument unless it's non-frivolous⁴. There's an exception for criminal cases, but it only says you can insist that the prosecution prove every element. On appeal, you aren't just saying they have to prove it, you're affirmatively asserting that the decision should be overturned. You can't do that on a frivolous appeal, not without violating the rule. So you have the ethical rules that're enforced by the Bar Association saying you can't do it, then the Supreme Court saying you have to. What're they gonna do, force them to un-disbar you at gunpoint? Never mind, it's a long story.

Anyway, you can't do a frivolous appeal or you're violating the professional conduct rules and messing with your own head. You can't get out of it unless you're willing to backstab your own client on the way out the door. And they can't make it easier to get out because the U.S. Supreme Court says that would violate the guy's rights. It's enough to drive a

man to drink.

Speaking of which....

Douglas v. People of State of California, 372 U.S. 353 (1963)

² Anders v. California, 386 U.S. 738 (1967).

³ Griffin v. State, 18 P. 3d 71 (Alaska

App. 2001) 4 ARPC 3.1

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The Chief Justice at 30 years

When the powers that be requested of me that I hand out this 30-year pin

to a colleague so youthful, I asked could it be truthful, that he had all the time put in?

So I spent quite a while going over his file in support of this valuable prize for I remembered a tip from the venerable Gip, to

trust but to verify.

So here's a synopsis of the working biopsis of our guy of the accolades.

Follow along and see, right or wrong, if he should receive your applause.

As a clerk and a crony for chief justice Boney his listening skills came to

For two years there, through foul times and fair, he studied the uses of

Then service he rendered as a public defender, for two years he put in his

For the downtrodded and the merely besotted, he made the town safe for

With a shifting of gears for another two years he ascended the district court hassock.

Though sometimes routine, his work there was keen, and his judging was sort of a class act.

He gave up the garter for President Carter, he changed into a federal

Soon Jimmy was out but the years there don't count, and next was the court of appeal.

On the bench intermediate with firmness and fiat he presided for 17 years, where counsel were 'nointed with questions so pointed, some struggled to fight back their tears.

Then Governor Knowles had him change roles to that of a high magistrate.

and his seven year tour in this sinecure has brought my researches to date. So, Chief Justice Bryner you're the justified winner of the 30-year pin and

and if not quite the nicest, it's the state's fiscal crisis that prevents us from giving a watch. --Warren Matthews, 4/29/04



Justice Bryner at entry to the Bar