The Alaska BAR RAG

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2004 Convention! — pg. 17

- **Cutting-Edge CLEs**
- **Convivial Colleagues**
- **Annual Awards**
- **Trade Show**
- **Distinguished Speakers...** including Judge LeRoy F. Millette, Jr., Presiding Judge in the John Muhammad "Virginia Sniper" trial

Parting company:

Who gets what when lawyers & clients split?

By Mark J. Fucile

When a lawyer and a client end their relationship in midstream, questions frequently arise over who gets what in the file. The Alaska Bar has three principal ethics opinions that deal with these issues. The first, Ethics Opinion 95-6, addresses a lawyer's possessory lien rights over the client's file. The second, Ethics Opinion 2003-3, covers file transition generally. The third, Ethics Opinion 2004-1, applies the other two in the context of expert and investigators' reports. When read in concert, 95-6, 2003-3 and 2004-1 offer very practical guidance on the interplay between attorney lien rights and a client's need for the file, the parts of the file that a lawyer must return and the portions that the lawyer can retain and who pays for copying the file. All three opinions are available on the Alaska Bar's web site at www.alaskabar.org.

Lien Rights

95-6 outlines a lawyer's possessory lien rights over a client's file to secure unpaid fees. Under AS 34.35.430, a lawyer may hold a client's file until the client pays the lawyer. At the same time, Alaska RPC 1.16(d) requires a lawyer who is withdrawing to "take steps to the extent reasonably practicable to protect the client's interests." Putting the two side by side, 95-6 concludes that a client's need for a file "trumps" the lawyer's lien rights. In doing so, 95-6 relied on *Miller v. Paul*, 615 P.2d 615, 620 (Alaska 1980), in which the Alaska Supreme Court reached that same conclusion. Therefore, if the client needs the file, 95-6 counsels that the lawyer must turn it over notwithstanding the lawyer's otherwise valid possessory lien rights. In many instances, this is also the "smart thing" for the lawyer to do. By turning the file over to the client, the lawyer is not waiving a potential claim for unpaid fees. But, the lawyer will be avoiding a possible argument later by a disaffected client that the lawyer's failure to turn over the client's file promptly somehow damaged the client's continuing ability to handle the matter involved. This is more than an idle consideration. 2004-1 notes that the comments to ABA Model Rule

Continued on page 16

IN PURSUIT OF THE DIGITAL LAW OFFICE — page 25

Russian tours and trials

Alaskans advise Russians

By Richard Curtner

Judge Eric Smith and I had the privilege to represent Alaska in a week-long training seminar in Khabarovsk, Russia on the topic of "Jury Trials."

This program was entitled "Integrated Training Seminar on Jury Trials for Federal Judges, Prosecutors, and Advocates Under the New Criminal Procedure Code," and was conducted Nov. 17 – 21.

Our travel to the Russian Far East was made possible by FRAEC (Foundation for Russian-American Economic Cooperation). Judge Smith and I participated on behalf of KAROL (the Khabarovsk-Alaska Rule of Law Steering Committee), and specifically the KAROL Jury Trial Subcommittee. This seminar was a follow-up to the Jury Trial Conference hosted in Anchorage in September, in which a delegation of Khabarovsk judges, prosecutors and defense counsel observed

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FEATURED IN THIS ISSUE

Bar Convention '2 for 1' Special Offer! Details on page 23

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PRESIDENT'S COLUMN

Alaska bar dues to go up — effective next year

By Lawrence Ostrovsky

As I've discussed in my columns over the previous few issues, the budget dominated the Board's agenda this year. There was a retreat in September devoted to the long-term picture of the Bar's mission and functions. This was followed up by a November meeting, which focused on the 2004 budget. And, in January, there were more discussions of budgetary issues, culminating in a decision to raise dues $100, effective with the 2005 bar dues.

The Bar Association has been spending down its unappropriated capital fund. As many of you may recall, this is the fund that accumulated as a result of the 1993 dues increase. The unnapropriated capital fund was intended to supplement bar dues and eliminate the need for a future dues increases for approximately a decade. It has met that goal.

Recognizing that, by continuing current operations, this fund will soon be eliminated, one of the things that I wanted to accomplish as president was to establish a timely and deliberative process to consider the long term budget. Thus, over the previous nine months, the Board considered two fundamental questions: should the Bar Association continue to perform its current functions; and, is it operating efficiently?

"The budget dominated the Board's agenda this year. "

While the Board decided on some cuts and instituted some efficiencies, it did not support fundamentally changing the Bar's mission or organizational structure.

By maintaining the current level of Bar functions and services, the unappropriated capital reserve is predicted to run out in 2006. Thus, the Board could have waited until the 2006 budget cycle to address a dues increase.

The majority of the Board, however, felt that taking action a year earlier than required would provide the Bar with stable funding for many years before another budget increase must be considered. With the $100 dues increase beginning in 2005, the unappropriated capital reserve is now expected to last until 2009. This action is similar to the one taken by the Bar in 1993, when it last adopted a once-a-decade type dues increase.

In the end, the level of dues and the activities it supports, represent a philosophy about what the Bar should be doing and how it should be doing it. I've heard from some members who think the Bar should become a much more skeletal organization, and I've heard from other members who actively participate in sections, fee arbitration committees, or attend the convention and CLEs and find Bar functions valuable to their practice and the profession. The current budget, and the dues increase necessary to support that budget, represent the current Board's sense of what it takes to maintain an active Bar Association that provides a level of services both necessary and desirable to the practice of law in Alaska.

The Board represents a broad cross-section of attorneys and types of practice. It changes every year as old members go off and new ones come on. To the extent that members disagree with the Board's choices (and I know some do because I've certainly heard from them) I can only encourage them to run for the Board and take an active role in the future direction of their Association.

EDITOR'S COLUMN

Top signs the mentor you work with needs help

By Thomas Van Flein

Every field has a method for training new members. Marines have boot camp. Doctors have residencies. And new lawyers often get paired with partners who are supposed to be mentors. These senior lawyers are supposed to impart wisdom derived after 20, 30 or 40 years of practice. Mentors are supposed to teach you how things really work; the secrets never disclosed in law school and CLE seminars. Secrets not available in any store but sometimes available on late night TV.

But, it doesn't always work that way. How can a young lawyer tell if his or her mentor is really a member of the bar in good standing? How is one to know whether the senior partner who constantly asks questions, such as "What is justice?," is trying teach by the Socratic Method, or whether the partner really needs to know the answer to the question? Here are some indications that the partner you are mentoring with may need your assistance more than you need his:

(1) Believes "wrongful discharge" is a medical condition.

(2) When asked by the judge to enter his client's plea, says "kind of" before "not guilty".

(3) During voir dire, asks female jurors "So, what's <u>your</u> sign?"

(4) Gets so many letters from the bar counsel marked "personal and confidential" that you wonder if she's having an affair with Steve Van Goor.

(5) First thing he tells you is "Whatever you do, don't let Mike Wallace in here again!"

"Mentors are supposed to teach you how things really work."

(6) Lists the hours spent watching "Law and Order" when asking for her VCLE discount.

(7) During a dental malpractice case, yells at the defendant, "you can't handle the tooth!"

(8) Starts her portion of oral argument with, "Your Honor, . . . if that's your real name."

(9) Believes "stare decisis" is a constellation next to Cassiopeia.

(10) Yells "Bingo!" when the court calls Juror No. 5 to the box.

(11) Believes there is a "summary judgment" and a "wintery judgment."

(12) In closing argument for a breach of contract case, tells the jurors "if the glove don't fit, you must acquit."

(13) In a suit between two mimes, says "the evidence speaks for itself."

(14) Quotes an episode of "LA Law" when asked by the judge if she has any "authority" for that argument.

(15) Refuses to subscribe to Westlaw because "I practice up North."

(16) On resume, says he "successfully appealed several parking tickets."

(17) In trying to get a new surgical malpractice client to sign with the firm, boasts that he is "on the cutting edge of the law."

(18) Believes "injunctive relief" is a brand name for a laxative.

(19) Asks the court reporter, "what TV station do you work for?"

(20) Paid someone to take the ethics portion of the bar exam for him.

You are cordially invited by the Supreme Court of the State of Alaska to the installation of

Greg L. Heath

as Judge of the District Court of Alaska on the sixteenth day of April two thousand and four at three o'clock p.m.

Palmer Courthouse
Palmer, Alaska

CLE Course Materials available for free download on the Bar website

All CLE course materials two years old and older are now available for free on the bar website. For more information, please go to the CLE catalog at www.alaskabar.org <http://www.alaskabar.org>

The Alaska BAR RAG

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Publication Dates 2004*	Editorial Deadlines
January-March	January 15
April - June	April 15
July - September	July 15
October - December	October 15

*New schedule

Board of Governors meeting dates
April 26 & 27, 2004
April 28 - 30, 2004 Annual Convention (Anchorage)

December Poll Results

The poll results are in. In light of the money spent on investigating and handling baseless grievances (over 90% are dismissed), the question was posed whether there should be a filing fee for grievances to help defray some of these costs. The overwhelming majority of respondents stated that filing fees should be imposed and that disciplined lawyers should pay.

(1) Should the Bar Association impose filing fees in order to file a bar grievance?

YES	**77%**
NO	**22%**

Typical comments from those who were in favor of filing fees included: "Yes, there should be a filing fee for Bar Grievances. I think it should be $50."

Typical comments from those against a filing fee included: "I believe imposing a fee will not deter grievances, and it is not worth exacerbating the bad feelings lay people have about attorneys already . . . ."

100% of the respondents agreed that disciplined lawyers should have to pay some costs and fees incurred if a disciplinary action has merit.

Selected comments:

No, Bar Grievances should not have a filing fee.
Yes, disciplined lawyers should pay (but you'll probably not get a dime 'cause they're broke anyway).

— Mark Christensen

Yes, there should be a filing fee for Bar Grievances.
Yes, disciplined attorneys should pay.
Thanks for asking,

— Sarah Felix,

Yes, there should be fees.

— Ralph Ertz

No. Bar Grievances should not have a filing fee.
Yes, disciplined lawyers should pay.

— Carol Johnson

I wanted to expand on my responce to the poll, which was that there should not be a filing fee for bar grievances. I believe that imposing a fee will not deter grievances, and it is not worth exacerbating the bad feelings lay people have about attorneys already to charge them to file a complaint about those services. The current requirement that the grievance be verified may reduce the amount of frivolous grievances, and perhaps more than a filing fee might do.

At the same time, I do believe that disciplined lawyers should pay. To get that far in the grievance process, there is generally some passing legitimacy to the grievance. To be found "guilty" of a grievance means there has been a breach of an attorney's ethical responsibility, and I believe that responsibility should include some payment of costs.

Bar Letter

"Give me a fish and I eat for a day; teach me to fish and I eat for a lifetime." We are in communication with American Bar Association Section on Legal Education and Admissions to the Bar with the intent of starting a law school in Alaska as soon as September, 2004. This can only be accomplished if there are funding sources. There are many issues to address beginning with hiring a Dean as soon as possible. Just to get your competitive spirit going, what about having a competition to name the law school? We need a business office immediately. If your and/or your firm are interested in this long overdue effort, please contact us.

—Theresa Nangle Obermeyer, Ph.D.
www.tobermeyer.info

BAR POLL

Should Alaska have a law school?

Yes _____

No _____

Fax response to: 272-9586 or e-mail to: oregan@alaskabar.org

Editor's note: How about this for a name? "Just Another Third Rate Law School"

Paris in the off-season: Bon Appetit!

By S.J. Lee

There must be a down side to European travel during the off season, but during a recent trip there, I was unable to see one. My husband and I stopped over in Paris last month after 4 days in Birmingham, England, and a visit with an old friend in celebration of her simultaneous retirement and 60th birthday.

We stayed in a more residential section of the city shared by the "Tour Eiffel," on a street bordering Napoleon's palace and burial crypt. There were few people at our hotel, and during our entire visit we were overwhelmingly in the company of locals who spoke little to no English. Having brushed up on our bare basic French, we knew enough to say hello, good evening, thank you, and ask if anyone spoke French. It was enough to get us by, and making the effort seemed to go a very long way with them. It seemed that everywhere we looked, and went, there were gorgeous and huge palaces, museums, monuments of one sort or another, and grand architecture.

The temperatures ranged in the high 30's to mid 40's and no tourist spot was busy — we enjoyed a private tour on a very quiet day at the Louvre. Our tour guide was a doctoral student in art from the U.S east coast who had lived in Paris for 6+ years and whose in depth knowledge of art seemed endless. She provided fascinating detail, history, and the stories behind the fantastic works of art we viewed, and our level of appreciation and understanding of what we saw was immeasurably enhanced by her company. Of course, we took in the Mona Lisa, housed behind high security and bullet proof glass, and thanks to our guide I now know enough about it to appreciate it a great deal more.

Most annoying at that painting were the other tourists clustered there who wanted nothing but to get their picture taken in front of it, having no interest in the painting itself. Their attitude was very much that if you were there to take in the painting itself, you were in their way!

The "Tour Eiffel" was also lightly visited the sunny day we went.

We opted to first walk up several decks or so, taking in the growing view of the city as we went. There was actually room to sit with coffee at one of their viewing decks on the way up, admire the architecture and sheer magnitude of the structure, and watch the River Seine flow by. The line for the lift to the top was short and fast moving. The Musee d'Orsay was also lightly traversed with plenty of space to soak up the gorgeous Renoirs, Manets, Degas, and other impressionist art everywhere, as well as the beautiful old rail station it is housed in.

What a treat not to have to compete with other tourists for space and time and to hear French all around us, including from the small school children brought in for field days at the museums!

Paris is famous as the city of lights, the city for lovers. But as fabulous as everything was, what we fell most deeply in love with was the food and its incredible quality! Small specialty stores and shops everywhere, selling only gourmet breads, or pastries, or only wine, or only chocolates, or just cheese but hundreds of different kinds; stores selling the highest quality meats, sausages, and pates, it went on and on.

We were very lucky to have a lovely open marketplace just around the corner from our hotel my husband found one morning while looking for a coffee. Frequented and owned by locals, we had pastries there every morning, and on three nights out of 4 we opted to hand pick a fabulous repast to dine in our room instead of going out.

Even the humblest cafe's coffee was head and shoulders above what we are used to. At a lovely cafe in the Latin Quarter with a huge picture window perfectly framing Notre Dame, we twice ordered simple coffees with cream which brought us shining little silver pots of espresso coupled with silver pitchers filled with hot, steaming half and half to mix as we chose.

This was the norm, though not always served so fancily. It was all too easy to get used to — what a culinary let down returning to the States was for us!

We will go out of our way to stop again in Paris in the future when en route to another destination. Hopefully, it will be during the off season again. Paris-Ooooo la la!! Bon appetit!

ALL MY TRAILS

There's more than superstition for advocates in 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."

•

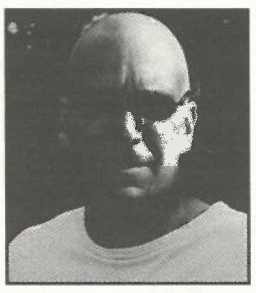
Trial lawyers and judges are a superstitious lot. Here is how the superstition gets started.

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.



"Of course, being human, the lawyer falls in love with the facts, law and arguments he found or 'created.'"

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

> 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 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, he or she will feel quite comfortable overturning the jury's decision.

In fact, neuro and cognitive psychology supports a non-superstitious view of the jury—the same view held by the framers of the Constitution. 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 effective for certain problems than others. 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.

I may use different arguments trying to persuade my wife, my adult daughter, my 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 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*.

Practice tip: Find a good proofreader for $25 per hour

Attorney loses $31,350 for sloppy briefs

A U.S. magistrate judge took the unusual action of slashing an attorney's fee award in late February for what he considered abominable and careless writing on behalf of the plaintiff.

U.S. Magistrate Judge Jacob P. Hart reduced attorney Brian Puricelli's fee by half--from $300 to $150 per hour--for that portion of a case attributable to brief- and motion-writing. The lawsuit in question pertained to a former Philadelphia police officer who alleged he was harrassed and fired for being a whistle-blower and "ratting out" his partner's alleged theft of a cell phone.

Although Hart found Puricelli's courtroom work "smooth" and "artful," the magistrate judge's 12-page opinion for attorney's fees award in *Devore v. City of Philadelphia* said, "Mr. Puricelli's complete lack of care in his written product shows disrespect for the court. His errors, not just typographical, caused the court a considerable amount of work. Hence, a substantial reduction is in order. We believe that $150 per hour is, in fact, generous." And, he said, the attorney's writing in an amended complaint was "nearly unintelligible."

During the proceedings, when defense lawyers complained that the typographical errors in Puricelli's work were "epidemic," Puricelli's response included several more typos, Hart said. The judge quoted a paragraph from Puricelli's response, adding "[sic]" after each typo. Puricelli wrote:

"As for there being typos, yes there have been typos, but these errors have not detracted from the arguments or results, and the rule in this case was a victory for Mr. Devore. Further, had the Defendants not tired [*sic*] to paper Plaintiff's counsel to death, some type [*sic*] would not have occurred. Furthermore, there have been omissions by the Defendants, thus they should not case [*sic*] stones."

And, in his most recent letter to the court, Hart noted, Puricelli misspelled the judge's name, referring to him as the "Honorable Jacon [*sic*] Hart."

After trimming 32 hours from Puricelli's fee petition, Hart awarded the attorney more than $172,000 in fees--for 209 hours (his written work) at $150 per hour and 470 hours at $300 per hour for proceedings and appearances, a reduction of $31,350.

(The jury found on behalf of plaintiff, with the judge awarding the former policeman $354,167 for salary and damages. He declined to order the city to rehire the plaintiff: "After all the bad blood that has been exchanged between the plaintiff and the defendants, we do not believe it wise to return Mr. Devore to his former position," wrote Hart in a second opinion for plaintiff award.)

--Reported by Shannon P. Duffy in The Legal Intelligencer, Feb. 25, 2004.

ALASKA'S BAR FOUNDATION

IOLTA grant applications due no later than April 2, 2004

By Kenneth P. Eggers

The Alaska Bar Foundation IOLTA program funds are designated for the following purposes: Support of legal services to the economically disadvantaged and programs to improve the administration of justice.

The Foundation is soliciting proposals for fiscal year 2005 (July 1, 2004 to June 30, 2005) from organizations to supplement legal services programs for the economically disadvantaged and programs to enhance the administration of justice. The Foundation asks lawyers who are involved with organizations that meet the Foundation's grant guidelines set forth below to make those organizations aware of this solicitation. However, please be advised that due to the low interest rates being paid on lawyers' trust accounts, the Foundation estimates that it will only have $60,000 available for grants for the fiscal year 2005. This compares to $77,500 for FY'04 and $121,000 for FY'03.

The following grant guidelines will be utilized by the Foundation.

1. The Foundation does not intend to use its limited IOLTA resources to replace existing funding.

2. A primary function of an organization seeking a grant must be consistent with the guidelines of the Foundation for IOLTA program monies.

3. Grant requests must be consistent with the tax exempt public purposes prescribed by the Foundation *and with applicable Internal Revenue* Code regulations and rulings relative to Section 501(c)(3) organizations.

4. Generally, the Foundation will not be the primary source of financial support for a sustained period of time for programs to improve the administration of justice. The applicant should demonstrate an ability to function eventually without the assistance of the Foundation.

5. The Foundation may require matching funds as a condition of the grant in order to broaden the base of community support.

6. The majority of the available grant funds will be awarded in June of each year. Each grant recipient shall be entitled to only one (1) grant in each granting year unless the grantee can show special circumstances necessitating a second grant.

7. The grant funding cycle will normally be a 12-month period. Recipients must reapply each year if additional funding is desired.

8. The Foundation will use a significant portion of available funding for programs delivering legal services to the economically disadvantaged and will give highest funding priority to those programs.

"The Foundation is soliciting proposals for fiscal year 2005 (July 1, 2004 to June 30, 2005) from organizations to supplement legal services programs for the economically disadvantaged and programs to enhance the administration of justice."

9. Significant weight will be given to a history or a clear ability of an applicant to provide a successful program.

10. Consideration will be given to the proportion of clients to be served within a geographic area and the breadth of services proposed to be offered.

11. The Foundation will rely on the written demonstration submitted by the applicant, thus the applicant must present the Foundation with complete, thorough and accurate information.

12. The Foundation will not make grants to: individual persons; religious organizations; political campaigns; organizations that are designed primarily for lobbying; organizations for the sole purpose of funding litigation; governmental entities; endowment scholarship or fellowship programs; continuing legal education programs for lawyers; lawyers in the private practice of law; law enforcement or correctional organizations; or law schools.

Grant applications for the July 2004 through June 2005 funding cycle must be received by the Alaska Bar Foundation, at 550 West Seventh Avenue, Suite 1900, Anchorage Alaska 99501, or P. O. Box 100279, Anchorage, Alaska 99510, no later than 5:00 p.m., April 2, 2004. Upon submission all proposals become the property of the Alaska Bar Foundation which has the right to use any or all ideas presented in any proposal submitted, whether or not the proposal is accepted.

For grant applications or further information, contact Kenneth P. Eggers, president, Alaska Bar Foundation, (907) 562-6474. Applications will also be available on the Alaska Bar Association's web site – www.alaskabar.org.

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.

Filling the exam book

A letter, and a reprieve for a failing law student

By Lawrence Savell

(Reprinted with permission)

Dear Professor Rosenstein:

Let me begin by thanking you very much for the insight, enthusiasm, and energy you clearly put into your teaching of Introductory Taxation this semester. It was very obvious to me that you enjoy this course, and that you make an extra effort to reach out to all the students in your class, to ensure that they understand the concepts being presented.

I am looking ahead with a considerable degree of mixed feelings to graduation next week. While it would be a relief to have this three-year and six-digit odyssey behind me, I am a bit apprehensive of the next turns of the road: the bar exam and, finally, actual law practice. I do feel that the Law School has prepared me well for both these challenges, although I suspect perhaps more completely for the former than the latter.

Like many of my classmates who desired to pursue such a path, I was thankfully successful in landing a coveted associate position at a prominent law firm. I appreciate that the prestige and reputation of the Law School significantly helped make it possible for my efforts to translate to such a job, which might during the course of my projected life span actually allow me to pay off at least the majority of my student loans.

From growing up watching rerun episodes of *Perry Mason*, spending a couple of summers at firms doing primarily litigation work, and, *perhaps most significantly*, being told throughout my life that I can be difficult to get along with, I plan to be a litigator. Nevertheless, I thought it useful to be exposed to a broad variety of legal disciplines, which is why I picked for my last four credits your Introductory Taxation course. Given that purpose, I did think it prudent to take the class on a pass–fail basis.

I concede and apologize for the fact that I inordinately focused my efforts this semester on the courses and activities that most directly related to the work I plan to do, in particular the moot court competition and the law clinic. And I also confess that I did allocate my energies and time more to those courses that I was taking for a letter grade, although I was convinced that, after seven years of college and grad school, I knew what I needed to do and what kind of exam essays I needed to write to comfortably earn that critical "P". All of this had the unfortunate result of my not always being prepared for your class, and for actually missing class on far too many occasions.

What I obviously regret most was missing your last week of classes, including the class in which you apparently advised that the final exam, which was placed before me over an hour ago and remains untouched, would be not an essay exam, but a computation exam requiring specific numerical calculations with particular results.

I have often heard people speak or write of time standing still, but I have never experienced or fully understood that concept until this moment. But I am experiencing and understanding it incredibly well now. As I look around this massive exam room (temporarily renamed during testing periods to emphasize it is no longer a classroom where knowledge could be obtained), with its cathedral-like ceilings and windows, I see scores of my classmates scribbling furiously with their originally sharpened pencils and pounding relentlessly the keys of their trusty calculators.

All of this had the unfortunate result of my not always being prepared for your class, and for actually missing class on far too many occasions.

Mine is the only head that is not looking down.

Knowing that passing this course would provide the last credits I needed for what I believed to be the technicality of graduation, I had prepared for it with no less (and arguably even a bit more) rigor than I had for other classes I have taken with such a grading option. I was prepared to discuss eloquently the nature of tax law, and the positive and critical public and social policies that often (but not always, regrettably) underlie it. For each of the concepts you taught, I had come up with what I thought were compelling examples of the arguments and implications on both sides, and airtight analysis to support the conclusions I had reached about them.

But these efforts are of no moment now. No examples, reasoning, or creativity can guide my pen (in my ignorance, I didn't even bring a pencil) to generate the supportive calculations and magical final numbers you seek. I am at sea, with (pursuant to your direction, also apparently issued during those last classes, and abruptly enforced upon my arrival in this room) no treatise, outline (original or commercial), or notebook with which to paddle to safety.

I hear nothing except the sound of my own breathing.

And so I am doing the only thing I can do: I am filling my exam book with this desperate, and knowingly futile, plea for help.

I have no illusions that you will help me. Preparation is (usually) rewarded with success, and failure to prepare adequately is (usually) met with the array of sanctions designed to deter such behavior from occurring again in those who are properly fearful.

I cannot begin to imagine (although I of course am) how my family, and my friends, will react to my getting a failing grade and not graduating. I've recklessly let those who care about me down—those who have sacrificed to give me opportunities that they were not given, those who encouraged me and who looked forward to rejoicing in my having succeeded. And even if they are charitable, I have no delusions that my law firm (or any law firm) would be.

How could I have been so stupid? I think of the fallen trapeze artist in the Judy Collins song, "Send In The Clowns," and ask myself how I could have lost my balance this late in my academic career, literally when the bar is in sight.

Finally, I do thank you for reading this, if indeed you have (surely many in your position would have stopped and slapped on the "F" pages ago). I'm not sure I could have made it through these four hours without writing *something*, without being able to concentrate on something other than trying to work up the courage to leave this room early, perhaps four hours early.

I suspect that this letter (or whatever it is; it surely is not the answers to the questions you have asked) at this point may be more for me as an exercise in self-flagellation and self-analysis than it will be for you in making any decision other than the expected one. But at least my exam booklet is not blank. I can for the moment join my classmates who are now rising to hand in their calculation-filled volumes, all of whom appear to be smiling, presumably through some combination of glee and relief. I obviously feel neither. I feel only emptiness.

Sincerely yours,
Nicholas Bennett

Dear Mr. Bennett:

This is the first occasion in my 45 years of teaching that I have returned an exam booklet to a student, but I thought it necessary and appropriate to respond to your words directly and in kind.

Obviously, as a teacher, I am dismayed that you did not devote the necessary efforts to my class. No professor wants to acknowledge that a student has been a failure in his or her course, because, if even to a small degree, it means the teacher has also failed. But students do fail, and teachers do issue failing grades, no matter how reluctantly.

I am not completely unsympathetic to your situation. I have to confess that, even to this day, and although there is no personal historical basis for it, I occasionally (and usually during particularly stressful periods) have the recurrent and still horrific nightmare in which I find myself in a final exam for which I am totally unprepared. Perhaps all lawyers do.

As you may or may not know, this was also my last class at the Law School. Last December, after 52 years of marriage, my beloved wife, Faith, passed away. I have tried to carry on the routines of my life, in particular the teaching that has for so long given me so much pleasure and satisfaction, but I have found that it is impossible to experience those feelings without her.

When I first took this position, my wife, a very charitable and forgiving person, asked me to make her a promise: that I would never fail a student. And, frankly, before this semester, there was never really a situation where I had to test the resolve of that oath. But obviously there is now.

But there are many oaths in my life. Another is the oath to maintain the standards and principles upon which this institution and others like it are built, and by which students as well as faculty strive to conform their behavior. I take these requirements very seriously, as we should.

Thus, I cannot simply and offhandedly say, "Oh, what the heck!" But perhaps the analysis should not stop there.

I do believe you have done a degree of preparation for this exam, although obviously you have not done enough. In terms of its relation to the correct responses, your answer booklet unavoidably warrants a failing grade.

But you have taken this opportunity to assess and discuss a variety of other matters. Although they bear no reasonable relation to Introductory Taxation, they (albeit belatedly) reflect your recognition and understanding of the need for proper preparation and diligence, the responsibilities inherent when others depend upon you, and the value of balancing out competing demands. You echo feelings of despair that countless clients who find themselves in apparently hopeless situations experience, until they are comforted by the support of knowledgeable and reliable counsel on and at their side. And you present your sentiments in a reasoned and compelling way.

I have always felt that those who want to be litigators should, as part of their training, have their own deposition taken, so they can feel firsthand the terror a first-time witness experiences. Those who plan to be criminal defense counsel should spend a few hours being "processed" in the criminal justice system, so that they can gain a modicum of understanding of what their clients are going through.

As you may be aware, during my career I have, in addition to this course, also taught a variety of small-group practical and practice-oriented seminars, on such subjects as Legal Negotiation, Legal Ethics, Lawyers and Their Clients, Equity, and Remedies. It could be argued that you have demonstrated that you have learned much of what I have attempted to convey in these seminars, although of course you have technically never taken them. And so, with perhaps a generous helping of logical extrapolation, I can justify viewing your exam as meeting the requirements by which I could have issued a passing grade in a couple of those two-credit courses.

So, following that reasoning, I believe I can, in good conscience, essentially transfer these credits and pass you in this class.

But please do not consider this a free ride. I strongly hope you will appreciate it as one who suffers a sudden but thankfully transitory chest pain heeds it as a fortuitous warning sign, and does everything in his power to prevent himself from experiencing such terror again. Your clients and your colleagues will be relying upon you, and you cannot let them, or yourself, down again.

You cite songs; I cite movies. I find myself watching a lot of them lately, and what comes to mind is the scene in *Wall Street* where Hal Holbrook's fatherly character advis-

Continued on page 7

ESTATE PLANNING CORNER

Term vs. cash value life insurance

By Steven T. O'Hara

Should clients buy term life insurance, rather than life insurance that develops a cash value?

The decision of what type of life insurance to buy is not always simple. The choice is a personal decision, dependent on case-by-case facts.

Consider a client who is 33 years of age. She is a single mother with two young children. One child is disabled and may never be self-supporting.

The client has a secure, well-paying job, and she believes she would be able to afford the premiums on a cash value insurance policy. Despite her wealth, both current and projected, the client believes her family needs insurance on her life in the amount of $100,000. She believes this is a long-term need, perhaps lasting her entire working life.

Under such circumstances, with a secure income and yet a long-term insurance need, the client may prefer cash value life insurance.

If the client purchases $100,000 of term insurance on her life, the initial annual premium, including disability waiver, will be $146. This quote is for traditional term insurance with premiums that increase each year as the client gets older. The disability waiver provides, in general, that no premiums will be required under the policy during any period the client is disabled. See the July-August 1992 issue of this column entitled "Disability Insurance" (a copy may be obtained from Karen at 907-276-1711).

With annually-increasing premiums for the term insurance it is projected that by the time the client reaches age 65, she will have paid a total of $11,762 in premiums. Her policy will have no cash value, and her coverage will cease if she discontinues paying premiums. Indeed, under this particular term policy, no life insurance would be provided beyond age 75.

By contrast, if the client purchases $100,000 of cash value insurance on her life, the initial annual premium, including disability waiver, will be $1,077. This quote is for traditional whole life insurance.

It is projected that by the time the client reaches age 65, she will have paid a total of $34,464 in premiums. Note that the projections do not take into account the time value of money -- in other words, that premiums are paid at different times.

With a whole life policy, the client can expect the policy to generate a material cash value, which accumulates tax free (D. Westfall & G. Mair, Estate Planning Law and Taxation at 5-5 (2nd ed. 1989)). Projected cash value at age 65 is $96,748, while the guaranteed cash value at age 65 is $43,259.

"The decision of what type of life insurance to buy is not always simple. "

With the reputation and history of the insurance company issuing this cash value policy, it is projected the company will have an annual surplus from which it will pay dividends to policyholders. If these dividends are used to purchase paid-up insurance, it is projected the client will have $200,353 of life insurance at age 65. Also at that age it is projected that the annual dividend will have exceeded the annual premium for so long that the client will not have to worry about losing the coverage if she decides to stop paying premiums.

In other words, the decision concerning what type of life insurance to buy is not black and white. It is generally dependent on two basic issues. First, can the client afford the large initial premiums of cash value insurance? Under no circumstances should the client compromise the need for a certain amount of life insurance with the desire to purchase a cash value policy.

Second, how long will the insurance be needed? After deciding this issue, the client should run the numbers based on realistic projections and see which policy is less expensive over the period the insurance is needed.

Related to the issue of how long the insurance will be needed is the argument that the client can earn more money by purchasing term insurance and investing, on her own, the money she saves in lower premiums. This is a good argument under certain circumstances, provided the client actually invests the premium savings rather than spends them. Human nature being what it is, some clients prefer the forced-savings aspect of cash value life insurance.

Also related to how long the insurance will be needed is the client's attitude toward risk. A significant risk is that the client may be unable to accumulate on an after-tax basis sufficient resources to meet her and her estate's liquidity needs. Keep in mind that if the ownership of life insurance is properly structured, the proceeds are not only income-tax free but estate-tax free as well. See the March-April 1993 issue of this column entitled "Life Insurance Ownership" (a copy may be obtained from Karen at 907-276-1711).

Another significant risk with term insurance is that the client may drop needed coverage in later years when the term insurance becomes expensive. In purchasing a term policy the client may think the coverage is needed only for a limited time. My experience with clients, on the other hand, is that generally the need for tax-free cash never goes away -- the reason for the need just changes as we get older.

Accordingly, a risk-averse client may wish to acquire and pay up a cash value policy while she can, so in later years she will not have to worry about losing the coverage.

As important as the choice of what type of insurance to buy is the choice of from what company the policy should be bought. The policy's projections are only as credible as the assumptions on which they are based, including the company's ability to obtain a consistently high investment yield.

As minimum due diligence in evaluating an insurance company, the client needs to obtain the company's ratings. There are a variety of rating companies available, including: A.M. Best Company (908-439-2200, ambest.com), Moody's Investors Service, Inc. (212-553-0300, moodys.com), Standard & Poor (212-438-2774, standardandpoors.com), Weiss Research, Inc. (800-289-9222, weissratings.com), and Fitch Ratings (212-908-0800, fitchratings.com).

Not all insurance companies are rated by all raters, but a wise client will want to review as many ratings as are available. The ratings will be of assistance in determining what further due diligence, if any, is advisable.

The costs and projections discussed in this article were obtained from a large insurance company offering policies in Alaska. I chose this company because I have a female client who in July 1992, at the age of 33, purchased from the company a $100,000 traditional whole life insurance policy like the one discussed above. To date, the policy's cash value exceeds the premiums paid, dividends have purchased paid-up additional insurance, and the client is happy.

A letter, and a reprieve

Continued from page 6

es the about-to-be-arrested young hotshot played by Charlie Sheen: "Man looks in the abyss, there's nothing staring back at him. At that moment, man finds his character. And that is what keeps him out of the abyss."

Stay out of the abyss.

And perhaps down the road, when you are a senior partner or a general counsel (or even a law professor), and a young underling messes up, you will give him or her similar heartfelt advice and a similar second chance.

That's all I wanted to say. Please read these words carefully (as I suspect you have), and perhaps read them a second time. Then find a nice open space away from other combustible materials and burn this booklet, so that the only record of its contents will be in your and my memory.

And never forget them.

Have a great career, and congratulations on your upcoming graduation.

Sincerely yours,

Professor Simon Rosenstein

Lawrence Savell is counsel at Chadbourne & Parke LLP in New York. This article originally appeared in Washington Lawyer.

New views, old laws, on Workers' Compensation

By Joe Sonneman

The new view

A general practice gives one a fresh eye, untainted by experience, in looking at situations so many other, wiser, old hands saw and accepted as the legal landscape long before. Photographers often try to see the new, or new depths, in commonplace sights of everyday life, and I am a photographer, so I find this new view concept familiar, even if fresh looks occur less frequently to others. So here's a new view of Workers Compensation.

Workers Compensation basics

I'm on only my second Workers Compensation case--more complex than my first, with areas new to me. So with the aid of Larson (*the* treatise in Workers comp), may I offer some basic concepts for those readers new to this field?

The overall concept

Workers Compensation is one of the oldest forms of social insurance.

The concept is--given that workers get injured while working--that employers should charge a bit more for their goods and service, and use that extra income to buy workers comp insurance.

In exchange for a much greater likelihood of receiving compensation via insurance, workers get somewhat less than total compensation[1] but need not prove employers negligent, while employers are protected against employee suits, provided the employer bought workers comp insurance.

If an employer has too many claims because of unsafe work practices or conditions, the employer's workers comp insurance rates rise, so self-interest (rather than regulation alone) should lead employers to improve work practices and conditions, to cut their insurance costs. A party who reaps the benefit of anothers dangerous work should pay the actual cost of human injury that the work entailed.[2]

Four-way classification

As workers comp developed in Alaska and other areas, employee injuries and resulting disabilities and compensation is only for those work-related and work-aggravated disabilities which reduce earning power (not usually, for example, for pain and suffering)

Laws classified those disabilities and compensations four ways: temporary partial, temporary total, permanent partial, and permanent total disability. People engaged in workers comp tend to initialize these classifications as, TPD, TTD, PPD, and PTD. Remember, that's only for injuries and conditions, i.e. employees must still be alive to collect any of these compensation types. If the worker dies because of work-related accident or occupational illness, then the estate or heirs may be eligible for a death benefit, calculated in a completely different manner.

Something missing

Something seems missing from PTD {permanent total) compensation. Several somethings, in fact. Suppose, which perhaps is not far from the truth, that younger workers tend to have riskier jobs, with older workers migrating towards desk jobs with no heavy lifting, etc. Or just suppose that by mere chance, an employee aged say, 25 to 30, receives a work related injury which leaves the worker permanently and totally disabled. Also assume for simplification's sake, that everyone agrees that the injury is work-related and that the resulting disability is indeed permanent and total with no hope of rehabilitation.

Less than total compensation

A permanently totally disabled worker is entitled to a certain pay level, usually based on a percentage of that employee's actual earned pay over the recent past[3], for the rest of the employee's life. That compensation will not be equal to 100% of the employees actual past pay. As noted, the employee gives up the right to get 100% in exchange for the greater certainty of getting compensation and in exchange for not having to prove employer negligence.[4]

No inflation indexing

But remember, the employee is, let's say, aged 28. He or she perhaps has a normal life expectancy of living to perhaps age 78, that is to say, for another 50 years. But the compensation rate is fixed, and not indexed to inflation. Given the reality of inflation averaging 3% per year,[5] the $20,000 (or other amount) that might have seemed adequate compensation in 2004 will probably be well below poverty levels in 2024, let alone in 2054.

For another example, just imagine getting in 2004 what was thought a good income in 1964!

Inflation not given up

Don't think that this lack of inflation-proofing is something that employees willingly or even theoretically give up when they accept the higher probability of some compensation through Workers compensation plans. No, the only "something given up" is the difference between 100% compensation and the lesser compensation amount which the law allows.

No part of workers compensation theory says that workers also must give up the right to have their already-limited compensation in later years mean the same in real economic terms as their already-limited compensation did at the time of the disabling injury or condition. Workers presently get no real or theoretic compensatory benefit for this inflation loss. But since Alaska inflation-proofs the Permanent Fund,[6] Alaska should also inflation proof long term Workers comp PTD (permanent total disability)payments.

Some cases--even workers comp cases--already say inflation should be taken into account. *Stone v. Fluid Air Components of Alaska*, 990 P.2d 61, 626 (Alaska 1999), citing *Wainwright v. Wainwright*, 888 P.2d 762, 765 (Alaska 1995) to suggest a party should not have inflationary effects apply only against them.[7]

Indeed, our Court in *Morrison v. State*, 516 P.2d 402, 407 (Alaska 1973) cites *Beaulieu v. Elliott*, 434, P.2d 665, 671 (Alaska 1967) to say:

Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us in the future.

So this neglect of inflation on PTD payments seems just an oversight, and one which the Legislature--perhaps with labor union and worker encouragement--could and should repair, by requiring inflation indexing for workers permanently and totally disabled. (Maybe also for workers permanently disabled, even if not totally, but permanent partial disability compensation often occurs in a lump sum, or for a short time period, when inflation is perhaps not so much a factor).

Remedial court cure

This article is mostly about permanent total disability, PTD. Because Workers Compensation is statutory and not part of the common law, perhaps the Legislature alone can fix it.

On the other hand, considering that Workers Compensation is already remedial in broad terms, perhaps the courts can follow their standard of interpreting even a statutory system like Workers Compensation broadly, to give the full remedial effect intended, without requiring legislative action.

So the courts said of a similar law (AS 36.95.010): [T]his legislation is a remedial act for the benefit of construction workers, [so it] is therefore liberally construed to effectuate its beneficient purpose.(8) Note also that several courts have refused to strictly construe remedial legislation merely because that legislation punishes wilful violations by imposing criminal penalties.[9]

More specifically:

> The Workmen's Compensation Act was enacted for the benefit of the employee. The Industrial Accident Board is a state board created by legislative act to administer this remedial legislation, and under the act the Board's first duty is to administer the act so as to give the employee the greatest possible protection within the purposes of the act.[10]

Even in Territorial days--instructively if not compellingly--the Alaska District Court affirmed the employee's lawyer who said, citing 58 Am. Jur. 995:

> Although it has been held that the provisions of workmens compensation acts are to be strictly construed, inasmuch as the provisions thereof are in derogation of the common law, the rule of liberal construction has been very generally applied upon the ground that such legislation is remedial in character.
>
> The Court went on to cite further:
>
> Why construe narrowly a statute which courts construe liberally? A less liberal rule applied to claims arising under our Workmens Compensation Act would do violence to the beneficient purpose intented to be effectived by the act. Liberality of construction of the Workmens Compensation Act has been firmly established and runs consistently through our cases on the subject.[11]

No-promotion estimate

Second, the standard Workers Compensation plan only compensates the worker at the employee's level at the time of the accident or illness. Taking again our example of a 28-year old worker, that employee in a normal career would probably move up over time, from job to job, perhaps even to supervisory positions in later years.

Too speculative, you say? No, this is a field where statisticians and actuaries like to work. Actuaries should be able to determine "standard career paths," and, in the ordinary course of actuarial science, should be able to calculate the 28-year-old worker's likely future earnings with as much accuracy as they estimate anything else.

The statistical "law of large numbers" gives actuaries those definitive data Courts so desire. Given that the law of large numbers works in some areas (like life expectancy), we should think it works in other areas also(like probable promotion paths for many people over 50 year working careers).

Another oversight

This absence of promotion likelihood, too, seems an oversight. The employees already give up the right to get 100%, but nothing in Workers Compensation theory says that workers also give up the right to compensation for higher-paying jobs which in all likelihood they would have earned through promotion, had it not been for their work-related accident, illness, and disability.

Again, the Legislature could and should enact remedial laws, unless the courts can resolve this issue also via the standard judicial method of broadly interpreting remedial laws.

Structured settlement situation

Third, something seems to have gone seriously wrong with Workers Compensation theory once one understands how insurers actually pay for a permanently disabled worker's compensation. Often, for tax purposes, that payment is through a structured settlement

Interest, forward & back

All readers are familiar enough with the concept of interest--the varying price the world pays people for forgoing the present use of their own money. You put $100 in a bank for a year, and you get $101 or $105 or $110 back at the end of the year, depending on the interest rate at the time. Fine.

Think also, though: How much money would you need to put into the bank now, to get $100 out in a years time?

Structured settlement companies do that kind of thinking frequently. But for a permanent and totally disabled worker, the employer, insurer, and structured settlement company and, ultimately, the really BIG insurance company with which the structured settlement company contracts, needs NOW to put enough money into a financial mechanism that earns money over time--to make sure the permanently and totally disabled worker gets paid the compensation due each month, during all of that worker's expected life.

Under this scenario, the employer's insurance company can buy that stream of payments from the structured settlement company for a fixed sum of money. The employer and the employer's insurer can then move pretty much out of the picture, because the other insurance company or structured settlement company then pays the permanently and totally disabled employee.

(Structured settlements offer tax advantages, notably, that the payments are not taxed, which Internal

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New views, old laws, on Workers' Compensation

Continued from page 8

Revenue Code fact may accidentally[12] offset some apparent inequities discovered here).

Life span payments & rated age

Okay, so far, but how long do actuaries expect the employee to live? Remember, Workers Compensation payments continue only as long as the permanently and totally disabled employee actually lives.

Well, perhaps, if the employee had NOT been injured, perhaps the worker would have lived to 78, let's say. Actuarial tables provide these life expectancy numbers. But the structured settlement company or its large insurance company may well say--and the employer and employer's insurance company probably hope the structured settlement company and its insurance company DO say--that they will instead use a "rated age."

Under the "rated age" concept, the structured settlement company will say, well, given all injuries which made the worker permanently and totally disabled, this person is more like a person aged, perhaps, 45--instead of using the employee's *actual* age (in our example, 28).

So with the same expected life span to 78, the financial instrument to assure lifetime payments probably need last only 23 years instead of 50 years.[13] Naturally, a 23-year pay-out will cost much less than a 50-year pay-out, despite the greater discounting of payments further away in time.

Like other actuarial efforts, this rated age estimate is accurate over large numbers of people, even if in particular cases it might be incorrect by few or many years. The worker will get compensation for their complete and actual life span, that's not the problem. But what it means is, the employer pays less, the more the worker's life is expected to be shortened!!

This fact stands public policy on its head, because the general public policy is that employers who have unsafe working conditions will, over time, incur HIGHER insurance costs, with those higher costs leading self-interested employers to improve work conditions and practices so as to reduce their insurance costs.

Not so. If the employer pays less, because of the rated age concept, the more unsafe work conditions or practices shorten employee lives! What's more, the worker is paid only while alive!

Shorter life span (partial death)

So who pays the worker for the years of life which, the structured settlement company knows from its actuarial tables, the employee is unlikely to enjoy?

Occasionally, courts in tort cases note that "the knowledge of decreased life expectancy may lead to emotional distress or suffering which may be considered in assessing future pain and suffering." *Morrison v. State*, 516 P.2d 402, 406 (Alaska 1973).

But what about the actual loss of life expectancy itself? When a worker "has suffered a permanent injury...the whole span of life must be considered." *Chugach Elec. Assn v. Lewis*, 453 P.2d 345, 350 (Alaska 1969). When the lifespan span is shortened, compensation should be paid--compensation for the otherwise-anticipated lifespan, not merely for the loss of income while alive.

The loss of earning power extends also to the years lost through early death, and to the loss of enjoyment of that life! Workers Compensation should pay at least for the loss of earning power, and probably also for the loss of life, itself, to ensure employers take rapid remedial action so as not to kill off their workers prematurely.

Partial death benefit

That loss of expected life was not part of what Workers Compensation theory set out. No one says, even in theory, that workers give up both life itself and the right to compensation for loss of some life, in order to get compensation for missed earnings only while alive! So, if the employer and its insurer benefit by paying a lower cost for a structured settlement based on a rated age, Workers Compensation laws should allow the worker to receive an offsetting partial death benefit to compensate the employee and later heirs for the years of life likely deprived.

Can the courts stretch their interpretation of remedial legislation so far as to make this change without actual new legislation? I certainly hope so. I see it clearly, with my new view, but what do I know, with so little experience in this field?

Other views?

No doubt attorneys who are old hands at workers comp laws will say much about why the reasoning here is faulty. Judges perhaps must wait for appropriate cases before they can write in decisions either to set things right or to call for legislation to set things right.

Still, I look forward to learning why this new view is perhaps neither new nor right. But given my untutored and inexperienced eye--or perhaps, given an eye trained to see differently—that's my present view. Maybe you can now see things this way and act on them also.

FOOTNOTES

[1]The purpose of the workers= compensation system is to Acompensate the victims of work-related injury for a part of their economic loss. Alyeska Pipeline Service Co. v. DeShong, 2003 WL 22272328, *7 (Alaska 2003) (emphasis added).

[2]Sievers v. McClure, 746 P.2d 885, 888 (Alaska 1987), other citation omitted here.

[3]Highest 13-week average out of the past 52 weeks, for example.

[4]In California, for example, the most a worker can get in compensation is 2/3 of their actual working pay; in Alaska, up to 80% of the high quarter average. Robles v. Providence Hospital, 988 P.2d 592, 598 n. 5 (Alaska 1999) citing AS 23.30. 180.

[5]The Permanent Fund and others proposing POMV, making the Permanent Fund more like an endowment, use this 3% figure as their estimate of long-range inflation, for example.

[6]Hickel v. Cowper, 874 P.2d 922, 934 (Alaska 1994) (An additional amount is transferred ...to offset the effect of inflation).

[7]Wainwright further cites Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 540-41 (1983) for the same point.

[8]Western Alzska Bldg. & Const. Trades Council v. Inn-Vestment Assoc. of Alaska, 909 P.2d 330, 333 (Alaska 1998) (other citation omitted here).

[9]State v. ONeill Investigations, Inc., 609 P.2d 520, 539 n.20 (Alaska 1980).

[10]Richard v. Firemans Fund Ins. Co., 384 P.2d 445, 450 n.15 (Alaska 1963).

[11]Hohn v. Alaska Industrial Board, 17 Alaska 94, 102 (D.Alaska Terr. 1957).

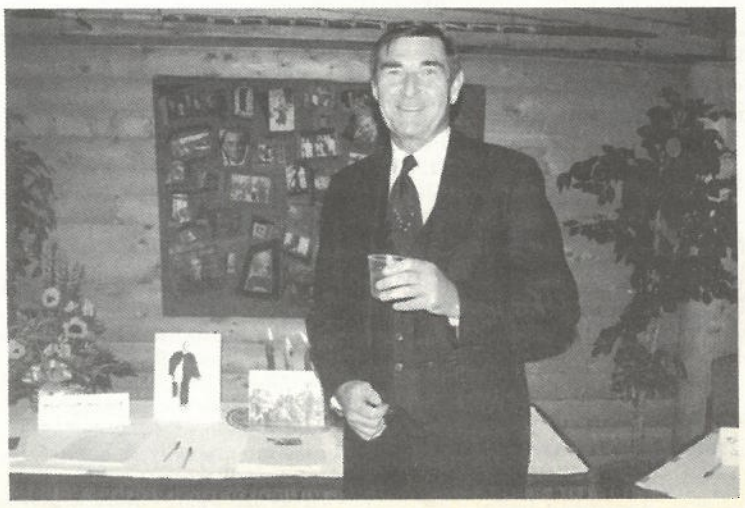
[12]Accidentally, because, so far as I know, the Code does not intentionally set out to remedy the inequities in Workers Compensation law, but just agrees that legal recovery, whether in court or by Workers Compensation, is not earned income as usually defined and taxed.

[13]The worker will get compensation for life, regardless of how long that particular worker actually lives. But over many such workers, the actuary estimate of expected life span should be accurate [or else the insurer which employs the actuary may go out of business!].

Marcus R. Clapp to retire

Clapp, Peterson & Stowers announces that after: 1,763,589 frequent flyer miles, 611 cancelled flights, 86 lost bags, 1,325 depositions, 1,324 deposition donuts, 3,299 Tums, 644 trials, 12,764 objections (7 sustained, but five of those reversed on appeal), 27 new associates trained, one too many partner meetings, countless sleepless nights, a few sleepy days, and 35 years of practicing law, Marcus R. Clapp is retiring. He will have a "burning of the timesheet" bonfire in the near future. The firm presented an engraved pencil as a going away present and waived the firm policy of escorting departing employees with a phalanx of security personnel. To confirm this, you can call Randy at 479-6405. We are sure he would like to hear from you.

Clapp, Peterson & Stowers also announces that Laura Gould has joined its Anchorage office as a litigation associate. She is a 2001 graduate of Lewis and Clark Northwestern College of law and will be focusing on professional liability defense and commercial litigation. She has accumulated 22 frequent flyer miles so far.



Arthur H. Snowden

Arthur H. Snowden inducted into Warren E. Burger Society of the National Center for State Courts

Arthur H. Snowden, retired administrative director of the Alaska Court System, was inducted Nov. 21 into the National Center for State Courts' Warren E. Burger Society. The Burger Society honors individuals who have demonstrated the highest commitment to improving the administration of justice through extraordinary contributions of service and support to the National Center for State Courts.

Chief Justice of the United States William H. Rehnquist and California Chief Justice Ronald M. George, chair of the National Center's Board of Directors and president of the Conference of Chief Justices, inducted Snowden and other new members into the Burger Society at a luncheon in Washington, D.C.

Snowden, who was instrumental in helping to establish the National Center more than 30 years ago, has been one of its most dedicated supporters. He served as a voice and advocate of support for the Center with federal and state officials for three decades. He also has volunteered his time and donated personal support to advance the mission of the National Center.

Inductees to the society are selected by a committee that is chaired by Texas attorney Charles M. Noteboom who commissioned the original portrait of Chief Justice Burger, which hangs in the National Center's headquarters. Each new society member receives a limited edition print of the portrait, which is signed and numbered by the artist Fran Di Giacomo. Chief Justice Burger's children own the first two prints and Chief Justice Rehnquist owns the last print, numbered 1986, the year Chief Justice Burger retired and Chief Justice Rehnquist took office.

The National Center, headquartered in Williamsburg, Va., is a non-profit court reform organization dedicated to improving the administration of justice by providing leadership and service to the state courts.

The National Center, founded in 1971 by the Conference of Chief Justices and Chief Justice of the United States Warren E. Burger, provides education, training, and technology, management, and research services to the nation's state courts. The National Center also is taking the lead on several key issues facing the justice system. For example, it has established a major civil justice initiative, a multi-year project that is examining best practices in civil case management and how complex litigation procedures can be improved. Other national initiatives being driven by the National Center include judicial selection reform and increasing citizen participation in jury service.

Bar People

John Athens formerly with the Attorney General's Office in Fairbanks, has retired.....**Kimberly Allen,** formerly with the District Attorney's Office, is now with the Municipal Attorney's office in Anchorage.....**Nora Barlow,** formerly with the District Attorney's Office, is now with Russell, Tesche, et. al.....**Peter Bartlett,** formerly with the Law Offices of Peter Bartlett, is now with the Municipal Attorney's office in Anchorage.....**Laura Bowen,** formerly with Edgren Law Offices, is now with the Attorney General's Office, Human Services Division, in Anchorage.

After 20 years, the firm of **Bankston, Gronning, O'Hara, Sedor, Mills, Givens & Heaphey,** has moved to a new location at 601 W. 5th Avenue, Ste. 900, in Anchorage.....**Margaret Boggs** is now with the City & Borough Attorney's Office in Juneau.....**Eric Conard,** formerly with William Tull & Associates, is now with the Law Offices of Kenneth J. Goldman in Palmer.....**Mark Choate** has relocated from Hawaii to Juneau.....**Rand Dawson** has relocated from Anchorage to Westlake, Oregon.

John Dittman has relocated to Olympia, WA to work for the Washington Attorney General's Office.....The law firm of **Davis Black LLC** has dissolved and Paul Davis is practicing under the law firm name of Paul L. Davis & Associates, LLC.....**Lea Filippi,** formerly with the Attorney General's Office in Anchorage, is now with Bankston, Gronning, O'Hara et.al.....**Lynne Freeman,** formerly of counsel at Tindall, Bennett & Shoup proudly announces the opening of the firm "Law Offices of Lynne Freeman." The new offices are located at 880 H Street, Suite 201, Anchorage, AK 99501, (907) 279-9940, (907) 279-4599 fax, lynnef@gci.net. Her practice focuses on family law.

David Freeman & Grant Watts have joined Holmes Weddle & Barcott as shareholders.....**Jim Fosler,** formerly with Keesal, Young & Logan, is now with Fosler Law Group, Inc.....**James Fayette,** formerly with the District Attorney's Office, is now with Delaney, Wiles, et.al.....**Gene Gustafson,** formerly with the District Attorney's Office in Fairbanks, is now with the Attorney General's Office.....**Blaine Gilman,** formerly with Gilman & Associates, is now with Robertson, Monagle & Eastaugh.

Dean Gates is now with the Municipal Attorney's Office in Anchorage.....The firm of **Hedland Brennan Heideman & Cooke** has formed into two new firms: the firm of Hedland Brennan & Heideman, and the firm of Cooke, Roosa & Valcarce.....**Lindsey Holmes,** formerly with Ashburn & Mason, is now with Heller Ehrman, et.al.....**Rebecca Hiatt,** formerly with Holmes, Weddle & Barcott, is now with the Attorney General's Office in Anchorage.....**Charles Huguelet,** formerly with the Attorney General's Office in Anchorage, has relocated to Kenai.

Lorie Hovanec, formerly with DeLisio, Moran, et.al. is now with Wells Fargo Trust Dept.....Former Judge and District Attorney **Jay Hodges** has now retired.....The firm of **Ingaldson Maassen,** is now Ingaldson, Maassen & Fitzgerald, P.C.....**Dave Ingram** has retired from the State of Alaska Commercial Fisheries Entry Commission.....**Paul Jones,** formerly with the Municipality of Anchorage Dept. of Law, is now with Kemppel, Huffman & Ellis.....**Douglas Johnson,** formerly with the Law Offices of Dennis Mestas, is now with Beard, Stacey, Trueb & Jacobsen.

John Ketscher, formerly with the Public Defender Agency in Kodiak, is now with the District Attorney's Office in Soldotna.....**Barbara Kissner** has relocated from Ketchikan to Vero Beach, FL.....**Byron Kollenborn** has relocated from Anchorage to Buna, TX.....**Kelley & Kelley** announce that they are now Kelley & Canterbury.....**Paul Lisankie,** formerly with the Attorney General's Torts & Workers' Comp. Section, is now the Director, Workers' Compensation Division, Alaska Dept. of Labor & Workforce Development in Juneau.

C. James Mathis, formerly with Davis & Davis, is now with the Municipality of Anchorage Dept. of Law, Civil Division.....**John Messenger,** has transferred from the Anchorage office of Preston, Gates & Ellis, to their San Francisco office.....**Andrew Mitton,** formerly with Hartig Rhodes, et.al., is now with ARSC Energy Services, Inc.....**Dick Monkman,** formerly with the Attorney General's Office in Juneau, is now with Sonosky Chambers, et.al. in Juneau.....**Heather Nobrega,** former staff counsel to Rep. Rokeberg, is now with Routh Crabtree.....**Anthony Guerriero** has returned from California & joined Brena, Bell & Clarkson

Sean Parnell, formerly with Conoco Phillips Alaska, is now with the state DNR, Division of Oil & Gas.....**Roger Rom,** formerly with the Attorney General's Office, is now with Davis & Davis.....**Jack Schmidt,** formerly with OSPA in Anchorage, is now with the Juneau District Attorney's Office.....**Martin Schultz,** formerly with the Attorney General's Office in Anchorage, is now with the Dept. of Natural Resources, Division of Oil & Gas.....**Stacy Steinberg,** formerly with LeGros, Buchanan & Paul, is now with the Attorney General's Office in Anchorage, Collections & Support Section.....**Wally Tetlow,** formerly with the Public Defender Agency, is now with the Office of Public Advocacy.

Paul Tony is now with the U.S. Dept. of the Interior, Bureau of Indian Affairs.....**Terry Thurbon,** has closed Thurbon Regulatory-Legal Services and is now with the Attorney General's Office, Environmental Section, in Juneau.....**Jay Trumble** has relocated from Anchorage to Vancouver, WA.....**Jason Weiner,** formerly with Clapp, Peterson & Stowers in Fairbanks, is now with the District Attorney's Office.....**Donn Wonnell,** formerly Of Counsel to Hughes Thorsness, et.al. has relocated to Williamsburg, VA.

Dennis Wheeler, formerly with the Anchorage Municipal Attorney's Office, is now with the Attorney General's Office in Anchorage.....**Sharon Young,** who has served as Alaska's State Recorder for the past eleven years, recently retired from state service and has relocated to Mesquite, Nevada. She was admitted to practice law in Alaska in 1987 and is also licensed in both Wyoming and Colorado.

Christa K. Collier writes: Even though I've been inactive for years, I'd still like to let people know what I'm up to now a days. I am a Master Practitioner of Neuro-Linguistic Programming (NLP) and have a new business, "Resolve". NLP is the cutting edge in personal transformation work. I conduct seminars and personal breakthrough sessions. NLP techniques can be used to teach advanced communication skills, including "reading" people for jury selection. Visit my website at ResolveAlaska.com for information.

Gilman joins Roberston, Monagle & Eastaugh

Blaine D. Gilman has joined the firm of Robertson, Monagle & Eastaugh as of counsel, representing the firm in civil litigation matters related to personal injury cases and insurance defense, real estate law, business law, public relations and lobbying.

Gilman is a 31-year resident of the Alaska, who has been engaged in civil litigation for the past 17 years at all levels of the Alaska judicial system. Born La Grande, Oregon in March, 1961, he was admitted to the Alaska bar in 1986. Gilman holds a B.A. in philosophy from Seattle University and received his law degree from the Northwestern School of Law of Lewis and Clark College in 1986.

FAMILY LAW

Alternatives to the retroactive modification of child support rule

By Steven Pradell

Attorneys in child support cases are often asked by clients to attempt to have a court retroactively modify a valid child support order. However, pursuant to Alaska Civil Rule 90.3(h)(2), retroactive modifications are generally prohibited. This article explores two alternatives which attorneys can consider in appropriate cases to attempt to reduce an obligor's child support arrearages.

The prohibition for retroactive modification is contained in Alaska Civil Rule 90.3(h)(2), which provides:

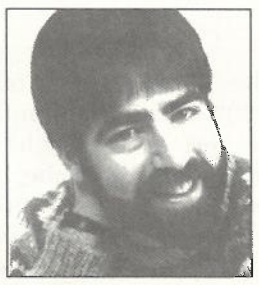
No Retroactive Modification. Child support arrearage may not be modified retroactively, except as allowed by AS 25.27.166(d). A modification which is effective on or after the date that a motion for modification, or a notice of petition for modification by the Child Support Enforcement Division, is served on the opposing party is not considered a retroactive modification.

One alternative that may be of use in certain cases is the theory of preclusion. Pursuant to Civil Rule 90.3(h)(3),

Preclusion. The court may find that a parent and a parent's assignee are precluded from collecting arrearages for support of children that accumulated during a time period exceeding nine months for which the parent agreed or acquiesced to the obligor exercising primary custody of the children. A finding that preclusion is a defense must be based on clear and convincing evidence.

The Commentary to Civil Rule 90.3, section X.C. provides, in pertinent part:

The doctrine does not allow retroactive modification, but it can in limited and appropriate cases limit collection of a support arrearage. It also may be applied to limit arrearage enforcement by a parent's assignee such as the child support enforcement agency of this or another state. Clear and convincing evidence is required to support a finding of equitable estoppel. Rule 90.3's preclusion provision limits application of this principle to cases in which the obligor assumed primary custody of a child for the time period for which the obligee now attempts to collect support. Also, the time period must exceed nine months. The application of preclusion would not be appropriate when the proportions of shared custody changed or even when an arrangement originally conceived as primary custody changed to shared custody. Further, preclusion would apply. . .only when the obligor assumed primary custody of all the children on which the support obligation is based.



"This article explores two alternatives which attorneys can consider in appropriate cases to attempt to reduce an obligor's child support arrearages."

Another alternative to preclusion is explored in the commentary to the Rule. AS 25.27.020(b) may allow a reduction of support owed to the other parent when the obligor assumes custody of one or more of the children. The rule provides:

Duties and Responsibilities of the Agency. . . (b) In determining the amount of money an obligor must pay to satisfy the obligor's immediate duty of support, the agency shall consider all payments made by the obligor directly to the obligee or to the obligee's custodian before the time the obligor is ordered to make payments through the agency. After the obligor is ordered to make payments through the agency, the agency may not consider direct payments made to the obligee or the obligee's custodian unless the obligor provides clear and convincing evidence of the payment.

See also, State v. Gause, 967 P.2d 599, n. 33 (Alaska 1998).

Prior to simply telling a client that they can do nothing to reduce their child support arrearages, a child support lawyer should carefully review the facts of each case to determine whether or not there are any arguments to be made which would allow a credit or other appropriate reduction.

 Steve's book, *The Alaska Family Law Handbook*, (1998) is available for attorneys to assist and educate their clients regarding Alaska Family Law matters.

Perkins Coie named in Fortune's list of the "100 best companies to work for"

For the second year in a row, Perkins Coie LLP has been named one of Fortune Magazine's "100 Best Companies to Work For." It is one of only three law firms nationwide to make the list.

Those of us who work here certainly feel that it is one of the "Best Companies," said Tom Daniel, the office's managing partner. "Having a culture where we all support each other helps us attract and retain top talent and provide superior client service."

The Fortune "100 Best" companies are selected based on a survey of companies' employees and a review of the programs, benefits and general working environment that all contribute to the firm's culture. Two-thirds of the survey's weight is placed on employees' responses.

The full story was published in the January 12, 2004 issue of Fortune.

(Editor's Note: Notably, the Bar Rag was voted the second worst place to work for, right above "Kathy Lee Gifford's Sweatshop")

Case upholds mechanical signatures for government contracting bid documents

In a matter of high importance to virtually anyone using computer technology to prepare proposals or contract materials while conducting business with the U.S. Government, the national law firm of Patton Boggs LLP is pleased to announce an important win on behalf of client plaintiff Hawaiian Dredging Construction Co., Inc.

In *Hawaiian Dredging Construction Co., Inc., v. The United States, et al.,* a post-award bid protest, the United States Court of Federal Claims granted Patton Boggs' motion for summary judgment in a matter questioning whether the Government must accept a mechanical (computer generated) signature affixed to a surety's power of attorney.

Plaintiff Hawaiian Dredging submitted bids on two separate construction contracts, and Hawaiian Dredging guaranteed those bids with bonds accompanied by powers of attorney containing mechanically applied signatures. The contracting officer determined both bids to be non- responsive because these powers of attorney lacked original, or "wet" signatures. At issue was whether or not the United States Government had a reasonable basis for rejecting Hawaiian Dredging's bids because the aforementioned powers of attorney lacked original signatures.

On January 9, 2004, Court of Federal Claims Judge Christine Odell Miller granted Hawaiian Dredging's motion for summary judgment, ordered injunctive relief enjoining the Navy from awarding the contracts at issue to anyone other than Hawaiian Dredging, and denied defendant's and intervenor's cross- motions seeking to affirm the contracting officer's rejection of Hawaiian Dredging's bids. Consistent with the Court's Order, on February 2, 2004, the Navy awarded both contracts at issue to Hawaiian Dredging. Douglas C. Proxmire of Patton Boggs LLP represented Hawaiian Dredging, assisted by Robert K. Tompkins and Michael J. Schaengold, both also of Patton Boggs LLP.

Doug Proxmire called the decision a victory for contractors, sureties that guarantee contract performance and the taxpayer, because "it promotes the use of electronic technology in government contracting, it ensures that contractors can pursue government contracting opportunities efficiently, and it will reduce the cost of contracting with the government."

Based in Washington DC, Patton Boggs is a national law firm in public policy, litigation and business law. The firm's core practice departments are Litigation, Business, Intellectual Property and Public Policy /Administrative.

From our main office, to any of our four regional offices-in Northern Virginia, Dallas, Denver and Anchorage-to our international office in Doha, Qatar, approximately 400 lawyers provide legal counsel.

— Press release, Patton Boggs LLP

Delaney Wiles adds shareholder, associate

Delaney Wiles Hayes Gerety Ellis & Young, Inc. is pleased to announce that Kevin L. Donley has been made a shareholder with the firm, and that James J. Fayette has joined the firm as an associate attorney .

Mr. Donley has been an associate attorney with the firm since 2001, practicing primarily in the areas of general and commercial litigation, medical malpractice defense, ski industry defense, and insurance coverage. He received undergraduate degrees from the University of Washington and Seattle University, and his law degree from Fordham University School of Law. Prior to joining the firm, Mr. Donley was an assistant district attorney for the State of Alaska from 1996-2001, and was a law clerk to the Honorable Judge Peter Michalski, Superior Court of Alaska, from 1994-1996.

Kevin Donley

Mr. Fayette will practice primarily in the litigation, employment, and health care practice groups. He received his undergraduate degree at the University of Vermont, and his Juris Doctor from Boston University School of Law. Previously, Mr. Fayette was a felony trial attorney assigned to the Violent Crimes Unit of the Anchorage District Attorney's Office, and as captain and prosecutor with the Judge Advocate General's Corps.

James Fayette

Mary Hilcoske elected to board of Association of Legal Administrators

The Association of Legal Administrators announced today that Mary Hilcoske, was recently appointed to the Region 5 board, which oversees the Western United States and Canada. She is the first Alaskan to be appointed to this position.

Mary Hilcoske

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.

Ms. Hilcoske has been the administrator at DeLisio Moran Geraghty & Zobel, P.C. for the past 24 years, and has held various leadership positions in the local chapter of ALA.

NEWS FROM THE BAR

Board adopts Ethics Opinion No. 2004-1

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2004-1

LAWYER'S RIGHT TO WITHHOLD EXPERT REPORTS WHERE THE CLIENT FAILS TO PAY FOR THEM

The Committee has been asked to give an opinion as to whether it is proper for a lawyer to withhold a copy of an expert or investigator's report if the client has agreed to pay for the report but has failed to do so.

It is the committee's opinion that Ethics Opinion 95-6 controls this issue. The lawyer may not withhold the report if the client would be prejudiced by doing so.

DISCUSSION

A. Prejudice To the Client Is The Determining Factor

In Ethics Opinion 95-6, the Committee previously opined that a client's *files* may not be withheld if prejudice would result to the client. "A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case."[1] The previous opinion addressed the propriety of charging a client for copies of his or her file, and the lawyer's right to withhold the file when the client fails to pay the copying charges.

> "The lawyer who has not been paid for his or her services is entitled to assert a lien against the file. However, the lawyer's interest in getting paid must be subordinate to the rights of the client. A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case."[2]

Similarly, in Ethics Opinion 2003-3, the Committee concluded that a lawyer must presumptively accord the client access to *the entire file* upon termination of the representation.[3] As noted in Opinion 2003-3, Rule 1.6(d) governs the lawyer's obligation to the client when representation ends. Upon termination of the representation, a lawyer shall take steps to protect a client's interest, including surrendering papers and property to which the client is entitled.[4]

The considerations addressed in Ethics Opinions 95-6 and 2003-3 are equally applicable to an expert or investigator's report. In the committee's view, expert or investigator's reports present particular illustrations of the general rules noted in the Opinion 95-6 (prejudice to the client is the paramount concern), and 2003-3 (client is entitled to presumptive access to the entire file upon termination of representation). Each situation must be carefully reviewed to determine whether prejudice will result.

The committee envisions certain instances where prejudice to the client may be readily apparent, but other instances where there is little impact. If the matter is in the middle of litigation, the client is likely to have an immediate and paramount need for an expert's report.[5] Similarly, an investigator's report may contain information critical to the client's case.[6] In these examples, prejudice may be readily apparent.

In other situations, withholding the report may inconvenience the client, but is not likely to result in actual prejudice. For example, a personal injury lawyer who consults with a physician to determine whether to pursue a case may be justified in withholding the report if the client fails to pay for it. Similarly, in a real estate transaction, an alternative appraisal may be readily obtained. A probate case may need a duplicate inventory. In each of these examples, it seems again to be readily apparent that prejudice to the client is unlikely. The client may be inconvenienced by having to pay for an alternate report, or valuation, but that inconvenience, or added expense, does not automatically equate to prejudice. In each instance, the lawyer must weigh the possible prejudice to the client against the lawyer's right to reimbursement for the expert's report.

B. Attorney Work Product Is Problematic

One variation on the "client's file" deserves additional mention. There are situations where a lawyer engages an expert to assist in preparation of the lawyer's strategic work product. For example, many lawyers prepare demonstrative aids for use at trial. Sometimes, such aids are simple posterboards which can easily be duplicated. Another lawyer may commission a detailed electronic presentation. Other times, the demonstrative aids may be complex, expensive working models. In some of these instances, the lawyer may have devoted substantial time and money to preparation of the exhibits. Such exhibits are extremely problematic for the lawyer examining ethical questions because they would clearly *benefit* the client. Whether the absence of such aids would *prejudice* the client, however, is the test. No bright line rules can be pronounced in these instances. In each instance, the lawyer must look to whether the client will suffer prejudice if essential materials are withheld.

C. The Lawyer's Obligation To Inform

The lawyer's attempt to withhold an expert or investigator's report raises an additional issue not addressed in previous opinions. Rule 1.4 governs a lawyer's obligation to communicate with the client:

> "(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable request for information.
>
> (b) A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . ."[7]

The comment to the model rule provides additional insight:

> "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with a duty to act in the client's best interest, and the client's overall requirements as to the character of representation. . . .
>
> A lawyer may not withhold information to serve the lawyer's own interest or convenience."

The Committee notes there are circumstances in which a lawyer may justifiably delay transmission of information to a client. However, those circumstances are limited to situations where harm may come to the client or someone else.[8]

D. Conclusion

In summary, an expert or investigator's report is part of the client's file. Ethics Opinions 95-6 and 2003-3 control. A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount.[9] The lawyer's right to reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case.

Approved by the Alaska Bar Association Ethics Committee on November 6, 2003.

Adopted by the Board of Governors on January 15, 2004.

(Footnotes)

[1] Ethics Opinion No. 95-6.

[2] Ethics Opinion No. 95-6, emphasis added.

[3] Ethics Opinion No. 2003-3.

[4] Alaska Rule of Professional Conduct 1.16(d).

[5] If the expert's report was prepared by a retained expert for purposes of testimony, it may be subject to mandatory disclosure under the Rules of Civil Procedure, or a court's pretrial order. Failure to make timely disclosure could seriously jeopardize the client's case, or subject the client to potential sanctions.

[6] For example, a lawyer may retain an investigator to interview witnesses in a personal injury case. If the interviews turn up information adverse to the client's position, the client may proceed with an imprudent case. Here again, if the matter is in litigation, the client may be faced with disclosures required by applicable discovery rules.

[7] Alaska Rule of Professional Conduct 1.4(a) and (b).

[8] The example given in the comment allows a lawyer to withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that the disclosure would harm the client. *See* Alaska Rule of Professional Conduct 1.4, comment, withholding information.

[9] In this Opinion, the Committee assumes the expert or investigators report has been prepared with the client's consent, and for the client's benefit.

— ATTORNEY DISCIPLINE —

The Disciplinary Board of the Alaska Bar Association publicly reprimanded former Alaska attorney, Amy E. Headrick, for her misconduct involving client neglect and lack of candor with the court.

Ms. Headrick represented her client in a divorce. She failed to file the settlement papers in compliance with a court-set deadline. The client thought the divorce was final. Although her client had not yet legally divorced, he married in a church ceremony that Ms. Headrick attended.

When the new marriage came to light opposing counsel advised Ms. Headrick to get her client divorced first. Later the judge wrote Ms. Headrick telling her to advise her client that his marriage was not valid. Rather than contact her client Ms. Headrick advised the court that the marriage was ceremonial in nature.

Bar counsel contacted the client some time later. Ms. Headrick had not contacted either the client or his new wife so they learned of a possibly invalid marriage from the Bar Association.

Ms. Headrick no longer resides in Alaska and she is administratively suspended from the practice of law for her failure to pay bar dues. Ms. Headrick and Bar Counsel stipulated to the discipline of a public reprimand for her failure to act with diligence in her representation and for her failure to take reasonable remedial measures to correct the false information she provided to the court when she indicated that the marriage was ceremonial only not intended to have legal effect.

NEWS FROM THE BAR

Board invites comments on rules, bar dues

The Board of Governors invites member comments concerning proposed amendments to Article VII, Section 3(a)(1) and (2) of the Alaska Bar Association Bylaws and Alaska Bar Rule 2, Section 3(c)

Article VII, Section 3(a)(1) and (2): At the January 15-16 meeting, the Board voted to increase the fee to members for joining additional sections of the Bar from $10.00 to $15.00. To provide equal treatment, the Board voted to publish an increase for informational, or nonlawyer, members of sections to the same amount. The Board also voted to publish Deborah O'Regan's suggestion that membership in sections be opened to inactive members in good standing as well as active members.

ARTICLE VII, SECTION 3(A)(1) & (2)

AMENDMENTS PERMITTING ANY ACTIVE OR INACTIVE MEMBER TO BE A SECTION MEMBER AND INCREASING THE FEE FOR INFORMATIONAL MEMBERS OF SECTIONS

(Additions are underscored; deletions have strikethroughs)

ARTICLE VII. COMMITTEES AND SECTIONS

Section 3. Substantive Law Sections.

(1) *Attorney Member and Fees.*

Attorney membership in each section is open to all active and inactive members of the Alaska Bar Association in good standing. $5.00 of a member's annual membership fee will be allocated to the budget of the first section joined by that member. A member may join additional sections at an annual registration fee to the member of ~~$10.00~~ $15.00* per additional section joined per year. (*amendment pending at January 2004 meeting)

(2) *Informational Membership and Fees.*

Non-voting section membership is available at the discretion of each section to any person who is not a member of the Association, but who subscribes to the informational and educational objectives of the section. Informational section members may not serve on the executive committee of any section. There is an annual ~~$10.00~~ $15.00 membership fee assessed for each section joined by an Informational Member.

Alaska Bar Rule 2, Section 3(c): At the January 15-16, 2004 meeting the Board heard a request by an applicant who had graduated from a foreign law school to amend Bar Rule 2, Section 3(c) regarding the qualifications necessary for a foreign law school graduate to sit for the Alaska Bar Examination. The proposed amendment would permit a foreign law school graduate to substitute membership in good standing in the bar of one or more states, territories or the District of Columbia after passage of a written bar examination for the requirement to have completed one academic year in an approved law school with specific course requirements. This amendment would only permit the foreign law school graduate to sit for the examination. It would not change reciprocal admission requirements.

(Additions are underlined; deletions have strikethroughs)

Alaska Bar Rule 2, Eligibility for Examination.

Section 3.

(a) An individual who has not graduated from a law school accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools shall be eligible to take the bar examination as a general applicant if he/she (1) has been licensed to practice law in one or more jurisdictions in the United States for five of the seven years immediately preceding the date of his/her first or subsequent applications for admission to the practice of law in Alaska, (2) was engaged in the active practice of law for five of those seven years, and (3) meets the requirements of (a), (c), and (d) of Section 1 of this Rule.

(b) An individual shall also be eligible to take the bar examination as a general applicant if he/she (1) has successfully completed not less than one academic year of education at a law school accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools, (2) has successfully completed a clerkship program which meets the requirements of (a), (c), and (d) of Section 1 of this Rule.

(c) An individual who is a graduate of a law school in which the principles of English law are taught but which is located outside the United States and beyond the jurisdiction of the Council of Legal Education of the American Bar Association or the Association of American Law Schools may be eligible to take the bar examination as a general applicant if he/she submits proof that (1) the foreign law school from which he/she graduated meets the American Bar Association's Council of Legal Education standards for approval, (2) he/she has: (a) successfully completed not less than one academic year of education at a law school accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools, including evidence satisfactory to the Board of Governors that the applicant has successfully completed not less than one course in United States Constitutional Law and one course in Civil Procedure in the United States, or alternatively (b) is a member in good standing of the Bar of one or more states, territories or the District of Columbia and was admitted to the Bar of that state, territory or the District of Columbia after written examination and (3) meets the requirements of (a), (c), and (d) of Section 1 of this Rule.

(d) An individual eligible to take the bar examination as a general applicant under (a) through (c) of this section shall request that: (1) certified proof of graduation and/or attendance be sent directly from the law school(s) attended to the Alaska Bar Association, and (2) where applicable under Section 3(c)(2) (b) a certificate of good standing from the Bar of the state, territory or District of Columbia where he/she is licensed to practice law be sent directly to the Alaska Bar Association. Proof of attendance and/or graduation and the certificate of good standing must be received prior to the date of the examination.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by April 16, 2004.

The Board of Governors invites member comments concerning a proposed amendment to Article III, Section 1(a) to raise bar dues for active members of the Bar from $450.00 per year to $550.00 per year beginning for the 2005 membership year.

Article III, Section 1(a)

AMENDMENT INCREASING BAR DUES FOR ACTIVE MEMBERS BY $100.00

(Additions are underscored; deletions have strikethroughs)

ARTICLE III. MEMBERSHIP FEES AND PENALTIES

Section 1. Annual Dues.

(a) **Active Members.** The annual membership fee for an active member is ~~$450.00~~ $550.00, $10.00 of which is allocated to the Lawyers' Fund for Client Protection. The annual membership fee for an active member, who is 70 years of age or more and who has practiced law in Alaska for a total of 25 years or more, is one half of the total amount assessed to each active member, $10.00 of which is allocated to the Lawyers' Fund for Client Protection.

...

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by April 16, 2004.

ECLECTIC BLUES

When 'They' come to town, Juneau is transformed

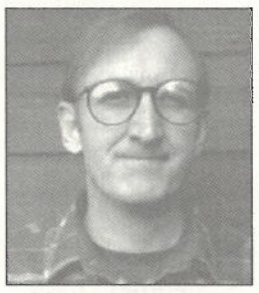
By Dan Branch

Juneau's hibernation ends in early January when the Legislature returns to town. Then the Capitol Building lights up like a New York tenement building and the sound of high-heel shoes can be heard again on Seward Street. The legislative process brings good and bad energy to fire up our landlocked town.

In the fall, after the last cruise ship departure, the town quiets down. The locals may flock to the South Franklin T-shirt shops for the end of season sales. After that you could fire a cannon down South Franklin Street on Sunday afternoon without hitting a soul. It's nice for awhile, having the town to ourselves. Folks can usually find a window seat at The Hanger to eat lunch and watch monsoon rains wash the town clean. On weekends you can enjoy nearly empty hiking trails or troll for silver Salmon without bucking charter boats.

At the end of December legislative aides start to arrive, bringing welcomed new energy to town. They also bring more cars to compete for scarce parking spaces. Many drive Lower 48 rigs with out-of- state plates and decals that advertise a university or college. Others belong to the old hands that have lived the gypsy life of an aide for many years. They exist in Juneau for 120 days and some change and then return to their other homes for the rest of the year.

In the days before start of session, more and more lights shine into the late afternoon darkness from the old brick State Capitol Building. Even those without business there notice the increased traffic (both pedestrian and car) that moves around the building.



"By the end of session the legislators have made countless decisions. They are working late hours and many of their decisions have made someone mad."

Early in the session, lunch-time rallies take place on the Capitol steps. The police usually cordon off the street facing the steps so rally participants can gather on the pavement and listen to the speakers. Unless they are actively involved in the rally, most folks stand on in the public area around the Dimond Courthouse, which is across the street from the Capitol. From there they can listen without being filmed by the Anchorage TV crews that set up their cameras by the courthouse entrance. This leaves a desert of blacktop between the rally speakers and the cameras that must puzzle Anchorites when tuning in to the nightly report from Juneau. Before 9/11, there was an openness about the Capitol Building. Only the front door was guarded, and that one casually. More precautions are taken now but people are still free to walk the halls or sit in on a committee meeting.

Most of the committee meeting rooms are small. The Senate and House Finance rooms are spacious, reflecting the interest that follows the money bills that must past through these committees. On sunny afternoons near the end of session, these rooms heat up. Every seat is taken by the lobbyists and other advocates hoping to see their bills make it to the floor.

Out in the halls, other advocates camp out on favored benches. Some wait for a chance to buttonhole the aide to an key legislator. Others long for the start of the committee meeting where their bills are scheduled for hearing. War stories and wishes for the end of session can be heard from one end of the building to the other. Toward session's end, everyone looks tired and more than a little stressed. If there are no committee meetings or floor sessions to air, KTOO moves its TV cameras into the halls to capture the human movement on its Gavel to Gavel broadcast.

By the end of session the legislators have made countless decisions. They are working late hours and many of their decisions have made someone mad. Caucus leaders start to implement the end games. When there is less than a week to go *the legislators must push all their surviving bills toward a shrinking hole of opportunity.* The action creates friction and many bills are left in committee. If it's the second year of the session, the bills will die there. Others make it to a vote on the House and Senate floor. Some of these are sent to the governor.

Tempers flare sometimes in the last weeks of session, but committee chairs and others maintain decorum. Everyone is tired and stressed, but rarely rude.

On the last night of session, the Senate and House galleries fill up with advocates and followers of the political process. Debates on bills continue, even with time running out. Finally the gavel bangs down with the announcement of *sine die* and it is over.

One year a retiring House representative took his place on the house floor at *sine die*, dressed like a Roman Senator — complete with toga and laurel. He ended his 20-year term in Juneau with a song.

Want to reach out to a law student?

The American Bar Association Law
Student Division
has a list of law students from around the county
who want to practice law in Alaska.

What we are looking for now is attorneys who
would be willing to correspond with the students via e-mail about what
it's like to practice in Alaska, job opportunities, advice, etc.

If you are interested,
please e-mail your name, e-mail and practice area to Melody Crick,
12th Circuit Governor ABA/LSD at
crick12circuit@abanet.org.
We look
forward to hearing from you.

Nominations Sought for Hickerson Award

The Board of Governors is soliciting nominations for its Robert K. Hickerson Public Service Award. This award recognizes lifetime achievement for outstanding dedication and service to the citizens of the State of Alaska in the provision of Pro Bono legal services. Past award winners are Robert Hickerson, Executive Director of ALSC (posthumously), and Christine Pate, Director of the Alaska Network on Domestic Violence and Sexual Assault.

Nominations should be made by March 31, 2004. Please send your letter stating your nomination and why this person should receive the award to the Alaska Bar Association, attn. Deborah O'Regan, Executive Director, P.O. Box 100279, Anchorage, AK 99510 or via e-mail to oregan@alaskabar.org.

GETTING TOGETHER

My resolutions for the 'new and improved' *Bar Rag*

By Drew Peterson

As *The Bar Rag* changes to its new frequency, as a quarterly rather than a semi-monthly periodical, it seems appropriate for me to reflect generally on the future of this column.

I have been writing here on various topics of mediation and appropriate dispute resolution (ADR) since 1987. It has been an interesting process. Sometimes I have generated controversy, usually by accident, but occasionally on purpose. Sometimes I have written heartfelt personal columns. More often, I suspect, I have written on esoteric issues of interest to myself and perhaps a couple others. Overall though, the feedback which I have received has been gratifying, and mostly favorable.

As I look forward to fewer deadlines per year and more time to think about my subjects, it seems an appropriate time to make a few resolutions for the future.

I Resolve to Continue to Try to Generate Controversy - Mediation and ADR remain controversial within the legal field and rightly so. They challenge many of the assumptions of the law that we were taught in law school. Mediation asserts that we will make better decisions on our own than will others deciding things for us. That we can find fairness working together, side by side, better than we can as adversaries engaged in battle. That a third party facilitator is better than a third party decision-maker.

ADR encourages restorative justice, based on principles of acknowledgment, recognition, empowerment, reconciliation and even forgiveness. In contrast, our legal system supports a system of retributive justice based upon principles of restitution, punishment and revenge.

Mediation and other processes of collaborative problem solving encourage taking personal responsibility for our actions. The traditional legal system encourages blaming others and finding loopholes to allow us to avoid taking personal responsibility.

ADR encourages fast, efficient and inexpensive conflict resolution of conflict. The traditional legal system is willing to dispense justice only to those who can afford it and at prohibitive prices.

I am getting on a roll here. The point is that there are many additional controversies to generate and issues to debate.

I Resolve to Try to Speak from the Heart -- The columns I have written in the past that have generated the most favorable comment have inevitably been the ones written from my heart. With more time on hand now to prepare each column, I vow to write less about the mundane new developments in the ADR field, or new research articles of interest, and more about items of personal interest or my experience in the field.

ADR is no longer a strange new development in the law, no matter how challenging some of its concepts. The ADR movement has been going strong for more than 20 years now and is still picking up steam. Those of you who are not fully versed in its ideas and concepts already are losing touch with your profession. I no longer need to write to educate dinosaurs, and they would probably not be reading the column in any event. Instead, I will try to write from my heart about what I love about this field.

"Sometimes I have generated controversy, usually by accident, but occasionally on purpose. Sometimes I have written heartfelt personal columns."

I Resolve to Attempt to Avoid Stale Rhetoric -- I have to smile when I read this resolution. I am afraid that terse beautiful prose is not exactly what we are known for in the *Bar Rag*, except perhaps for Dan Branch. Nevertheless please don't laugh as I promise to try to do better in the future. Hopefully my next resolution will also help here.[1]

I Resolve to Write Shorter, Not Longer -- Our managing editor Sally Suddock will like this resolution.[1] I try to be mindful of Mark Twain's comment that he did not have time to write a short letter, so he wrote a long one instead, but I fear I often fail to remember the point. With less articles to write in the future, and an extra month to write them, I vow to keep my column at 750 to 1000 words in the future.

I Resolve to Walk My Talk -- Finally, and most importantly, I resolve to attempt to always walk my collaborative dispute resolution talk when engaging with others about the field. What I love about mediation is that it represents the cutting edge of a new and benevolent consciousness shift that is engulfing the world. A shift away from an either/or, right/wrong, good/bad view of the world, and towards a both/and, win/win, view of the world in which all individuals are important.

As an old lawyer (actually young middle aged, thank you), trained to be analytical and adversarial in dealing with the world, I find that I need to be careful or I can easily find myself slipping into cynical, argumentative and judgmental roles. Modeling such negative roles, of course, is the worst possible way to promote this field that I love. I like to think that those of us involved with the ADR movement in Alaska for the past 20 years or so have been good in walking our talk--that is to say in working cooperatively with others in spreading the word about this new way of looking at the world and at the law. Similarly , when I walk my talk I continue to spread the word about mediation and ADR to others, both in this column and otherwise in my life.

[1] M.Ed Note: Actually, she enjoys long manuscripts, if artfully, perceptively, and entertainingly written (and with pretty pictures to break up visual gray tedium!). She more appreciates the aforementioned resolution re: the avoidance of (long) stale rhetoric. Another excellent resolution might be: Notwithstanding the perception of *more time!* to create exceptional profundity, that nagging deadline will no longer continue to sneak up on writers who will no doubt continue to find themselves scrambling around at the last minute, awaiting the muse's appearance (this is not a chiding directed solely to the author of these resolutions...).

Parting company: Who gets what in the file when lawyers and clients split?

Continued from page 1

1.4, which deals with a lawyer's duty to communicate with clients and on which Alaska RPC 1.4 is patterned, conclude that "'[a] lawyer may not withhold information to serve the lawyer's own interest or convenience.'" (Emphasis omitted.) It would not take much of a leap for a client to craft a breach of fiduciary duty claim against a lawyer who withheld file material that led to the client being damaged in the underlying proceeding involved. In short, this is an area where discretion is usually the better part of valor.

What must be returned?

2003-3 takes the position that the client should generally be entitled to the entire file subject to narrow exceptions and 2004-1 reiterates that general view. The primary exceptions are for a third party's materials that the lawyer placed in the file for the lawyer's convenience and items that go to the business relationship between the lawyer and the client rather than to the representation itself. A legal research memo prepared for another client dealing the same issue is an example of the former and a conflict check or loss avoidance note that the lawyer did for the lawyer's own purposes are examples of the latter. 2004-1 notes that expert and investigators' reports are subject to 95-6's general rule that the client's need for the material "trumps" the lawyer's lien rights. Therefore, if the client's position will be prejudiced by withholding the reports, the lawyer must turn them over to the client even if there is an outstanding bill.

Who pays for the copying costs?

When a lawyer and a client go their separate ways, it is often prudent for the lawyer to make a copy of the file to document where the matter stood when it left the lawyer's hands should any questions arise later. Unless the engagement agreement provides otherwise, 95-6 finds that the lawyer must generally bear the cost of creating the lawyer's own "loss prevention" copy because the principal benefit accrues to the lawyer rather than the client. By contrast, if the lawyer has already given the client copies of what makes up the file during the course of the representation and the engagement agreement requires the client to pay for copies, then 95-6 concludes that the lawyer can charge the client for what is essentially a second copy of the file. Again however, the client's need for the file "trumps" the lawyer's right to withhold the file pending payment of photocopy charges. Like issues surrounding unpaid fees, it is often wiser to simply provide the client with the file (while making a loss prevention copy) rather than open the door to a claim that the client's position was damaged by the delay caused by a fight over copy charges.

The general approach taken by the three Alaska opinions is very similar to others in the Northwest, including Washington State Bar Formal Ethics Opinion 181 and Oregon State Bar Legal Ethics Opinion 1991-125. Those opinions are available at, respectively, www.wsba.org and www.osbar.org.

Don't Miss the 2004

Alaska Bar Convention in Anchorage!

Wednesday – Friday, April 28, 29 & 30
Hotel Captain Cook

Come to the convention -
- ✓ take a break from the usual grind
- ✓ network with peers
- ✓ fulfill your VCLE recommended minimum CLE credits

Convention Highlights

WEDNESDAY, APRIL 28

Morning


Paul Lisnek

Case Evaluation/Discovery/Early Resolution
Randy Clapp, Clapp, Peterson & Stowers, LLC; **Mauri Long**, Dillon & Findley PC; **Tim Petumenos**, Birch Horton Bittner and Cherot; **Christine Schleuss**, Friedman, Rubin & White. **Paul Lisnek,** Moderator

Executing Effective Motion Practice
Bob Blasco, Robertson Monagle & Eastaugh PC; **Jeff Feldman**, Feldman & Orlansky; **Judge Richard Savell**, Superior Court, 4th Judicial District; **Mike Schneider**, Law Offices of Michael J. Schneider, PC; **Gail Voigtlander**, Attorney General's Office, Special Litigation Section. **Paul Lisnek**, Moderator

The Anti-Government Movement & The Courts
Luncheon CLE – continues in afternoon. This program dramatizes the issues involved when tax protestors conduct their own defenses.

Afternoon

Getting to ADR: How, Who, When, What Type
Bruce Bookman, Bookman & Helm, LLP; **Jon Katcher**, Pope & Katcher; **Tim Lamb**, Delaney, Wiles, Hayes, Gerety, Ellis & Young, Inc.; **Kirsten Tinglum**, Friedman, Rubin & White. **Paul Lisnek**, Moderator

Negotiating Tactics & Strategies
Senior Judge Elaine Andrews, Appellate Mediation Project, 3rd Judicial District; **Glenn Cravez**, Law Office of Glenn Cravez; **E.H. Dahlgren**, CPU, V.P., Northern Adjusters Inc.; **Paul Dillon**, Dillon & Findley PC; **Matt Jamin**, Jamin, Ebell, Schmitt & Mason/part-time U.S. Magistrate Judge. **Paul Lisnek**, Moderator

Evening

"Springtime in Spenard"–
a block of tickets has been reserved for bench and bar.

THURSDAY, APRIL 29

Morning

Who Is Attorney X and Why Is Attorney X In Trouble All the Time? (Bar)
Dan Winfree, Winfree Law Office PC, former Discipline Liaison, former Board of Governors President; **John Murtagh**, Sole Practitioner, Respondent's Counsel, Rules of Professional Conduct Committee Member, former Board of Governors Member; **Ken Eggers**, Groh Eggers LLC, former Board of Governors Member; **Donna Willard**, Sole Practitioner, Alaska State Delegate to American Bar Association House of Delegates, former Board of Governors President; **Steve Van Goor**, Bar Counsel

Courtroom Control, Decorum, and Civility
Judge LeRoy F. Millette, Jr., Judge of the 31st Judicial Circuit, Prince William County, City of Manassas, Manassas City, Virginia; presiding judge in the John Muhammad trial; moderator. Panel: **Judge Ralph Beistline**, U.S. District Court; **Presiding Judge Larry Weeks**, Superior Court, 1st Judicial District; **Acting Presiding Judge Charles Pengilly**, Superior Court, 4th Judicial District; **Rex Butler**, Law Offices of Rex Lamont Butler; **Mary Anne Henry**, Anchorage District Attorney's Office; **Roger Holmes**, Biss & Holmes.

Lunch: State of the Judiciaries Address

Afternoon

Effective Brief Writing
Justice Robert Eastaugh, Alaska Supreme Court; **Judge David Mannheimer**, Alaska Court of Appeals; **Joanne Grace**, Attorney General's Office; **Susan Orlansky**, Feldman & Orlansky.

Powerful Communication Inside the Courtroom and Out (Bench & Bar)
Dr. Paul M. Lisnek, nationally known communications expert, trial lawyer and consultant, educator, and author based in Chicago.


Jeffrey Toobin

Awards Reception & Banquet
Keynote: **Jeffrey Toobin**, senior legal analyst, CNN; staff writer, The New Yorker

FRIDAY, APRIL 30

Morning

U.S. Supreme Court Update
Professor Erwin Chemerinsky, USC Law Center, and **Professor Laurie Levenson**, Loyola University School of Law


Professor Erwin Chemerinsky


Professor Laurie Levenson

Lunch: Annual Business Meeting

Afternoon

Alaska Constitutional Law Update – 3rd Annual
Professor Erwin Chemerinsky

Myth, Reality, and the Patriot Act
Jeffrey Toobin, senior legal analyst, CNN; staff writer, The New Yorker, moderator; **U.S. Attorney Patrick Fitzgerald**, Northern District of Illinois; **Prof. Nadine Strossen**, National President, American Civil Liberties Union; **Prof. Michael Avery**, Suffolk University Law School and President of the National Lawyers Guild, look at the Patriot Act and its implications post 9/11.

See our '2 for 1' Special Offer on page 32

Reserve these dates on your calendar now: April 28, 29 & 30, 2004!
Watch for your brochure in the mail!
Call us at 907-272-7469 or e-mail us at info@alaskabar.org for more details.

TALES FROM THE INTERIOR

(War of words, cost of recovery) . . . Priceless

By William Satterberg

Eight dollars and ninety-five cents may not sound like a large sum of money to some. To me, it is significant. It can also be the beginning of many expenditures to come.

I once had the snow shoveled in the yard between my two office buildings in anticipation of the annual basement spring flood. A private joke immediately developed among the staff. Someone noted that "Satterberg lost a nickel." when explaining the curious snow removal between the structures. What hurt the most was that no one questioned the explanation.

I am not that bad about finances, but I still do remember the time that an elementary school classmate borrowed a nickel from me and promised to pay it back. To this day, he has not performed. But, that is fine. I do not intend to push the issue. I simply plan to file a claim with his estate when the time comes. Besides, interest is accruing.

Eight dollars and ninety-five cents is the amount of money which it cost to purchase my now infamous "pink thing," otherwise known to the Fairbanks State of Alaska District Attorney's Office as "Satterberg's prohibited metal knuckles."

At the time my pink thing was purchased, there was a kiosk in the Bentley Mall operated by a knife distributor from Wasilla.

Wasilla apparently is a big area of the state for martial arts suppliers. When I had asked my paralegal to find a comparable item to my client's disputed black "pink thing", the paralegal went to the Bentley Mall and had purchased a replica, choosing pink as its natural color, in order to lessen its intimidating appearance. In addition, the paralegal did her best to negotiate a good price for the item, recognizing that I might actually reimburse her for her expenditure at some future date.

On April 8, 2002, a hearing was held before Judge Funk to address whether or not my client had been carrying metal knuckles. In response to an inquiry from the bench, I swiftly pulled out my own pink thing before Judge Funk and his court clerk, Karen. Shortly thereafter, I was arrested by what I perceived to be a zealous state trooper. The charges were wisely dropped 30 days later.

Admittedly, my period of time spent in jail was nominal, lasting less than one hour, but it was still quite traumatic, nonetheless. Moreover, the stigma of having been branded a common criminal, and paraded out of the Fairbanks Courthouse in shackles is a painful memory which will scar my emotional psyche for untold years to come. In my mind, the damages must be significant, even if considered by a Fairbanks jury. It is a shame this particular incident did not take place in Bethel.

"Eight dollars and ninety-five cents is the amount of money which it cost to purchase my now infamous "pink thing"...

Waiting by the phone

Several months passed after the charges against me were dismissed. During that time, I sat patiently by my telephone, waiting for the expected phone call from the trooper's evidence custodian advising me that I could come and reclaim my pink thing. Because the charges had been dropped, I knew that the item could not be legally destroyed without a valid court order. All that Judge Funk had ever ruled in my client's companion case was that the arresting officer had probable cause "to believe" that my client had carried a prohibited weapon. It was not the same as an actual finding that a prohibited weapon had been involved. Furthermore, Judge Funk had, in fact, made it clear in his ruling that the final decision as to weaponry status would be up to the jury. As such, when I was arrested for the possession of my pink thing, I recognized that the ultimate issue had never been resolved. As such, I reasoned that my pink thing simply had to be held for its eventual release. Conceivably, had the district attorney's office at the time been on the ball, it could have asked me to agree to a destruction of the pink thing in exchange for the dismissal of the charges. Not that I would have done so, but it could have asked.

Escalating property claims

As the months passed, it became more and more apparent that I was not going to receive the long expected phone call. Frustrated, I finally took matters involving the pink thing into my own hands.

I courageously filed a motion before the magistrate who had been in charge of my case, seeking the return of my pink thing. The then-district attorney opposed my motion. Magistrate Hammers decided the issue. I lost. I have always hated it when the law is against me. I was hoping that I might have had some stroke for a favorable ruling, but I was mistaken. Magistrate Hammers made it quite clear that there was a case directly on point. Apparently, once criminal charges are dismissed, the only remedy is to file a civil action when the State decides to wrongfully convert one's possessions. By then, I was committed. Moreover, when I discussed with various people my intentions to file a civil action against the State of Alaska in order to have my pink thing released, many agreed that I should be committed, apparently referring to another type of commitment. Regardless, having lost my motion before Magistrate Hammers, I was not to be lightly beaten. I moved toward contentious civil litigation.

War of words begins

Having represented the Hells Angels in a matter involving a replevin case filed by the Hells Angels alleging that certain Alaska State Troopers were seizing evidence from the club as souvenirs, I relied upon my extensive research in that case to conclude that I could probably file a similar action on my own behalf in the District Court. Following hours upon hours of laborious research, I crafted my complaint against the State. It is reproduced in full below:

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

WILLIAM R. SATTERBERG, JR.,)
Plaintiff,)
vs.)
STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY,)
Defendant.)

Case No. 4FA-03-1729 CI

COMPLAINT FOR REPLEVIN

COMES NOW Plaintiff William R. Satterberg, Jr., by and through his attorney of record (himself), and hereby complains against the Defendant, State of Alaska, as follows:

1. At all times relevant to this cause, Satterberg has been a resident of Fairbanks, Alaska, in the Fourth Judicial District.

2. On or about April 8, 2002, Satterberg was arrested for allegedly possessing a set of pink alleged metal knuckles as evidence in a case involving a client of Satterberg's firm.

3. Satterberg disputes that the items in question were metal knuckles or that, regardless, they were a prohibited weapon, even if classified as a weapon. Because of the uncertain nature of the item involved and to avoid confusion, Satterberg has referred to the item repeatedly as Satterberg's "pink thing."

4. The State of Alaska finally officially declined to prosecute Satterberg approximately thirty days after Satterberg's arrest. Despite demand therefor, the State of Alaska has refused and continues to refuse to release the pink thing seized from Satterberg, holding it, instead, as evidence.

5. Satterberg is entitled to immediate release of his pink thing from the State of Alaska and requests an order of the court so compelling release of Satterberg's pink thing.

WHEREFORE, Satterberg prays for judgment against the Defendant for replevin as requested and for his reasonable costs, interest, and attorney's fees occasioned thereby, and any such other relief as deemed just and equitable in the premises.

DATED this 30th day of July, 2003.

THE LAW OFFICES OF WILLIAM R. SATTERBERG, JR.

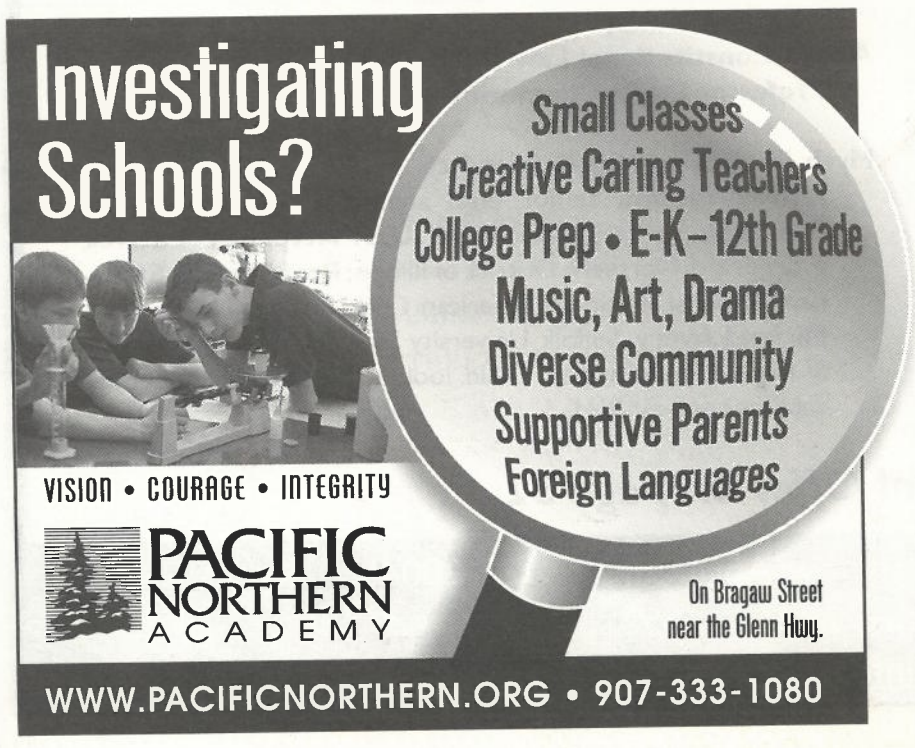
By: William R. Satterberg, Jr.
ABA No. 7610126
Attorney for Satterberg

•

Having professionally set forth my prayer for relief in my draft complaint, I petitioned the Attorney General for redress. I wrote a letter to Attorney General Gregg Renkes, copy reproduced in relevant part below, which sought the full release of my pink thing. As an incentive, I also included some free samples of the merchandising items which had so quickly flooded the market:

Gregg D. Renkes, Attorney General
Office of the Attorney General

Continued on page 19



TALES FROM THE INTERIOR

Priceless

Continued from page 18

PO Box 110300
Juneau, Alaska 99811-0300

RE: State vs. Satterberg
Case No. 4FA-S02-1041 CR

Dear Attorney General Renkes:

This letter is being written with the hopes of avoiding what could otherwise be protracted litigation.

Specifically, as you may be aware, prior to your assuming the Attorney General's Office in April, of 2002 I was arrested in Fairbanks for allegedly possessing a set of alleged metal knuckles in the courtroom. In all fairness, the charge was idiotic, but it took the District Attorney at the time, more than 30 days to decline to prosecute the case. During that time, I sat beneath the proverbial Damocles' Sword, with one offer even being extended that I could plead to the charges and be given an SIS for good behavior, based upon my prior "clean" record.[1]

Be that as it may, and based upon I believe the widespread support of the Free Willy movement, (coffee cup and bumper sticker enclosed) the State of Alaska eventually declined to prosecute me. I was elated, to say the least. My joy caused me to author two acclaimed articles, "Busted: Part One," and "Busted: Part Two" (copies also enclosed) in the acclaimed *Alaska Bar Rag*. Predictably, my widespread support quickly grew, as evidenced by the many bumper stickers which I gave away for free, some of which have even found themselves on the bumper of a City of Fairbanks employee's pickup truck, and, purportedly, in the offices of various state troopers.

Recently, I inquired as to the release of my pink thing back into my possession. It should be noted that the court never ruled that the item was even a weapon. Instead, the court's ruling was simply a probable cause determination in an unrelated case involving a client of mine. Rather, the court simply ruled that the officer had probable cause to believe that my client might have violated the law with his own, longer version of my pink thing, and that, as such, it would be up to a jury to make the final decision.

At this time, I am seeking return of my pink thing in order to have it properly ensconced in clear plastic. I do not care about my client's thing at all. Moreover, I certainly do not intend to use my pink thing as a key ring or a weapon. In point of fact, such items can still be bought readily over the Internet, and are marketed as key rings. See Appendix D.

Nor do I want damages at this time. All I want in this particular matter, however, is for the item to be given back to me by the State of Alaska, which apparently is holding it, so that I may have it preserved for prosterity. I will even give the State a full release for it.

As the Attorney General for the State of Alaska, I am aware that you have the authority to settle all claims brought against the State of Alaska. As such, I would humbly ask that we engage in a quick and easy administrative settlement of this matter, with a stipulation that the item will be returned to me or be returned to an award shop, as I indicated in my briefing, (copies attached as Appendices B, C, and D) with no human fingers ever to touch it again, should you desire. Rather, it will simply hang on the wall or sit on my desk as a glorified paperweight, or possibly be someday displayed in a museum.

Sincerely,
William R. Satterberg, Jr.

P.S. Sorry, but we are fresh out of Free Willy T-shirts.

•

One mistake occurred. At some point, I had remarked that, if Gregg Renkes did not respond, I would file the complaint. My instructions were apparently twisted, and must have been twisted by my staff, since I am always abundantly clear in everything I say and do.

Regardless, the complaint was actually filed in court and sent out for service, as opposed to having simply been attached to the letter as a thinly-veiled threat. One of the issues which concerned me at the time was the fact that another attorney used my power of attorney to sign the check for the filing fee. Whether I was set up or not by those around me will likely never be known. What is known is that my complaint for the release of my pink thing rests for this day deeply in the annals of the court.

Although the filing of the complaint was, in fact, arguably a mistake, the net effect was apparently a benefit. When I subsequently spoke to the Attorney General, Gregg Renkes on the telephone, who graciously agreed to interrupt what was most likely a very important meeting with the governor or someone else in order to talk with me, I was first advised by him that his office had no jurisdiction to settle the case. Rather, according to the Attorney General, the Department of Public Safety had made an administrative determination, apparently maybe even at the Commissioner's level, that my pink thing was a very dangerous and prohibited weapon which simply could not be released. Because my pink thing still rested with the Commissioner of Public Safety, the Attorney General lacked jurisdiction.

When I reminded the Attorney General that my pink thing had now been thrust into litigation, and that I knew from my own days as an Assistant Attorney General that the Attorney General had full authority to settle all disputes on behalf of the State, his position compassionately changed. My pink thing had now risen to his level. There might be a possibility of reaching a resolution, after all. The Attorney General would ask one of his Anchorage tort attorneys to closely examine my pink thing and to advise on its outcome. It was a hard issue.

Subsequently, I was contacted by Assistant Attorney General David Knapp. David explained to me that he was the attorney unfortunately assigned to the case, but that he was going to get right to the bottom of it. He asked for my settlement position. I explained that I wanted my pink thing released. I promised that I would embed it deeply in plastic at a trophy shop, where no human hands would ever touch it again. In short order, we settled. Additional correspondence was exchanged and reproduced below:

•

David H. Knapp
Assistant Attorney General
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501-5903

RE: Satterberg vs. SOA
Case No. 4FA-03-1729 CI

Dear David:

This letter is a follow up to our conversation of October 8, 2003.

The trophy shop that will be doing the encasement of my pink thing is The Trophy Cache. As discussed with you, they are willing to contact the State Troopers directly and to obtain possession of the item, realizing that they often do award work for the Troopers with respect to other things such as shooting, etc.

The stipulation for dismissal has been filed, and I am sending the release to you. Hopefully, this should resolve all questions.

Might you please notify the Troopers to release the pink thing, as discussed, as soon as possible, so that we can have the matter concluded? It is ironic that an $8.95 key ring has become almost worth $500, given the filing fees, trophy making, and other factors.

Regardless, it will be part of history, needless to say.

Sincerely,
William R. Satterberg, Jr.

•

In keeping with the issue at hand, the settlement was to the point. Similarly, the release was quick and provided for me also to release my significant claims for personal anguish and emotional loss in exchange for the return of my pink thing. The legally complex release is reproduced in full below:

•

RELEASE

Pursuant to the terms of the settlement between the parties of civil case 4FA-03-1729, William Satterberg hereby releases the State of Alaska Department of Public Safety from all causes of action and liability arising out of or in any way related to his arrest and the seizure of his "Ninja keyring" on or about April 8, 2002.

As set forth in my letter to David, agreement was also reached that the pink thing would be delivered to an award shop in Fairbanks where the eventual embedding would take place. Only afterwards would I receive the return of my dreaded device.

•

The long-awaited full release had finally occurred.

To this day, some people say I wasted money and time, since I could have ordered a replacement "Ninja Key Ring" from any martial arts supplier via the Internet for less than $5. (Apparently, national demand for the alleged, prohibited item has dropped since Judge Funk's ruling.) But, I did not want just any cheap substitute. I wanted my own pink thing back. Cost was not an object — even if it meant pulling my kids out of school. Some things cannot be valued.

Cost of Pink Thing $8.95
Cost of Bail .....500 Alaska Airline miles (used VISA)
Cost of District Court Filing Fee..... $60.00
Cost of Service Fee $6.17
Cost of Mounting Pink Thing..... $100.00
Ability to Clutch Pink Thing Tightly in Hand Once Again .....PRICELESS.

Footnotes

[1] This is not entirely correct. I actually had a conviction for a Fish & Game violation when I was approximately 18 years old and had an SIS at that time. As such, I do not even know if I would have qualified for the SIS, given the circumstances.

Statutory interpretation logic

More on white rabbits, tortoises and other friends

By Peter J. Aschenbrenner

Alert readers will remember that in our last episode an eminent Oxford scholar played a walk-on role. As that was child's play for some, while a bit confusing for other readers, let me clear things up.

Henry George Liddell was father to Alice. Henry is best known for his *Greek-English Lexicon*. Alice is best known for going down a rabbit hole on a summer day. It was at Oxford that the math scholar Dodgson met Alice and her sisters. And Charles Lutwidge Dodgson played a trick on his first names and, as puzzled about, is now known as Lewis Carroll.

After the publication of *Alice's Adventures* in 1865, Queen Victoria asked Carroll to send her a copy of any other works that he had written. It is said that Carroll sent Her Majesty a copy of his *Condensation of Determinants*, but in his *Introduction to Symbolic Logic* he says that's just a fairy story.

Carroll's *Introduction* is launched in his cheeky fashion. Someone who wishes to learn symbolic logic should read the book with a "genial friend" who will "talk over any difficulties with you." Carroll has underlined this point, which would be of interest to lawyers and judges: "Talking is a wonderful smoother-over of difficulties." Carroll even recommends as a "capital plan" talking through the puzzles in logic or in any other hard subject "aloud"; and this was Carroll's own practice, "even when I am all alone." We'll return to talking-as-problem-solving in moment.

I mentioned Carroll's fable of Achilles and his friend in our last episode; Carroll died in 1898 and is fondly remembered in a variety of websites; lewiscarroll.org has good links to all of them.

We'll take what we've learned on the road, but deferring, for now, our own send up of *The Tortoise and Achilles;* let's think of a modern problem that frequents state courts.

Judges are called to sort out this from that in codelaw; the task is called statutory interpretation. Let us imagine that a statute gives a number of examples. Take "unimproved portion of the land" on which an accident occurs. AS 9.65.200(a). The legislature has helpfully provided instances to chew on. Trail, abandoned aircraft landing area and disused mining road are listed at §200(c).

So what other examples are in the set (unimproved real property)? If the legislature has seen fit (in codelaw A) to give us examples K, L, M, N and O, then is P a member of (A)? The lawyers brief and argue, drink water at the podium and so forth. But set (A) stares back at the judge; apparently a riddle, wrapped in an enigma, if not in paradox.

Readers will remember that (in an earlier episode) I suggested that sorting *this* from *that* requires an apparatus, and it may be that the Latin phrase *sociis noscitur* fits comfortably into this discussion. "Known by its friends" was dignified by Justice Antonin Scalia in his speech to the Bar Association last May. He was speaking Latin, but there are differences in vocalizing even dead languages.

I'm gratified that J. O. Urmson has cleared up this matter for me. Urmson knew both Russell and Wittgenstein when teaching at Oxford. The style of pronunciation (acquired in public school early in the last century) has given way to reformed pronunciation that now dominates Latin studies. Urmson (reformed) says so-Key-ees No-skuh-tur. Scalia has it so-She-ees No-shi-tur.)

Vocalized *this* way or *that* way, the conceit is that the legislature's examples will, in some way, speak out loud and tell us who their friends are. In this dialogue of the mind, as Carroll might say, we're able to know whether a ski hill is a friend to trails, abandoned landing sites, or old mining roads.

Part of this isn't too troublesome, which is the part where you think out loud in your head, or you talk out loud about it, or you write it down, which is what lawyers and judges are quite used to doing. But the part that is quite troublesome is the suggestion that L, M, N, etc. are going to talk to you and tell you the answer. Is P saying she's a friend? Or a not-friend?

Even before we go too much farther, this is how we're going to get into trouble; what the legislature said were examples are really generalizations, which makes a piece of codelaw a generalization about generalizations. The alert reader will already guess that there's a wheelbarrow of problems running one generalization/property/set into another *or* nesting one class in another class.

Can you have a generalization of generalizations where former are complete and the latter are incomplete? The class of all classes who are not members of themselves – known as R, in honor of its discoverer Bertrand Russell – can only be perfect if it doesn't exist. The year is 1902.

But on the other hand, the perfect generalization must exist because if it didn't exist it wouldn't be perfect. St. Anselm gets the honors here. The year is 1078. (Apparently the real world can be full of imperfect and indubitably *really* existing generalizations.)

One other approach (among many) is to look for the negative analogy, in our case, to look for the un-friends of the legislator's listed examples. Perhaps the un-friends would tell us more than the friends would tell us. So ran the thinking of John Neville Keynes, who taught moral science at Cambridge. His son, John Maynard, is better known but the young J.M. wrote an important work on logic as well. What's interesting about looking for un-friends is that diversity in experience of the searchers may be of value. If you have ten people with ten different life-stories – differing in socio-economic, race, religious backgrounds and so forth – perhaps working together these ten are more likely to come up with some useful un-friends to populate the set in question. On Keynes' account, variety in examples is more useful than similarity. Differences matter but only if the experience is shared in public.

One solution might be to follow Carroll's suggestion. Talk–or at least ask–out loud. You could, for example, ask the legislature. In fact, judges in the first French republic (1792) were instructed to refer matters to the legislature if they found the law was unclear.

Within a few years, however (and the guillotine at work may have played a role here) judges were unwilling to make decisions, and they were referring all legal issues to the legislature. So when the Code Civil was adopted, which we know as the Code Napoleon (1805), judges were told not to ask the legislature for help. No matter how tough the work was, the judge had to do it. So if there's any kind of dialogue about the set of examples, the dialogue would have to be one where the legislature's not on the other end of the phone. On the other hand, perhaps that's the solution to "activist" judges. Simply have the legislature decide all contested issues of statutory interpretation.

It's been done another way: In the Roman Empire a litigant could write the Emperor and get back a "rescript" which answered the legal question posed. The first litigant with a winning rescript won the suit. The Emperor Valens (364-378 A.D.) complained that there was no point in having a court system if he was going to resolve all these issues himself. In the Eastern Roman Empire these issues were referred to the Attorney General in Constantinople, just as our Governor might dispense rescripts, if the idea catches anyone's fancy these days. If we adopt the terminology of that empire, Gregg Renkes will be known as the Quaestor of the Sacred Palace. Juneau and Constantinople! Narrow bodies of water, silk robes, the raised dias. It's all coming together.

Which brings us back to the question: Are a bunch of generalizations going to be helpful without an apparatus to help us decide how to populate (A)? Or is there a way to generalize about generalizations? Of interest is the fact that many solutions assume live discourse as a way of getting at the friends of L, M, N, etc. Perhaps generalizing about generalizations works if you do it together.

For those interested in the Supreme Court's apparatus read *University v. Shanti*, 835 P. 2d 1225, 1232 (Alaska 1992) which contains the instructions to the trial judge for parting friend from foe. (Along the way, the court did clear up this point: natural bodies of water are unimproved land. At 1228.)

In getting friends for your tea party into (A), whether associated or dispersed, friendly or unfriendly, you wind up being committed to method and this has more to do with the logic of the law than most lawyers feel comfortable articulating. Since we're an extraordinarily articulate profession, we'll just have to talk out loud, as Lewis Carroll suggests, although we may keep it to ourselves.

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

Comments are sought on proposed amendments to Local Rules

Local (Civil) Rule 10.1

All Comments received become part of the permanent files on the rules.

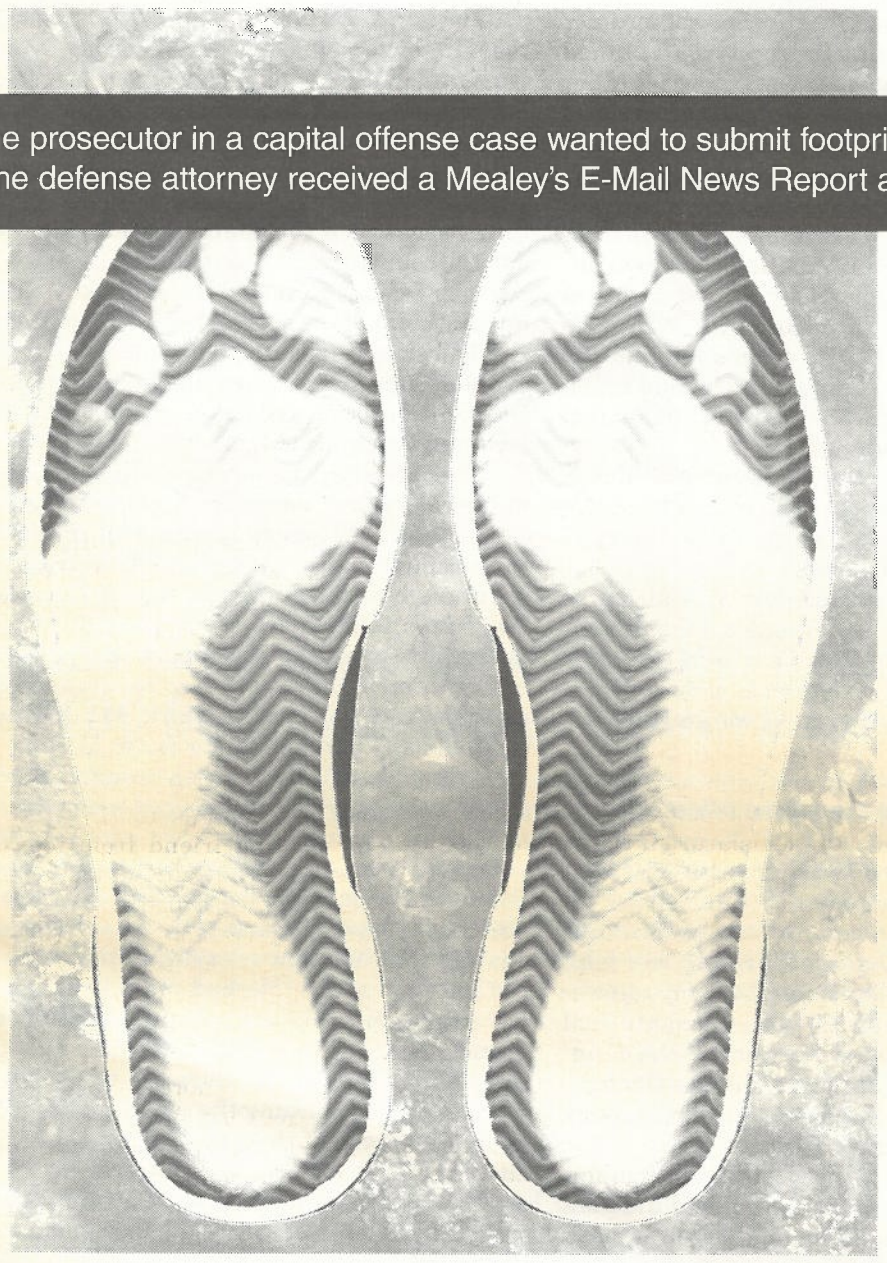
Written comments on the preliminary draft are due not later than April 2, 2004

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

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

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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Alaska Women in the Bar

First woman lawyer in Fairbanks leaves legacies of reform

By Phyllis Demuth Movius

French born Aline Chenot trained as a singer in Paris, a doctor in Philadelphia and a lawyer in Fairbanks. Juggling this unlikely combination of careers she found her niche in the north where she flourished amidst sorrow and trials, joy and opportunity.

Born in Paris on December 18, 1867 to Jacques and Louise Renaud Chenot, Aline lived in Europe until 1886, when her parents gathered up their three daughters and one son and emigrated with the family to the United States.

On April 5, 1894, Aline married Thomas Hardy Baskerville of New York. Ten years her senior, Hardy as he was called, was a practicing physician in Pennsylvania. Possibly inspired by his work, Aline abandoned her life-long plan to be a professional singer in exchange for a medical career.

However, in the 1800s, the idea that women should be trained as physicians met with animosity. In fact, as late as 1872 the German anatomist Theodor von Bischoff preached that because of woman's smaller brain, her physical weakness and her gentle nature she was unfit for medical science. He argued further that "by both the divine and natural order, women lacked the rare ability to work in the natural sciences and especially medicine."

Aline Chenot Baskerville Bradley Beegler 1867-1943

Nevertheless, closed doors to women at the existing American medical schools resulted in the opening of women's medical colleges in Philadelphia, New York City, Chicago and Baltimore.

A woman of science and song

Begun in 1850, the Women's Medical College of Pennsylvania was considered the best of the four because of its early beginning, capable leadership and unusual local support, while the University of Pennsylvania Medical School continued to bar women from admission until World War I. Therefore, Aline's choices were limited if she planned to attend school in Pennsylvania where she and Hardy lived. She graduated from the Woman's Medical College of Pennsylvania in 1903.

In 1907, when Aline was thirty-nine years old, Hardy's chronic asthma forced the couple to seek the cooler, dryer air in the north. Arriving in Fairbanks during the summer, Aline, indulged her trained soprano voice and immersed herself in the seasonal performing arts scene.

Days before her first concert on August 11 her talent was praised when the *Fairbanks Daily Times* proclaimed, "Dr. Aline Baskerville Will Make Her First Appearance and Her Reputation Has Already Preceded Her." Reporters said she was "one of the best singers" who had ever come north, and after performing *Just a Song at Twilight* she was dubbed "a most valuable acquisition to the music circles of Fairbanks."

After making a name for herself musically, Aline opened a medical practice holding the distinction of the second woman doctor in Fairbanks— Dr. Dora Fugard preceding her in 1903. Apparently Aline and Hardy felt comfortable in Fairbanks because by fall they were ensconced in what a friend described as a "picturesque large log cabin" that they bought at the corner of 8th Avenue and Cushman Street. However, within a year this contentment turned to profound sorrow.

On September 8, 1908, Thomas Hardy Baskerville died as a result of an inoperable spinal tumor. More than 100 Fairbanksans paid their respects at his funeral service at the Episcopal Church--a tribute to a man who had lived in the community only a year, but illustrating the tight bonds formed quickly on the frontier where reliance on each other was not just part of the social fabric but an integral part of survival.

Aline soon remarried James Freeman Bradley, a tall, handsome Canadian miner. They had met when James guided a hunt for Aline and Hardy earlier that year. The story has it that shortly after Hardy's death, James approached Aline saying he had fallen in love with her on that trip and wanted to marry her.

Aline affiliated with the Presbyterian Church where she was choir director and a member of its Ladies' Aid Society that was organized about the time she arrived in Fairbanks.

Beginning with her first days in Fairbanks Aline delighted in sharing her musical talent with the community. She was also active in the city's choral club and oratorio society during these years. But her community involvement would run even more deeply.

E.T. Barnette runs into Aline

Little was known about E. T. Barnette when he founded Fairbanks in 1903. However, by 1911 every resident had an opinion of him. In his biography of Barnette, Alaska historian Terrence Cole recounted "that Captain Barnette had both more money and more enemies than any man in Alaska." But, according to Cole, Barnette had no idea how deeply hated he was by these enemies until the consolidated Fairbanks Banking Company/Washington-Alaska Bank unexpectedly closed its doors in January 1911.

Caught unawares by the closure, the community charged Barnette and the bank's directors with mismanagement and fraud. Angry depositors formed a representative committee to investigate—six men and Aline.

When Barnette, who had been "Outside" at the time the bank collapsed, finally returned to Fairbanks in mid-February, the community felt relieved that an explanation would be forthcoming and justice would be done. Imagine their disbelief when Barnette had no acceptable solution to the problem nor did a grand jury find enough wrong-doing to indict him. An editorial in the *Fairbanks Weekly Times* warned that "wildcat banks" could lawfully operate in the Territory, and "in the absence of laws necessary to protect unsuspecting depositors from financial tricksters, it is plainly up to the people to look out for themselves as best they can."

The same newspaper reported that E. T. Barnett and his wife, Isabell, slipped out of town the previous night in a "double-ender" drawn by a white horse. Disgusted with the corruption, secrecy of this affair, and the way the case was being handled, Aline and four other Fairbanks women formed a new depositors' committee to take action. And take action they did: 250 depositors attended the first meeting called by Aline on a Tuesday evening in early April at which a police escort protected her from threats made by a known community troublemaker. Convincingly she shared the results of her research into the case, and the depositors voted without dissent to further the prosecution of Captain Barnette on the charge of embezzlement; to ask the court to call a special grand jury; to ask the court to remove Receiver Hawkins; to ask for the appointment of the special accountant, and lastly, the depositors present voted to pledge five per cent of their deposits to assist in the investigation of the bank situation and the employment of the best legal advice obtainable.

The day after the meeting Aline and her committee were praised by the local newspapers for the "spunk" they demonstrated in trying to get to the bottom of the situation. As a result of this initiative, both the *Fairbanks Weekly Times* and the *Fairbanks Daily News-Miner* pledged to do more aggressive investigative reporting. To maintain momentum Aline shared her opinions with Territorial Governor Walter Clark who highlighted the following passage in her letter to him.

"That Grand Jury was a wonderful body of men—a few may have been good men—four were in debt to the bank; two were men of notorious character; one of them lives at a nominal rent in Barnette's house, and shamelessly saw Barnette's attorney every day. Barnette's subsequent actions showed that he knew everything that transpired in that Jury room. He had come here to quiet a few dangerous large depositors, and see that that grand jury did not harm him—which it did not. The failure to indict was not surprise to the public."

A petition outlining the details of the case and Aline's analysis of the jury was presented to the District Court for the Fourth Division of Alaska and to Governor Clark. But, the "most wonderfully terrible part of this tale," she explained, was that F. W.

Hawkins, one of the bank's cashiers in on Barnette's scheme, was appointed as receiver during the litigation for a salary of $400 a month. Aline pointed out that Hawkins was still in this position despite cries from depositors. The women's committee urged his removal. The dramatic conclusion

Continued on page 23

SOLICITATION OF VOLUNTEER ATTORNEYS

The court system maintains lists of attorneys who volunteer to accept court appointments. The types of appointments are listed in Administrative Rule 12(e)(1)-(e)(2). Compensation for these services is made pursuant to the guidelines in Administrative Rule 12(e)(5).

Attorneys may add their names to the volunteer lists by contacting the area court administrator(s) for the appropriate judicial district(s):

First District:
Neil Nesheim
PO Box 114100
Juneau, AK 99811-4100
(907) 463-4753

Second District:
Tom Mize
101 Lacey Street
Fairbanks, AK 99701-4761
(907) 451-9251

Third District:
Wendy Lyford
825 W. 4th Ave.
Anchorage, AK 99501-2004
(907) 264-0415

Fourth District:
Ron Woods
101 Lacey Street
Fairbanks, AK 99701-4761
(907) 452-9201

To be eligible to receive court appointments, a lawyer must have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate.

First woman lawyer in Fairbanks leaves legacy of banking, health reform

Continued from page 22

to the appeal urged clandestine secrecy.

"Do not ask for assistance from Delegate Wickersham, [Aline wrote] for we do not know on which side he would stand, and we can afford to take no chances. The manner in which you will help us, we leave to your goodness and discretion. We are moving as quietly as possible, so as not to let the other side know what we are doing.

While Aline urged Governor Clark to move secretly and quickly on this matter, the *Fairbanks Daily News-Miner* editor, W. F. Thompson, who had pledged to investigate this case, moved faster. On April 10, Thompson wrote to Delegate James Wickersham in Washington, D. C. asking for much the same things outlined by Aline's women's committee. A month later, Wickersham replied by telegram that he would send an investigative agent as soon as practical. Thompson's response was revealing:

"The people of Tanana will be grateful for your action. Please remember that past investigations made in Alaska by department officials have been boys' play and jokes, and assure yourself personally that only high-class men are sent to conduct this investigation."

Surprisingly, a mid-June Fairbanks newspaper article warned that E. T. Barnette was enroute to the Tanana Valley aboard the first through stern-wheeler of the year. Once there, a *Fairbanks Weekly Times* reporter asked Barnette, "Why did you come back?" Barnette responded, "Why shouldn't I come back?" The conversation stale mated. Supposedly Barnette was still trying to work out the bank's problems and repay depositors their accounts.

The investigation that ensued led to the ultimate arrest of E. T. Barnette in late 1911, but his eight flamboyant attorneys waged a good battle on his behalf in

December 1912. Out of eleven indictments against him on such charges as making false reports, perjury and embezzlement, only one misdemeanor charge was proved.

Despite the prosecution's request for imprisonment, Judge Thomas Lyons only fined Barnette $1000. Based on his accumulated wealth, this was hardly punishment. Hundreds of ruined Fairbanksans believed it was their money that Barnette used to buy his freedom in what W. F. Thompson called the " 'rottenest judicial farce the North has ever witnessed.' " Frustrated by the turn of events, Aline retaliated.

Banking and health reform

On January 12, 1913, Aline and her committee staged a dramatic conflagration on the frozen Chena River at the foot of Cushman Street where they burned three effigies representing John L. McGinn, and John A. Clark, two of the bank's attorneys, and another labeled "Justice." Hundreds of townspeople turned out to cheer the women's vengeful effort to even the score with E. T. Barnette and his men. However, according to her friend Jessie Bloom, for her actions Aline was snubbed by some Fairbanksans all the years she remained in the Territory. In spite of this, Aline's perseverance paid off when three months later the first Legislature to convene in Alaska enacted the Territorial Banking Act. Except for national banks, all Alaska banks were now under territorial government regulation for the first time. Aline's efforts had paid off, and her influence was felt Alaska-wide.

With the bank failure case behind her Aline concentrated on her medical practice and redirected the focus of her life. The Fairbanks City Council that elected Aline City Physician from a slate of four applicants in October 1913. In this public health role, Aline wasted no time presenting a report to the council outlining ventilation deficiencies in the school building which received immediate attention. Other issues raised were medical care for indigents, and dairy inspection to insure the safety of milk, the latter resulting in passage of legislation for quality control. Aline filled this position, for which she received $50 a month (later $70), for a year and a half until April 1915 when the City Council abolished the office.

During her tenure as City Physician, Aline was appointed by Governor J. F. A. Strong to the Territorial Board of Medical Examiners. At the same time Judge James Wickersham noted in his diary having a "long talk about political conditions with shrewd Mrs. Dr. Bradley." Possibly at his urging, Aline began self-directed study of the law intending to take the Alaska Bar Exam. Undoubtedly these medical appointments enhanced Aline's image and exposure in the Territory enabling greater recognition in the political arena on important issues about to become public.

From Prohibition to the Bar

Like many Alaskans, Aline was caught up in the volatile prohibition debate. An

active member of the Woman's Christian Temperance Union (WCTU) she also chaired the "Fourth Division Drys," the Fairbanks women's group formed to push for the Bone Dry Law. Along with Margaret Keenan, Aline, who also served as Legislative Superintendent for the group, was credited with swaying the vote in the Fourth Division on election day 1916 when Alaskans decided two to one in favor of prohibition.

She passed her oral and written tests, and at the recommendation of the three-member examining committee that included attorney John A. Clark (whom Aline had hanged in effigy several years earlier), she was proposed for admission to the Alaska Bar.

In addition, Aline worked with Alaska's Delegate to Congress, James Wickersham, to secure Territorial control of school funding. When Congress passed the Bone Dry Law in February 1917, Aline was one of three individuals, and the first in Fairbanks to whom Wickersham telegraphed the news. By spring 1918, Governor Strong was pleased to report that arrests and crime associated with alcohol had decreased dramatically in the first two months of that year, and C. L. Vawter, United States Deputy Marshal at Tanana predicted that when the last drop of cached alcohol disappeared, "all Alaska jails will go out of business." Now that laws were in place to control the manufacture, importation and consumption of alcohol, Aline's turned yet again to other matters.

Although Aline accepted reappointment to the Territorial Board of Medical Examiners in September 1917, her study of the law under Fairbanks attorney Albert R. Heilig was sufficient for her to take the Bar exam. She passed her oral and written tests, and at the recommendation of the three-member examining committee that included attorney John A. Clark (whom Aline had hanged in effigy several years earlier), she was proposed for admission to the Alaska Bar.

But Aline's husband's lack of American citizenship stalled the process. Second husband James Bradley was born in Nova Scotia, Canada and as a teenager moved to Missouri with his adoptive parents. Under the impression that his adoptive father had taken care of the citizenship matter long ago, James thought he was an American citizen and in fact had voted in several Fairbanks elections. Nevertheless, his citizenship could not be proven, and his naturalization hearing was challenged on a legal technicality. Before the question could be settled, James Freeman Bradley died at home of pleuro-pneumonia at age 59 on November 29, 1918.This then raised the question of Aline's citizenship since her marriage to a Canadian made her a subject of Great Britain. Because her first marriage made her an American, and Aline planned to remain in Fairbanks, she argued for her American citizenship. (As her admission to the bar hung in limbo, Aline during this time made an unsuccessful bid for a seat on the City Council in 1917, losing with the fewest votes among six other candidates. A newspaper article announcing the results noted that most of that election's winners were pioneers "having been in the North since the early days of the Dawson stampede." Aline's mere nine years in Alaska may have been a hindrance.)

It was not until October 1919, when Aline married her third husband, Michael Beegler, himself a naturalized American, that her citizenship question was resolved. She was finally admitted to the Alaska Bar in November 1920, over three years after passing her exams. On March 5, 1921, Aline became the first female attorney to appear before the Fairbanks bar.

As before, Aline's period of widowhood was measured in months. According to one source, only weeks after James Bradley's death the first proposal came and they continued until 11 months later when Aline married Michael, a miner of German descent. Beegler came north in the 1898 stampede, established himself in Livengood, and was previously married in Fairbanks to Kittie McGowan.

Immediately after their marriage, Michael and Aline left to spend the winter Outside visiting family and friends. Michael had established the practice of spending the harsher half of the year in a warmer climate, and apparently Aline adapted easily as the next 10 years were spent in this way. Because summers were spent in the Livengood mining district, Aline's practice of the law was limited, but in the fall 1922, the City Council selected her as city magistrate and legal adviser for a salary of $50 a month.

By 1923, Aline was 56 years old, and evidence of her medical and legal practices declined. But, that does not imply that Aline shrank from view. In fact, quite the contrary. In July, Aline made history as aviator Carl Ben Eielson's passenger on the first flight to Brooks near Livengood. The compass-directed trip took only 55 minutes at an altitude of 4,000 and cost Aline $85.

In 1929, the Beeglers bought a house in southern California where they had spent the past few winters. When they returned to Fairbanks in the spring 1930 it was only to settle business affairs and prepare to retire Outside. A difficult task for Aline was the sale of her beloved log home on Cushman Street. By early summer Michael had sold most of his Livengood mining interests, and the Beeglers prepared to start south. On July 10, 1930, Michael and Aline left Fairbanks for the last time headed to Seward where they boarded the steamer *Aleutian* for their passage Outside. Their retirement together was short-lived.

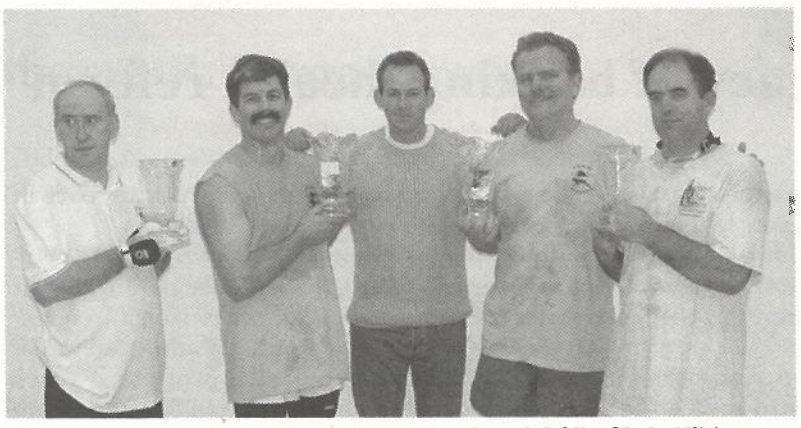
In June 1931, Michael and Aline attended college commencement exercises in California for Franklin Zimmerman, son of Aline's good Fairbanks friend Mary Zimmerman. The day after Michael suffered a paralytic stroke and lost the use of his arms and legs. Five weeks later on July 17, he died in Highland Park, a Los Angeles suburb, at the age of 73. Ed Wickersham, brother of Judge James Wickersham, served along with other former Alaskans as pall bearers at the funeral.

Aline continued to live in the Los Angeles area for another 12 years and managed some Fairbanks area mining interests from afar. She died of heart failure in Pasadena on June 19, 1943 at the age of 75. Although she had lived Outside for over a dozen years, her Alaskan roots remained strong, and her Fairbanks friends Bob Bloom and Mary Zimmerman handled her estate.

Aline Chenot Baskerville showed tenacious courage as she moved through adulthood in her roles of physician, lawyer, political activist and always wife. Her cunning ways provoked some and impressed others, but no matter how she affected people her energy, excitement and intelligence allowed her to reach new heights. Although only an ethereal image of Aline remains in the north, she had a hand in shaping Alaska's public health policy and its banking laws.

Aline's commanding presence caused family friend Meta Bloom Buttnick to remark, "Daddy *admired* her. Mother *obeyed* her. We *all* loved her." Those watchwords could serve as Aline's epitaph.

Phyllis D. Movius is an independent historian from Fairbanks. This is an excerpt. The full manuscript, including footnotes and references) is in the collection of the Alaska Bar's Historian's Committee. The full version also can be found in the online collection of the Alaska Bar Rag's Historical Bar section. (www.alaskabar.org).



Attorney Scott Dattan (second from right) and GCI's Chris Kilday (fourth from right) hoist their Waterford vases in Ireland with their doubles opponents and match ref.

Alaskans win handball championship in Ireland!

By D. Scott Dattan

Two members of the Alaska Bar Association played in The World Handball Championships in Kilkenny, Ireland in October, 2003. Rich Curtner and two were part of "Team Alaska" consisting of 20 handball players who made the trip from Anchorage.

Kinkenny, a beautiful old city built on the Nore River, includes some old buildings such as St. Canice's Cathedral (built in the 13th century) and Kilkenny Castle which was a 12th century Norman fortress that is now a museum and art gallery. My wife Carol and I stayed at the Zuni Hotel in the middle of Kilkenny. It is a small hotel recently remodeled which also has one of the best restaurants in the region. The Zuni Hotel is within walking distance of everything in Kilkenny which also has great shopping within its ancient medieval walls.

Handball is definitely an Irish sport. The World Championships have been held in Ireland in 1970, 1984, 1994, and in 2003. Although Dublin and Kilkenny hosted the tournament, matches were played in small towns throughout the area, such as Kells, Castlecomer, Clonmel, Coolboy and Carlow. Given the advanced age of both Curtner and myself, we entered the tournament in the Men's Golden Masters in both singles and doubles. Singles matches were played in the morning and doubles in the evening – so players had time to travel to the town where the match would be played.

Rich Curtner is the president of the Alaska State Handball Association and has done a lot to invigorate the sport in Alaska. Other notable members of the Bar who play handball include Gordon Schadt and Dave Knapp and Don Edwards, none of whom could accompany Team Alaska to Ireland.

My partner Chris Kilday and I actually won the Golden Masters B Doubles World Championship in Kilkenny on October 26, playing in the finals against the #1 seed All-Ireland 50+ Doubles Champions. We won the final match 21-6, 21-17 in an astonishing victory for Team Alaska. Although I have won a couple of Golden Masters State Championships in singles and doubles, this is the first tournament I ever entered outside of Alaska. It was well worth the trip.

The World Championships are sponsored by Waterford Crystal which manufactured the beautiful crystal vases engraved to commemorate the 2003 championships. Before and after the tournament, all of the players took some time to see Ireland. Each of us has adventures to relate, (especially Rich Curtner who experienced some delay in getting to Ireland due to an expired passport).

My wife Carol and I spent a few days in Dublin which in addition to great shopping in and around Grafton Street and some wonderful restaurants in the Temple Bar section of town, also has Trinity College, Dublin Castle and the Four Courts (housing both the law courts and the public records office.) No visit to Dublin would be complete without visiting the Guinness Brewery or seeing the ancient manuscript known as the Book of Kells in Trinity's Old Library.

During the tournament we managed to visit the Rock of Cashel, the Waterford Crystal factory, the Vale of Avoca and many other beautiful sights, including mountain drives in the Wicklow Mountains and the Knockmealdown Mountains. We discovered crumbling, beautiful old ruins at Kells Priory, Jerpoint Abby and out on the Ring of Kerry. Ireland proved to be a great place to visit, full of historic sites, great museums, friendly people and excellent places to eat and stay. There is no doubt that a large Alaska contingent will be well represented for The World Championships to held in 2006 in Edmonton.

In 2003, 1,400 players came from Australia, Spain, Canada, England, Ireland, Japan, Wales, Alaska and The United States. The Irish were wonderful hosts.

Handball is an invigorating game and a great way to get into or to stay in shape. It also works as a wonderful antidote to the stress of being a lawyer. One of the great things about handball is that you don't have to be a great player to get a great workout. The game is easy to learn, but difficult to perfect.

Upcoming CLE Seminars: March & April 2004

(NV) = Not videotaped

Date	Time	Title	Location
March 9	8:30 a.m. – 4:00 p.m.	Gaining A Competitive Edge: Persuasive Presentation for Trial and Transactional Lawyers CLE #2004-002 6.25 General CLE Credits	Anchorage Hotel Captain Cook
March 12 (NV)	9 :00 a.m. – 12:15 p.m. AND 1:30 – 4:45 p.m.	Ethics is NOT a Multiple Choice Question: Mandatory Ethics for New Lawyers in Alaska CLE #2004-888A 3.0 Ethics CLE Credits	Anchorage Snowden Building Training Center
March 18	9:00 a.m. – 12:15 p.m.	Using a Property Division Spreadsheet: Helping Domestic Relations Clients, Lawyers, and the Court CLE #2004-010 3.0 General CLE Credits	Anchorage Hotel Captain Cook
March 18 (NV)	8:00 a.m. – 12:00 p.m.	ALI-ABA Satellite TV CLE Limited Liability Entities 2004: New Developments in Limited Liability Companies and Limited Liability Partnerships CLE #2004-017 3.5 General CLE Credits	Anchorage KAKM Board Room, APU Campus
April 28 (NV)	8:30 – 10:00 a.m.	Annual Convention CLE: Case Evaluation/Discovery/Early Resolution CLE #2004-701 1.5 General CLEs	Anchorage Hotel Captain Cook
April 28 (NV)	10:30 a.m. – 12 noon	Annual Convention CLE: Executing Effective Motion Practice CLE #2004-702 1.5 General CLEs	Anchorage Hotel Captain Cook
April 28 (NV)	12:15 – 1:30 p.m.	Annual Convention CLE: The Anti-Government Movement and the Courts, Part 1 CLE #2004-703 .5 General CLEs	Anchorage Hotel Captain Cook
April 28 (NV)	1:45 – 3:15 p.m.	Annual Convention CLE: Getting to ADR: How, Who, When, What Type CLE #2004-704 1.5 General CLEs	Anchorage Hotel Captain Cook
April 28 (NV)	3:45 – 5:15 p.m.	Annual Convention CLE: Negotiating Tactics and Strategies CLE #2004-705 1.5 General CLEs	Anchorage Hotel Captain Cook
April 28 (NV)	1:45 – 5:00 p.m.	Annual Convention CLE: The Anti-Government Movement and the Courts, Part 2 CLE #2004-706 3.0 General CLEs	Anchorage Federal Building Courtroom TBA
April 29 (NV)	8:30 – 10:00 a.m.	Annual Convention CLE: Who Is Attorney X and Why is Attorney X in Trouble All the Time? CLE #2004-707 1.5 Ethics CLEs	Anchorage Hotel Captain Cook
April 29 (NV)	10:30 a.m. – 12 noon	Annual Convention CLE: Courtroom Control, Decorum, and Civility CLE #2004-708 1.5 General CLEs	Anchorage Hotel Captain Cook
April 29 (NV)	1:45 – 3:15 p.m.	Annual Convention CLE: Effective Brief Writing CLE #2004-709 1.5 General CLEs	Anchorage Hotel Captain Cook
April 29 (NV)	3:30 – 5:00 p.m.	Annual Convention CLE: Powerful Communication Inside the Courtroom and Out CLE #2004-710 1.5 General CLEs	Anchorage Hotel Captain Cook
April 30 (NV)	8:30 a.m. – 12 noon	Annual Convention CLE: U.S. Supreme Court Opinions Update with Professors Chemerinsky & Levenson CLE #2004-711 3.25 General CLEs	Anchorage Hotel Captain Cook
April 30 (NV)	2:00 – 3:30 p.m.	Annual Convention CLE: Alaska Constitutional Law Update CLE #2004-712 1.5 General CLEs	Anchorage Hotel Captain Cook
April 30 (NV)	3:45 – 5:15 p.m.	Annual Convention CLE: Myth, Reality, and the Patriot Act CLE #2004-713 1.5 General CLEs	Anchorage Hotel Captain Cook

Please see the convention ad on page 17 for more information

HI-TECH IN THE LAW OFFICE

Introducing the digital law office: An historical perspective

By Joe Kashi

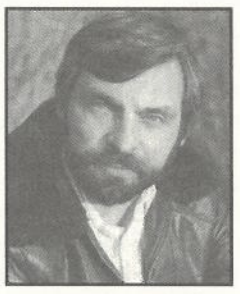
The paper-cluttered lawyer's office is a cinematic cliche and a malpractice suit waiting in the wings. I've seen estimates that staff waste as much as 10% of their work week looking for lost or misfiled documents, an estimate that probably understates the frustration and time wasted filing, retrieving, copying, and refiling paper documents.

As litigation becomes increasingly complex and as computers render the generation of paper documents almost too easy, more and more paper is generated, resulting in a bigger haystack within which that needle may reside. Not only is time wasted looking through all of this stuff for whatever you might need on a day to day basis, but you obviously must spend the time and staff resources to correctly file everything in the first place. Not only is handling all of this paper costly but it severely degrades your own efficiency to an extent that you'll likely find hard to believe until you actually convert your office to digital filing.

Over the years, digital office concepts have come and gone, but the available hardware was not really suitable for a small firm. In particular, scanners were either too expensive or too slow and hard disk storage was too limited. Commonly used file formats such as TIFF were huge, data compression schemes were rudimentary, and hard disk capacities were much too small.

I remember a 1994 visit to the electronic imaging facility used by Exxon when preparing its defense to the multi-billion dollar claims arising from the 1989 Exxon Valdez oil spill, one of the first major electronically conducted trials. Exxon's ad hoc litigation imaging facility for that trial was huge, employing dozens of people housed in a huge multi-floor industrial building in Anchorage. In order to store those images, Exxon used then-state of the art mechanical laser disk libraries that cost many thousands of dollars, were unreliable and slow but had a then-astounding 20 GB or 40 GB storage capacity. Similarly, suitable scanners were complicated to install, slow and expensive. A basic CD disk burner cost $3,500.

Inspired by the Exxon litigation imaging initiative, I actually tried to start a small business to image physician records, fixing up a nice small facility and spending about $15,000 on basic hardware, including a Fujitsu 15-page-per-minute scanner, a stand-alone CD burner and a 20 GB HP mechanical laser disk tower. Even then, having purchased what was then near state of the art hardware, I found digital imaging was still not ready for prime time, at least in the small law office. It was simply too slow and too cumbersome. I received another sharp and expensive illustration about avoiding cutting edge technologies and waiting until the technology became mature, inexpensive and mainstream. What was economically feasible on a one-time basis in a $5 billion lawsuit could not be justified in a small law practice. As a result, I was content to mostly practice law in a traditional way, relying upon highly trained and experienced staff and legacy paper filing.



"Not only is handling all of this paper costly but it severely degrades your own efficiency to an extent that you'll likely find hard to believe until you actually convert your office to digital filing."

After a long-time paralegal recently retired, I was forced to reconsider my entire method of practicing law and to move away from legacy paper files to an all-digital filing system as much from desperation as anything. Surprisingly, transitioning to a fully digital law practice was unexpectedly easy due to rapid advances in low cost but highly capable imaging hardware, software and large capacity hard disk.

The economic benefits of a fully digital office were immediate and significant. Clerical staff requirements, and payroll costs, dropped very significantly. I was able to split staff duties into simpler, easily taught components and was no longer so dependent upon one or two key employees who might retire or move away. Within three months, I found that almost any document or information that I needed was already imaged and filed, or could be imaged on the spot. Even though I chose to not scan existing paper files in cases that would be concluded in the foreseeable future, I did scan all newly received and produced documents in all cases. As a result, I could put my hands on almost anything that I needed without leaving my desk - most of the data that we're likely to need in the immediate future is data that we have already recently used and, presumably, already imaged.

You'll need to implement several different, mutually supporting technologies as part of your digital law practice initiative. For example, document imaging supports the accounting function by electronically storing and retrieving all of your receipts, invoices and cancelled checks. Imaging also supports your litigation presentation in much the same way. Be sure to install and optimize one digital office function at a time in an orderly and measured way. Trying to do everything at once is, at best, frustrating and scattered.

First and foremost, you'll need an effective and reliable law office network so that people can readily access everything produced or received by your firm. Without effective networking, you're practicing solo, regardless of how many lawyers physically reside in your office.

Secondly, you'll need a networked billing and accounting program that allows each lawyer and staff member to directly input time, billing, and cost information as it's incurred. That saves more time and staff resources than you might imagine.

Thirdly, you'll need a strong case-management and contact management program. These are the foundations of any digital law practice.

Fourthly, you'll need to share your word processing and spreadsheet documents throughout the office by storing everything on central file servers. (Be sure to give some thought to internal and external network security while you're at it.). Only after you've accomplished these ends should you go to the next level, document imaging and digital filing.

Most law practices have already implemented some of these functions, at least partially. Before you go further, be sure that these fundamental technologies have been optimized and, if necessary, upgraded to the latest versions. Use their capabilities to the fullest extent that you can justify -- often, we realize only a fraction of the potentially available benefits because our rather traditional mindset inhibits optimum use. For example, rather than waiting for your bookkeeper to enter checks that you've written, take a little extra time to enter check data on the networked accounting package as the checks are written. Change client telephone number and address data yourself rather than instructing a secretary to do so. Now, it's often faster for the lawyer to simply do these simple tasks ourselves rather than instruct clerical staff - and, you've eliminated some clerical overhead as well.

After your fundamental applications are working reliably and used to their optimum, then it's time to take the next steps. These include underlying enabling technologies like document imaging and voice recognition and also litigation support and trial presentation applications, perhaps the ultimate expression of our profession.

Starting to practice digitally is something like learning to swim. The technologies are now mature and proven, accessible to anyone willing to make the effort and spend a few thousand dollars to save tens of thousands. You'll want to prepare yourself ahead of time, but ultimately you'll need to take the plunge to get anywhere. Luckily, the water's no longer over the heads of solo and small firm practitioners.

Anchorage Inn of Court Update

The Anchorage Inn of Court held its legislative meeting in December 2003. The key note speaker was Lt. Governor Loren Leman. In addition, the Inn invited lawyer legislators to attend a panel discussion on pending legislation. The lawyers on the panel included: Sen. Hollis French, Rep. Lesil McGuire, and Rep. Max Gruenberg.

Lt. Gov. Leman speaking with Judge Beverly Cutler.

L to R. Mark Bledsoe, Sen. Hollis French, Thomas Van Flein, Rep. Lesil McGuire.

L to R. Charlie Coe, Ken Jacobus, Virgil Vochoska, Zachary Manzella, Aleta Pillick, Thomas Van Flein, Lt. Gov. Leman, Sam Cason, Gene DeVeaux, George Skladal, and Yale Metzger.

HI-TECH IN THE LAW OFFICE

The basics of spam & strategies for defense

By Sharon D. Nelson & John W. Simek

So how much do you hate spam? Spam-haters have become the world's largest club.

Where we all once had a trickle of unsolicited e-mail that turned into a river, most lawyers now see spam in terms of a tsunami that grows in height on a daily basis and threatens to crush legitimate e-mail correspondence.

The grim facts

First, let's examine the unnerving statistics, as reported by Massachusetts Institute of Technology's *Technology Review* and *Consumer Reports*, some of which may seem startling. It will not surprise anyone that spam now comprises more than 50 percent of the average inbox, up from 8 percent in 2000. More than 13 billion unsolicited e-mail messages swamp inboxes worldwide every day. America Online reports it routinely blocks more than 1.5 million spam messages per day and yet it also averages 7 million complaints daily about the spam that gets through. According to the Radicati Group Inc., a market research firm specializing in e-mail, the number of spam messages is doubling every 18 months. Ferris Research now estimates spam causes a $10 billion a year loss of productivity in the economy.

How the spammers find you

How do spammers get your address in the first place? There is the classic "dictionary attack" in which spammers target guessed names such as johndoe, johndoe1, johndoe2, etc. Spammers all have software to facilitate these attacks — if they don't receive a "bounceback" indicating that the address is invalid, they add it to their "confirmed valid" database.

If you shop or register for something online, be wary. L.L. Bean will not sell your e-mail address, but "Joe Chen's Bargain Computers" might do just that. Make sure you look at privacy policies and be skeptical about companies you don't know to be reputable.

If a lawyer places an e-mail address on his or her law firm site at 8 a.m., he or she is likely to receive the first spam message by 8:10 a.m. Ditto for talking in chat rooms. Spammers use special harvesting software to scan the Net for visible e-mail addresses. As an experiment, The Center for Democracy & Technology, a Washington, D.C., advocacy group, posted 250 new e-mail addresses on its Web site. Within six months, the addresses received more than 10,000 unsolicited e-mails.

Spammers also harvest e-mail addresses from free chat services. That was at least part of the reason that Microsoft closed its chat rooms in 28 countries on October 14th, although it allowed them to remain open on a subscription basis in the U.S., Canada and Japan, where visitors are more accountable because their billing details are on record with Microsoft.

How do the rest of them find your address? Often through reselling. Sometimes lawyers are their own worst enemy as they reply angrily "Remove" or "Unsubscribe," only to have their address now added to spammers "confirmed valid" lists, which they will of course then sell to other spammers. Unsurprisingly, "confirmed valid" lists are generally resold many times over.

The statistic that takes most people aback is the experts' consensus that roughly 90 percent of all spam is sent by less than 200 people, a view affirmed by the Coalition Against Unsolicited Commercial E-mail, an anti-spam coalition. Jon Praed, an attorney with the Internet Law Group in Arlington, Virginia told *Technology Review* these major league spammers are "hackers gone bad or they are crooks gone geek."

State Legislative solutions: Spammers in the slammer?

As the federal government struggled with competing lobbies and got nowhere quickly, 35 states managed to pass anti-spam laws, none of which seemed to accomplish a great deal.

Spammers in the slammer, a common state penalty, sounds great to many of us, but many commentators have expressed the concern that prosecutors would not enforce such laws aggressively, both because they lack funding and because they don't perceive spam as a serious crime. Typically, one would think murder, arson, rape, armed robbery and other significant charges would receive attention far ahead of unsolicited bulk e-mail. Another factor is it's extremely difficult to trace the source of spam in most cases. Spammers are wily creatures who change their network addresses regularly and relay their e-mail off unsecured servers, primarily in Asia, to hide the true source of the e-mail.

The most stringent of the state spam laws was California, whose law was signed on September 23, 2003, and scheduled to take effect on January 1, 2004. It was called vulnerable to legal challenges, including First Amendment grounds or arguments based on the law's interference with interstate commerce. The new federal CAN-SPAM Act preempts California's "opt in" requirement. The California law outlawed sending most commercial e-mail messages to anyone in the state who has not explicitly requested them. That made it the most wide-reaching law of any of the 35 other state laws meant to regulate spam or any of the anti-spam bills that Congress considered. The law, which also prohibited companies inside the state from sending unsolicited e-mail to anyone outside the state, imposed fines of $1,000 for each message, up to $1 million for each campaign. Proponents of the law said it would be more effective than many anti-spam laws because it gave people the right to file private lawsuits rather than depending on state prosecutors. Unfortunately, the California law never got a fair shot as the federal law largely preempted it.

The Federal CAN-SPAM Act

Congress remained, for a shamefully long time, a lumbering ineffectual giant that listened to the lobbyists for marketing groups, particularly the powerful Direct Marketing Association. Competing anti-spam bills vied against one another, as did their passionate proponents and opponents.

Finally, prodded by their constituents, every member of Congress got one clear message: the voters wanted them to do something about spam and were going to be distinctly fed up with a Congress that didn't produce a law quickly. Hence, the CAN-SPAM Act of 2003. The lobbyists did not lose entirely – the Act that emerged from Congress has been greeted with a great deal of skepticism.

The Act has an unwieldy name *Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003.* Even the Act itself contains the subtitle "CAN-SPAM Act of 2003." It was signed by President Bush on December 16, 2003 and went into effect January 1, 2004. It pre-empts state anti-spam laws except to the extent that they prohibit falsity or deception in any portion of a commercial electronic mail message or information attached to it. Unlike the California Act, which required that users "opt-in," the federal law is an "opt-out" law. It does not ban spam outright, and it is questionable whether "opting-out" is ever a methodology that will truly work. The Act does not apply to political or charitable spam. For other unsolicited bulk e-mail, the Act:

• prohibits senders from falsifying or disguising their true identity;

• prohibits the use of misleading subject lines;

• prohibits the harvesting of e-mail addresses by either (1) automatic means from an Internet Web site or proprietary online service maintained by a third party; or (2) an automated system that generates possible electronic addresses by combining names, letters and numbers in numerous permutations;

• prohibits businesses from knowingly promoting themselves through false or misleading e-mails;

• requires the inclusion of a legitimate return e-mail and physical postal address for the sender;

• requires the inclusion of a functioning opt-out mechanism, clear and conspicuous notice of the opportunity to opt-out and require senders to honor any such opt-out request;

• requires clear and conspicuous notice that the message is an advertisement or solicitation; and

• requires messages with sexually oriented material to be clearly identified.

Liability under the act is broad, not only for the spammers themselves, but those who hire them. If a company knowingly hires a spammer who does not comply with the Act, the company may be prosecuted in the same manner as the spammer. Criminal penalties for violation of the Act include stiff fines and up to five years in prison. Civil penalties can be as much as $250 per e-mail. Repeated misconduct or aggravated violations can result in treble damages.

In a move that has generated a lot of contemptuous criticism, the Act charges the Federal Trade Commission with administering a "Do Not Spam" registry, presumably much like the "Do Not Call" registry. The FTC has six months in which to submit a comprehensive plan for the "Do Not Spam" list to Congress, but critics scoff that there is no way to enforce the list against all of the foreign generated spam. In any event, after Congressional review, the FTC will have three months to implement the plan. The FTC is also charged under the act with developing rules within 270 days to curtail spam messages on cell phones.

The FTC and state attorney generals are charged with the enforcement of the law. Most commentators are relieved that there is any federal law at all, but it remains to be seen how well it will be enforced. Even with the law's considerable teeth, will states and the FTC commit real resources to anti-spam enforcement?

In the end, finding spammers is an expensive, time-consuming process that often leads to a dead end. Even when they are found, few spammers have significant assets. Earthlink, MSN and AOL have all filed numerous suits against spammers, but for the most part, in spite of 35 state laws on the books and a barrage of suits, spam continues to grow as a percentage of the mail in everyone's in-box. How can this scourge be stifled effectively?

Today's best hope: Filters

In an astonishingly short period of time, most of corporate America has adopted some sort of filter system to screen unwanted e-mail. Though wildly imperfect, filters have become the nation's No.1 weapon in the fight against spam.

One way to measure the effectiveness of a spam filter is to weigh the percentage of junk e-mail blocked versus the false positive rate (the percentage of legitimate mail inadvertently blocked). A 95 percent filtration rate is considered excellent, and some companies claim a higher rate. But be wary of claims, since corporate users generally report something more like a 70 percent filtration rate. The higher the filtration rate, the higher the false positives, unfortunately. It's generally considered to be unacceptable to have a rate of 0.1 percent or higher, which translates into losing 1 of 1,000 legitimate e-mails.

One filter used by some of America's corporate giants comes from San Francisco-based Brightmail Inc., which says its filter processes about 10 percent of the world's e-mail. Brightmail has an extremely low false positive rate, about one out of every 1 mil-

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HI-TECH IN THE LAW OFFICE

The basics of spam & strategies for defense

Continued from page 26

lion spam messages. Though Brightmail claims a filtration rate of more than 90 percent, once again, consumers report the rate is significantly less. A great help, certainly, but not a complete solution. Brightmail is a server-based solution and not available for a small or solo office that doesn't have its own e-mail server.

Though there are many kinds of filtering software, law firms with Exchange servers rely more and more on Symantec's filtering product. The new version is called Symantec Mail Security for Microsoft Exchange and promises to do a much better job of managing unsolicited e-mail. Some of the new features include separate scanning of inbound and outbound mail, comparison of attachment type to the file extension, support for external "black list" databases (known spammers) and support for "white lists" to allow all e-mail from a known good address regardless of content. Unlike the old version, it also can be configured to give or not to give users notification of blocked e-mail, though only if the action selected is to delete the message. If the messages are to be quarantined, it will still give the users notification. As many lawyers have complained, having the long list of notifications in their inbox is almost as irritating as the spam itself, especially if they are retrieving their e-mail via a PDA. It's akin to spam about spam.

Though wildly imperfect, filters have become the nation's No. 1 weapon in the fight against spam.

Recommendations

Consumer Reports Picks the Best Filters:

1. Stata Labs SAProxy: According to *Consumer Reports*, this free program outperformed all other spam filters, but be forewarned that it requires some degree of computer skill and comes with complicated installation instructions.
2. Mailshell SpamCatcher Universal: $20
3. Blue Squirrel Spam Sleuth: $30
4. Symantec Norton Internet Security 2003 (Spam Alert): $70

We combine the Symantec product (Symantec Mail Filter, which comes bundled with Symantec Antivirus, Enterprise Edition) with the application of certain blacklists. For a list of all currently known blacklists, see http://www.declude.com/junkmail/support/ip4r.htm.

Although experts disagree on which blacklists are best, the Super Computer Center at the University of California uses these, which seems a pretty decent recommendation:

- dsn.rfc-ignorant.org
- sbl.spamhaus.org
- list.dsbl.org
- bl.spamcop.net

Anecdotally, some of our solo and small-law firm clients speak well of Sunbelt's iHateSpam ($19.95).

Don't expect the problem to go away. Our combination of Symantec, blacklists and our own fine-tuning of the filters has resulted in 92% of incoming mail being blocked as spam. Two percent is spam that gets through (more fine-tuning always in progress) and the remainder is our legitimate e-mail. We have created a daily spam folder for each individual – the only spam that goes there is the spam we catch with our own fine-tuning. We review it once in a while and find that we have to whitelist someone (perhaps our realty or financial counselor, whose words may trip our content filters). In terms of the spam we never see because it is caught by the blacklists, only once have we had legitimate mail blocked by a blacklist and that was because a client had their server configured as an open relay and was therefore blacklisted. Clients who are blacklisted have a much bigger problem, since they need to get off the blacklist to conduct business with anyone who uses blacklists – and that's a steadily growing number! By the way, figure at least 72 hours of business impact to get yourself totally removed from the blacklists if you somehow find yourself on them, even if you jump on the problem assiduously from the beginning.

An ongoing problem for law firms has been legal newsletters, which are often blocked as spam (because of length or content) even though lawyers have subscribed to them. As whitelists become more prevalent in filters, this problem may erode, though it will require the lawyer to take the additional step of placing the sender on the whitelist.

Though woefully inadequate, filters are seen by many technologists as a formidable weapon that can be made more potent with modifications. Have you ever heard of Bayesian filters? Named after the 18th century English mathematician Thomas Bayes, his theories of probability have been successfully incorporated in filters that learn from the users themselves. If you typically open penile enlargement e-mails (to pick a common subject), it will regard those as normal e-mails. If you routinely delete them, it will learn to block them. Microsoft Research has taken this concept one step further, by creating a "naïve Bayesian filter," which learns probabilities for words, phrases and other characteristics that distinguish spam. For example, many filters have no trouble blocking "Viagra" but cannot block V*I*A*G*R*A. Undoubtedly, you have seen many variations on this theme, and the more modern filters are learning to recognize this trick.

Unfortunately, spammers are wily creatures and their seeming ability to get around each new defense is maddening. More and more, they are getting all of us to open their e-mail because it says something innocuous, such as "Confirming your order," "Requesting Information" or the like. Lawyers are finding it's dangerous to delete too quickly, lest they delete a client or potential client's e-mail.

Battlefields of the future

Can we change the economics of spam as a countermeasure? Right now, experts estimate it costs spammers between $200 to $500 to send a million e-mails, with roughly 100 "paying" responses expected from each transmission. One suggestion from technologists is to create an "e-stamp," perhaps in a nominal amount such as one-tenth of a cent per e-mail. Mail without the stamps would be blocked automatically.

Another technical suggestion is to impose a time cost, by forcing a transmitting computer to perform a quick mathematical problem before the transmission goes through not enough to disturb a normal user, but enough to confound the computers of spammers. Microsoft Research is currently working on this approach.

Microsoft now blocks more than 2.4 billion spam messages daily and has assembled a team of experts to come up with innovative and more effective ways to fight spam.

Bill Gates himself has lamented the number of "Get Rich Quick" e-mails he receives every day, though such messages certainly seem to exemplify "carrying coals to Newcastle." The sad truth is no one is immune and half of us will continue to receive messages promising to add three inches in length to a body part we don't possess. (Perhaps the ladies among us should buy the product and seek to exercise the warranty? In the meantime, hang on to that trusty old delete key, and press, press, press so you too can be a part of the annual $10 billion loss of productivity caused by spam.

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

What's it worth? Valuation of a business is a matter of variables

By Robert Doughty & Terry P. Draeger

Business valuations can serve many useful purposes such as developing succession plans/exit strategies, devising shareholder/partnership agreements, evaluating minority interests, merging and acquiring a business, reorganizing a company, or creating incentive stock options. In legal controversies, a valuation analyst and expert witness can assist the legal team in marital dissolutions, estate-related matters, compensatory damage cases, government actions, and much more.

For business owners, business valuations can also be a dynamic strategic planning tool that can enhance, document and support many aspects of a company's strategic planning process. We at CFO Growth Solutions often hear the question, "How much is my business worth?" The answer to this question is rarely an easily-available one. This is due in large part to the fact that business valuation practice and theory are still in relative infancy. Also, over the years, the valuation of closely held businesses has unfortunately developed into more of an "art" than a "science." Partially, this is because of the extreme positions of advocacy many valuators have taken in the past and continue to take today.

Fundamentally, a business valuation provides the value of a certain business interest on a specific date for a particular purpose, and must clearly and convincingly establish how the valuation analyst reached his conclusion. Value is a worthless term by itself because it can mean so many different things. A value found for one purpose can be entirely different from the value for another. Examples of value are: book value, fair market value, minority value, marketable value, investment value, fair value.

In its simplest form, the value of a business can be expressed as follows: V = BS (Benefit Stream) divided by R (Risk). In order to arrive at the numerator, the analyst must determine the type of income to use (definition of income), and project this income over an appropriate time. In order to derive the denominator, a capitalization/discount rate must be computed.

Depending upon the purpose(s) of the engagement and the specific facts and circumstances, the valuation will estimate these key variables by following appropriate steps, collecting credible resources, and ensuring that the data conforms to accepted standards. Some of the factors that the analyst will consider include competition, management ability, financial strength, profitability/stability of earnings, and industry and economic factors and how they affect the business.

The valuation process normally includes five major steps: defining the engagement, gathering necessary information, analyzing the information gathered, estimating the value of the enterprise, and preparing the written valuation report. Throughout this process the valuator must follow and comply with applicable pronouncements and standards. The standards may come from legal precedence, the IRS (tax matters), the US Department of Labor (ESOP's), and professional certifying associations, such as the National Association of Certified Valuation Analysts (NACVA), Institute of Business Appraisers (IBA), American Society of Appraisers (ASA), and the American Institute of Certified Public Accountants (AICPA).

One of the most difficult, and perhaps one of the most challenging, responsibilities for a valuator is knowing how to combine all the factors that have been gained in the entire process and reach a meaningful conclusion of value that will withstand any challenges. An experienced valuation person will possess professional training, along with experience in taxation, finance, management, and accounting.

The primary purpose of this and future articles is to explore the "scientific" aspects of business valuations, while accepting that valuations include subjective and qualitative factors that will lend themselves to differing opinions and values. Hopefully, as the profession matures and more standards are developed, the difference in values that can result between two experienced professionals will become narrower.

Russian tours and trials

Alaskans advise colleagues on trial processes

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jury trials in the Anchorage and Palmer courts.

Russia has enacted a sweeping reform of their criminal justice system that has returned the right to a jury trial to criminal defendants charged with the most serious of crimes, after an absence of more than 80 years. The acquittal rate before juries at the time of the Revolution was over 30%. In Soviet times jury trials were prohibited, and the conviction rate before judges was over 99%.

With grave concerns about crime levels after the disintegration of the Soviet system, Russian judges and prosecutors are anxious about relinquishing power to jurors. This program, sponsored by the American Bar Association/Central European and Eurasian Law Initiative and the Russian American Rule of Law Consortium, was designed to prepare the participants to conduct jury trials, and to perhaps assuage some of their fears.

Federal Defender Rich Curtner (2nd from left) and Judge Erik Smith (5th from left) pose in Khabarovsk with their Russian colleagues.

You can't get there from here (The Endless Night)

Some difficulties in communications resulted in less than ideal travel arrangements for our trip. Eric and I had to travel from Alaska to the Russian Far East via Seattle and Moscow. The Aeroflot flight from Seattle takes 12 hours, flying *over Anchorage*, and the North Pole. Leaving Anchorage on Friday at noon, we arrived in Moscow on Saturday night.

Fortunately, this was one flight that wasn't completely full. Eric and I had two seats to stretch out – a necessity while flying for an endless night. Leaving Seattle at 7:00 p.m. and arriving in Moscow at 7:00 p.m., we *never* saw the sun. Watching a Russian version of "Kangaroo Jack" and a 1940's Russian mystery/comedy film did little to relieve the tedium.

But the highlight was crossing the North Pole. I awoke at the mid-point of this flight to an incredible display of the Northern Lights. Rather than watching this phenomenon on the horizon or directly above, we were flying in the middle of a downpour of shimmering light. Waves of green illuminance engulfed the plane. With a new moon, the Northern Lights themselves lit the landscape below; a series of crevasses dissecting the polar ice field. A red tint on the horizon was the reflection of the sun, literally and figuratively on the other side of the world.

Moscow

We were met at the Moscow airport by a taxi driver who took us directly to the Marco Polo Hotel. The taxi ride in Moscow was appreciably riskier than the Aeroflot flight over the pole. Our driver swerved to avoid the collision of two cars immediately ahead of us. Other close calls did little to slow down our driver. Downtown Moscow on a Saturday night was abuzz. Garish lights competed to advertise the many casinos, clubs, shops and restaurants.

We had most of Sunday to explore some of the historic landmarks of Moscow. We visited the churches inside the Kremlin, Red Square, Lenin's Mausoleum, and Pokrovsky Cathedral. At 3:00 p.m. we headed for the airport for our flight to Khabarovsk.

The *eight-hour, all-night flight* across Russia was another ordeal. The flight was completely full. Seven time zones. A "non-smoking" flight means smoking was limited to the restrooms. The more seasoned Russian travelers brought a bottle of vodka to ease the pain.

We landed in Khabarovsk at 9:00 a.m. Monday, just in time to make our opening presentations!

Welcome to the seminar (You're on next)

After a quick stop at our hotel, Eric and I joined the seminar in progress. Judge Valery Vdovenkov, Chief Justice of the Khabarovsk Krai Court, and a previous visitor to Anchorage, greeted us warmly.

The rest of the morning addressed "Professionalism and Ethics." Judge Boris Kanevsky, of the Saratov Oblast Court, covered the topic from the Russian perspective, while Eric focused on professionalism in the context of jury trials.

At 2:00 p.m. we recessed for a quick lunch at the cafeteria in the vocational school next to the courthouse. The basic Russian food is a favorite of Chief Judge Vdovenkov, and allowed us to return to the seminar within the hour, maintaining our agenda.

Fueled on instant coffee and Russian tea, we marched into the afternoon session. I was asked to discuss "Plea Bargaining in the U.S." Vladimir Derbyshev, a defense attorney from Ivanovo, talked about the "Abbreviated Trial Procedures" under the new criminal code.

Formerly, all criminal cases went to trial in Russia, albeit a bench trial with a foregone conclusion. Now a defendant can "admit" to the charges, which involves an "investigation of no more than two or three months," so that "punishment is executed promptly," rather than the many months awaiting trial. The other advantage to the defendant is that the punishment may not exceed two-thirds of the maximum possible sentence. Both the prosecutor AND the victim must consent to this procedure.

The seminar, as is the norm in Russia, went until about 6:00 p.m. Eric and I retired for a quiet dinner at the Hotel Parus (originally built for a visit by President Eisenhower), and a good night's sleep.

This seminar received a good amount of media coverage. Eric and I were interviewed on "DTV," the local television news show. Coverage of the seminar was run on the local news several times throughout the week. An article appeared on the front page of the Khabarovsk paper. We were also interviewed at length for the local public radio station. The questions in that interview reflected some of the anxieties and issues concerning the jury trial process, based to a great extent on "Hollywood" treatment of the American jury system.

And finally, an American reporter from the *Christian Science Monitor* was working on a lengthy article on the introduction of the jury process to various districts in Russia.

Tuesday/Wednesday

Tuesday morning covered the area of "Preliminary Hearings Under the New Criminal Procedure Code."

The "preliminary hearing" under the new criminal code looks very similar to a "pretrial conference/omnibus hearing" in Alaska. All motions to be addressed before trial are dealt with. One interesting distinction is that FOUR parties participate: the prosecutor, "advocate," defendant and "victim" all have a say on each issue. (And many times the defendant and advocate, or prosecutor and victim, don't agree.) The morning concluded with a preliminary hearing on the issues presented by the mock trial scheduled for Friday.

Tuesday afternoon the panel of presenters began discussion of the jury trial process. This was a uniquely qualified panel that had been trying cases in front of juries in Russia for the past 10 years. Judge Kanevsky and Mr. Derbyshev were joined by prosecutor Julia Strepetova-Andrianova and defense attorney Elena Levina. They came from a region that was the "pilot" for the new criminal code in 1993, before it was applied throughout Russia.

The procedure for the next two days was for the Russian panel to address the "nuts and bolts" of jury selection, opening statements, witness presentation, cross-examination, and closing arguments. One of the panel members would give a lecture and conduct a demonstration. Eric and I had the opportunity to add additional comments at the end of each presentation.

We also were asked to make special presentations on specific issues. I covered cross-examination of eye witness testimony. Eric discussed jury instructions.

There were also breakout sessions where I had the opportunity to work with the defense attorneys at the seminar as an "advisor" on their presentations for the mock trial scheduled for Friday. Eric attended judicial "roundtables" with the judges during these times.

A real trial

Eric and I also had the chance to attend a real jury trial in a courtroom two floors below the seminar conference room. A judge who visited Anchorage just two months ago to observe jury trials was now conducting his own murder trial.

As we entered the courtroom in the morning, without interpreters, we could nevertheless feel the tension and drama unfold. The trial was already at the end of the second week. Although the age limits for jury service are from 25 to 65, this jury averaged close to 60 years of age. The two defendants sat in a cage across from the jury. Defense counsel sat at a small table directly in front of them, with their back to their clients. Two prosecutors sat with the "victim" (a family member of the deceased), who was quietly weeping. All were watching a video that I can only assume consisted of a defendant's statement regarding the homicide.

A second chance to watch this trial continue in the afternoon included more drama that we could only guess at.

The late afternoon session began with the judge addressing the parties. It seemed as if everyone was ready to begin with the next witness when one defendant started reading a four-page written statement. Halfway through, the judge asked a young man in the courtroom (the defendant's brother or friend?) to leave the courtroom. The defendant continued to read. The prosecutor sighed, rolled her eyes, and seemed upset. Defense counsel sat mute. After some discussion the

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judge called in the jury.

The young man returned and stood in the witness box in the middle of the courtroom. He was obviously very uneasy and didn't want to be there. Reluctantly he made a long statement. The prosecutor asked a few questions. The real cross-examination came from the judge. We could only guess at the import of his testimony.

This was the second jury trial conducted in the Khabarovsk court. The first trial resulted in an acquittal.

Wednesday night Eric and I joined our four colleagues for dinner at a local restaurant close to the hotel to share our impressions of the first three days of the seminar. It was an enjoyable and enlightening experience to share the perspectives of our two different systems of criminal justice.

Thursday — a road trip to "see the tiger"

After three long days of dialogue (with simultaneous interpreters), punctuated by quick lunches at the vocational school cafeteria, we had earned a free day. While the 14 or so participants in the mock trial prepared for their various parts, Chief Judge Vdovenkov volunteered to take the presenters to the "taiga" to see a Siberian tiger.

Before our ride into the countryside, we visited some of the local sites. First we toured a building constructed for an international conference on the oceans in 1979. In the front foyer is a fantastic mosaic of the plants and animals of the Khabarovsk region, made of precious stones and gems of the area.

Our second stop was a war memorial overlooking the Amur River, dedicated to local soldiers killed in World War II. Inscribed on the walls are the 50,000 names of those killed just from one region of Russia. An eternal flame honors a memorial that could have inspired our own Vietnam Memorial.

Then it was off for a 100 kilometer drive to "see the tiger."

As we left this city of 600,000, and endless monolithic apartment buildings, we traveled through miles of small garden plots with summer "dachas" where city residents grow fresh vegetables. I thought we were making pretty good time, until a cavalcade of expensive sedans with a police escort blew by us, a scene reminiscent of the Soviet era. Chief Judge Vdovenkov indicated that we had been passed by the Deputy Interior Minister and an entourage also headed to see the tiger. I felt like we just dropped down a notch on the pecking order of the Khabarovsk region.

We stopped halfway on our road trip for a tour of a small rural courthouse, and some tea and snacks. Chief Judge Vdovenkov and the presiding judge of this court regaled us with stories of their early legal careers in "bush" Khabarovsk. Their tales were similar to those who practiced in rural Alaska in the 1960's.

Later we crossed through an area of fallow farmland reminiscent of the Midwestern U.S. The main crops are corn, melon, cucumbers, and wheat. We learned that what were large "collectives" under Soviet rule are now leased to Korean farmers who reside in small villages. Then we gained elevation through birch and pine forests.

The war memorial overlooking the Amur River is dedicated to the 50,000 Khabarovsk-region soldiers killed in World War II.

At the end of the road we found ourselves at the "Wild Animal Rehabilitation Center." In small cages are several sun bears, black bears, two lynx, two elk, and a Siberian tiger.

After a quick tour we're in the lodge for a three-hour feast of boiled reindeer, liver salad, calamari salad, sturgeon salad, fresh tomatoes and cucumbers, excellent potato soup in a meat broth, and a fantastic pork shish-ka-bob. And, of course, copious amounts of wine and vodka.

Judge Kanevsky found an old guitar he was able to tune, and Eric and I were treated to a medley of Russian folk tunes. All of the Russian lawyers and judges participated with hearty voices. Luckily, we had three designated (paid) drivers for the return trip to Khabarovsk.

Friday — The mock trial (Zhirov and Tishkova Case)

On Friday morning the mock trial began. We had a 94-page "record" of the murder investigation of the death of Valery Droplin. Two people were accused of his murder: his drinking buddy that he met in prison, Alexander Zhirov, and Droplin's 23-year-old granddaughter, Yekaterina Tishkova. The case file included police reports, forensic reports, and the statements of witnesses and both defendants. A reading of the complete file built a damning case against Zhirov; with Tishkova seemly minimally involved. But, of course, trials can often prove different from the written record preceding it.

The jury, witnesses and defendants were local law students. The local attorneys participating in the seminar took parts in the prosecution and defense. Judge Kanevsky pushed the parties through jury selection, opening, testimony of three prosecution witnesses and both defendants, and closing arguments in four hours. His jury instructions took 30 minutes. Then we broke for lunch.

Under the new Russian law a jury has three hours to reach a unanimous verdict. After that, a majority rules. And the jury is given a series of detailed questions to answer. Basically, these questions are: was a murder committed; did (each defendant) commit the murder; if so, are there factors for leniency. The judge includes great detail from the facts presented in the testimony for each question.

Our mock jury came back with a split verdict in one hour (to me a surprising verdict). Tishkova (who claimed she was distressed and didn't remember much of what happened, but claimed duress, and was subjected to harsh cross-examination by the judge) was convicted. Zhirov (who flatly denied any involvement) was acquitted. (Go figure.)

But, all-in-all, it was an important exercise to expose the young lawyers and law students to the experience of the jury process they will soon encounter.

Friday night I was able to meet up with an old friend, Sergei, who was my guide in a wilderness hike in Khabarovsk in 1991. Sergei drove Eric and I to his "country lodge" (close to the Wild Animal Rehabilitation Center). Sergei now works with student groups who visit New Zealand and Australia, and entertains student groups from those countries at his lodge. We were treated to an authentic Russian "banya" – a three-hour visit to his wood-fired sauna, with breaks in the "resting room" for fish, sausage and beers.

A real banya must include a thrashing with dried oak leaves tied in a bundle, alternating with a splash in the snow, and another round in the "resting room." It was an exhilarating and relaxing experience. We finished the night with a vegetarian feast, all grown at the lodge this past summer, and of course, another bottle of vodka.

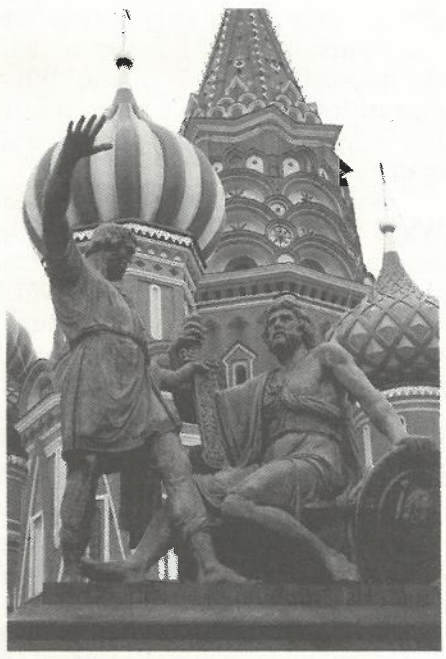
Final thoughts

Saturday brought us back to Khabarovsk to temperatures at -20°C (below 0°F), and two to three inches of snow. An afternoon of shopping, dinner at the "Russian Restaurant," and we were ready for the trip home. (Another 24-hour marathon – via Seoul, Vancouver, and Seattle – home to Anchorage.)

In spite of the torturous itinerary, I thoroughly enjoyed my trip to Khabarovsk. The Russian people are gracious and wonderful hosts, enthusiastic to learn about our system of justice, and dedicated to their roles in their criminal justice system.

Our exchange of ideas has been beneficial to me. It is critical to be open to new ideas if we are to reform our own judicial system. The Russian people have the unique perspective of observing our courts and laws in order to inform their judicial reforms. Seeing their new "model" of criminal procedure reminds us of the values we should be working for in our courts.

The jury trial is the centerpiece of their new criminal procedure code. I have always been an ardent supporter of our jury system. After exposure to the Soviet style system when juries were banished, I appreciate even more that a jury can be the critical check and balance that stands between our citizens and the potential abuse of the government.



A bronze monument stands before the Pokrovsky Cathedral in Moscow's Red Square.

I hope to continue to work with this free exchange of ideas under the concept of "rule of law." Perhaps both of our countries can make the lofty ideals of "justice" a reality in our courts.

The Greatest Dissent?

Kozinski opinion uses language, law, rule, & reason

By Gregory S. Fisher

Introduction

The United States dropped charges against a defendant convicted of smuggling illegal immigrants across the border, released him from prison, and sent him home to Mexico *after* the conviction was affirmed on appeal–all as a result of a sharp dissent authored by Judge Alex Kozinski in *United States v. Ramirez-Lopez.*[1] No known dissent has ever effected such a stunning turn of events.

This brief essay uses Judge Kozinski's dissent as a platform for exploring the analytical and rhetorical elements of opinions and dissents. It is divided in three principal parts. Part II (immediately following this introduction) begins by defining dissents in relation to precedent. Part III summarizes the case and dissent that are the subject of this essay. Part IV analyzes the dissent in light of four elements (language, law, rule, and reason) which, I argue, compose all effective opinions and dissents. I conclude that Judge Kozinski's dissent in *Ramirez-Lopez* might be one of the better dissents authored in recent times. But if not, it's a fun read and worth twenty minutes of your time.

Kozinski

Defining Dissents

What is a dissent? Dissents represent disagreement with a court's holding, and consequently should be defined by relation to the court's holding. If not, the dissent is not a true dissent but a form of extended dicta, which does not necessarily make it less worthy or notable–but does make it not a dissent. The problem is that opinions may be read as narrowly or broadly as the reader prefers,[2] making it difficult to distinguish a court's holding from dictum.[3] Here, we briefly review common principles pertaining to court holdings, use those principles to define dissents, and then discuss the subject of this essay.

The Holding: Precedent and Predictability

Although most professors and an alarming number of judges or justices (all of whom should know better) may have you believe otherwise, opinions are important for what is decided, and not for what is said.[4] The concept of stare decisis is based on "the detailed legal consequence following a detailed set of facts."[5] "The holding of the case is the application of the law to the specific facts before the court . . . ."[6] In this respect, lawyers may be the only persons who accurately read opinions–which is to say, we don't. We skip to the disposition line. Who won? Who lost? When everything is said and done the literal bottom line is really and truly the governing principle of precedent.

Holdings create precedent. Precedent evolves. Why? Shaped by Professor Llewellyn, the dominant line of thinking over the past half century is that precedent is manipulated,[7] which is certainly not an inaccurate observation. But I would argue that precedent evolves less as a product of calculated intent and more because life is messy and law messier. A court's holding has little to do with the rule of law that a court thinks it is imparting and more to do with the rule of law that is actually understood and applied by those of us comprising the great unwashed masses. It's not what Judges say, but what we think they are saying that counts, particularly in an era of an increasing Bar and multiplying published opinions. This, I believe, is why holdings evolve. Precedent is kinetic. Decisions gather momentum. If we misread or misunderstand precedent, but persuade a trial court that our interpretation is correct, we suddenly have a new direction to the law's development that snowballs across the landscape. Each time the issue arises before that trial court, the same result will probably be reached. In time, the error becomes accepted as a given rule of law not so much because it is "right" or "wrong," but because "it's just the way we do things around here."

Ultimately, holdings drive precedent, and precedent is about predictability. We need to know not just what the law is, but how gaps likely will be filled in by courts. In this sense, the rule of law is the law of rules. We may disagree with "the rules" in any given legal context, but we need to know what they are and how they operate. We must have that.

Dissents and dicta

In contrast to holdings, dissents are *only* important for what is said. The fact that dissents register disagreement with a particular result has no legal or (pure) predictive value. No one cares if a particular judge or justice disagrees with a particular result. No one is bound by a dissent. But that is not the same thing as saying that dissents are worthless. Like dicta, dissents may offer interpretative shading of an apparent holding by presenting an alternate interpretation of the majority's decision.[8] Dissents may anchor a concurrence, pulling theories in one direction or another and thereby limiting the apparent scope of the majority's holding.[9] Dissents may also foreshadow trends and developments. But more typically dissents point out logical or legal flaws in the majority's analysis. And that's what makes them fun to read. There's no beating a stick in the eye.

Thus understood, we can view dissents as a form of dicta. Dicta are "expressions of opinion about the way the law would be applied to facts not before the court."[10] Dissents are expressions about the way the law *should* be applied to the facts that *are* before the court.. Although judges are supposed to apply precedent as it exists, and not how they think it will evolve,[11] the rest of us must keep an eye and ear on developments and trends. Courts appreciate this, too. For example, although never considered binding, dictum is not ignored. Instead, lower courts accord it due deference.[12] The same holds true for effective dissents,[13] and that brings us to our subject–a dissent I believe to be perhaps one of the better crafted in recent history.

United States v. Ramirez-Lopez.

The Case

Ramirez-Lopez (Lopez) crossed the border through the mountains in eastern San Diego County on March 6, 2000 in a group of sixteen other illegal immigrants.[14] One member of the party[15] died of hypothermia because of an unexpected and freakishly severe Spring snowstorm.[16] The remaining fifteen, including Lopez, were discovered and detained by border patrol officers. Two implicated Lopez as a smuggler responsible for leading their party across the border.[17] Twelve told border agents that Lopez was not the leader of their group. Lopez denied being a smuggler.

Notwithstanding the fairly overwhelming evidence suggesting that he was not responsible, Lopez was arrested, and charged with multiple counts of alien smuggling in violation of 8 U.S.C. § 1324. However, his arraignment was delayed two days while the government interrogated Lopez and the other witnesses.[18] After being questioned, nine witnesses (all of whom cleared Lopez of any wrongdoing) were returned to Mexico before Lopez was arraigned and had counsel appointed.[19] Consequently, the nine witnesses were returned before they could be interviewed by Lopez's (not-yet-appointed) counsel. The government detained the two witnesses who inculpated Lopez, and three witnesses who exculpated him.[20]

Lopez moved to dismiss his indictment or suppress statements, arguing that his due process rights were violated by unreasonable delay in arraignment.[21] The district court concluded that the delay in arraignment was reasonable in light of the number of witnesses that the government was interviewing, Lopez's medical condition, and the fact that a death had occurred thereby complicating the investigation.[22] Meanwhile, at trial, statements of the nine witnesses who had exculpated Lopez were excluded as being both hearsay and cumulative. The jury never heard that twelve of fourteen members in the group completely exonerated Lopez. Lopez was convicted and sentenced to 78 months (six and a half years).

The Result

Although Lopez raised numerous issues on appeal, the case turned on two principal arguments: (1) delay in arraignment; and (2) exclusion of witness statements. Reviewing the arraignment delay issue for clear error, the governing standard under existing precedent, the majority concluded that the delay between arrest and arraignment was not unreasonable particularly since it did not appear as if the delay was used to further interrogate Lopez prior to arraignment.[23] The majority implied it was not concluding that the delay was reasonable.[24] Instead, properly construed, its holding simply established that the delay was not necessarily unreasonable when analyzed under the clear error standard of review.[25] The irony of this conclusion appears to have been lost on both the district court and the panel majority: delay was reasonable because the government had so many witnesses to interview, but effectively denying Lopez a chance to interview these same witnesses before they were placed beyond his reach was not unreasonable.

Reviewing the district court's evidentiary ruling excluding witness statements for an abuse of discretion, the majority acknowledged that Lopez "had made strong arguments" favoring admissibility of the statements from the unavailable witnesses,[26] but ultimately concluded that no abuse of discretion existed because Lopez had failed to show that the statements carried sufficient indicia of reliability and trustworthiness.[27] This conclusion was reached even though the reliability subject to question implicated the government's own investigation. Lopez's conviction was affirmed.

The Dissent

Setting up an imaginary dialogue between Lopez and his lawyer, Judge Kozinski lost no time cutting to the chase:

Lawyer: Juan, I have good news and bad news.

Ramirez-Lopez: OK, I'm ready. Give me the bad news first.

Lawyer: The bad news is that the Ninth Circuit affirmed your conviction and you're going to spend many years in federal prison.

Ramirez-Lopez: Oh, man, that's terrible. I'm so disappointed. But you said there's good news too, right?

Lawyer: Yes, excellent news! I'm very excited.

Ramirez-Lopez: OK, I'm ready for some good news, let me have it.

Lawyer: Well, here it goes: You'll be happy to know that you had a perfect trial. They got you fair and square![28]

Judge Kozinki's script continues with the lawyer explaining to his hapless client how, although Lopez had lost an opportunity to have counsel promptly appointed–counsel who could have been expected to interview and take notes or statements from the nine witnesses who were sent back to Mexico-- it was really okay and no harm occurred because the government's agents had taken exhaustive notes. "Is this a great country or what?," the lawyer asks.[29]

Ramirez-Lopez: OK, I see it now, but there's one thing that still confuses me.

Lawyer: What's that, Juan?

Ramirez-Lopez: You see, the government took all those great notes to help me, just so we'd know what all those guys said.

Lawyer: Right, I saw them and they were very good notes. Clear, specific, detailed. Good grammar and syntax. All told, I'd say those were some great notes.

Ramirez-Lopez: And twelve of those guys all said I wasn't the guide.

Lawyer: Absolutely! Our government never hides the ball. The government of Iraq or Afghanistan or one of those places might do this, but not ours. If twelve guys said you weren't the guide, everybody knows about it.

Ramirez-Lopez: Except the jury. I was there at the trial, and I remember the jury never saw the notes. And the officers who testified never told the jury that twelve of the fourteen guys that were with me said I wasn't the guide.

Lawyer: Right.

Ramirez-Lopez: Isn't the jury supposed to have all the facts?

Lawyer: Not all the facts. Some facts are cumulative, others are hearsay. Some facts are both cumulative and hearsay.

Ramirez-Lopez: Can you say that in plain English?

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The Greatest Dissent: Language, law, rule, & reason

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Lawyer: No.[30]

As the imaginary dialogue proceeds, Lopez expresses confusion as to why evidence that twelve members of the group exculpated him would not have been relevant. "Don't you think they might have had a reasonable doubt if they'd heard that twelve of the fourteen guys in my party said it wasn't me?," Lopez asks.[31] Not so, the lawyer explains:

You'd think that only if you didn't go to law school. Lawyers and judges know better. It makes no difference at all to the jury whether one witness says it or a dozen witnesses say it. In fact, if you put on too many witnesses, they might get mad at you and send you to prison just for wasting their time. So the government did you a big favor by removing those nine witnesses before they could screw up your case.[32]

Slowly appreciating his fate, Lopez wonders why the notes taken by border patrol agents were excluded:

Ramirez-Lopez: I see what you mean. But how about the notes? Surely the jury would have gotten a different picture if they had just seen the notes of nine guys saying I wasn't the guide. That wouldn't have taken too long.

Lawyer: Wrong again, Juan! Those notes were hearsay and in this country we don't admit hearsay.

Ramirez-Lopez: How come?

Lawyer: The guys writing down what the witnesses said could have made a mistake.

Ramirez-Lopez: You mean, like maybe one of those twelve guys said, "Juan *was* the guide," and the guy from Immigration made a mistake and wrote down, "Juan was *not* the guide"?

Lawyer: Exactly.

Ramirez-Lopez: You're right again, it probably happened just that way. I bet those guys from Immigration wrote down, "Juan wasn't the guide," even when witnesses said loud and clear I was the guide–just to be extra fair to me.

Lawyer: Absolutely, that's the kind of guys they are.[33]

Finally persuaded, Lopez concedes, "You're very lucky to be working with guys like that." Judge Kozinski's script concludes:

Lawyer: Amen to that. I thank my lucky stars every Sunday in church.

Ramirez-Lopez: I feel a lot better now that you've explained it to me. This is really a pretty good system you have here. What do you call it?

Lawyer: Due process. We're very proud of it.[34]

Analysis

I would argue that effective opinions and dissents are built on four elements: language, law, rule, and reason. I admit that this is a construct, perhaps artificial, but it's a construct I believe is as useful as any other, and (if nothing else) gives us a outline for analysis.

Language adopts style and tone to tell a story. Cut and paste styles don't work. What might be appropriate in one case may not work in another. Here, the dialogue script employed by Judge Kozinski is both different and effective. It is different because it adopts an inviting convention that we seldom see in formal opinions or dissents. You want to read this dissent. You want to read it even if you have no particular interest in the case and only passing familiarity with its underlying legal principles. It's a puppet show–a kind of legal Punch and Judy.

The dissent is effective because its convention follows a Socratic line of inquiry. Lopez is our convenient foil–befuddled and bemused, he sets up the logical tension of each point. No witnesses? No problem–there are notes. Oh, that's right, there are no notes. No problem–the government has notes. Wait, the government's notes are inadmissible hearsay. Hearsay because the notes are insufficiently reliable? Yes, the government's investigation was untrustworthy.

Point by point, one is slowly, inexorably, led to the conclusion that the majority has erred, and erred rather badly. It is also effective because there is a shock of recognition. What lawyer has not had a conversation like this before--has not had to explain the law to a bewildered client when results seem to conflict with reason and common sense? In sum, the language employed by Judge Kozinski is a well-crafted blend of style and tone seasoned with mild irony that relates a persuasive point of view. Whether one agrees or disagrees with the ultimate conclusion, the dissent is read–and it's read because it is readable.

Language can't carry the load on its own. Good opinions convey good law. In our common law tradition, law reveals and is revealed. Distilled to its essence, Judge Kozinski's dissent in *Ramirez-Lopez* aptly reveals a point the rest of us slobs sort of dimly understand, but seldom acknowledge; specifically, consistent principles consistently applied will sometimes lead to results that are inconsistent with our ideals and values. There is nothing wrong with the majority's analysis or reasoning. Indeed, the majority applied long-settled standards of review governing analysis of a trial court's due process and evidentiary decisions. Even the result reached by the majority is plausible. I wonder if this is not really the whole point of Judge Kozinski's dissent? Forget his disagreement with the majority's result–what Judge Kozinki's dissent teaches us is that we are a country of values, and those values should not be sacrificed in blind obedience to judicially-created standards of review. Don't confuse law with justice.

Language and law need rules and reason. Rules and reason are the foot soldiers of all good opinions and dissents, and like good infantrymen, they tend to dig in deep–often squirreled away in footnotes or subordinate clauses. Rules are simply "wisdom made institutional"[35] by observed custom and practice. Judicially-crafted standards of review are an excellent example. We need fair, predictable, and uniform rules or else every appeal would be an exercise in caprice. As Judge Posner instructs (correctly, I believe), legal reasoning is not, and should not be confused as, formal logic, but instead is dependent on "reasoning by analogy,"[36] which is another way of describing our reliance on the persuasive, if anecdotal, nature of precedent. If one result was reached in one particular case based on a certain set of circumstances, we would expect (or expect an argument) that the same or similar result should be reached in a different case presenting similar circumstances. If not, what we loosely describe as the "rule of law" is frustrated.

What does a great Judge do when "the other guy" has more and better foot soldiers–when the majority's rule and reasoning seem invincible? At Agincourt, tired, ragged English peasants--vastly out-numbered and mustering after a forced march exceeding 200 miles--turned to their longbows, and decimated better-trained, better-fed, and better-equipped French soldiers before they reached the English lines. Reaching for his arrows, Judge Kozinski does much the same here. He knew that the majority's reasoning was–at face value–correct. The majority's opinion is principally based on standards of review, and those standards are what they are; virtually unassailable judge-made rules applied in every appeal. But he prefaces his reasoning with the imaginary dialogue previously reviewed. Barb after barb scores hits. By the time the reader is half-way through the dissent, he or she is already prepared to accept Judge Kozinski's reasoning with little or no question. One has no choice because the rules and reasoning relied upon by the majority have been reduced to tatters. The result seems obvious once we reach the core of Judge Kozinski's dissent--an unmistakably clear analogy lifted from contemporary news:

Imagine if the shoe were on the other foot: A corporate defendant suspected of criminal conduct interviews some of its employees, and takes careful notes showing that the employees were aware of criminal activity. Before federal investigators can talk to the witnesses, the corporation whisks most of them to a foreign land where they are beyond the power of the United States. At trial the corporation opposes the introduction of the inculpatory interview notes, arguing that they are hearsay and cumulative. And, when a corporate officer testifies, he suggests that some of the removed witnesses would have provided exculpatory evidence.

Is there any doubt what would happen in such a case? Any corporation that tried to pull a stunt like this would quickly find itself indicted for obstruction of justice, and the inculpatory notes would be ordered produced and introduced at trial. I can imagine no other result.

Should the outcome be different because the entity that put the witnesses beyond the power of the court is the United States? I think not. Indeed, the United States is subject to far more obligations in a criminal case than the defendant.[37]

Check and mate: not only has Judge Kozinski harried and badgered the majority, but he's boxed in the government, as well. Yes, the majority's rules and reasoning are probably correct. But the majority's conclusion somehow seems silly nonetheless. And, if not silly, not terribly forceful, and certainly less fun. Rules and reason guide. In this particular dissent, Judge Kozinski applies his rules and reasoning to teach us a simple but quite effective message–logic will get you anywhere fast, and often nowhere good.

Conclusion

Could Judge Kozinski's dissent in Ramirez-Lopez be one of the better dissents authored in recent years? I think so. Following Judge Kozinki's dissent, the government dismissed Lopez's case, released him from prison, and sent him back to Mexico.[38] In hockey, that's a hat trick. I know of no other dissent that has ever had this sort of direct and immediate impact.[39] Some dissents or concurrences age like whiskey and become accepted as majority views once time reveals their merit.[40] But it's a rare dissent that both shames the government in a shameless age, and spurs immediate and necessary correction.

FOOTNOTES

*Jaburg & Wilk, P.C. 3200 North Central Avenue Suite 2000 Phoenix, Arizona 85012 (602) 248-1014. J.D. University of Washington (1991), B.A., with honors, State University of New York, Binghamton (1988). I am a former law clerk to the Honorable Barry G. Silverman, United States Court of Appeals Ninth Circuit, and to the Honorable John W Sedwick, Chief Judge United States District Court, Alaska. This essay is dedicated to the memory of Professor Leonard Rex Criminale, Professor of Humanities and Language, Elmira College. The views expressed in this article along with any mistakes are mine alone.

[1]315 F.3d 1143, *opinion withdrawn and appeal dismissed,* 327 F.3d 829 (9th Cir. 2003).

[2]KARL LLEWELLYN, THE BRAMBLE BUSH 64-69 (1960) ("LLEWELLYN.").

[3]RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 96 (1990) ("POSNER").

[4]In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996).

[5]Id.

[6]United States v. Reed, 810 F. Supp. 1078, 1080 n.3 (D. Alaska 1992).

[7]LLEWELLYN 64-69.

[8]For discussions regarding dicta's predictive value, *see* Note, *Dictum Revisited,* 4 STAN. L. REV. 509, 512-13 (1952); *see also* Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461 (1897) .

[9]Where no clear majority controls, an opinion's holding is defined on the narrowest grounds presented by concurrences, *see* Marks v. United States, 430 U.S. 188, 193 (1977). Since Circuit Court panels are usually composed of three judges, a dissenting judge may significantly affect proceedings if he or she can partially persuade a colleague that a proposed opinion, if not wrong, is not absolutely correct. The resulting concurrence may represent the holding of the three judge panel.

[10] Reed, 810 F. Supp. at 1080 n.3.

[11]*See* United States v. Medina, 181 F.3d 1078, 1085 n.2 (9th Cir. 1999) (B. Fletcher, J., dissenting). A notable exception concerns situations where federal courts must apply state law in the absence of binding state precedent. In those situations, federal courts predict how they think the state supreme court would resolve the issue. *See* Pacheco v. United States, 220 F.3d 1126, 1131 (9th Cir. 2000).

[12]*See* Newdow v. U.S. Congress, 321 F.3d 772, 785 (9th Cir. 2003) (O'Scannlain, J., dissenting from the denial to take the case en banc).

[13]Although, admittedly, respect accorded to dissents affords no basis for lower courts to ignore controlling precedent, and such respect ripens long on the vine before bearing fruit. Over fifty years passed between Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 357 (1896) and the Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), and nearly forty years passed before Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438 (1928) was impliedly recognized as correct by the Court's opinion in Katz v. United States, 389 U.S. 347 (1967). A rarer example, where a dissenting Justice lived to see his or her views embraced by the Court, is seen in Justice Black's dissent in Betts v. Brady, 316 U.S. 455 (1942) which was ultimately adopted by a unanimous Court in Gideon v. Wainwright, 372 U.S. 335 (1963) in an opinion Justice Black authored.

[14]*See* United States v. Ramirez-Lopez, 315 F.3d 1143, 1148-49, *opinion withdrawn and appeal dismissed,* 327 F.3d 829 (9th Cir. 2003).

[15]The person who died is unnamed in the court's opinion.

[16]Id.

[17]Id. at 1149.

[18]Id. at 1150-51.

[19]Id. at 1149, 1152..

[20]Id. at 1149, 1151-52.

[21]Id. at 1150-51.

[22]Id.

[23]Id.

[24]Id. at 1151.

[25]Id.

[26]Id. at 1153.

[27]Id.

[28]Id. at 1159-60 (Kozinski, J., dissenting).

[29]Id. at 1160.

[30]Id. at 1160-61.

[31]Id. at 1161.

[32]Id.

[33]Id. at 1161.

[34]Id. at 1161-62.

[35]LLEWELLYN 74.

[36]POSNER 86.

[37]Ramirez-Lopez, 315 F.3d at 1162.

[38]See David Houston, *The Power of Judge Kozinski's Pen,* L. A. DAILY JOURNAL, April 18, 2003, at 1.

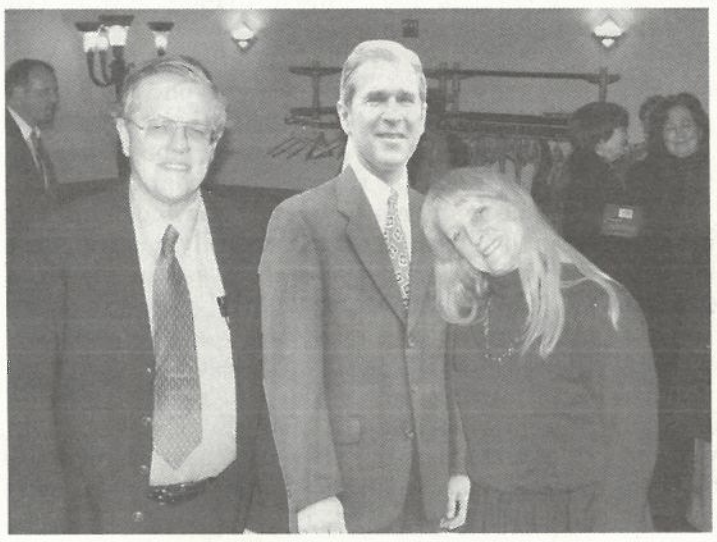
[39]In ranking recent Ninth Circuit dissents, I would rate Judge Silverman's dissent in Gerber v. Hickman, 264 F.3d 882, 893-94 (9th Cir. 2001) (Silverman, J., dissenting), and Judge Kleinfeld's dissent in Rand v. Rowland, 154 F.3d 952, 964-72 (9th Cir. 1998) (en banc) (Kleinfeld, J., dissenting) a close second and third, respectively.

[40]See supra, note 13.

TVBA gathers for January summer-fest

There are some who say the Tanana Valley Bar Association is behind the times, holding its 4th of July annual dinner/picnic well past mosquito-infested Month 7 of the year.

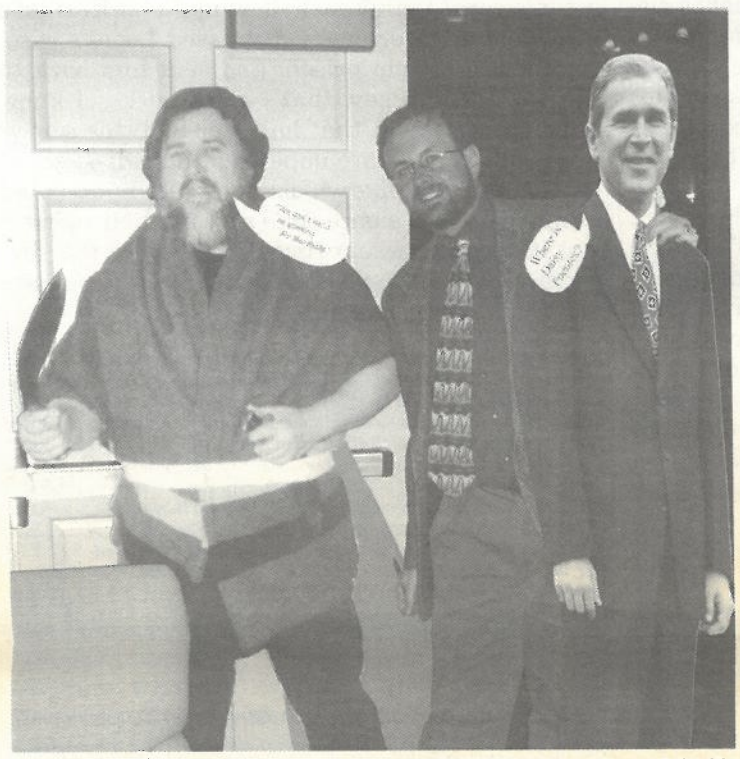
Others say nay, the TVBA is actually ahead of its time, setting the trend for the year. Witness TVBA 2004, held Jan. 9 at the Fairbanks Princess Hotel. Foreshadowing the vigorous candidate stumping in an election year, President George Bush made his first appearance in Alaska--"a last minute guest at the party and a big hit," opined Lori Bodwell. "I think we could have raised money with a 'have your picture taken with George' booth."



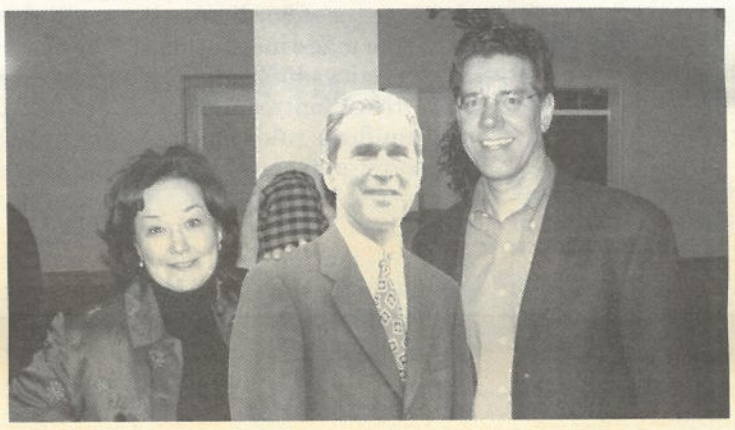
Ken Jacobus, George Bush and Terri Lynn Coleman.

Brenda and Gary Stapp.

Newly retired Ed Niewohner shares his wisdom and a few war stories with the crowd.

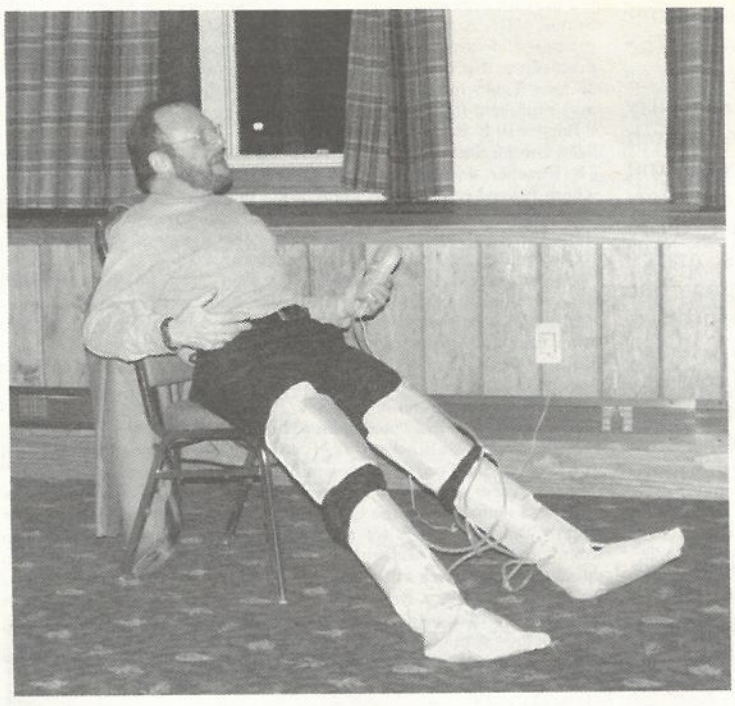


New TVBA Treasurer Jason Weiner poses with Ken Covell (left) and George Bush (right).

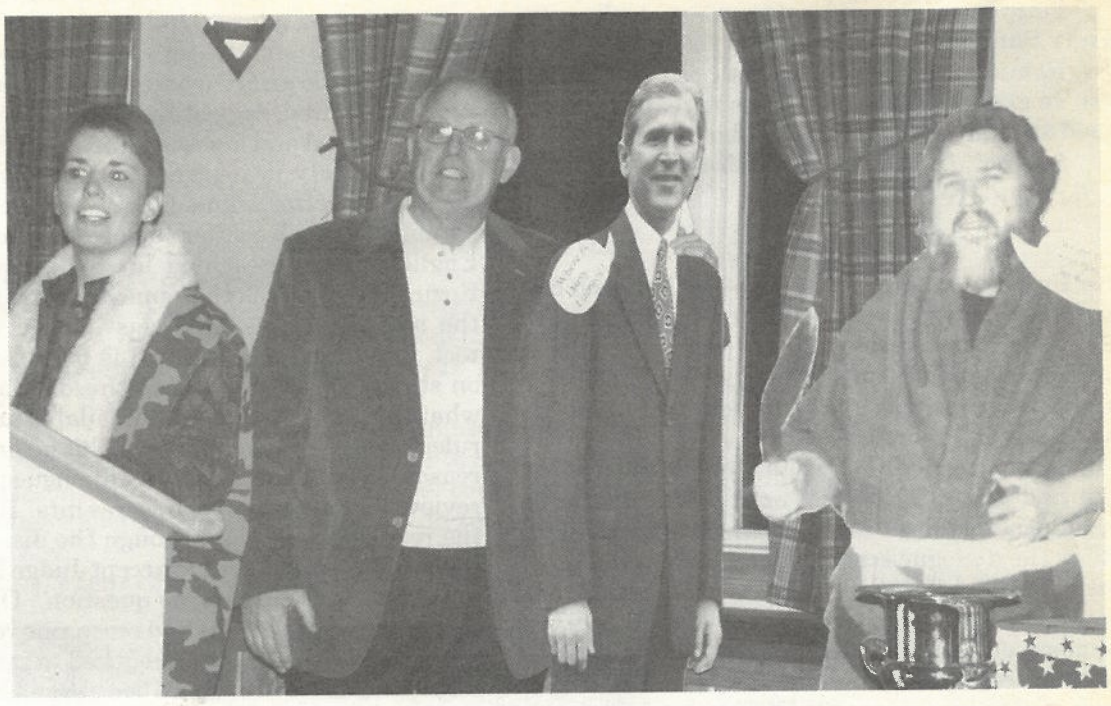


Niesje Steinkruger and Roger Brunner take time to chat with George Bush.

Andy Kleinfeld makes a new friend.



Richard Savell tries out the new leg massager he won in the raffle.



TVBA President Lori Bodwell assisted by TVBA secretary Terry Hall, George Bush and Ken Covell.

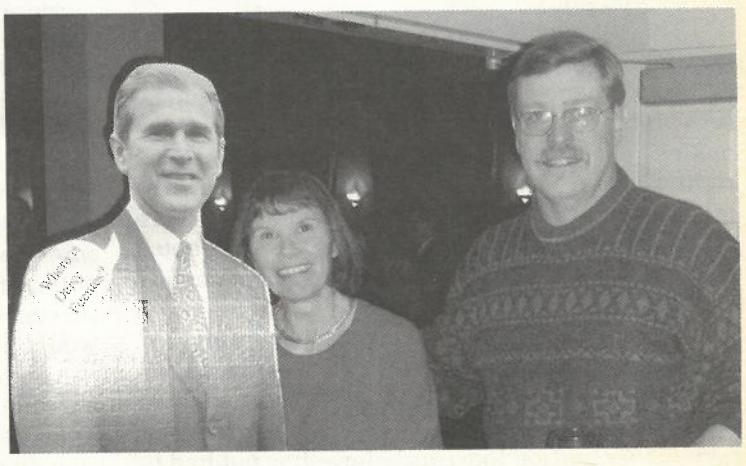
2004 Bar Convention Special Offer

Special Offer "2 for 1"

Bring a bar member admitted within the last 5 years, and pay only one convention registration fee (all 3 days, any 1 day or any 1/2 day). Both members must fill out separate registration forms and submit them together. The "2 for 1" offer does not apply to social events. The two attorneys attending under the "2 for 1" special are

_____ Name of attorney #1 _____ Bar Member ID

_____ Name of attorney #2 _____ Bar Member ID



George Bush, Betty and Bob Noreen.