The Alaska BAR RAG

SINCE 1896
ALASKA BAR ASSOCIATION

- Board approves judge selection resolution Page 35
- 2005 bar dues increase approved Page 22

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Territorial lawyers gather again

By Michael Carey

Alaska's territorial lawyers — joined by lawyers who have practiced in the state 40 years or more — held their annual gathering July 27. This year the group met at Anchorage's Petroleum Club for a buffet. More than 50 people were present.

Most of the lawyers were members or former members of the Anchorage bar including Ken Atkinson, Roger Cremo, Jim Delaney, Bob Erwin, Bob Ely, Joe Henri, John Strachan, David Ruskin and Gene Williams. Among those from outside Anchorage were Barry Jackson and Charlie Cole of Fairbanks and Jamie Fisher of Kenai. Many of the lawyers brought spouses and guests. Widows of lawyers of yesteryear were in attendance as well.

Memories of the best and the worst of the territorial and early statehood era were in abundance. The best was the number of outstanding lawyers, the friends and allies made, and the sense of adventure — the opportunity to practice law where both the communities and the law were new.

The worst was the inadequacies of the federal territorial system.

In 1955, as Roger Cremo remembers, a young lawyer could meet a man like George Grigsby, who had begun practicing when Teddy Roosevelt was president and still had a shingle out while Dwight Eisenhower was in his second term. Grigsby first practiced in Nome in 1902, where he was city attorney, and later was territorial attorney general (1916-1919). He also was in private practice in Juneau, Ketchikan, and Anchorage. For a young lawyer, Grigsby was a master of the law and compelling story

Continued on page 30

Al Maffei, James von der Heydt, and Helen Houston share a meal.

7 RULES FOR PARENTS OF TEEN GIRLS— page 20

Selection of judges displeases Governor

By Sally J. Suddock

"If it ain't broke, you're not trying"

—"Red Green", Red Green Show, PBS TV, Saturdays.

Not since the last round of aerial wolf hunt controversy has a statewide issue stirred up so much political (and apolitical) fuss.

By now, as the *Bar Rag* goes to press, there can't be an attorney in Alaska who is not aware that the Governor (a) has taken aim at the Alaska Judicial Council; (b) rejected "after careful consideration" the three "most qualified" applicants the council sent forward for his appointment to an Anchorage Superior Court judgeship; (c) wants to look at a bigger pool of candidates; and (d) suggests the constitution's selection process should be revisited.

Nor could it have escaped anyone's notice that this flurry of press releases, op-ed columns, TV and radio sound bites and letters to the editor have morphed into a decidedly partisan (as in Democrats vs. Republicans) issue.

UPDATE: Stowers appointed page 35

At issue is the role and practice of the judicial council, charged in the Alaska Constitution with the sole responsibility for screening, vetting, and recommending candidates for the Governor's appointment to Superior and Supreme Court judgeships (and, since constitutional adoption, Court of Appeals judgeships.)

Continued on page 35

Featured in this Issue

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PRESIDENT'S COLUMN

Resolution begets special committee on bar dues

By Keith Levy

This month, in addition to the usual wit and wisdom you've come to expect from the *Bar Rag*, you get a cross-cultural lesson. You will be exposed to some Yiddish expressions and your assignment is to sprinkle them into casual conversation, showing proper usage. Extra points will be given out for including one of these expressions in a Supreme Court brief.

It may come as a surprise to you, but some people feel that bar dues are too high when compared with the services the Bar Association provides. This is a topic that people frequently like to raise with me when they learn that I am on the Board of Governors. What they are doing is known as *kvetching*. To understand the concept, think of that old Groucho Marx joke, repeated by Woody Allen in one of his movies. Two little old ladies are sitting in a deli. The first says, "the food in this place is awful." "Yes," the other replies with a frown, "and the portions are so small." Pure, unadulterated *kvetching*.

"Although I should probably give it a fancy sounding name that has the phrase ad hoc in it, I've come to think of it as the Gelt Committee."

It is not all *kvetching*, however. Occasionally, someone will *kvell* about some accomplishment of the Bar Association. *Kvelling* is basically the opposite of *kvetching*. One commentator defines *kvell* this way: "to take extreme pride or pleasure in the accomplishments of others, typically one's children." This is what my grandmother would have done if she had lived long enough to see me graduate from law school. And to see me become president of the Bar Association? *Oy*, such *nachas*, you wouldn't believe. It is not completely unheard of to hear someone *kvelling* about the activities of the Bar Association. No one, however, *kvells* about bar dues (unless, of course, they are completely *meshugga*).

So what does any of this have to do with anything? Don't be such a *nudnik*; I'm getting to that. At the Alaska Bar Association's annual meeting the membership passed a resolution proposed by the Anchorage Bar Association. The resolution calls for the establishment of a special committee to study the way we use our bar dues and to recommend new ways to use bar dues "to advance the profession of law in Alaska and to benefit the members of the Alaska Bar Association and the practice of law in general." The committee is to be composed of lawyers of varying ages and practice areas, and must include at least one member of the Board of Governors.

In response to the resolution, I have appointed an eight member special committee. Although I should probably give it a fancy sounding name that has the phrase *ad hoc* in it, I've come to think of it as the *Gelt* Committee. (*Gelt* means money, not to be confused with guilt, which is a whole other cultural concept.) It will be chaired by John Tiemesson,

Continued on page 3

EDITOR'S COLUMN

The "Jib Standard" and the new transparency

By Thomas Van Flein

It is not often the inner workings of the Alaska Judicial Council make news, so we at the *Bar Rag* decided to exploit this for all it was worth. Anyone who has watched the selection of judicial candidates over the years knows that what may seem arbitrary, secretive, and whimsical to the untrained eye is in fact . . . arbitrary, secretive and whimsical. But we like it that way.

Picking the final candidates for a judgeship is like making sausage. Somebody has to do the messy part, but just show us the final vacuum packed product. Or maybe defining the standards used to select a judge is like defining pornography or explaining the popularity of reality TV; all are impossible to articulate. Maybe a council member "likes the cut of her jib" when voting on a candidate. That's a good enough reason in anyone's book. It's the "jib standard." The Governor says he wants stated guidelines, rather than the "jib standard."

Here are my suggested guidelines for superior court judicial applicants: (1) no one younger than 40. It takes a few years of living, perhaps even some children (the more problematic the better), before one can pass judgment on others and their children's mistakes. (2) No party hacks. The day-to-day business of the courts bears no resemblance to the hot-button political and social issues for which people blame the courts. (3) Tolerance. Not tolerance as in diversity and singing 'round the campfire, but tolerance for pro se litigants; tolerance for lawyers (sometimes demonstrated by one's reputation and bar poll ranking); tolerance for staff and law clerks who research everything except the real issue; tolerance for a presiding judge who will ride you like a whipped donkey until you get the paperwork turned in; and tolerance for a supreme court that will reverse you no matter how closely you think adhered to their most recent decision or instructions on remand. All of this is actually included in the "jib standard."

I will concede that our system of selecting our state court judges is not perfect. But its political overtones are thankfully muted and it sure beats anything else out there. Have you ever been down in the states where there is an election for judges? To call it unseemly is to pay it a compliment. There seems to be only one platform a candidate can run on: "I'll be tough on crime." Nobody runs with the slogan "I am up to speed on the hearsay rule" or "I'll treat both sides with respect." How would you like to get the call from a judge running for re-election asking you to buy a table at the next fundraiser for only $1,500? I have seen that in Nevada. Even worse, what will your client think about the system when she learns that the opposing counsel's firm bought two tables for the judge about to rule on the motion to dismiss, and you did not buy one?

"Picking the final candidates for a judgeship is like making sausage. Somebody has to do the messy part, but just show us the final vacuum packed product."

Direct election is just one alternative. I think the governor would like to make the pick based on ***his*** criteria; much like the President does for federal judges. Some have questioned the value of holding the highest office in the state if you can't put some friends and family on the bench. I know if I was governor I would try to load up the state payroll with my deadbeat friends and family. It's practically an American tradition.

The Governor spent some time as a U.S. Senator, but selecting federal judges is almost entirely a political exercise, the exact opposite of Alaska's system. One commentator posits:

> "As to the political aspects of judges, the appointment of judgeships by governors (or the president in federal courts) has always been part and parcel of the political spoils or patronage system. For example, 97% of President Reagan's appointments to the federal bench were Republicans. Thus, in the overwhelming majority of cases there is an umbilical cord between the appointment and politics. Either the appointee has personally labored long and hard in the political vineyards, or he is a favored friend of one who has . . . ." —V. Bugliosi, "The Betrayal of America" p. 24 (2001).

Contrast that to our merit based system. I find our de-politicized and merit-based system of selection to be so superior that it is surprising the other states and the federal government don't copy us. The results of our system speak volumes: Only three judges in the history of the state have failed to be retained in election. None has been impeached. None has been removed from office under a cloud of scandal (I am excluding Judge Noyes and the Nome claim-jumping scandal . . . he was a political appointee before statehood... case in point). The other states cannot match that record. In short, our system is not broken and it certainly does not need fixing.

What of the stated concerns of "transparency" or "hidden agendas"? It is hard to accept either as legitimate concerns. First, the Council's proceedings are generally public up to the point of deliberating on a candidate's particular attributes. A closed session allows for a frank discussion. The current legislative majority in Juneau swears by its closed door sessions for the same reason. Second, overlooked in all this is that the Governor already gets to pick 50% of the Council, so the executive branch is well-represented.

As for "hidden agendas," the only thing hidden here is what is not being said, but yet is the most obvious. So let me say it: it seems to most that the executive branch would like to pick judges based on its selection criteria and not be limited by whom the Council finds most qualified.

It is understandable that those with a political position would try to horn in on some of this action. Since the real motivation is to politicize this process, I say stand up and say so. Let's have an honest discussion about

Continued on page 3

The Alaska BAR RAG

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Board of Governors meeting dates
September 13 & 14, 2004 (Monday & Tuesday)
October 28 & 29, 2004 (Thursday & Friday: July Bar Exam results & budget)
January 27 & 28, 2005 (Thursday & Friday)
May 9 & 10, 2005 (Monday & Tuesday)
May 11 – 13, 2005 (Wed. - Friday: Annual Convention – Juneau)

PRESIDENT'S COLUMN

Resolution

Continued from page 2

the Treasurer of the Bar Association. Other members will include Diane Vallentine, Pete Petersen, and Jennifer Stuart, of Anchorage; Terry Hall and Sheila Bishop of Fairbanks; and Kent Sullivan and Lisa Kirsch of Juneau. These folks represent a fairly good cross-section of the bar, young and old, public and private, small firm and large. The whole legal *mishpuchah*, as it were. Bar Association staff will also be intimately involved in the work of the committee.

The committee's assignment is to take a look at the history and structure of our bar dues, analyze our finances, and consider what services the Bar Association should provide to members. In other words, the whole financial *schmeer*.

The committee will then make recommendations to the Board of Governors. This is an opportunity to give voice to whispered complaints about how high bar dues are and how the dues are spent, but also to show support for the services and activities that are important to us. In other words, a great chance to *kvetch* on the one hand, and *kvell* on the other.

Over 10 years ago the Board of Governors decided to raise dues more than was necessary to cover the annual budget. The idea was to create a surplus to meet expenses without having to reconsider raising dues each year. The surplus was expected to keep the dues constant for about five years. With some good planning and a little luck, the surplus has actually lasted more than 10 years, without a dues increase. The surplus is now expected to dry up fairly soon. Thus, we have a good opportunity to look more carefully at our budget and dues level and decide what we value.

These budget issues are complicated by several factors, some of which we have little control over.

We are an integrated bar, meaning anyone wanting to practice law in Alaska must join the Bar Association and pay dues. There are practical and legal limitations on how an integrated bar association may spend mandatory dues. We also have the privilege, delegated to us by the Supreme Court, of policing ourselves.

The discipline process, which is the single biggest item in our budget, is not subsidized by the state. This distinguishes us from many other states, where bar dues do not have to cover the significant expenses of attorney discipline. Accordingly, there is a substantial portion of the budget that would be difficult, if not impossible, to reduce.

On the other hand, the budget contains numerous items that are elective. The extent to which we subsidize CLE, our support of *pro bono* activities, and the subsidy we provide to produce the Alaska Law Review, are just a few examples.

If you are someone who is inclined to *kvetch* privately about the bar dues or bar services, this is an opportunity to let the Board of Governors know what you think we should be doing. Contact a Board member or a member of the committee and communicate your thoughts. Give us something to *kvell* about.

Bar Letter

More facts in death penalty case

I found Jeff Feldman's reports regarding his and Susan Orlansky's participation in the Texas death penalty case of Elroy Chester to be very absorbing. The reports reflect excellent lawyering and excellent writing in the type of a case that most any lawyer finds both intriguing and gut-wrenching.

However, after I completed my reading I was left with the definite impression that the story was incomplete--that pieces to the puzzle of the Elroy Chester case were missing. Particularly, I was left wondering what were the factual details of the crimes that Mr. Chester committed. True, the reports had small snippets of facts--five murders committed over six months, wearing a mask, cutting telephone lines, and wearing gloves--but the reports left the reader wondering just exactly what it was that Mr. Chester had done to place himself on death row in Texas. I genuinely do not mean that as a criticism of the reports--which I found to be excellent--but instead I simply intend it as an observation.

So intrigued, I performed an internet search and found the following information on the Texas Department of Criminal Justice, Death Row, web page. This information filled in the puzzle and completed the story for me:

On February 6, 1998, in Port Arthur, Chester broke into the residence of Kim Ryman Deleon. Chester raped her 14 year old and 16 year old daughters. Willie Ryman III (uncle to the girls) entered the home and was shot and killed by Chester. Chester took jewelry from the home and fled the scene. While in police custody, Chester confessed to this crime, two other murders, and three attempts to commit capital murder. Chester stated that he committed these offenses because he was out his mind "with hate for white people" due to a disagreement with a white staff member over a disciplinary report during a previous TDCJ incarceration.

I don't presume to suggest how anyone should view the issue of the death penalty, either in general or in the specific case of Mr. Chester--that is a difficult question for anyone, including me. I simply believe that the published reports can only be fully appreciated with the above factual detail.

—Kevin G. Clarkson

Texas Post-Script:

On Friday, July 23, 2004, Judge Charles Carver of Beaumont, Texas, found that Elroy Chester was not mentally retarded and, on that basis, declined to vacate his death sentence. Chester's case now will be reviewed by the Texas Court of Criminal Appeals, which is the highest court in Texas for criminal cases. If the Court of Criminal Appeals affirms Judge Carver's ruling, Chester's lawyers expect to file a Petition for Habeas Corpus, challenging Chester's execution, with the U.S. District Court for the Eastern District of Texas.

—Jeff Feldman

EDITOR'S COLUMN

The "Jib Standard"

Continued from page 2

this, not a discussion about "transparency." Maybe we should change the state constitution and have our prospective judges picked by the governor and go through a legislative hearing to vet their political pedigree. Maybe not. But that is the issue, so let's talk about that.

Maybe we should change the state constitution and have our prospective judges picked by the governor and go through a legislative hearing to vet their political pedigree. Maybe not. But that is the issue, so let's talk about that.

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Because this issue presented constitutional brinkmanship between the Council and the Governor, the *Bar Rag* spent some of its slush fund to get confidential materials from the Governor's office, as well as the Council. It was much harder to bribe the Council staff. The channels for getting confidential information from broke staffers in Juneau were much easier to open than the hard bargaining Council staffers who wanted more than just cash, but back-stage passes and a free Pontiac. In the interest of public disclosure, we met the demands and here are portions of two transcripts we received that we thought you might find interesting:

Transcript of Governor's Meeting 9/2/04

Governor: But I don't know any of those folks and as far as I can tell none of them gave me any money in the last election and I haven't seen them working the precinct either . .

Chief of staff: Governor, that's the federal system. Here, the Judicial Council makes the first cut and you have to pick from those they select.

Governor: Now Jim, maybe you forget who signs the paychecks around here. But I want to pick who I want and that's the way its gonna be . . . you get on the phone to that Council and let them know I am on to their little game and that I want a whole new batch of names with everyone on it . . .

Chief of Staff: Well, of course I know who signs the checks, big guy. I'll make the call and let them know we are not happy . . .[sounds of door opening]

[**Unidentified voice**] We still on for the poker game tonight at the Whiskey Hut?

Governor: Loren, we're having a meeting here.

[Unidentified voice] Sorry boss.

Governor: Anyway, give them a Cheney. Tell them I said they can all go #%&@# themselves.

Chief of Staff: How about instead of that we say you reject their submissions and to send us all the applicants?

Alaska Judicial Council Transcript of Meeting 9/3/04

[Indiscernible] . . . just what should we say to the Governor's request that we send him more names?

[Unidentified voice] How about "Go *%#*@! yourself"?

[Simultaneous talking, unidentified voice] Too Vice-presidential. But direct and concise.

[unidentified voice] How about that sentiment, but we say something like "We have met our constitutional obligation."

All in favor say "Aye."

ALSC President's Report

ALSC board faces challenges from budget veto

By Greg Razo

The tasks of all ALSC Board members became more challenging a few weeks ago when Gov. Murkowski singled out the $62,500 the legislature had appropriated for ALSC for a line-item veto.

Loss of critically-important funding always presents the organization with distasteful options. Close a rural office? Take a position away from our already-strained urban offices? Reduce the meager salaries or benefits we pay our committed staff attorneys? None of these are palatable choices.

Coincidentally, just a few days before word of the veto came through, ALSC's Executive Director had a call from the office of Senator Lisa Murkowski, inquiring on behalf of a dissatisfied constituent as to why ALSC had not accepted her application for representation. The answer, as it is all too often, was that the agency would have preferred to assist her, but lacked sufficient resources. It is ironic that Sen. Murkowski's father was readying the line-item veto pen to insure that ALSC will have to turn down even more applicants in the future.

The stated reason for the line-item veto was that "providing a grant to an organization that provides legal assistance to individuals is not a basic responsibility of state government." Of course, the Public Defenders and the Office of Public Advocacy, although they are state agencies and not charitable 501(c)(3)s, do provide exactly that service.

Don't get me wrong; I don't mean to suggest that either the PD's office or OPA is over-funded (obviously, neither is). I remain supportive of both agencies, and I wouldn't want to see either agency suffer the kinds of cuts that ALSC has, or any cuts, for that matter; the criminal side of the docket has just been made significantly more complex in my view by the recent U.S. Supreme Court decision in *Blakely v. Washington*.

But if criminal law has its complexities, that observation is even more cogent on the civil side, where scarcely a day passes without a reworking of some significant area of civil litigation. Thus I respectfully disagree with the stated rationale that it is not the state's basic responsibility to provide help to individuals who need that help to obtain access to our judicial system, and cannot afford privately retained counsel to do so.

Those of us who take pro bono cases should consider whether we can take on another.

I'm reinforced in that belief by the fact that ALSC's appropriation was approved by both the House and the Senate, and that former Govs. Cowper, Hammond, Knowles, Hickel, and Sheffield all found ways to keep ALSC in the state budget.

But for those readers who may feel supportive of the cutoff of funding to ALSC – doesn't it bother you just a little that the budgets for the public defenders and the OPA and the Department of Law have all grown over the past two years, whereas this private charitable nonprofit, whose attorneys earn significantly *less* than state salaries, has seen its state appropriation disappear, because its mission is to represent the working poor in Alaska *not* charged with a crime?

In case it's not clear, it very much bothers me. I do want us to make sure that those charged with a crime are given competent legal help when they can't afford private attorneys, but I also want to do so for those not facing criminal charges – in part because the consequences to a family from losing their shelter, or their income, or their health coverage, all of which are civil matters, are hardly less devastating than a the typical criminal sentence, and in part because providing timely legal advice or assistance in a civil case can prevent a situation from blowing up into a criminal or child protection matter consuming significantly more public resources in the long run.

I submit that we should all redouble our efforts to fulfill the duty imposed upon us by Alaska Code of Professional Responsibility Rule 6.1 to improve indigent Alaskans' equal access to civil justice.

In any event, this column is being written not solely to grouse about the Governor's veto (believe it or not), but to pose the question – regardless of whether we agree or disagree with the Governor's position, what should our obligation as bar members be in the wake of that decision? I submit that we should all redouble our efforts to fulfill the duty imposed upon us by Alaska Code of Professional Responsibility Rule 6.1 to improve indigent Alaskans' equal access to civil justice.

Those of us who take pro bono cases should consider whether we can take on another. Those of us who are on the panel but have not taken on a case for a while, should take one. Those of us who have not yet taken a pro bono case should sign up for one. Those of us who for some reason can't take a pro bono case should volunteer to teach a clinic or help with ALSC's Alaskalawhelp.org website.

Those of us who regularly make contributions to the Robert Hickerson Partners in Justice Campaign should consider increasing our last year's contribution by 50%. Those of us who have contributed in the past but did not do so this past year should make an effort to do so. Those of us who have never contributed should make this upcoming 2003-2004 campaign our first; watch for the initial mailing coming around in late September.

I don't think the private sector can provide what is needed to make up for the loss which indigent Alaskans will face from elimination of state funding, let alone what would be required to address the considerably larger unmet need; but I think that, for both those of us who think that is not possible and for those who do, and for both those of us who support Gov. Murkowski's decision and those of us who don't, the response is clear: Volunteer your time and donate your resources to make equal access to justice in Alaska more than just words.

Then, and only then, will **all Alaskans** truly have the opportunity of equal access to justice. We should demand no more, and settle for no less.

Fairbanks Court Staff Prepare for the Installation of CourtView®. On October 25, 2004, the Alaska Court System's new computerized case management system--CourtView®--will be installed at the Rabinowitz Courthouse in Fairbanks. Fairbanks court staff have worked diligently to ensure a smooth transition to CourtView®, including, L-R: Andra Burns, Probate/DV Supervisor; Ruth Meier, Clerk of Court; Kate Turner, Court Services Supervisor; and Cindy Bole, Chief Deputy Clerk. The new system will provide a range of services not previously available, such as electronic payment of fees and fines, web access to public information, and the potential for future e-filing of documents. CourtView® will also greatly enhance the ability of judges, lawyers, litigants and members of the public to obtain ready access to case information. Questions about what to expect with the new system or about any problems that may arise when the system goes "live" may be directed to the Area Court Administrator's office at 907-452-9201. Attorneys should make sure to update their contact information with the Alaska Bar Association as soon as possible, because CourtView® will rely on the Bar's database and cannot accept changes directly.

75 gather for NAWJ Color of Justice convention

The 2nd Annual Color of Justice conference to encourage rural and ethnic minority high school students to pursue professions in the law and judiciary was held on Friday, July 16, 8:30 - 4:30, in the Alaska Supreme Court in Anchorage.

Seventy five students from all points of Alaska attended the vibrant event co-sponsored by the Alaska Court System, Alaska Native Justice Center, Southcentral Foundation's RAISE Program, and the Law Schools at the University of Seattle, Gonzaga and University of Washington. The program featured an opening address by Chief Justice Alexander O. Bryner, breakout sessions and multi-media interactive presentations by judges, lawyers, law school professors and administrators.

The Color of Justice is a youth outreach program of the National Association of Women Judges (NAWJ). Founded in 1979 and based in Washington, D.C., the NAWJ works to to ensure fairness and gender equality in American courts, and provides education for judges on bioethics, elderly abuse, the sentencing of women offenders with substance abuse problems, improving conditions for women in prison, and the problems facing immigrants in the American court system.

QUOTE OF THE MONTH

"A jury consists of twelve persons chosen to decide who has the better lawyer."

— Robert Frost

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.

Loislaw, Alaska Bar offer member discounts

The Alaska Bar Association has reached agreement with Loislaw to provide several important services to the Bar Association and Bar members.

Based in New York, Loislaw is a leader in comprehensive, easy-to-use and affordable legal research. Its databases include coverage of all 50 states and the federal government as well as hundreds of practical secondary materials such as treatises, handbooks and forms.

Loislaw has agreed to include Alaska Bar CLE materials on its website, complete with a search engine and with links to Loislaw primary law (official text case law, statutes, administrative regulations, etc.) These enhancements will provide additional usefulness and value to Alaska Bar CLE materials as a research tool.

Under the new agreement, Loislaw will provide Alaska Bar members with a 25% discount off of its already affordable prices for primary law, provided they purchase by November 30, 2004. For subscriptions received after that date, the discount will be no less than 15%.

Loislaw also includes a sophisticated citator, GlobalCite, and LawWatch, a tool to update research automatically. These tools are included in the base price and can be used as much as a subscriber wishes without any additional charges. Indeed, Loislaw is particularly proud of its flat rate, no surprises fee structure, which never includes a transactional fee or a surcharge for high usage or searching outside of libraries the client has purchased.

Please take a look at The Loislaw product. It is powerful and easy to use. You can arrange for a free trial by calling (800) 364-2512, or visiting www.loislaw.com. The Loislaw product is completely available now and the CLE materials will gradually become available over the next few months.

Loislaw is a comprehensive, affordable and easy-to-use online legal research service. Loislaw provides legal professionals with unmatched analytical materials, practice guides and forms from Aspen, CCH and other sources, instant access to up-to-date state and federal cases, statutes, rules and other primary law, and extensive public records information.

For information on the program, the Loislaw contact is Matthew Van Campen, (509) 453-4025, mcampen@loislaw.com

Parsing the First Amendment for the faithful

By Kenneth Kirk

The lady in the back of the church raised her hand timidly. I had been invited to the pulpit to explain the (then-recent) Roy Moore case in Alabama, in which the chief justice had been removed for refusing to get rid of a Ten Commandments monument in the courthouse.

I had just explained what the case was about, and this was my first question. I pointed to her and waited, hoping to be able to give an intelligent answer to some difficult constitutional question.

"Sometimes," she began, "when I'm at the bus stop, I like to tell people there about Jesus. Does this mean I can't do that"?

I tried not to chuckle; it was obviously not easy for her to speak up in public, and I didn't want to embarrass her. I patiently explained that since she wasn't an agent of the government and wasn't at her job yet, she was pretty much free to tell the Good News to anyone she wanted. And then I moved on to more sophisticated queries.

It wasn't until the drive home that I realized where that question came from: confusion between two different clauses of the First Amendment. And then I realized how common that confusion is. Not just for church ladies waiting at the bus stop, but for school principals, government officials, and even lawyers.

When a teacher tells a pupil that she can't bring her Bible into class, or a mayor tells a religious group that it can't have a permit to use the park, they usually dredge up the unfortunate metaphor of "the wall of separation of church and state," thinking that's what the constitution says.

If they actually read and understood the First Amendment, they'd see that it doesn't require that the Bible be left at the schoolhouse door, in fact quite the opposite.

So herewith I present a little primer I call "Parsing the First." I was going to call it "Deconstructing the First," but apparently that word has all kinds of loaded political implications in academia.

Congress shall make no law respecting an establishment of religion...

Looking carefully at the establishment clause, one might first note that it appears to apply only to the federal government. However after the Civil War, the 14th Amendment applied all of these "privileges and immunities" protections against the states, as well.

The Establishment Clause is implicated when government actors try to push religion. For example, public school teachers used to be able to lead students in morning devotions; that isn't allowed anymore. High schools used to have baccalaureate, a religious service for the graduates, but those have had to be privatized. And at Christmas time, the land was once rife with creches, often put up by the local town council, but most of those (at least, the ones on private property) have been taken down.

The standard here is called the "Lemon test", which does not mean kicking tires before buying a used car. It is from a case involving a guy named Lemon [1] in which the U.S. Supreme Court set out a three-part standard: the challenged government action must have a secular purpose, it must not constitute an endorsement of religion, and it must not foster excessive government entanglement with religion.

A teacher passing out Bible tracts to her pupils would involve an endorsement of religion. Allowing little Johnny to pass out Bible tracts during recess would not. For that matter, the teacher could pass them out in the teacher's lounge on her break. Holding a city-organized passion play in the park would be excessive entanglement; allowing a church to use a public facility on the same basis as other private groups, would not. And if a schoolteacher gives a speech at graduation and talks about her religious faith, that would be unconstitutional, but if a student valedictorian does the same thing, no foul.

...or prohibiting the free exercise thereof...

No, this isn't where little Johnny gets his right to pass out Bible tracts, that comes later under the free speech clause. This is, however, where Big Dog Smith gets his right to have weekly religious observances at the state prison.

More importantly, this is where the faithful turn when they believe a law offends their religious sensibilities. For instance, if a school requires students to participate in a holiday observance, some Jehovah's Witnesses might object. Or if a state job has a dress code that requires female employees to wear pants, some women might object because their church believes women should never wear pants. I suppose that last example doesn't fit very well here in Alaska, since in winter most women would be pleased as punch to be ordered to wear pants, but this does actually come up in the south now and again.

Up until 1990, the rule was that laws of general applicability must accommodate the sincerely held beliefs of religious minorities. That changed completely that year, when the Supreme Court overturned years of precedent and held that general laws of neutral application would be upheld unless they specifically targeted religion.[2] Or, if the Free Exercise clause could be combined with some other constitutional right, which brings us to:

...or abridging the freedom of speech...

Yes, this is the fun part, I know. This is where Woody Harrelson gets the right to publish pictures of women with their legs spread apart, and such wonderful phrases as "I know it when I see it" are taken seriously. At the appellate level, these cases usually seem to involve outrageous, bawdy, or intentionally offensive statements such as "F*** the draft". And occasionally cases involving marijuana leaf T-shirts or internet pornography still come up. However at the trial level, a lot of these cases involve what we might call "conservative speech" such as condemning gay marriage or proselytizing co-workers during a break. These are sometimes deemed violations of sensitivity codes, and that's where the litigation begins.

This is also where school principals often miss the boat. They think they can't allow little Johnny to discuss religion because it's a public school, and religion isn't allowed in school. Actually, they can't restrict Johnny from discussing religion because he has free speech rights (assuming he's not in math class or otherwise off topic). This is why the teacher can't evangelize during the graduation speech (she's a government actor) but the valedictorian has every right to.

Separation of church and state is a metaphor, and like all metaphors it doesn't fit perfectly. The Free Speech clause actually requires, not separation, but neutrality by the government.

...or of the press...

This was a big issue back in the colonies, and is still an issue in Old England today, but it's pretty much settled now in the U.S. Outside of the narrow restrictions of defamation laws, the press gets to pretty much say what it wants.

But what is the press? In those days it was easy to define, it was newspapers, magazines, and pamphlets, which all came from a printing press. Then radio and TV came along, and restrictions such as equal time requirements for candidates, were accepted because there was limited spectrum availability and so a limited number of channels were allowed. That argument seems weaker now that there are 100+ cable channels. The Internet has been allowed to operate without such restrictions.

Of course a government publication would be an exception to the rule, just as government actors are exceptions to the general rule of free speech. But what about a publication such as the *Bar Rag,* which is published by a quasi-governmental agency (the Bar Association)? In order to get an answer to this burning question, I have decided to include a blatantly religious statement at the end of this article, in order that we may be sued by the ACLU. I feel strongly that it is worth the Bar Association's money and resources to test this important issue.

...or the right of the people peaceably to assemble...

This is where the government can impose reasonable time, place, and manner restrictions, but not much else. It comes up sometimes in abortion clinic protest litigation.

...and to petition the government for a redress of grievances.

I think this means they can't put you in jail for sending a copy of your pleadings to George W. Bush (as some of my clients have been known to do). But I'm not going any further into this one because I'm just about out of space.

So there you have it: the First Amendment to the U.S. Constitution in a neat if oversimplified nutshell. Recently in Sweden, a minister was sentenced to jail for 30 days for preaching, from the pulpit, that homosexuality is a sin. That shouldn't happen here in America, because of the free speech clause. Praise the Lord.

(Footnotes)

[1]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[2]Employment Division v. Smith, 494 U.S. 872 (1990).

ESTATE PLANNING CORNER

Determining the federal estate tax

By Steven T. O'Hara

The calculation of federal *estate tax* can be analogized to the calculation of federal *income tax*. The *gross estate*, which is the starting point, is like *gross income* in the sense that it is nearly all-inclusive.

The gross estate includes the value of all property the decedent owned at the time of his death, including retirement plans and jointly-owned property with rights of survivorship (IRC Sec. 2033, 2039, and 2040).

The gross estate also includes any gift tax paid within the three-year period ending on the decedent's death (IRC Sec. 2035(b)).

The gross estate includes the value of certain string-transaction property. This is property transferred before death but with respect to which the transferor retained certain strings in terms of rights of one form or another (IRC Sec. 2036, 2037, and 2038). The classic example is the creation and funding of a *revocable* living trust. The retained string, often in the form of control, pulls the property back into the decedent's gross estate as if the property had never been transferred.

The gross estate includes property over which the decedent had a general power of appointment. For these purposes, a general power of appointment exists where a person has the power to direct that property be paid to himself, his estate, his creditors, or the creditors of his estate (IRC Sec. 2041(b)(1)). When creating trusts, spouses and parents often give powers of appointment to their beneficiaries.

The gross estate includes property over which the decedent had a general power of appointment.

The gross estate includes insurance on the decedent's life if the decedent possessed at death any incidents of ownership over the insurance or if the insurance is payable to his estate (IRC Sec. 2042)). The insurance will also be included if the decedent owned any ownership rights at any time within the three-year period ending on the decedent's death (IRC Sec. 2035(a)).

The gross estate includes QTIP, which stands for qualified terminable interest property (IRC Sec. 2523(f)). This is property with respect to which the decedent's spouse took a gift- or estate-tax deduction when property was transferred in trust (IRC Sec. 2044). For example, suppose a married individual creates a trust and qualifies a $100,000 contribution to that trust for a deduction under the gift-tax system by making the so-called QTIP election on his gift tax return. Suppose the beneficiary-spouse then dies with $100,000 of principal remaining in the trust. Here the $100,000 would be included in the beneficiary-spouse's gross estate.

After arriving at the gross estate, deductions are considered. Typical deductions are funeral expenses, administration expenses, indebtedness, and losses incurred in estate administration, as well as transfers to a qualifying charity (IRC Sec. 2053, 2054, and 2055).

If the decedent is survived by a spouse, then transfers to his spouse may qualify for what is known as the "marital deduction" (IRC Sec. 2056(a)). The marital deduction is generally available for transfers to a surviving spouse only if the surviving spouse is a U.S. citizen (IRC Sec. 2056(d)). There is an exception if the transfer to the alien spouse is made through a so-called qualified domestic trust (IRC Sec. 2056(d)(2)).

"The gross estate includes QTIP, which stands for qualified terminable interest property."

After subtracting the deductions from the gross estate, the remaining balance is known as the taxable estate (IRC Sec. 2051). Again consider the income-tax analogy; gross income minus deductions equals taxable income.

If the entire gross estate qualifies for the marital deduction, as an example, then the taxable estate is zero.

If there is a positive taxable estate, then a rate schedule is applied to the taxable estate to arrive at a tax. If the decedent had made a taxable gift in his lifetime, the gift is generally included in the estate-tax calculation -- not in the gross estate, but in the estate-tax calculation (IRC Sec. 2001(b)). The effect of including the taxable gift in the estate-tax calculation is to apply the highest marginal estate-tax rate to the taxable estate. In 2004, the estate-tax rates begin at 18% and go up to 48% (IRC Sec. 2001(c)).

After the estate tax is calculated, then any available credits are applied to offset some or all of the tax. Recall that a credit is a dollar-for-dollar reduction in tax; if the credit is $1, the tax reduction is $1.

Consider a client who is domiciled in Alaska. The client is not married, has no debts, and has never made a taxable gift. He has one child, who the client intends to be his sole beneficiary. The client has one asset: a $1,500,000 brokerage account, in which the broker holds the securities in street name, all of which the client contributed.

The client's son has no creditor problems and, while being self-supporting, has no significant assets of his own. The client has put his son on the brokerage account as a joint owner with the right of survivorship. The son has never made a contribution to or a withdrawal from the account.

Suppose the client dies in 2004. Here the gross estate would be $1,500,000 (IRC Sec. 2040). The taxable estate would also be $1,500,000 because the administration expenses would be nil since the sole asset passed to the son by right of survivorship.

Now the federal estate tax is calculated by applying the rate schedule, where it appears at first glance that the decedent's estate tax is $555,800 (IRC Sec. 2001). Fortunately, this amount of tax is completely offset by the decedent's applicable credit amount, which is also $555,800 for 2004 (IRC Sec. 2010(c)).

The practical effect of the applicable credit amount, also known as the "unified credit," is to shelter from federal estate tax up to $1,500,000 in 2004.

Suppose our client's situation is more complicated. Suppose on the day before our client's death in 2004, the joint brokerage account balance is $2,511,000, all contributed by the client. Suppose the client's son withdraws, for himself, $1,011,000 from the brokerage account the day before his father's death. The son did this because he heard about the $11,000 annual gift-tax exclusion (IRC Sec. 2503(b)), and he also heard the unified credit is applicable against gift tax up to $1,000,000 (IRC Sec. 2505). He believed that if his father died with no more than $1,500,000, his father's estate would owe no tax.

Here the father would be considered to have made a taxable gift of $1,000,000 on the day before his death (IRC 2503 and Treas. Reg. Sec. 25.2511-1(h)(4)). This is the amount in excess of the $11,000 annual gift-tax exclusion. The father's gross estate would consist of the $1,500,000 that remained in the brokerage account at the moment of his death.

The decedent's personal representative would be required to file a gift tax return to report the $1,000,000 taxable gift. No gift tax would be payable because the gift tax would be completely offset by the unified credit (IRC Sec. 2505).

The decedent's estate tax return would report a gross and, in general, taxable estate of $1,500,000. Then the estate tax would be calculated by including the $1,000,000 taxable gift (IRC Sec. 2001(b)), which produces an estate tax of $1,025,800 (IRC Sec. 2001(c)). This amount is then offset by the unified credit for 2004, which is $555,800 (IRC Sec. 2010). After the credit is applied, and ignoring Alaska estate tax, the federal estate tax payable is $470,000.

Recall under our facts that on the day before the client's death the brokerage account had a balance of $2,511,000. The federal estate tax on that total amount would have been, ignoring Alaska estate tax, $475,280 (IRC Sec. 2001(c) and 2010).

Thus the son saved $5,280 by making the withdrawal. This savings is 48% of $11,000; 48% is the top marginal estate-tax rate in 2004.

The son could have saved the same amount, plus avoided the expense of a gift tax return, by withdrawing only $11,000, which illustrates the effectiveness of the annual gift-tax exclusion.

Attorney abandons bears for Texans

*By **Janet** Malik*

I fish because mercifully, there are no telephones on trout waters.
— John Volker,
Retired Michigan Supreme Court Justice

A bear, an interrupted vacation, a couple of all-nighters and a chance to save a guy's life...it all added up to "the most satisfying week in my professional career," says Bob Bundy, a partner at Dorsey & Whitney LLP's Anchorage office, who stepped in at the eleventh hour of the Joe Lee Guy death penalty hearing.


Bob Bundy

It was the week before Joe Lee Guy's last chance to avoid execution, and Steve Wells and Pat McLaughlin — lead partners on the Dorsey pro bono team representing Guy — were totally organized. After pouring themselves into the case since 2000, they had their facts, their law, and their hearing strategy down cold. The team was ready.

Then, just days before the continuation of the hearing (which had started in October 2003 but had been stayed) was to begin, Steve's wife became seriously ill, and it soon became apparent she would need emergency surgery (she is now recovering). The judge was asked for a continuance; he denied it. The show would have to go on, but "I knew that if there was anyone who could take over for me, I had to stay behind with my wife and kids," Steve said.

But who? Steve immediately thought of Bob Bundy, a trial partner in Dorsey's Anchorage office and former U.S. Attorney for Alaska. "Bob understands criminal cases, and he's a very experienced trial lawyer."

Meanwhile, Bob was enjoying the opening of trout season in Alaska's Katmai National Park, famous for its volcanoes, brown bears, fish, and rugged wilderness. No clients...no worries...and no phones.

That is, until Anchorage partner-in-charge Jim Reeves calls a bush pilot who radioes the lodge at Katmai who gets word to Bob who radioes back to Jim Reeves at home. The story is spilled, and Bob agrees to cut short his vacation to help out with the hearing.

Next morning, after being chased out of a trout stream by one of those famous brown bears, Bob boards a float plane and returns to Anchorage, where he squeezes in a Father's Day brunch at home, gathers up the foot-high pile of case materials that had been e-mailed to the office, and by 5 PM is on a plane to Lubbock, Texas — ready to play understudy for Steve Wells.

"Except I hadn't studied," Bob quipped. The 17-hour flight was his first chance to read and absorb all the work that had been done by the team since 2000. But having worked in criminal law, "you get used to having to get ready fast," he says.

Bob and the rest of the team gathered in Lubbock on Monday to prepare, with Bob taking Steve's parts in the hearing plan. Day one of the hearing, on Wednesday, went well, but on Thursday...a new wrinkle: Due to an unexpected order in another matter, Pat would have to leave to make an appearance in Chicago on Friday.

The hearing assignments would have to be re-shuffled. Again. Another late night for Bob and the team.

But it was a case of all's-well-that-ends-well when U.S. District Court Sam R. Cummings on Friday threw out Guy's death sentence and sent the case back to state court. "When I whispered to Joe 'we won!' his face lit up like fireworks," Bob said.

It was exhausting, but "I had the privilege of working with a great group of people, " he said. "Steve, Pat, Andre Hanson, Todd Trumpold, Marisa Hesse, Cathy Gress-Springer and our Texas colleagues were stupendous. It was the most professionally rewarding week I've ever spent."

Dorsey attorneys win victory for death-row inmate Joe Lee Guy

A team of Dorsey attorneys has successfully challenged the death sentence for Joe Lee Guy, an inmate on death row in Texas.

The Dorsey team sought to overturn Guy's death sentence on the ground that Guy's court-appointed investigator had a flagrant conflict of interest and had, as a result, performed little or no investigation into important aspects of Guy's case. At a hearing on June 25, 2004, Judge Sam R. Cummings, U.S. District Court Judge in Lubbock, Texas, threw out Guy's death sentence and sent the case back to state court. The prosecutor in that court has expressed his willingness to enter into an agreement for a life sentence.

Guy was convicted for his role in a 1993 convenience-store robbery in Plainview, TX in which the store owner was killed, and his elderly mother wounded. Guy, alleged to be the unarmed lookout, received the death sentence; the alleged mastermind and shooters, in separate trials, received life sentences.

The Dorsey team uncovered evidence that Guy's unlicensed investigator, Frank SoRelle, developed a relationship with the surviving crime victim (the only eyewitness to the crime) and, within weeks of the Guy's conviction, was named the sole beneficiary of her substantial estate. She died several months later, leaving the investigator with an estate worth approximately $750,000.

Compromised by the investigator's conflict of interest, Guy's defense lawyer presented only sparse testimony concerning Guy's childhood and upbringing during the punishment phase of Guy's trial. The Dorsey team located dozens of potential character witnesses who had never been contacted by the investigator--witnesses who described Guy's childhood as one marked by isolation and rejection. Friends and family members recalled that his mother was addicted to gambling and drugs and frequently left Guy and his sister to fend for themselves. His father, an alcoholic, was murdered. His elementary school classmates threw pennies at him for entertainment, laughing as the impoverished boy picked them off the floor. But the jury in his capital trial heard none of that character evidence because the defense investigator failed to find any witnesses who could have provided it. After a four-day hearing at which the Dorsey team presented evidence of the investigator's conflict of interest and its serious impact on Guy's defense, Judge Cummings vacated the death sentence.

"It was a gross injustice that Joe Lee Guy received the death sentence in the first place," McLaughlin commented. "And we are very pleased that we were able to help rectify that injustice."

Spear goes to the Blogs

Juneau attorney Bill Spear, renowned for his Wm. Spear Design art pins and rambling e-mail newsletters to his clients and friends list, said in August he's sent out his last spam.

Spear has gone to the Blogs (aka Internet web logs for the uninitiated.)

"Pinheads, this is it. My last spam. Although of course I stand 100% behind the content of the previous couple of decades worth of 20-page paragraphless, dense-pak paper newsletters and the more recent electronic screeds, I was never really comfortable with the method of distribution of either of them. Paper was too expensive and wasteful, and spam too intrusive. Even though I hardly ever got any actual complaints, sending off those huge spews seemed part of the spam problem rather than part of the solution. So, we are trying something new. The King is dead; long live the King ('O Pins)."

Spear's new Blog can be found at www.runningmummy.com (themed from his pin of the same name.) His wares remain available for purchase at www.wmspear.com.

Patton Boggs launches family website

Patton Boggs LLP has launched an internal family website in what it calls "the latest in a long line of innovative employee perks." The internal Family Community Website is designed to meet the needs of families of attorneys and staff members.

"The goal of the firm's virtual online community is to connect all members of the Patton Boggs family, at any virtual location. Attorneys, staff, children and families will now have a shared, online resource in which to find or exchange vital information and access forms and employee information," said the firm.

Link's memorial fund donated to Youth Court

By Kenneth P. Eggers

When Judge Jonathan Link died, his wife, Mildred Link, at the suggestion of Donna Willard, authorized the establishment of a memorial fund with the Alaska Bar Foundation. Judge Link's friends and colleagues have donated $4,105 to this fund. The Board of Trustees of the Alaska Bar Foundation solicited suggestions from Ms. Link and Ms. Willard as to how these donations might best be used to honor the memory of Judge Link. They suggested that the donations be used to support the Kenai Peninsula Youth Court.

On June 8, 2004, the Board of Trustees passed a resolution to donate the memorial funds to the Kenai Peninsula Youth Court. Judge Link was a solid supporter of the Youth Court Program, and was instrumental in recruiting Virginia Espenshade, the current executive director for the Kenai Peninsula Youth Court.

The Alaska Bar Foundation Board of Trustees thanks all individuals and law firms who have made contributions to the Judge Link Memorial Fund. Additional contributions will be welcomed.

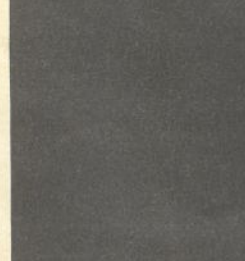
Bar People

Jennings moves office

Karen L. Jennings

Karen L. Jennings has moved her office from Anchorage to the Mat-Su Valley. Her office is now located at 4900 Palmer-Wasilla Highway. Karen has practiced law since 1982, first as a prosecutor and defense attorney in New Mexico and Texas, next as a Navy JAG, then since the early 1990s here in Alaska. She welcomes referrals in family law and criminal defense cases. Telephone: 373-3722; Fax: 373-3782.

Shannon made partner



Lee K. Shannon

Hobbs, Straus, Dean & Walker, LLP is pleased to announce that Lee K. Shannon has been named partner of the firm in the Portland, Oregon office. Mr. Shannon advises tribes and tribal entities on issues including economic development, gaming, business entity formation, commercial transactions, finance and tax. He is an enrolled member of a Northwest Coastal Salish Tribe (Cowichan Tribe, B.C., Canada). He received a B.S. in Biology from Seattle University in 1986, a J.D. from the University of Washington School of Law in 1993 and a Masters of Business Administration from the University of Washington Graduate School of Business in 1994

Preston Gates & Ellis hires new associates

Preston Gates & Ellis LLP,announced Sept. 14 that it had added six new associates in its Seattle, San Francisco, Anchorage and Hong Kong offices. Alaska new associates include:

Aileen P. Haviland, Associate, Corporate Securities/M&A, Anchorage. Aileen Haviland has experience working on project financings, restructurings and sale and acquisition work in the power and energy industry. Haviland holds a juris doctorate from Georgetown University Law Center.

Monique Henga, Associate, Labor, Employment and Benefits, Anchorage. Monique Henga practices primarily in employment and labor law, and maintains an intellectual property litigation practice as well. She has previous experience in insurance defense litigation, insurance subrogation litigation and domestic relations matters. She received her juris doctorate degree from Willamette University.

--Press release

Perkins Coie LLP merge with Brown & Bain, P.A.

Perkins Coie LLP and Brown & Bain, P.A. announced June 23 that the two firms will combine, effective July 1, 2004.

Perkins Coie, known far its full-service, technology-oriented legal services, and Brown & Bain, renowned far its strength in intellectual property litigation and counseling and complex commercial litigation, will together be able to offer their clients a range of new and deeper capabilities, said the firms in a press release.

"This is an incredible fit, " said Bob Giles, Perkins Coie managing partner. "Brown & Bain has a well-earned, sterling national reputation--they supplement our strengths in IP and complex litigation so that, together, we will be among the very tap firms in the country - They work extensively in California, where we are continuing to grow, and give us a substantial presence in Phoenix, which is one of the nation' 5 fastest-growing economies."

"Joining with Perkins Coie offers our clients two very important things, " said Joe Mais, Brown & Bain managing director. "First, although we have always been strong in litigation, the combination gives us incredible depth and talent that will enable us to handle any type and any size of IP or complex commercial case anywhere in the country. Second, Perkins Coie's strength in corporate, intellectual property, labor and employment and regulatory law complements and broadens our transactional practice, enabling us to provide clients with the full range of business services."

Giles and Mais both noted that, in addition to the client benefits and strategic rationale, the firms deeply respect each other's culture.

--Excerpted from PR Newswire press release, June 23, Seattle.

Court appoints rules attorney

Nancy Meade is the new Court Rules Attorney for the Alaska Court System. Nancy previously worked for the Attorney General's Office for many years, providing legal services to the Departments of Revenue and Natural Resources. She has also taught courses for the Justice Center at the University of Alaska Anchorage and served as Director of the Legal Writing Program at the University of California Berkeley School of Law (Boalt Hall). Former Court Rules Attorney Barbara Hood has moved to a new position as Court Initiatives Attorney, where she will be responsible for special projects, court information services, and community outreach.

FAMILY LAW

Alaska grandparents' rights in a post-*Troxel* world

By Steve Pradell

Many grandparents have had difficulty maintaining close contact with their grandchildren, especially after divorce proceedings have been initiated.

In the past, the only avenue which may have been available to grandparents in most cases was to request that their children ask the court for grandparents rights in an active divorce or custody case. The court could award for visitation by a grandparent if it was found to be in the best interests of the grandchild.

In August of 1995, the legislature enacted AS 25.20.065, "An Act relating to child visitation rights of grandparents and other persons who are not the parents of the child." This law allowed a grandparent to petition the court directly for an order establishing reasonable rights of visitation between the grandparent and grandchild.

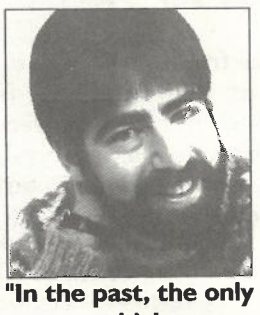
Under the statute, grandparents could petition the court prior to the entry of a divorce or custody decree, if the grandparent has established or attempted to establish ongoing personal contact with the child, and visitation is in the best interest of the child. After a final divorce, custody or adoption decree is entered, a grandparent may petition the court only if the grandparent did not previously request visitation during the prior litigation, or if there has been a change in circumstances which justifies reconsideration of the grandparent's visitation rights.

In determining grandparent visitation, the court must consider whether the child's parent who is the son or daughter of the grandparent had any history of child abuse or domestic violence. The law also provides that if parents make an agreement regarding the custody of their children, a court must determine whether their agreement should include visitation by grandparents which is in the best interests of the children.

Additionally, at that time, an amendment changed the prior law to add the last sentence of AS 25.20.060 (a), which provides:

Petition For Award of Child Custody provides:

(a) If there is a dispute over child custody, either parent may petition the superior court for resolution of the matter under AS 25.20.060 - 25.20.130. The court shall award custody on the basis of the best interests of the child. In determining the best interests of the child, the court shall consider all relevant factors including those factors enumerated in AS 25.24.150 (c). In a custody determination under this section, the court shall provide for visitation by a grandparent or other person if that is in the best interests of the child.



"In the past, the only avenue which may have been available to grandparents in most cases was to request that their children ask the court for grandparents rights in an active divorce or custody case."

The law concerning grandparent's rights was on solid foundation until 2000, when a decision of the United States Supreme Court in *Troxel v. Granville,* 530 U.S. 57 (2000) left the constitutionality of state laws concerning non-parental visitation unclear. In *Troxel,* the Supreme Court reviewed a decision by the Washington Supreme Court that struck down a non-parental visitation statute. The statute in question permitted "any person" to petition a superior court for visitation rights "at any time" and authorized the court to grant visitation rights whenever "visitation serves the best interest of the child." The Washington Supreme Court held the statute to be unconstitutional on its face because it believed that the federal constitution permits a state to interfere with the right of parents to rear their children only when necessary to prevent harm or potential harm to children. Further, the Washington court concluded that the statute was overbroad in permitting "any person" to petition for visitation "at any time." The Washington Supreme Court declined to impose any other narrowing construction on the statute pertaining to standing, a heightened standard of proof, or any requirement that the statute would only apply when a custody action is already pending.

In *Troxel*, the Supreme Court reviewed a decision by the Washington Supreme Court that struck down a non-parental visitation statute.

The United States Supreme Court affirmed the judgment of the Washington Supreme Court, but did so on different grounds than those relied on by the Washington court. There was no majority opinion. The lead opinion authored by Justice O'Connor, and joined in by three other justices, held that the statute as applied to the mother was unconstitutional. A "combination of several factors" led the plurality to reach this conclusion. The factors mentioned are first that the mother was not found to be an unfit parent. Second, the Washington Superior Court did not "accord at least some special weight" to the presumption that a fit parent will act in the best interest of her child. Third, there was no indication that the mother had ever sought to completely cut off visitation with the grandparents. (She had agreed to one visit per month and special holidays whereas the grandparents sought two weekends of overnight visitation per month and two months of summer visitation.) The lead opinion also relied on what it described as the "sweeping breadth of the statute," noting:

The Washington Supreme Court had the opportunity to give [the statute] a narrower reading, but it declined to do so. See, e.g., 969 P.2d at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm."); 969 P.2d at 30 ("[The statute] allow[s] `any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child."). *Id.* at 67.

The *Evans* case is both good and bad news for grandparents.

Having relied on these grounds to hold the Washington statute unconstitutional as applied to the case, the plurality declined to consider the main constitutional question decided by the Washington Supreme Court - "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."

Things stood unclear in Alaska post-*Troxel* until the Alaska Supreme Court addressed the issues in *Evans v. McTaggart*, 88 P3d 1078 (Alaska 2004), which was issued in April of this year. In the determination of the Alaska Supreme Court, the *Troxel* opinions, viewed collectively, do not indicate that AS 25.20.060(a) is facially unconstitutional. The statute, as construed by the Court, does not permit any person at any time to seek visitation rights. Visitation rights can only be sought in a pending case concerning child custody. Further, although the statute permits a court to provide for visitation based on the best interests of the child "by a grandparent or other person" the Court construed the latter phrase to be limited to third parties that have a significant connection to the child. The Court found that these two differences serve to distinguish Alaska's statute from "the sweeping breadth" of the Washington statute that was, in part, the basis for the plurality's conclusion in Troxel that the Washington statute was unconstitutional, and was the basis for Justice Souter's concurrence.

However, and significantly, the Court also gave a narrowing construction to AS 25.20.060 so that it need not be unconstitutional as applied. Justice O'Connor's lead opinion states that special weight must be given to a fit parent's determination as to the desirability of visitation with third parties. The Court believed that this can be accomplished by imposing on the third person the burden of proving that visitation by the third person is in the best interests of the child and by requiring that this be established by clear and convincing evidence. This would provide effective protection for a parent's choice, except where the choice is plainly contrary to a child's best interests.

After reviewing its prior decisions and the standards of proof historically required, the Court determined that a heightened standard of proof is appropriate in initial custody contests between parents and non-parents. The Court concluded that the heightened standard should be clear and convincing evidence standard, choosing this standard rather than the "clear evidence" standard of some prior decisions, or the "clear showing" standard of other opinions, not because it is necessarily substantively different, but because it is the customary formulation of the intermediate standard that lies between the preponderance standard and proof beyond a reasonable doubt. The court held that in order to overcome the parental preference a non-parent must show by clear and convincing evidence that the parent is unfit or that the welfare of the child requires the child to be in the custody of the non-parent. One element of the welfare of the child requirement is that the non-parent must show that the child would suffer clear detriment if placed in the custody of the parent. The Court found it desirable to impose a heightened standard of proof in order to reduce the risk of too readily overcoming the parental preference. The result reached is consistent with the results in many other jurisdictions which, by statute or by decision law, impose a standard of proof higher than a preponderance of the evidence in custody contests between a parent and a non-parent, although there is also contrary authority.

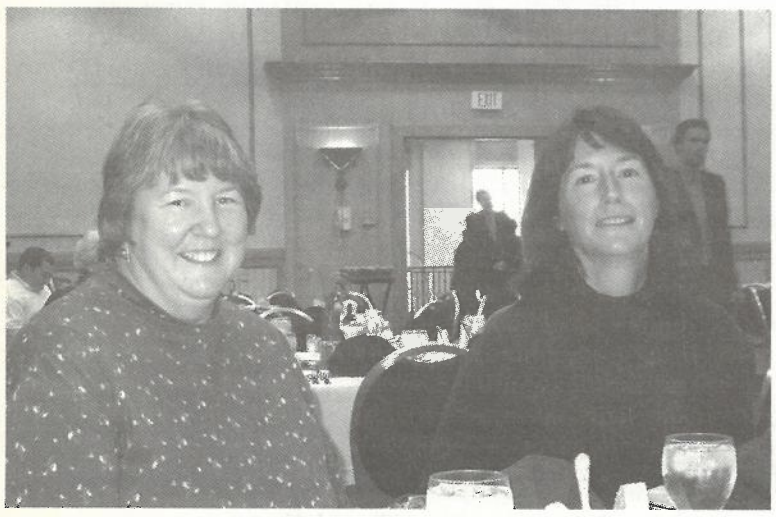
The *Evans* case is both good and bad news for grandparents. Although they still have a cause of action for enforcement of grandparent's rights, with the higher standard of proof, it will most likely be much more difficult for grandparents to prevail.

Historians discuss creation of the Bar Association

For the third year, members of the bar who are interested in the profession in the "early" days, gathered for a Bar Historians Committee Luncheon.

The theme at this year's event Sept. 15 was "Creation of the Alaska Bar Association."

With a 1958 news report for stimulation, (below) discussion was vigorous on the subject of admission and discipline (or lack of it) before Alaska's integrated bar act.



Marilyn May (left) and Kathleen King enjoy the luncheon.

(Left to right) Tim Lynch, Moderator, Retired Superior Court Judge Tom Stewart, Senior U.S. District Court Judge James Fitzgerald, Leroy Barker, Chair of Bar Historians Committee, and Steve Van Goor, Bar Counsel, gather for a photo.

Judge Lashes Alaska Legal Standards, Scolds Bell

OCT 29 1958

Judge Lashes Alaska Legal Standards

District Judge Vernon D. Forbes leveled a blistering attack at the Alaska legal profession for its "low standard of ethics" in passing judgment today on Anchorage Atty. Bailey E. Bell.

The district judge from Fairbanks dismissed most of the charges of violations of the Canons of Ethics against Bell, but found him guilty of conduct unbecoming an attorney.

Because of the existing low legal standards in the territory, Judge Forbes said he would not disbar the accused attorney, nor even suspend him from practice. Bell, however, was strongly reprimanded.

Judge Forbes indicated that such "low" practices could not be blamed on Bell, or any other one attorney. Instead, he lashed out in a strongly worded reprimand at the entire profession in Alaska.

The visiting judge said he practiced law in the States for 18 years before he was as "they call it" Outside, "elevated" to the bench. "Up here," the jurist continued, "it might be said I was lowered to the bench."

"The standards of ethics in Alaska are so far lower than those in the States, I cannot judge you by those same standards," Judge Forbes told Bell.

The judge said never in all his life had he seen or heard of attacks on courts such as those he has heard of since coming to Alaska.

"Here you say 'Let's give it to them,' " Judge Forbes asserted, " 'Let's show them what kind of pinheads they've got up here on the bench.' "

He posed the question of whether people Outside should conclude the judges of Alaska "are all a lot of incompetent" persons.

"I would think the members of the bar, even if they don't think much of the incumbent judge, they'd respect their own profession." He said he does not believe lawyers should attack the bench.

Testimony indicating there existed certain animosity against the late Judge George W. Folta by Bell was brought out in the three-day trial.

In passing judgment on Bell, Judge Forbes, on finding him guilty o funbecoming conduct, said: "I do not feel moved to disbar or suspend you. It is my belief, Mr. Bell, despite your age, you can and will go on from this day forward representing clients in an honorable fashion as I know you have the ability."

"The bar, the world," the judge continued, "would profit by you

(Continued from Page 1)

the man who prosecuted you, then I think I have judged wrong."

In dismissing some of the charges yesterday Judge Forbes stated that numerically the government had six witnesses and the defense had 11. But factually, he asserted, the government had only one witness. That is, he added, unless the defendant himself is to be considered a government witness.

Thomas Merton, former deputy U.S. marshal, who arrested Bell when the informations were filed in 1952, was said by the judge to have had the only clear, concise testimony offered for the government. Merton, Judge Forbes stated, recalled what happened and so testified.

Some of the other witnesses, including Bell, Judge Forbes said had difficulty in recalling certain incidents and conversations and were otherwise hesitant in their testimony.

He observed yesterday that he had hoped to conclude the case without the mention of the name of the late Judge Folta. But inasmuch as it had been brought out, Judge Forbes said he agreed wholeheartedly with the action of the late judge, that of mentioning to the U.S. attorney he felt certain actions of Bell should be taken under consideration.

Coming to the Juneau Convention in 2005!

Justice Sandra Day O'Connor U.S. Supreme Court

Alaska Bar Association Annual Convention and
Judicial Conference
Juneau, Alaska
May 11 - 13, 2005

Photo from the Collection of The Supreme Court Historical Society. Photographed by Richard Strauss, Smithsonian Institution

TVBA tosses eggs, blows bubbles at annual Christmas party

The TVBA hosted its annual Christmas Picnic for the entire legal community on July 16 at Pioneer Park. It was a beautiful sunny, warm day for an old fashioned barbeque.

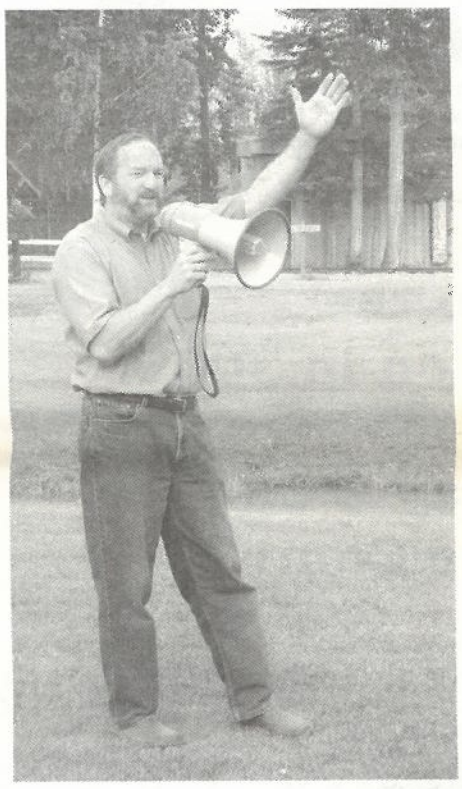
The group served up steaks, chicken, hamburgers, hot dogs, bratwurst and the occasional veggie burger. Everyone brought a side dish or dessert to share.

It was almost an Atkins-friendly picnic when the first round of meat came off the grill and we realized that the guy with the rolls had not arrived and learned that he was still in court. A quick trip to Fred Meyer's by Paul Eaglin kept the carb-crazed crowd at bay.

Once again, Ralph Beistline organized the games, including the traditional egg toss and bubble gum blowing contest. Everyone went home with a prize and a smile.

Krista Scully helps Gene Gustafson with grilling duties.

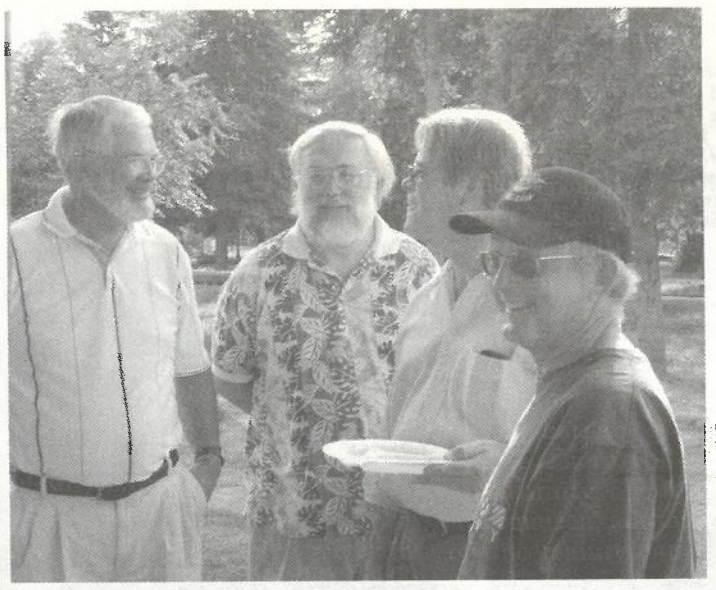
— Lori Bodwell Photos



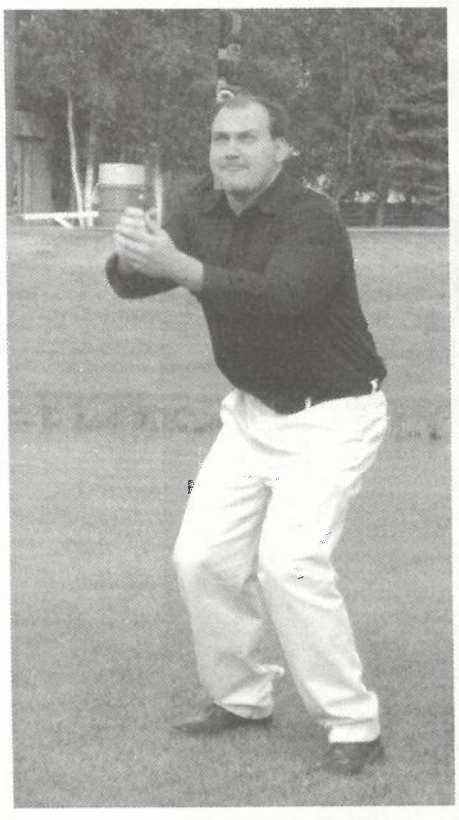
Ralph Beistline tries to line the crowd up for the egg toss.

The new kids on the block - Jason Weiner, Matt Christian and Jason Gazewood

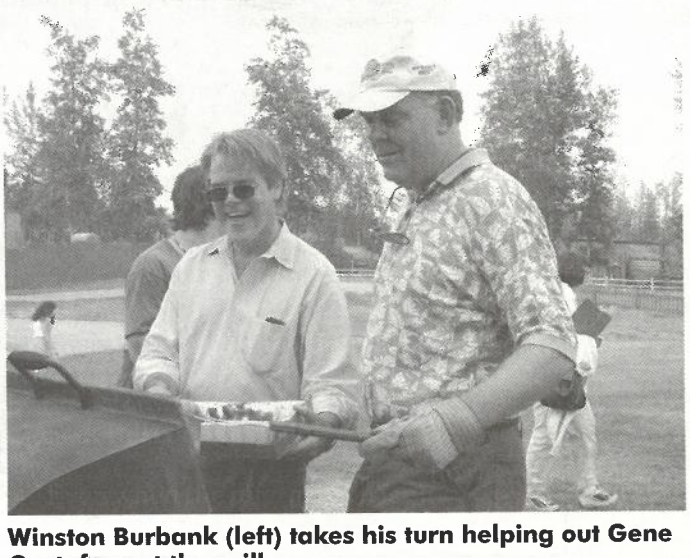
Krista Scully, who was in town to dispel rumors that her job as Alaska Bar Association pro bono director was being outsourced to India, is proud that her egg survived the first round.



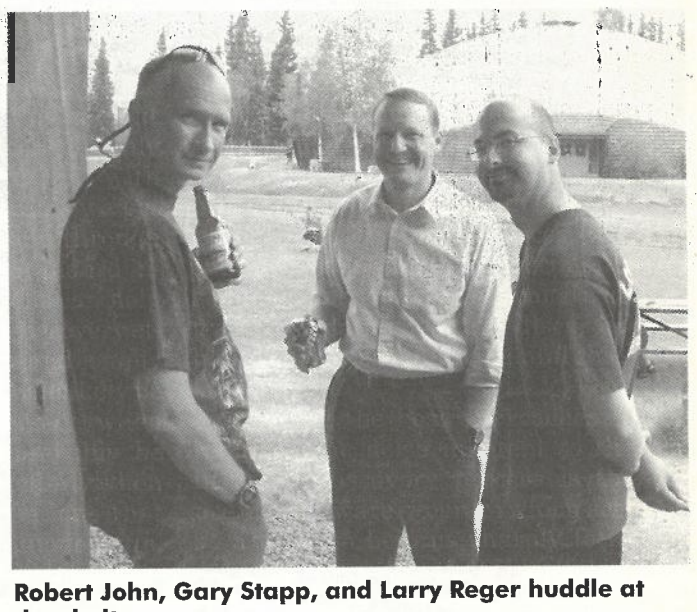
The old timers - Jim Blair, Ray Funk, Winston Burbank and Bill Murphree.



Jason Gazewood concentrates on his egg.



Winston Burbank (left) takes his turn helping out Gene Gustafson at the grill.



Robert John, Gary Stapp, and Larry Reger huddle at the shelter.

Legal press reports trends in the making

Jury pay hikes: Maybe they'll cover juror parking

A new law in Arizona pays jurors up to $300 a day to serve -- but not all members of the same jury get the same pay. The state hopes to broaden the jury pool for long trials by removing some or all of the financial hardship.

The law is part of a package of jury "reforms" -- expected to be under consideration soon in many states -- called the "Jury Patriotism Act." It calls for, among other things, a dramatic increase in juror pay for civil trials that last more than 10 days. The act will be on the agenda of about 20 states this fall, says Cary Silverman, an advisor to the American Legislative Exchange Council (ALEC), the organization that wrote the act. About a third of all state legislators are ALEC members. Overwhelmingly, they are conservative Republican tort reformers, said Silverman. The act is also supported by the American Tort Reform Association (ATRA).

"What it will achieve is that defendants will ultimately be judged by their peers, a group more representative of the community," said Gretchen Schaeffer, ATRA's spokeswoman. The act has also been endorsed by the U.S. Hispanic Chamber of Commerce and the National Black Chamber of Commerce in resolutions that often use identical language.

From the National Law Journal, Sept. 9, 2004. law.com.

You're a Paralegal where? Sorry, the Doctor Is Out

The trend of doctors refusing to treat patients who work for plaintiffs' firms has been reported in Connecticut.

A Koskoff, Koskoff & Bieder paralegal, Janet Mitchell, claims she was denied medical treatment because her of employer. KK&B is among the most successful firms in the state at bringing malpractice suits against the medical profession, reported the Connecticut Law Tribune July 15.

The issue of doctors refusing to treat plaintiffs attorneys gained prominence last month when South Carolina doctor J. Chris Hawk, a delegate at the American Medical Association annual meeting in Chicago, proposed a resolution that -- except in emergencies -- would make it ethical to refuse care to plaintiffs attorneys and their spouses. The proposal died after being denounced by several AMA delegates during a heated debate.

--law.com, July 15, 2004

The downside of technology: Court assigns lawyer 900 extra cases

Fulton, GA Superior Court Clerk Juanita Hicks and a chief deputy clerk say they have no clue why Atlanta attorney Patrick D. Deering was listed in computer case files until June 2 as the attorney of record for 900 cases that don't belong to him.

The Fulton County Daily Report reported July 12 that a computer glitch had judges calling Deering, wanting to know why he wasn't in court. One angry litigant filed a bar complaint against Deering, later withdrawing it. Judges' clerks wanted Deering to file motions to withdraw from cases that were never his to begin with. Hicks said June 2 that technicians with The Software Group (TSG), which installed the software in 1998 that computerized the county's civil case files, had been unable for weeks to resolve the problem.

Deputy clerks repeatedly had tried manually to delete Deering's name from the 900 files but Hicks said it kept reappearing. Deering was the only attorney singled out by the computer, Hicks said, adding that Deering seemed to appear randomly on cases, including many where at least one litigant is pro se.

Hicks first noticed odd assignments last fall. He said it appeared that he'd become "the default lawyer for every pro se litigant" until the problem was resolved in July.

Judge Stephanie Rhoades to receive national award

Anchorage District Court Judge Stephanie Rhoades recently received the Paul H. Chapman Award from the national Foundation for the Improvement of Justice for her work with mental health courts. The Foundation recognized the "commendable improvements" in such courts that have resulted from Judge Rhoades' efforts, as well as her dedication to cultivating therapeutic justice principles throughout the Alaska Court System. "She continues to extend her wealth of knowledge beyond practice, through educating others on both a state and a national basis," according to the award announcement. "This is quite an honor for Judge Rhoades, and well deserved," according to Stephanie Cole, Administrative Director of the Alaska Court System. Judge Rhoades will travel to Atlanta in late September to accept the award.

GETTING TOGETHER

Why settlement rates don't matter, or worse

By Drew Peterson

A few years ago I had a conversation with a prominent Alaska judge who assured me that he had a settlement rate of 100% in certain kinds of custody matters.

The judge was surely unaware of the fact that the consensus of experts in the field of dispute resolution is that such a settlement rate is nothing to brag about. Rather than being a sign of proficiency as a mediator, such authorities would assert that bragging of high settlement rates is actually a warning to avoid a particular mediator.

It may be counter-intuitive, but the fact of the matter is that a high settlement rate is often a sign of a bad mediator, rather than of a good one.

Not every case should be settled!

I once got into a spirited debate with a participant at a "transformative" mediation workshop when I asserted that some cases should be settled, no matter what. I was speaking of a custody dispute, with two sane and effective parents, and I still am inclined to that belief. There is no question, however, that the opposite proposition is true, namely that there are many cases that should not be settled. Indeed this is the area where mediation has been most criticized over the years, and rightly so.

Cases that should not be settled:

There are many cases that should not be settled. The following are some examples and merely touch the surface:

Cases involving fundamental rights - I always think of the Rosa Parks case as the classic case where mediation would not have been appropriate. I envision a mediated agreement whereby she would be seated in the middle of the bus and everyone would agree not to talk about it. The specific case would have been resolved, and would have served no benefit whatsoever for society as a whole.

"Rather than being a sign of proficiency as a mediator, such authorities would assert that bragging of high settlement rates is actually a warning to avoid a particular mediator."

Some issues, of course, should never be compromised. This is particularly true of issues of fundamental rights. Mediation, while it may look for a win-win solution, often needs to fallback on compromise, and this is usually very appropriate. Not so, however, where issues of fundamental right are involved.

Cases where it is important to set a precedent. The Rosa Parks case is also an example of a case where it is critical to set a legal precedent, to not only benefit the litigants, but others following in their footsteps. Setting a legal precedent may be a critical component of many other cases, whether or not fundamental rights are at stake. Most mediated results are private, which means they will have no effect as precedent. Even where the results are made public, a mediated resolution of an issue will have no binding effect on later cases.

Cases with serious power imbalances. Perhaps the area with the largest potential for doing parties real harm in mediation involves those with serious power imbalances. Forcing parties to settlement in such cases will inevitably result in a substantial advantage for the more powerful party.

Anyone with any experience with domestic violence will recognize the pattern whereby victims of domestic abuse will agree to almost anything to try to escape from an abusive relationship.

When settlement is looked upon as the goal regardless of the particular terms thereof, it is possible to do parties real harm in the name of resolution. This is what Ralph Nader's sister Laura refers to as "trading justice for harmony." Ms. Nader has been one of the primary critics of mediation. Her anecdotal evidence against mediation comes primarily from settlement conference style mediation focused on obtaining high rates of settlement in situations involving fundamental rights and domestic violence.

While such parties might be coerced into a settlement by a forceful mediator, they are not going to be happy with any result reached.

Negotiations concerning violence. It should go without saying that negotiations about violence are flying a bright crimson flag that mediation is not appropriate. People can and do negotiate about anything and everything, including the existence, extent, duration and even severity of violence. Just because parties are willing to negotiate certain issues, is no reason to help them do so, however. Some things are non-negotiable in a civilized world, and violence is a primary example. People in abusive relationships may still have legitimate issues that they need to negotiate about, but violence itself should never be negotiated.

Cases involving serious mental health issues. I used to assert to aspiring mediators that "you cannot mediate a personality disorder," although some of my therapist/mediator friends assure me that there are indeed many issues that can be mediated with people suffering from a variety of mental health conditions. Such successes do not negate the fact, however, that mediation requires parties that have the legal capacity to negotiate, and who are rational, at least in the moment.

While mental illness does not necessarily make mediation impossible, it certainly makes it more difficult. And there are many cases where it may not be appropriate to mediate at all when aspects of serious mental illness are involved.

Cases involving serious issues of addiction. I remember attending my first workshop about mediating with alcoholics, a few years after I began my mediation practice.

The descriptions at the workshop led to an immediate "Aha!" as I recognized they were describing exactly what I had encountered in some of my more difficult cases. As with mental illness, addiction issues do not necessarily make mediation impossible. But they definitely make it much more difficult. And such issues may make mediation impossible if parties are not able to put the issues in discussion at a higher level of their priorities than the object of their addiction.

Cases where parties simply do not want to settle. We are all aware of some cases where people just do not want to settle, no matter how much it is in their interest to do so. Some people simply "want their day in court," is the way we phrase it, and it does not take long as a practicing attorney to become aware of the phenomenon.

Sometimes mediation can be helpful in allowing people to be really heard, so they feel like they have had their day in court. In other cases, however, nothing but a real judge or jury will do, and parties are simply unwilling to decide issues for themselves.

While such parties might be coerced into a settlement by a forceful mediator, they are not going to be happy with any result reached. Often, of course, they will not be satisfied with the judge or jury's decision either, but at least they will have had their "day in court."

The critical element of being able to walk away from the table

Mediation offers many benefits to parties trying to resolve a matter outside of a courtroom. The mediation process offers a safe place to negotiate, in a neutral setting. Mediation empowers parties to ask for what they want and need without fear of reprisal. The process provides an impartial referee to protect against undue influence. Mediation encourages parties to discuss options calmly and rationally, and attempt to find win-win solutions. It allows parties to express their feelings honestly; to listen and to be heard. Perhaps most important of all, mediation allows parties to negotiate in an atmosphere where they can simply walk away from the table if things are not going they way that they desire.

Without that ability to walk away from the table, mediation becomes another form of coerced resolution of issues. In such a setting the underpowered and disadvantaged are inevitably going to find themselves at a disadvantage.

Mediation that results in 100% settlement rates does indeed trade justice for harmony, and is doing the parties no favors.

...and speaking of civility

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KLEIN-BECKER, LLC, and BASIC RESEARCH, LLC,

Plaintiffs,

-vs-

Case No. A-03-CA-871-SS

WILLIAM STANLEY and BODYWORX.COM, INC.,

Defendants.

ORDER

BE IT REMEMBERED on the 21st day of July 2004 and the Court took time to make its daily review of the above-captioned case, and thereafter, enters the following:

When the undersigned accepted the appointment from the President of the United States of the position now held, he was ready to face the daily practice of law in federal courts with presumably competent lawyers. No one warned the undersigned that in many instances his responsibility would be the same as a person who supervised kindergarten. Frankly, the undersigned would guess the lawyers in this case did not attend kindergarten as they never learned how to get along well with others. Notwithstanding the history of filings and antagonistic motions full of personal insults and requiring multiple discovery hearings, earning the disgust of this Court, the lawyers continue ad infinitum. On July 20, 2004, the Court's schedule was interrupted by an emergency motion so the parties' deposition, which began on July 20, would and could proceed until 6:30 in the evening. No intelligent discussion of the issue was accomplished prior to the filing and service of the motion, even though the lawyers were in the same room. Over a telephone conference, the lawyers, of course, had inconsistent statements as to the support of their positions. On July 20, 2004, the Court entered an order allowing the plaintiffs/counter-defendants until July 23, 2004 (two days from today) to answer a counterclaim. Yet, on July 21, 2004, Bodyworx.com, Inc.'s lawyers filed a motion for reconsideration of that Court order arguing the pleadings should have been filed by July 19, 2004.

The Court simply wants to scream to these lawyers, "Get a life" or "Do you have any other cases?" or "When is the last time you registered for anger management classes?"

Neither the world's problems nor this case will be determined by an answer to a counterclaim which is four days late, even with the approval of the presiding judge.

If the lawyers in this case do not change, immediately, their manner of practice and start conducting themselves as competent to practice in the federal court, the Court will contemplate and may enter an order requiring the parties to obtain new counsel.

In the event it is not clear from the above discussion, the Motion for Reconsideration is DENIED.

SIGNED this the 21st day of July 2004.

Sam Sparks
UNITED STATES DISTRICT JUDGE

(Editor's Note: Diane Vallentine submitted this order from an unhappy judge.)

Jumping ship can be risky for lawyers

By Maureen F. Fitzgerald

A colleague called me yesterday and told me about another lawyer who had jumped ship – you know - left his law firm, decided to go out on his own, chose to follow his heart, couldn't take it any more and so on.

Upon reflection I realized how powerful my friend's metaphor: *Jumping Ship*. Did the lawyer jump into the ocean or was it just a lake? Did the ocean have sharks? Was it rough water? Did the lawyer have a lifeboat or perhaps a life preserver?

All my answers lead me to conclude that jumping ship was a fairly risky thing to do and that, all things considered, things were not looking good for this poor lawyer. In effect this lawyer had propelled himself off of a safe and comfortable ship into icy cold water and we have no indication about how he would survive.

Metaphors reflect deeper hidden assumptions that we hold about reality. Perhaps this metaphor explains why each of us is afraid to make a change. Many of us secretly envy those who make the leap, yet we are unable to do it ourselves.

Perhaps, you too, hold in your mind many of the assumptions that other lawyers hold in relation to switching firms or changing careers. These include:

- I will never earn as much as I am now;
- I will be all alone;
- I will loose the reputation I have gained at this firm;
- I will have no access to other expert lawyers;
- I will lose the status attached to a particular law firm;
- My colleagues will think I am copping out; and
- My family will think I am going through a mid-life crisis.

The lawyer who just jumped would likely be able to dispel many of these assumptions. If you reflect on each right now, you can probably see that many are not grounded in reality and might never come true. For example, I suspect that the leaping lawyer will continue to work beside and across from many lawyers. He probably took with him many life-saving devices including close relationships and a solid reputation.

My own assumptions were dispelled three years ago when I jumped ship. I left a safe and comfortable position and decided to do what I really enjoyed. After all, at 42, with 10 years of practice, surely I had some control over my career.

I now practice as a workplace conflict and collaboration expert and am dedicated to helping companies prevent workplace problems from becoming legal issues. I love what I do, and my clients appreciate the energy and passion I bring to my work.

Through this process I have come to believe that if you are doing what you love, everything you need will come your way, you will be happy and successful.

Your ideal life is located at a place where you can be your best and those around you bring out the best in you. If you are working in a situation that is not ideal, do not let your assumptions prevent you from finding your ideal career. Be daring and courageous. Challenge the assumptions that prevent you from becoming truly successful.

Maureen Fitzgerald, a lawyer, is the author of four books including "Mission Possible-Creating a Mission for Work and Life" (Quinn) and "Hiring, Managing and Keeping the Best "(McGraw Hill). www.TheFitzgeraldGroup.ca

Fairbanks shines in pro bono

A recent visit to Fairbanks by Krista Scully, Alaska Bar Pro Bono Director, yielded these photos of attorney volunteers for Alaska Legal Services Corporation and Alaska Network on Domestic Violence and Sexual Assault receiving certificates of appreciation.

Keith Levy presents Rita Allee a certificate of appreciation for her continuing donation of time and expertise to pro bono.

We extend our sincere thanks to attorneys Valerie Therrien, Dan Winfree, Allen Cheek, Barry Jackson, David Leonard, Peter Aschenbrenner, Aisha Tinker Bray, Dan Callahan, Paul Eaglin, Andy Harrington, Larry Reger, Becky Snow, Corinne Vorenkamp, Rita Allee, Michael McDonald, Peter Le Blanc, Craig Parytka and Mila Neubert for their contributions in 2003-2004.

Peter M. LeBlanc, Mila A. Neubert & Craig B. Partyka of Cook Schuhmann & Groseclose, Inc. have each donated countless hours to Alaska Network on Domestic Violence & Sexual Assault.

Firm partner Michael MacDonald & paralegal, Julie Simmons have 23 active pro bono bankruptcy cases for Alaska Legal Services in 2004. The firm gathers in the conference room with visitors: back row from left are Lynn Levengood, Heidi Thomerson, Amy Coletta, Joyce Lloyd, Julie Simmons, Michael MacDonald, and Keith Levy. Front row from left: Ellen Craig, Ethan Allen, Barbara Johnson, Bob Downes, and Anjenette Cloud.

The light side of the Web

About once a month Bar Web Manager Rachel Batres gathers statistics for the ABA's website. "I check to see what are the most frequently requested pages, how many people spend time on our site on a given day, etc.," says Batres.

"Another thing I check is what terms people use in our 'Search' feature. This is useful in knowing what people are looking for when they come to our page."

There are some odd searches being done on the www.alaskabar.org website including:

"drink recipes"

"does the state of Alaska pay people to live there?"

"who passed the New York bar exam in 1960?"

"guiding light"

"letter closing 'your humble servant'

'love letters closing sample'

. . . and my favorite:

"the dark side of the force" – this appears many times.

ALASKA BAR FOUNDATION

IOLTA grants total $58,000 for fiscal year 2005

By Kenneth P. Eggers

The Board of Trustees of the Alaska Bar Foundation held its annual meeting on June 8, 2004. Applications for grants from the IOLTA (Interest On Lawyers' Trust Accounts) funds for the fiscal year 2005 were considered. A grant of $32,340 was made to Alaska Legal Services Corporation, a grant of $15,876 was made to Alaska Pro Bono Program, Inc., and a grant of $10,584 was made to Catholic Social Services (Immigration and Refugee Services Program), pursuant to a joint grant proposal made by these organizations.

Unfortunately, due to a substantial reduction in the interest rates on trust accounts, the Board only had $58,800 available for grant purposes for fiscal year 2005. This compares to fiscal year 2004, when the Board was able to make grants totaling $77,500, and fiscal year 2003, when the Board was able to make grants totaling $121,000. This year the Board received grant proposals which totaled $173,000. The Board hopes the financial situation will improve before they consider grants for next year. The Board thanks all lawyers and law firms for their participation in the IOLTA program.

Juneau attorney BethAnn Boudah Chapman was appointed to serve a three-year term on the Board of Trustees. BethAnn replaces Juneau attorney Bill Council who served two three-year terms on the Board. The Board expressed its appreciation to Bill for his six years of service. Other Board members and officers for the upcoming year are Juneau CPA Karen L. Smith; Fairbanks attorney Daniel E. Winfree (who will serve as Secretary); Anchorage businessperson William A. Granger (who will serve as Treasurer); Anchorage attorney Dani Crosby (who will serve as Vice President); Anchorage attorney Mary K. Hughes; and Anchorage attorney Ken Eggers (who will serve as President).

Alaska Bar Association 2004 CLE Calendar

Date	Time	Title	Location
September 22	8:30 a.m. – 5:00 p.m.	The Dynamic of Cross Examination & Impeachment: Weapons of Mass Destruction - with Terry MacCarthy and Ray Brown CLE #2004-011 6.5 General CLE Credits	Anchorage Hotel Captain Cook
October 12	8:30 a.m. – 12:30 p.m.	Alaska Native Law: What Every Alaskan Lawyer Needs to Know CLE #2004-020 3.75 General CLE Credits	Anchorage Downtown Marriott Hotel
October 15	11:00 a.m. – 3:15 p.m.	Seattle University School of Law Videoconference – Ethical Issues in Day-to-Day Practice: Amanda Kumar's Case with Professors John Strait and David Boerner CLE #2004–031 4.0 Ethics CLE Credits	Anchorage UAA – Business Education Bldg., Room 117
October 19	8:00 – 11:15 a.m.	ALI-ABA – American Law Network Satellite CLE Deposing Witnesses for Trial CLE #2004-028 3.0 General CLE Credits	Anchorage KAKM Board Room, APU Campus
November 10	8:00 – 11:15 a.m.	ALI-ABA – American Law Network Satellite CLE Annual Fall Employee Benefits Update CLE #2004-029 3.0 General CLE Credits	Anchorage KAKM Board Room, APU Campus
November 10	8:30 a.m. – 12:30 p.m.	2004 Real Estate Law Update CLE #2004-016 3.5 General CLE Credits & .25 Ethics CLE Credits = 3.75 total CLE Credits	Anchorage Hotel Captain Cook
November 18	8:30 a.m. – 5:00 p.m.	What Every Newer Lawyer Needs to Know About Business Law CLE #2004-015 6.25 General CLE Credits	Anchorage Hotel Captain Cook
December 3	8:30 – 10:30 a.m.	17th Annual Alaska Native Law Update CLE #2004-021 2.0 General CLE Credits	Anchorage Hotel Captain Cook
December 10	Morning	Ethics at the 11th Hour CLE #2004-014 2.0 Ethics CLE Credits	Anchorage Hotel Captain Cook

The appeal: Pleading for law school compassion

By Lawrence Savell

"That's wonderful news, Julie," Nick responded, hoping desperately that it would sound convincing. "I couldn't be happier."

They talked for a while longer, and said goodbye in the caring and wistful way that people in the magical upswing of a developing relationship do. Nick slowly returned the handset to its cradle.

It *was* wonderful news. Nick Mancuso's girlfriend of seven months, Julie Merritt, had been rescued off the waiting list at Stanford Law School, where classes would begin in just a few weeks. Wonderful news.

The only problem was that Nick and Julie lived in Manhattan. Nick was a fourth-year associate and Julie was a paralegal at the law firm of Weinstein & Kennedy, LLP. Nick had a bad track record when it came to sustaining long-distance relationships, a record akin to the World Series record of certain long-time Chicago and Boston residents.

Julie shared Nick's concerns, but was far more confident about the ability of their relationship to survive what she pointed out – with feigned disdain -- was a less than three-inch separation according to the miniature world map embedded in Nick's mouse pad.

Nick sighed audibly, thankful that he had finally moved up to a single (albeit small) associate office, thus ending his three-and-a-half year penance of sharing a room with a pleasant but chronically inquisitive colleague. Until recently it had looked like things were going to work out in terms of Julie's law school choice: she had applied to all of the top-shelf schools that were conveniently located in or within commuting distance of Manhattan (plus a few out-of-state luminaries), and her undergrad grades, LSAT score, and work experience made her a viable candidate at all of them. But, as Nick recalled from his own application odyssey, this was a far-from-scientific process, and reality rarely matched expectations. For reasons unknown, all but one of the local schools had rejected Julie, and the remaining one had, like Stanford (the only out-of-state school that did not reject her outright), placed her on the Twilight Zone of the waiting list. A few days before, that local school had notified Julie that she would not be offered a spot in the entering class.

Nick, running on auto-pilot, let his gaze wander around his office, first at the crystal globe on his desk that was the "parting gift" from the last W&K Holiday (no longer just Christmas, of course) Party. Working in different departments at a 300-plus-lawyer shop with at least as many more other personnel, he and Julie had met for the first time that night, when they simultaneously reached for the same surviving chocolate-camouflaged strawberry on the presumably dentist-designed dessert buffet. Next to the globe was the gleaming seashell that was a souvenir of their first vacation together, early that spring. His glance moved to the shelves of treatises and case books that were the already-obsolete relics of his own legal education, and then at the piles of brief drafts that were stacked on his floor face up in reverse chronological order, like geologic layers of sediment, each successive iteration purportedly reflecting a discernible increase in clarity and decrease in typos. He could argue forcefully in print -- and hopefully someday in court -- on behalf of his clients, but now he had no ability to remedy the far more personal crisis in which he and Julie found themselves.

He thought about the prior relationships that had been undermined by the frequent yet often unforeseen evening and weekend commitments required of him as a young associate, and of all the opportunities that had been lost to meet people at outside parties and other events he had not been able to attend. And he thought how his relationship with Julie had been different -- both in the magnitude of their feelings for each other and in her understanding and acceptance of the unavoidable requirements of his job.

And he closed his mercifully opaque door and began to cry.

Eventually, the phone rang again, and Nick, composing himself, proved to be an easy mark in agreeing to participate in a "Little Italy" dining excursion for the current crop of inordinately well-fed W&K Summer Associates later that week.

After he hung up, Nick stood, grabbed his sport jacket, and headed out his door. He walked down the long hallway of mahogany and fluorescence to the elevator bank.

"I'll be back shortly," he lied to the receptionist. Nick knew better. Since his arrival at the firm, Nick had developed his own personal way of coping with adversity, which he encountered with unfortunately increasing regularity: he went for a long walk. When his annual review included pockets of unexpected turbulence, he went for a long walk. When a partner marked up his draft such that red ink dwarfed printer toner, he went for a long walk. When he wrongly thought Julie was interested in a visiting foreign intern, he went for a long walk. It was time for another.

These walks never had any particular destination, or even direction. But what they did have was speed. Speed on the sidewalks of midtown Manhattan, unless you are a bicycle messenger, means devoting all your mental energies (as well as your ability to pivot suddenly like a running back) to avoiding impact with other pedestrians; thus, you cannot think of anything else. That was the idea.

Who were these people, and what kind of jobs did they have that allowed them to escape at this ungodly early time, when there was still daylight and hours more of it?

As Nick weaved his way among the hoards, he sensed that he was encountering two primary sub-populations. The first were the tourists, strolling in their molasses-like cadence, some pointing and gawking as if they had never before seen a building more than two stories high. Given their numbers, Nick was convinced that huge swaths of the U.S. and most other countries must currently be empty.

Nick's second observation was that a lot of people seemed to be heading home or at least from work. But it was barely 4:00 p.m. Who were these people, and what kind of jobs did they have that allowed them to escape at this ungodly early time, when there was still daylight and hours more of it? Nick hated them even more than the tourists, if such a thing were possible.

Nick had walked for over an hour, although of course he had no idea of how long it had been – a striking departure from a professional existence precisely calibrated to six-minute intervals. He had made few turns, usually only to avoid an approaching red light which would have increased the likelihood that he would have to stop or at least slow his determined, albeit aimless, movement. But then suddenly he did stop, because he realized where his subconscious had taken him. He was at the entrance to the law school that had just recently advised Julie that her stay on the waiting list had been in vain.

Nick walked into the courtyard, a quadrangle of cement seasoned with tantalizing islands of City-toughened grass. He entered the main building and paused at a map of office locations. It said "Admissions Office Second Floor." Nick flashed the security guard his W&K ID and business card and muttered something about recruiting, and headed up the stairs.

"Can I help you?" the Admissions receptionist asked as he approached her desk.

"I'm Nick Mancuso from Weinstein & Kennedy, and I'd like to speak to the Director please."

"Do you have an appointment?"

"No, I don't."

"Can I ask what this is about?"

"It's a personal matter, and I would appreciate just a couple of minutes."

"Please sit down," she said, and reached for the telephone. Her eyes stayed on him, in a manner that made Nick suspect she was assessing the likelihood of his packing an Uzi.

Nick sat patiently for about 20 minutes. He thought about all the hopes and dreams that came through this office and others like it, the proportionately few that had been realized and the many that had not. He thought about the modicum of comfort that acceptance at such a top-tier law school gave, which to a minimal, but not insignificant, degree reduced the subsequent pressure to be at the top of the class to hope to land a quality job upon graduation.

Nick never experienced that level of comfort: his applications to all 14 of the law schools purported to be among the "Top 10" had been summarily rejected, leaving him to bust his hump for three years at a school of lesser reputation. After a forest of resumes and cover letters, a precious handful of interviews, and months when the arrival of the mail was the event around which his days revolved, Nick's relentless efforts to crack the rarified atmosphere of top New York firms resulted in a single success: Weinstein & Kennedy.

Finally, the inner door opened, and a tall man in his early 50s appeared. He reached out his hand to Nick, who stood to accept it.

"Hi, I'm Bill Rattner. How can I help you?"

"I would just like to speak with you for a few moments. It's a personal matter."

Rattner nodded and invited Nick to follow him in. They entered a small office, the far wall of which was a large picture window overlooking the courtyard. Gesturing to his guest chair, Rattner invited Nick to sit down.

"Thank you very much for meeting with me," Nick began. "I'm not sure how to say this, but I'm here to ask for a very big favor that I have no right to ask you for. I'm asking that you reconsider your decision a few days ago not to accept my girlfriend, because she's been accepted at Stanford, and if she goes there I'm afraid that our relationship will not survive."

Despite years of success dating back to his fraternity days in playing poker, Rattner's jaw dropped perceptibly.

Nick continued. "My girlfriend, Julie Merritt, who works as a paralegal at my firm, Weinstein & Kennedy, is incredibly bright and articulate, and did so well undergrad and on the LSATs that you placed her on the waiting list, as did Stanford. They accepted her from it and you did not. But I'm not here to talk about her numeric qualifications, because you know them and because if that's all you really wanted I'm sure you could stock your entering class with near 4.0s and perfect scores. I'm here because I love her and I do not want to lose her."

To Nick's surprise, Rattner did not throw him out of his office as he feared he might. Nick strove to make the most of the opportunity he was being given.

"Mr. Rattner, I need to make a few things clear. Obviously, Julie has no knowledge that I would come here -- nor did I until a little while

Continued on page 19

The appeal

Continued from page 18

ago -- and would probably be annoyed that I had done so without asking her permission, which she would not have given.

"Second, I am not here in any way on behalf of my firm, but on my behalf alone. Our relationship means more to me than anything, and I cannot even think of seeing it slip away. And I've tried to come up with other solutions, including scrapping the four years of sweat equity I've put in at W&K and the small clients I've been able to develop, and moving to California with Julie, but my less-than-stellar record and the current tough job market make my chances of finding a decent position there about zero. But if you say no that is what I will do.

"But I also want you to understand there is a lot more to Julie than her strong grades and test scores. Although I have not seen her application, my suspicion is that her modesty restrained her from mentioning all the wonderful qualities she possesses, qualities directly relevant to the study and practice of law. Julie is a good and caring person, and a determined and loyal ally. She has tremendous passion for things she believes are important and compassion for those who have not gotten a fair shake. Any client would be privileged to be represented by her.

"Mr. Rattner, I look forward each night to seeing Julie when I come home, when we share the highs and lows of our day, the challenges and the successes. When I describe to her the cases I am handling, she displays an amazing ability to discern the issues, and sometimes even the conflicts, with which I am wrestling, without my ever mentioning them.

"When she starts law school, I'd like to be there to discuss with her the new concepts she learns and the classic cases she reads for the first time, from English fox hunts to electronic discovery -- in person, not over the phone or in an e-mail. I remember well the traumas of law school, and although I know she will do just fine -- and far better than I did -- without my help, I want to be there for her in any way I can."

The two spoke (or, more accurately, Nick spoke and Rattner listened) for nearly half an hour. Then Rattner stood up and reached out his hand.

"I'll take a look at the file," Rattner offered.

"Thank you, sir. I very much appreciate your taking the time to hear me out on this. I think it's safe to say you've been a lot more considerate than others in your position might be or could be expected to be. Thank you again."

Nick walked out with the same feeling that he had walked out of nearly every law school exam with: no idea whatsoever how well or poorly he had done.

But as he headed back to the office, his soaked shirt clinging to his skin, the doubts began to bubble up. Who was he kidding, he thought. The man was just placating me to get me out of his office. People in Rattner's position don't get where they are by giving in to emotional appeals. The law does not concern itself with trifles, and one man's pathetic desire to hang on to his girlfriend must surely qualify as a trifle. As irrational as this was for him to attempt, 10 times more irrational would it be to think that it might somehow be successful. Nick returned to the level of despair that had first led him on his walk.

Nick, of course, did not tell Julie how he had spent that afternoon. That night there was an added intensity to Nick and Julie's lovemaking. Both were silently conscious of it, but neither could tell why. It was almost like they were physically and literally striving to hold onto each other so that no one could ever pull them apart.

A few days passed uneventfully. That Saturday morning, Nick and Julie were at Julie's apartment immersing themselves in oversized "everything" bagels loaded with Nova lox, chive cream cheese, capers, red onions, and tomatoes.

"I need to tell you something," she said suddenly.

Nick's emotional Early Warning System scrambled into alert mode. "Yes?" he responded tentatively.

"I'm turning down Stanford," she advised. "It's not worth the risk of losing you."

"You can't do that," he replied softly. "I know getting into a school like that means too much to you. I think there is another solution . . . ."

Julie was shaking her head from side to side when the ringing of the phone interrupted them both. She walked across the room to answer it.

"Hello?" Julie asked. A pause. "Dean *Rattner*?"

Nick put down his bagel.

"Yes, I know who you are. You signed the rejection letter I received a couple of weeks ago."

Don't piss him off, Julie, Nick implored silently.

"Excuse me? What? A *clerical mistake*?" Another pause. "What? I've been *admitted*?

Nick could barely control himself.

"Yes! Of course! I'll come down first thing Monday morning to pick up the materials! Thank you, Dean Rattner."

MajorLeague Ditto, thought Nick.

Julie, dumbfounded, hung up, triggering an explosion of laughter from Nick.

"I -- I -- I got *in*!" she announced breathlessly.

Nick smiled broadly and hugged her tightly, vowing to himself that he would never undermine her accomplishment by disclosing the events that had amazingly led to this spectacular outcome, nor would he ever forget the incredible understanding and compassion that had been demonstrated by a total stranger.

"That's wonderful news, Julie," Nick responded truthfully. "I couldn't be happier."

Lawrence Savell is counsel in the New York office of Chadbourne & Parke LLP. This story originally appeared in the New Jersey Lawyer.

Nick walked out with the same feeling that he had walked out of nearly every law school exam with: no idea whatsoever how well or poorly he had done.

Board of Governors action items

• Approved sending out RFPs for Bar database.

• Approved 17 reciprocity applicants.

• Approved two Rule 43 (ALSC) waivers and a Rule 43.1 (Military) waiver.

• Voted in support of reporting MBE scores to tenth place, but will do it with a new database.

• Granted relief on one of his essays to a February Bar Exam applicant who had failed the exam; this gave the applicant a passing exam score.

• Voted to recommend for admission an applicant from the February 2002 bar exam, based on the completion of the character investigation.

• Reviewed the budget and financial state of the Bar. Voted to send letters to two public attorneys and their supervisor due to their rudeness to Bar support staff and for writing derogatory comments on their bar dues checks.

• Heard a status report on the Bar Services & Funding Committee, which will be reporting to the Board in January, 2005.

• Approved the minutes from the April Board meeting and two May conference calls.

• Approved the request to form a Health Law Section.

• Adopted the ethics opinion entitled "Responsibilities of an Attorney When a Client cannot be Contacted."

• Discussed the Judicial Selection with Jim Clark's representative, Assistant Attorney General David Marquez; voted to pass a resolution which strongly encourages the governor to uphold the rule of law, uphold the constitution, and appoint judges from those individuals that the Judicial Council has found most qualified.

• Voted to accept a stipulation for discipline, which provides for a five year suspension, with two years probation and three years to serve, with the recommendation that it run concurrently with the California suspension.

• Voted to direct Hagen Insurance to get quotes from Blue Cross for the next contract year for deductibles of $100/200/500/1,000/2,500, and the discretion to re-request quotes without the higher deductible if it skews premiums.

• Reviewed Bar Rule 2 regarding graduates of foreign law schools, and voted that as a matter of policy, the Board thinks that, for the purposes of this rule, being admitted by exam in another state is more important than an additional year of law school.

• Declined to consider imposing filing fees for Fee Arbitration.

• Voted to increase bar dues by $100 to $550.

• Voted down a proposal that would prohibit Fee Arbitration panel members from representing a client in a Fee Arbitration case.

• Directed Bar Counsel to draft a proposed rule change which would provide for a minimum fee of $1,000 in cases where discipline is imposed as a cost recovery fee.

• Denied a request to appoint counsel in a reinstatement matter.

• Heard the results of the evaluation of the Executive Director and the Bar Counsel.

Sept. 13 & 14, 2004

Group asks states to test Indian law

On June 23, at its Mid-Year Session at the Mohegan Sun Resort in Connecticut, the National Congress of American Indians (NCAI) formally resolved that 22 states should test federal Indian law on their respective bar exams. NCAI's resolution, (available at http://www.ncai.org/main/pages/resolutions/midyear2004.asp) was championed by the Association of Washington Tribes and the Affiliated Tribes of Northwest Indians, the Northwest Indian Bar Association (NIBA), and Washington State Bar Association (WSBA) Indian Law Section.

"I'm very pleased with the NCAI resolution urging Washington State and other states that are connected to Indian Country, to test critical Indian law principles on the bar exam," said Ron Allen, NCAI Treasurer and Chairman of Washington State's Jamestown S'Kallam Tribe, who sponsored the Resolution. "This will ensure that future lawyers have a basic understanding of the inherent legal rights of the American Indian, which will in turn strengthen the fabric of the entire legal profession."

Currently, New Mexico is the only state to include the topic of Indian law on its bar exam. Similar efforts are also afoot in Washington, Idaho, Oregon, Montana and Oklahoma.

"We are pleased that the Washington State Bar Association will formally consider whether to include Indian law on its bar exam," said Gabriel Galanda, immediate past-President of NIBA and Chair of the WSBA Indian Law Section. "With the precedent set by our Indian colleagues in New Mexico and the momentum we have generated the dialogue on this issue has rapidly spread throughout the United States. It's only a matter of time before Indian law becomes part and parcel of state bar exams."

In April, the National Native American Bar Association passed a similar resolution, at the urging of NIBA and the WSBA Indian Law Section.

NIBA receives award

The American Bar Association in August selected the Washington State Bar Association Indian Law Section and Northwest Indian Bar Association (NIBA) for the annual "Solo and Small Firm Project Award."

The award acknowledges the success of the Indian Law Section and NIBA's Indian Legal Scholarship Program, which raised and donated over $30,000 in scholarships to aspiring Indian lawyers from Washington State, Oregon, Idaho and Alaska, over the past year.

According to Gabriel Galanda, past NIBA President and current Chair of the Indian Law Section, nationally, 4.1 million people identify themselves as Native American but there are only 3,000 Native practitioners (2000 Census).

Since the fall of 2003, the Indian Law Section and NIBA have awarded scholarships, in amounts ranging from $500 to $10,000, to 11 aspiring Native lawyers, including 3 from Alaska: Matthew Koenigs (Aleut), Michael Douglas (Haida) and, Karol Dixon (Athabascan). www.nwiba.org

ECLECTIC BLUES

Seven non-negotiable rules for parents of teenagers

By Dan Branch

It's late August. Outside the last rays of the day linger on our apple tree. I'm inside wearing chain saw ear protectors to block out the sound coming from my daughter's stereo. She is tied up with geometry homework, leaving me some computer time to write this column.

This is my chance to improve parent-child relationships throughout the state by setting out the seven nonnegotiable rules for parents of teenage girls.

Rule Number One

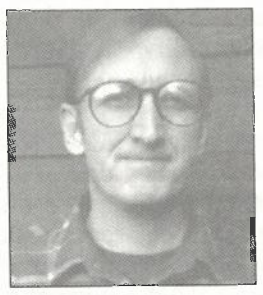
Mothers of teenage girls may not speak above a whisper in clothing store dressing rooms. Teenage girls find much joy and some sorrow in clothing stores. In such places dreams can be fulfilled or crushed depending on the cut of a top or jeans.

Mother and daughter won't know which fate awaits them until they reach the dressing room. Here the mother must act as if there is a public address system embedded in the wall. She must not speak above a whisper. The child's name should never be used at the risk of inflicting social death on the daughter. Serious trauma can result if the word "bra" is audibly used in the same sentence as the daughter's name.

Rule Number Two

Parents old enough to vote should never use teen-speak. The adolescents of every generation must develop their own sub-language designed to leave the older generation confused and a little scared.

While growing up in Southern California my generation spoke the language of the beach even though we rarely saw it. For example, we would be "stoked" (excited) if one of our buds (friends) let us cruise (ride) in his bitching (high quality) rod (automobile). We were convinced that it was physically impossible for our parents to be stoked.



"This is my chance to improve parent-child relationships throughout the state by setting out the seven nonnegotiable rules for parents of teenage girls.

Every parent must recognize that the use of teen-speak from the mouth of adults grates on the ears of its creators. Parents of today should consider off limits "hey dude," "hating on," "uber cool" or any words spoken by P.Diddy. Don't even try using teen-speak words that sound familiar.

A few years ago "old school" was an adjective used to describe someone with class--someone who treated others with consideration. Now an old school person is struck in a rut--someone who failed to move on.

Rule Number Three

Remember, there is a dress code for parents. Many times parents are so involved in making sure their kids look nice that they forget to honor the parents' dress code. Moms must refrain from bearing their midriffs unless they play professional beach volleyball. Even then they may bring shame on their teenage daughters. Your child will prefer the sixth ring of hell to school if either parent allows any part of their underwear to show.

There is a special rule for dads who wear ball caps. If you are over 25, keep the bill of the cap forward unless you are umpiring a baseball game. Wearing a cap sideways can only lead to embarrassment for the whole family.

The parents' dress code also limits where you can shop. Mom and dad must stay out of trendy stores or those selling counter-culture garb. For example, parents may never shop where Goth clothing is sold.

Rule Number Four

Parents must be on call at all times. If you own a mini-van or a large SUV you live this rule. Modern parents should plan on spending more off-work hours driving than sleeping.

When not transporting, you must be available for phone contact. Ironically, this contact rule does not apply to the children unless they have their own cell phone.

Rule Number Five

Contact with the child's friends must be limited in time and subject matter. Parents of teenagers are for answering doors and phones, not for entertaining their kid's visiting friends. If you pick up the phone and hear the voice of your daughter's best friend, you can probably get away with a "how are things going" or "did you have a nice summer." Don't expect more than a, "it was ok" in reply and don't ask a second question.

The same rule applies when you are out and about with your child. Keep interaction with her friends down to 15 seconds. In no event should the parent-to-kid's-friend conversation last longer than the kid-to-kid conversation. If this happens, you'd better have the name of a good family counselor on your Rolodex.

Rule Number Six

Parents are not allowed on Instant Messaging. As near as I can tell, Instant Messaging was designed by software companies to get kids to keep actual physical contact with their friends at a minimum. Why use the phone or shoe-leather to communicate with the next door neighbor when you can use the Internet?

IM users log on with special names--like modern CB radio addicts. My kid uses quotes for her log-on names. This week it's, "on the ground it's soil, on you it's dirt." Last week it was "you're not leaving this house in that outfit young lady." I wonder where she heard that one. Other kids also log on with quotes. One fan of MC Hammer (retro or old school music) logs on with "U can't touch this." Some use names like "texas cutie" or "death girl."

It isn't hard for me to comply with this rule because I can't figure how to find Instant Messaging on our computer. Those able to solve the messenger mysteries can log on, check to see who else is "on," then start messaging each other. While I've never seen the system at work, I have learned that breaking up with your boy or girl friend on Instant Messaging is very poor form. It would be better to use e-mail or even voice mail to end a relationship. Perhaps there is hope for this younger generation.

Rule Number Seven

Always have dinner together as a family (even if it's take-out pizza). Parents want their teenage kids to gain independence, but growing up means growing more remote from parents. A family dinner gives the teenager's universe a place to intersect with that of the parents. Your kids have been learning from you all their lives. Now that they are out there collecting new experiences they have a chance to repay the favor.

We follow this rule. That's how I learned the seven rules for parenting.

NOTICE

From the U.S. District Court:

- Due to budget reductions the Public Counter [Room 229] will be closed during the hours of 12:30 p.m. and 1:30 p.m. The Office hours are 9:00 a.m. to 12:30 p.m. and 1:30 p.m. to 4:30 p.m. To help alleviate any inconvenience, law offices are reminded that a Drop Box is available in front of Room 229 that will be checked at 1:30 p.m. and 9:00 a.m. each day for new filings. Also, a computer terminal to access Public Access to Court Electronic Records [PACER] has been installed outside Room 229.

- The District Court has installed Voice Case Information System [VCIS] that provides telephonic information regarding cases in the court's computerized data base. VCIS can be accessed by calling 907-222-6940.

- The District Court has installed a Public Information Kiosk in the Anchorage Courthouse and is in the process of installing Public Information Kiosk's in both the Fairbanks and Juneau Courthouses.

NEWS FROM THE BAR

Alaska Bar Association Ethics Opinion No. 2004-2

May An Attorney Contingently Agree to Pay Attorney's Fees Assessed Against a Client if the Client Loses on Appeal?

I. Introduction

The Committee has been asked to give an opinion as to whether a plaintiff's attorney, who has a defense verdict returned in a contingency fee case, is ethically permitted to agree to pay the attorney fee award against his or her client, should an appeal of the verdict be unsuccessful. In the scenario presented, the case has excellent points for appeal, plaintiff's counsel will not be paid absent a successful appeal, and plaintiff may be reluctant to proceed for various reasons, potentially including a settlement offer made contingent on foregoing appeal.

It is the Committee's opinion that such an agreement is permissible. The Committee interprets "expenses of litigation," that may be made contingent on the outcome of a matter under Alaska Rule of Professional Conduct 1.8(e), to include costs and attorney fees awarded against a client.

II. Analysis

The Committee's analysis is based on its interpretation of Alaska Rule of Professional Conduct 1.8 (e) and (j) which provide:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the indigent client.

. . . . .

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

While there are no Rule comments to 1.8(e), the section (j) comment notes that paragraph (j) is the traditional rule prohibiting lawyers from acquiring a proprietary interest in litigation, arising out of the common law rules on champerty and maintenance.[1] Excepted from this prohibition are "reasonable contingency fees set forth in Rule 1.5 agreements and the exception for certain advances of the costs of litigation set forth in paragraph (e)." Comment, ARPC 1.8 (j).

Although the "expenses of litigation" referenced in paragraph (e) are neither defined or explained in the Alaska Rules, the Committee can see no practical or rational basis for excluding an attorney fee award from the definition of "expenses of litigation." The Committee is also of the opinion that an attorney's agreement to pay an attorney fee award, is a natural extension of, or at least not sufficiently distinguishable from, a traditional and permissible contingency fee agreement.

The Committee is not unaware of concerns its opinion may raise. Consideration was specifically given as to whether permitting an attorney to guarantee the payment of an attorney fee award could be construed as an impermissible loan guarantee or whether it could reduce a client's incentive to weigh the merits of his or her case before filing suit, or run counter to the other Civil Rule 82 objectives of encouraging settlement and avoiding protracted litigation. Risks of frivolous litigation, compromised loyalty or overreaching on account of an attorney's economic self-interest were also taken into account. Ultimately, however, it is the Committee's opinion that all of these risks are generally inherent and acceptable in any contingency fee representation and that viewing them any differently where the contingency is that of paying an attorney fee award is not justified.

Thus, the Committee interprets the language, and policy behind, Alaska Model Rule 1.8 (e) and (j) to permit a plaintiff's attorney to agree to assume responsibility for a clients' adverse attorney award in the event that an appeal taken is unsuccessful.

III. Conclusion

The Committee concludes that "expenses of litigation" may be interpreted to include an adverse attorney fee award, and that under Alaska Model Rule 1.8(e) and (j), the client's obligation to pay such expense may be made contingent on the outcome of the matter.

Approved by the Alaska Bar Association Ethics Committee on February 5, 2004.

Adopted by the Board of Governors on April 27, 2004.

(Footnotes)

[1] Champerty has been defined as "an investment in the cause of action of another by purchasing a percentage of any recovery" and maintenance has been considered "another form of investment by providing living or other expenses to finance litigation." State Bar of Michigan Informal Opinion RI-14 (1989).

BOG adopts first dues increase in 11 years

At its most recent meeting (Sept. 13-14), the Board of Governors finalized the first bar dues increase in more than 10 years. In January, 2004, the Board voted to increase dues from $450 to $550 per year.

Under the Bar Association's bylaws, notice of the proposed increase must be published in the Bar Rag before the increase may be adopted. Notice was published following the January, 2004, Board meeting, and the Board had the opportunity to finalize the dues increase when it met in April, 2004. But the Board decided to wait until after the annual membership meeting, giving the members further opportunity to comment. The increase will take effect with the 2005 bar dues.

Alaska is one of only 13 State Bars responsible for both Admissions and Discipline, and receives no financial support from the State to perform these functions. Without a dues increase the Bar's unappropriated capital would be depleted at the beginning of 2007.

After many lengthy discussions the Board determined that the increase was necessary to maintain the financial stability of the bar in fulfilling its statutory obligations and its service commitments to the membership.

New entry as Alaska's first woman lawyer: Nathalena Roberts Moore 1875 - 1950

Nathalena Roberts was born 25 miles north of Boston in Essex, MA in January 1875, to Luella H. and Samuel S. Roberts.[1]

While a young girl, Natalie, as she was called, and her mother moved to Tacoma. It is unclear whether her parents divorced or her father died.[2] In Tacoma, Natalie attended school and was a student at the Annie Wright Seminary as a junior from September 1890 until June 1891.[3] Annie Wright Seminary, founded in 1884, was then an all-girls' school, where a young woman was exposed to a Christian education that molded a kind, joyous spirit, refined taste, and strong character.[4] Natalie continued her education with study of the law under the direction of attorneys Boyle and Richardson and she passed the Washington Bar examination on October 13, 1899.[5] For a number of years, Natalie practiced law and ultimately became chief clerk in the legal department of the Northern Pacific Railway.[6] On March 3,1903, at age 26, Natalie was admitted to the Washington Bar.[7]

Natalie continued to live with her mother in a rented house at 919 1/2 C St. in Tacoma until a couple of years later when she moved to Alaska.[8]

Around 1905, Natalie arrived in Fairbanks and worked as a stenographer for the law firm of Carr and Nye. Later she worked with the law office of McGinn & Sullivan.[9] Shortly after her arrival, she married dentist Charles Merton Moore and they lived at the corner of 8th Avenue and Cowles. Charles, a son and fourth child of Rebecca Jane Patrick and Jerome Moore, was born in December 1878 in Chico, CA.[10] He studied dentistry at the University of California, enjoyed golf, and attended the Episcopal Church.[11] On May 22, 1906, Dr. Moore became infamous in Fairbanks when a window curtain in his dental office blew into an open flame. The resulting blaze destroyed several blocks of the downtown area, but the damaged city center was rebuilt immediately.

(It should be noted that after Natalie married she regularly gave her birth date as 1878, the same as Charles. Presumably she did this so she appeared to be the same age rather than three years older than he.)

In 1907, Natalie's mother, Lulu, moved to Fairbanks and into the Moore's home on 5th Avenue. A year later on Monday, May 18, 1908, Natalie was admitted to the Alaska Bar by reciprocity at the recommendation of Judge James Wickersham.[12]

While she practiced law she was also a prominent hostess in Fairbanks. She regularly entertained the Five Hundred Club, a card group, and her Thanksgiving dinner party in 1908 was reported in the society pages of the local newspaper.[13]

In March 1909, Natalie gave birth to her only child, a daughter who she named Frances Lucile. The family resided at 232 Eighth Ave. for a number of years. By 1917, the Moores and Natalie's mother had left Alaska and were settled at 1716 Eighth Ave. in Tacoma. Charles practiced dentistry in that city at the Electro Dental Parlors.[14] It is unclear whether Natalie practiced law when she returned to Washington. However, she participated in the Monday Civic Club of Tacoma and attended the Congregational Church.[15]

On October 30,1948, Charles Merton Moore died just shy of his 69th birthday. Reverend Arthur Bell conducted the funeral service.[16] Natalie lived for almost two more years until she died on August 11,1950. She was survived by her daughter Frances who had married C. B Wolters, and one granddaughter, Carla Lou Wolters, both of Olympia.[17]

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--Phyllis Demuth Movius

Reflections on winning, losing and civility (and marketing ploys)

By Rick Friedman

"I don't laugh when I win, so that I don't have to cry when I lose."

— Gail Fraties

Whether measured by percentages, or by raw numbers, fewer and fewer cases are being tried. This is true of civil and criminal cases; it is true in state and federal court.

For example, the December 14, 2003 issue of the *New York Times* reports on a study of federal court cases showing that in 1962, 11.5 percent of all civil cases in federal court went to trial. By last year, the percentage had dropped to 1.8 percent. In criminal cases, the numbers fell from 15 percent in 1962 to less than 5 percent last year.

A study of 10 states by the National Center for State Courts showed steep declines in the numbers of state civil and criminal felony trials of between 35 and 78 percent in the last nine years.

William G. Young, the chief judge of the Federal District Court in Boston, is quoted in the *Times*: "What's documented here is nothing less than the passing of the common law adversarial system that is uniquely American." Judge Young's attitude is itself somewhat unique at a time when most judges and many lawyers regard a trial as nothing more than the consequence of failed lawyering.

Much has been written about the causes of the decline in jury trials. One cause I have not seen discussed is a psychological one. We live in a culture where, as Garrison Keiller says, "every child is above average," where there is a bright line between "winners" and "losers," and where losers are expected to get an extreme makeover. In this culture, the risk of losing is regarded with almost pathological terror.

Remember the Alamo? Who wants to see a movie about a bunch of losers?

Now I hate losing as much as the next person. There is nothing quite like putting your heart, soul and mind into a trial and then having a jury reject you. I will go to great lengths to avoid losing. There is a difference, however, between going to great lengths to avoid losing, and going to great lengths to avoid ***the risk*** of losing.

In our risk-adverse society, most people—including lawyers—want a no-risk, predictable, case, career, marriage, child, life, society, you name it. In this culture, the risk of going to trial and possibly *losing* is simply unacceptable.

It was not always so. In the not-so-distant past, even general practitioners could count on one or two trials a year. "Litigators" could count on more than that. And with that many trials going on, a lawyer could *count on* losing a trial from time to time.

This was not regarded as a bad thing—either personally or professionally. As Nietzsche observed, "That which does not kill me makes me stronger." Life—and the law—could be expected to deliver some hard knocks. Much could be learned and even accomplished through losing. Remember "To Kill a Mockingbird?" Remember the Alamo? Some of Clarence Darrow's most eloquent and lasting closing arguments are in cases he lost.

Civility vs. jury trial decline

Paralleling the decline in jury trials has been increasing commentary on the loss of civility among and between lawyers. As far as I know, no one has suggested a connection. So I will do it here. I am not saying fewer jury trials is the *sole* cause of declining civility. I do suggest it is a "substantial factor," that is, that "a reasonable person would regard it as a cause and attach responsibility to it." (Civil Pattern Instruction 3.06)

Here is an undeniable psychological truth: *one thing worse than losing a jury trial is losing a jury trial to someone you have treated like a jerk.*

In the "old days," there was a significant chance (say 11.5%) that a case would go to trial. Whenever you go to trial, there is a significant chance you will lose. Smart lawyers, with at least a passing acquaintance with trial loss, will think twice before they write nasty letters, interpose frivolous objections, file Rule 11 motions or bar complaints against someone who may ultimately beat them at trial. The risk of losing at trial is the ultimate psychological deterrent to that kind of behavior.

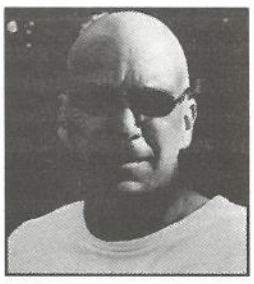
If there is no "judgment day," but only a settlement, mediation or summary judgment, there is no downside to rude or bullying behavior. In fact, such behavior can even pay dividends by increasing the economic or emotional cost to the other party, making them more eager to settle.

On the other hand, lawyers in trial share things no one else can share: an intimate knowledge of the case, exhaustion, fear, the fickleness of the jury draw, the fickleness of the judge, the certain knowledge that one of them will lose. In fact, when the light is right, and they are paying attention, they can even see into each other's souls. After going through this process a number of times, many lawyers develop a certain compassion and respect for their adversaries—an attitude incompatible with uncivil behavior.

All right. I know this sounds hopelessly romantic. But do a review of the civil and uncivil lawyers you know. As a general rule, I believe you will discover that the most civil and accommodating tend to be the ones with substantial trial experience. The least civil often have few trials under their belts.

Now there are many, many exceptions to this gross generalization. For one thing, there are the many inexperienced lawyers who are perfectly pleasant and professional. And there are the kooks, whose uncivil behavior is really just a sign of their mental imbalance. By my count, there are 12 of those in Alaska.

And then there are the legal psychopaths. By my count, we have six in Alaska. (My wife claims there are only four, but that is the subject for a different column.) These are the very experienced lawyers who revel in their ability to break the rules with impunity. They flourish and blossom under the ineffectual scolding of the judge—taking it as a badge of honor and accomplishment.



"In this culture, the risk of losing is regarded with almost pathological terror."

But kooks and legal psychopaths aside, I believe you will see that most of the uncivil behavior is coming from people who do not spend much time looking into the eyes of jurors. They have perfected the art of avoiding trial, ensuring there is no downside to their behavior.

War Stories

Three War Stories come to mind. The first is not a war story so much as an illustration. I cannot think about winning, losing and civility without thinking about Mike Lessmeier from Juneau. Back in the mid-80's, when I first met him, the plaintiffs' bar was referring to him as "Darth Vader" or "The Prince of Darkness." He was an implacable opponent, smart, creative, and relentless. He neither showed nor asked any quarter. Having him on the other side was liking fighting the bad robot in "Terminator 2."

Always civil and professional, Mike handed me the bitterest trial loss of my career some 15 years ago. He won a high-stakes, hard-fought, difficult case, and had every reason to boast and act superior. Instead, he was the epitome of graciousness. He made a point of complimenting my client and me. He treated us with consideration and respect that I have never forgotten.

Many years later, I handed Mike what must have been one of the bitterest trial losses of his career. Many in his position would pout, claim they were robbed, attack the jury, or just crawl into a hole and hide. Instead, he made a point of congratulating me. Again he acted with grace and class. By example, he taught me how to take the wins and losses. I want to be like him when I grow up.

Bill Royce tells the second story about our mutual friend, the late Clifford Smith from Ketchikan. Clifford was an old-school trial lawyer. He won and lost plenty of cases, and had the scars to prove it. He was also a master of the stage whisper.

Bill and Cliff represented a client at a mediation held in Ketchikan. The opposing party was represented by a Seattle attorney intent on conveying his legal prowess to the backwater lawyers who apparently had not heard of him before. He made an emphatic presentation of the case to the jointly assembled parties and attorneys. He concluded by dramatically announcing that in 15 years of practice, he had never lost a trial.

In the silence that followed, Cliff leaned over to Bill and in a whisper everyone in the room could hear announced, "Bill... Bill, looks like we've got ourselves a virgin."

The final story illustrates one of my earlier points—that we can learn things even from our losing cases.

I recently lost a medical malpractice trial. The trial began as most trials do, with a lot of tense, sweaty people sitting around posturing for each other and drinking warm water out of styrofoam cups. On the fourth day, things changed. Shiny new water bottles appeared on the defense table. There was one for each of the two defense counsel, one for the defendant doctor, and one for the defense expert who would be testifying that day. Four shiny new bottles marketed by a company called "TRUE."

Now I didn't even know there was a water bottling company called TRUE, but apparently there is. And they believe in putting really big labels on their water so everyone will know where it came from. And the water tastes so good that over the next several days, each defense witness carried his or her TRUE water bottle to the witness stand, making sure the TRUE label was facing the jury while they testified.

If I had to bet, it was my experienced adversary's effective advocacy, and not the TRUE labels, that won the trial for the defense. Nevertheless, it gave me an idea. We now have advertisements everywhere. There is even talk of putting Spiderman advertisements on the Safeco Field bases. Why not raise revenue for the court system by selling space on all those blank walls? Maybe a billboard behind the judge: "Promotional Expenses Paid For By Your Good Neighbor At State Farm." That will be up to the court administrators who *say* they care about running an economical court system. But we lawyers can get into the act now.

Advertisers pay movie producers to work their products into movie scripts. How much would they pay to have their products mentioned in high-profile trials?

Defense lawyer: What did you do next?

Captain Hazelwood: Well, ideally, I would have had a GPS manufactured by Acutron, but since I didn't, I just gave the order and went below.

Or

Defense lawyer: What did you do next?

You might be digitally impaired if...

Are you barely conversant with e-mail, or see your computer as merely a keyboard & file dump? You might be digitally impaired if you can't answer "yes" (or at least understand the meaning) to the following:

Do you IM? Some 42 percent of online Americans use instant messaging, and 24 percent of instant messagers say they use IM more frequently than email. This translates to 53 million American adults who instant message and over 12 million who IM more than emailing. On a typical day, 29 percent of instant messengers—or roughly 15 million American adults—use IM. The new survey by the Pew Internet & American Life Project also finds that instant messaging is especially popular among younger adults and technology enthusiasts. 62 percent of Gen Y Americans (those ages 18-27) report using IM. Within the instant messaging Gen Y age group, 46 percent report using IM more frequently than email. So reports the Information Technology Association of America.

Do you Blog? Another with-it technology is Web Logs, aka Blogs, aka P2P (Peer to Peer) publishing. The big ones are blogger.com and livejournal.com, web sites that allow users to create their own, real-time journal that's instantly unleashed on the Web. With thousands created each week, there are no accurate counts of the number of bloggers, but MIT, the National Institute for Technology & Liberal Education, blogcount.com, and technorati.com are major stat-collectors crawling the Web for these ubiquitous journals—logging anywhere from 2.1 million to 3.9 million blogs as of, like, an hour ago. (Trivia: 53 bloggers covered the Olympics; three dozen reported on the Dem's convention, and a dozen pumped out Web news for the Republican convention).

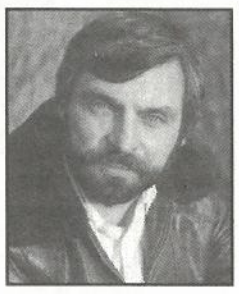
HI-TECH IN THE LAW OFFICE

Systematic discovery and organization of electronic evidence

By Joseph Kashi

Discovering electronic evidence, particularly from a large organization, can be more time-consuming and expensive than a litigator might imagine. Unless a litigator understands the many places where electronic evidence may be found, and how information flows within an organization, electronic discovery will likely be an unproductive, but expensive, hit or miss affair. This article proposes some thoughts about making discovery of electronic evidence a systematic and increasingly efficient process. Given that the information to be discovered is, by definition, already electronically searchable and subject to relatively easier organization before trial, systematic electronic discovery has a high payoff.

Although the nature and flow of information is frequently idiosyncratic, varying greatly from organization to organization, it's safe to generalize that the flow of information between different components of any organization is its life blood. When confronted with major litigation that demands sophisticated discovery, whether electronic discovery or traditional paper document discovery, identifying and modeling the manner in which information moves within your target organization is a key aspect of knowing what documents and information to look for, who the major actors are, where to look for that evidence, and how to secure it. Even if, by some quirk, your own client has unlimited finances and the ability to sift through every single record in any organization, there are some obvious drawbacks. Firstly, this would take years and your case might never get to trial or you'll run up against discovery deadlines. Secondly, it would be so expensive as to make the cost disproportionate to almost any litigation advantage. Thirdly, of course, a court would realistically enter a protective order barring that sort of discovery. Finally, even if you could surmount these problems, it's most unlikely that you would be able to sort through the masses of essentially irrelevant information to effectively find and use the few gems that will make or break your case before a jury. Intelligence agencies have a similar problem - sorting through mountains of contradictory, secondary and marginal data in order to find the few gems that show what's really happening.



"This article proposes some thoughts about making discovery of electronic evidence a systematic and increasingly efficient process."

It's fair to say that gaining an early, effective and systematic approach to your electronic discovery efforts can make or break your case. Achieving that focus requires that you understand how information flows within your client's organization and your opponent's organization and understand some basic theoretical concepts about information.

Understanding how information flows within a particular organization is useful because it helps us identify:

1. The types of data that are collected and the form and method by which such data is collected.
2. The types of formal computer data structures and paper records that might be retained.
3. Where we are most likely to find pertinent records and data.
4. The identity of the principal actors, not all of whom may be obvious from an organizational chart.
5. The types of informal records we might expect to find that are maintained idiosyncratically by involved individuals.
6. The most likely areas of concentration, which I'll call "nodes," where particularly rich concentrations of useful documents might be found, which in turn may help us further focus our efforts in a more productive, cost-effective manner that in turn sharpens our litigation strategy.
7. Where potential breakdowns in communication are most likely to occur either in our client's organization or in the target organization, which assists us in understanding what may have gone wrong, or conversely what did not go wrong, a crucial part of any plaintiff's or defendant's case.
8. Determining which participants seem to have the greatest affinity for particular types of records and who is talking to whom about the issue at hand, helping us to hone in on particularly rich lodes of electronic discovery.

Organizing and using the fruit of electronic evidence discovery

In order to track, analyze and use this sort of data, a litigation database of some sort is almost mandatory. For cases in which you might expect to find tens or hundreds of thousands of documents, Summation is usually the program of choice. For small to medium cases, though, I personally prefer CaseMap 4, along with its associated time line program TimeMap. These programs are particularly flexible means of organizing discovery, understanding significant time lines, and using the resulting data at trial. You can download 30 day evaluation copies from www.casesoft.com. After 30 days, the full-featured evaluation version won't work unless you purchase a permanent activation code from CaseSoft. I believe that CaseSoft charges $495 per authorized user, a cost that I consider worthwhile given the power and value that this program brings to small to mid-sized litigation.

If you have scanned and imaged any discovered electronic and paper discovery using a standard program like Adobe Acrobat, then you'll be able to directly associate a PDF file of each discovered document directly with its associated CaseMap or TimeMap entry and call up the imaged document with a single click within CaseMap - a fast and neat way to work with the discovered documents. You'll need the full Acrobat program, not the limited feature data reader available over the Internet. Plan on spending about $270 for Acrobat.

If you're dealing with many possible actors and large quantities of information, then an industrial strength management system such as IBM's Lotus Discovery Server 2.0 will greatly reduce the manual effort otherwise needed to identify and model information flow within a large entity. Programs like Discovery Server 2.0 automatically sort through the discovery target's electronic systems for relevant information, identify potentially rich "nodes," which may be particular authors, recipients, departments, or document types, and then map the relationships between the potentially most profitable targets for more focused discovery. The resources to do this sort of highly automated discovery will be expensive and will require counsel to formulate reasonable ground rules, probably incorporated into a discovery order using a neutral third party to conduct such discovery and protect privileged documents. If you're not using an integrated knowledge management program like Discovery Server, then you'll also need an advanced indexed search programs with highly specific boolean search functions, such as Concordance or DT Search.

Data mining software, often but not always used on mainframe computers, is also potentially useful in making sense out of large masses of otherwise undigested data. Some well-established data mining software, such as SPSS (now in version 11.5) works statistically with numerical data. Other knowledge management programs, such as Lotus Discovery Server, discover and group related textual documents, explicitly mapping the links between specific authors and various clusters of potentially interesting documents. The ability of Discovery Server to map the relationships between individuals and clusters of pertinent documents potentially makes it a very powerful electronic discovery tool in highly complex corporate and organizational situations, but setting up and using this tool requires experience and technical savvy that's beyond most attorneys.

Concept searching may be considered another form of textual data mining. Some very basic concept searching is employed with Internet meta-search engines. You'll be able to find a somewhat more complex and effective example of concept searching by National Criminal Justice Reference System web site, http://abstractsdb.ncjrs.org/content/AbstractsDB_Search.asp Using NCJRS's mainframe-based Internet search engine, I did a quick concept search looking for studies that measured the accuracy of psychological evaluations in predicting future violence, a fairly complex concept, and was very impressed by the precision of the weighted search results, which were exactly on point. Copernic Enterprise Server (Www.copernic.com) has similar capabilities: it's designed to work with all common file formats and across an entire company. Copernic Enterprise Server has real potential as a low cost and relatively simple electronic evidence concept search tool.

Why study your opponent's information patterns

The purpose of understanding how information flow within an organization is to make your discovery a deft and swift scalpel rather than a blunt instrument. Because data and the manner in which information flows may vary widely from organization to organization, you will need to have a good understanding of the organization's informational content, of the people who create it, of the types of documents that are used, of the numerous categories and subcategories that define the information kept by an organization, how and where the information flows, and where the organization's information is stored, indexed, backed up or otherwise maintained. It's also important to be able to quickly spot the most significant and important information (and significant gaps in that information), rather than be bogged down by reviewing, and possibly being distracted by, numerous documents and records that have only a tangential relationship to the issue at hand. Finally, you'll also need to understand the relationship between people who create the information, the documents and information they create, and the end users of those documents and information. You'll need to understand who is an internal expert, or at least highly knowledgeable, about topics critical to your search, and this may not always be obvious from organizational tables. You'll want to identify who is most often handling certain types of information. Finally, you'll also need to understand when and how data errors and distortions occur within a particular organization's internal data flow, because not all communication within an organization is clear, concise, and accurate.

Getting some litigation guidance from information theory

Information theory is a theoretical mathematical description that models how electronic communication works. Although primarily applicable to assessing electronic communication systems, information theory and related cybernetics theories include several theoretical concepts that provide useful analogies to the discovery process, such as the "noise" inherent to any communication process and "feedback loops."

Continued on page 25

HI-TECH IN THE LAW OFFICE

Systematic discovery and organization of electronic evidence

Continued from page 24

Information theory concepts are now used much more broadly - indeed, even the National Institute of Health funds entire laboratories devoted to applying information theory to the biology of living organisms.

As analogies, information theory and cybernetic concepts have several important lessons for litigators struggling to undertake very large electronic discovery efforts in a systematic and productive manner. Luckily, because electronic evidence discovery is typically already in a searchable format that gives us the ability to zero in upon, and bring us closer to, the original data, information theory concepts are particularly applicable to electronic data discovery have the potential to greatly sharpen our discovery efforts.

Here are some crude, but a real world, examples of how our thinking can be focused and our discovery efforts sharpened. These concepts apply whether you are asserting discovery demands or attempting to comply with reasonable discovery and disclosure while protecting your client from over-reaching. When we talk of "information" within an organization, we refer to any records and human communication, whether or not that communication contains factually accurate data. Indeed, there's a lot of inaccurate information floating around.

Because the author typically represents plaintiffs against larger entities and corporations, these concepts are phrased from the point of view of the party seeking discovery.

1. As information is repeated within an organization, its meaning often becomes more and more diffuse until much of the original information becomes highly uncertain and very possibly lost. This is not some esoteric scientific concept - it is simply the underlying basis for the hearsay rule, stated more specifically and theoretically.

2. It is not possible to readily reverse the noise process and to filter out any "noise" in the communications process. That means that we cannot work backwards and arrive at a completely accurate and certain knowledge of the original information. That's do to the human imprecision and uncertainty typically introduced into information as it is repeated throughout an organization. Thus, it is by far the most accurate, of course, to obtain documents that have been written directly by the person whose actions are being questioned or who recorded the original data.

3. As information is repeated, it tends to become distorted and thus more difficult to ascertain the basis upon which an organization did or did not act. The information which ultimately motivates and controls an act or omission becomes increasingly uncertain as we rely upon diffused data and secondary sources. Thus, again, it is by far the most accurate and powerful when the documents upon which you might later rely in litigation have been written personally by the actor whose acts are being questioned. Bill Gates's Emails come to mind.

4. Even when the information is transmitted in a relatively certain and unambiguous manner, the recipient may not understand ambiguous content because of his or her own experiences, biases and idiosyncratic use of language. Thus, extra weight should be placed upon clear declarations of intent and knowledge when made by directly involved actors, particularly when the document's recipients then act in conformance with clear directives and statements. An estoppel situation may have occurred.

5. As "noise" and blurring increase, the resulting imprecision tends to drown out the true message, the "signal." In electronic communications, such as long distance radio or telephone relays, communication engineers use a concept of a signal to noise ratio. When the signal is high and the noise is low, then there is a great deal of certainty about the true data state. When noise predominated, then the signal to noise ratio drops and there is much more uncertainty about what is in fact being said and done. Thus, when only one or two persons are speaking for an organization, particularly when such people have been conferring, much higher reliability may be placed upon their statements as reflecting the true state of organizational intent and action. We have a high signal to noise ratio. On the other hand, when there are many different actors and persons influencing the process, and they are all producing documents that may be pertinent to a questioned transaction, or when they are issuing contradictory statements about what has been happening and why, then the organization's signal to noise ratio becomes very low. As a result, it's harder to understand what's important, what's not, what really happened, and why.

6. As uncertainty increases, our ability to discern what is true and important in proving what actually occurred (the crux of any litigation) decreases. Thus, we should look, for example, for a series of documents written by a single major actor which state a consistent theme either throughout or alternatively which initially state one consistent theme or position and then sharply deviate to a new direction, corporate position and theme. In the latter case, the actual reason for the sudden change may be very interesting and probative.

7. There will always be some uncertainty about finding specific information, although the amount of uncertainty can be considerably narrowed, indeed calculated with a fair degree of precision, as we get more experience searching through large amounts of data. Standard information theory equations can help you decide when further discovery efforts or efforts to find data and comply with discovery requests will likely be unproductive, or, conversely, when further discovery will probably be money well-spent. Particularly when defending against accusations that discovery compliance is inadequate, uncertainty calculations showing the low probability of finding any more discoverable data, even with massive and costly efforts, may be very useful in establishing a well-founded basis for a protective order or resisting further discovery attempts.

8. Look for feedback loops. Communications and documents do not exist in a vacuum. They're usually made for a specific purpose and will typically elicit one or more rounds of responses and comments by recipients and other interested persons. The concept of feedback has been corrupted in the popular mind to something akin to interpersonal communication, but it's much more. The *American Heritage Dictionary* defines a feedback loop as *"The section of a control system that allows for feedback and self-correction and that adjusts its operation according to differences between the actual output and the desired output."* Although that definition may seem most akin to the thermostats that keep our homes at a constant temperature or an aircraft's autopilot, the concept of feedback loops has surprisingly strong analogies in everyday communication. Look, for example, at Email message threads and replies - these are verbal feedback loops where the initial authors and recipients regularly exchange roles, clarify concepts and intents, and expand or narrow a topic of discussion. Consider the documents and counter-documents drafted and circulated back and forth within a business that's trying to decide some issue crucial to your litigation, for example whether to correct a known product defect. For that matter, look at the sequence of summary judgment motion practice: motion, opposition, reply, oral argument, decision, appeal. Built into these procedures is an implicit feedback mechanism designed to ensure that faulty evidence, arguments, and decisions are ultimately corrected. Particularly in larger corporations and other entities, finding these feedback loops identifies the important actors and their relationship to each other and to the issue at hand, helping you focus your discovery efforts. The concept of feedback is useful to litigators in other, more direct, ways as well. For example, if you're trying to prove deliberate intent, what stronger evidence than plotting out a time line showing the incriminating documents and responses forming a feedback loop? Again, certain knowledge management programs like Lotus Discovery Server are specifically tuned to map out these relationships.

The problems inherent in language usage

Communication problems are not unique to the litigation process: It's true of all human endeavor and all human interaction. Even in Physics, the hardest of the "hard sciences," discerning which scientific experiments should be relied upon and which contradictory data should be discarded has always been a fundamental challenge.

One of the best approaches to reducing the noise inherent to the litigation discovery process is the use of a software program which acts as a filter to help us sharply focus upon what we've usefully in our case while reducing noise, redundant or distracting documents and information. Filtering out discovery "noise" was hard work for anyone doing traditional manual discovery. If you had a few hundred thousand documents to review, the process might take years and it is still highly likely that you would either overlook the most important documents or perhaps miss their significance and relationship to other discovery. Modern electronic discovery tools, using indexed search programs with highly specific boolean search functions and thesaurus-based searching tremendously speed our search process while assuring a much more comprehensive search. Similarly, advanced knowledge management programs, such as Lotus Discovery Server 2.0 discern the central themes to any organization's information, organized it into appropriate subcategories by content, ascertain which people have particular affinities for what sorts of information and documents, determine which documents are the most important or frequently used within an organization, and generally relate people and discoverable documents. Although complex to set up, an automated knowledge management tool like Lotus Discovery Server can be the filter to bringing your discovery into razor-sharp focus.

Of course, using a crude electronic filter to sort through electronic discovery has its own drawbacks. Sometimes, such a filter is too selective, reducing the change of serendipitous but crucial discoveries. And, it's highly probable that searching for specific words or phrases will miss some very important evidence because human beings are not entirely predicable in their use of language and idioms. Our written and spoken words are imprecise from a computer's almost inhumanly precise point of view. For example, while you or I would understand from its context an ungrammatical conversation or document, or one filled with idioms, pronouns and synonyms, searching such materials electronically would probably miss many important documents and concepts. Indexed search engines can partially overcome this problem by searching with common synonyms as well as the original search term. For example, if you were deposing expert witnesses in an airplane crash, the witness might refer to the "aircraft," a vocabulary term that might not be found by a relatively simple search engine looking for "airplane" or "plane." Yet, the witness's phrasing is entirely understandable. A good synonym-based search program would build a thesaurus of synonymous terms such as "airplane," "plane," "aircraft," "Boeing," "727", or "B727" or "airliner", all of which would realistically relate to the same concept, a Boeing 727 aircraft that crashed.

As a result, although a good search program can partially correct vocabulary variations and grammatical imprecision, there will be inevitable noise that causes at least some imprecision in the original document or transcript and also in any later searches. Further, you, the searcher, are also human and have your own implicit search terms and concepts in mind, which arise at least in part from the culture in which you were raised and educated and which may or may not match the words used by the original author or witness or by anyone who has previously prepared the litigation database or indexed any documents in it. One

Continued on page 26

HI-TECH IN THE LAW OFFICE

Systematic discovery

Continued from page 25

solution to this potential mismatch is to firstly review the raw discovery product using a concordance program and then, before actually indexing the discovery documents, to work out a very carefully controlled indexing and litigation database vocabulary, carefully training all indexers and users.

Even then, the electronic litigator must be prepared to cope with human imprecision and linguistic variations. Some years ago, I did an experiment where I used a number of different legal research tools to look for leading Alaska Supreme Court decisions relating to slip and fall accidents. I already knew two leading cases but wanted to see how readily legal research tools would help a novice find the two leading cases. Searching through a legal research database seemed to be the tightest possible test - generally, West's attorneys, practicing lawyers and Alaska Supreme Court Justices seem much more likely to use and re-use the same learned vocabulary and concepts to describe similar situations, at least compared to how an average corporate officer might phrase documents.

One would think that a generally precise and consistent database of this sort would produce nearly identical search results no matter how the electronic search is conducted or phrased and yet, despite my own expectations, each different search method (full text, key number, searching for specific words or phrases, natural language searching and Boolean searching) produced very different results. None of them found the leading case or alternatively returned so many hundreds of cases as to lose the desired case in the background noise. Had I been a litigator who did not already know that leading case, I would not have found it and my briefing would be far more precarious.

Thus, it would seem that even relatively seasoned lawyers and State Supreme Court Justices do not always use identical words and phrasings and therein lay lessons for the electronic litigator. Noise is an inevitable concomitant of human communication. As a result, a highly automated, narrowly focused brute force electronic search will likely not find all critical documents and data - the breadth or narrowness of your electronic search will inevitably balance the convenience and speed of a tightly focused search against the increasingly greater manual effort inherent to increasing the probability of finding every critical document. Even when a search is broadened greatly, a litigator cannot be assured of finding everything - he or she can only be assured of finding more data to review and consider. Thesaurus-based weighted searches using concept searching and lists of search term synonyms seem to be the most effective single search method but multiple searches using varying search phrasing and differing search methods increase your chance of finding the smoking gun or leading case.

Most estimates of business record-keeping suggest that more than 90% of all primary data now resides in computer systems rather than on paper. Because technology now makes creating and replicating that data very quick and easy, the amount of potentially discoverable data has increased dramatically, probably exponentially, over the past twenty years or so. As a result, our discovery burdens are potentially much greater, whether we are asserting discovery or seeking to comply with reasonable demands.

Effective technology, used in a systematic and well thought out manner, is the only way to deal effectively with today's information overload and the need to find the critical items that make or break our case.

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

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Wanamaker 'sentenced' to continued service

Passing of the Wellness Court Gavel Ceremony
From Judge Jim Wanamaker to Judge Stephanie Rhoades
June 18, 2004, Nesbett Courtroom 202, Anchorage, AK

"Now that Judge Wanamaker has been given a certificate of compliance for participating in the program, the only remaining matter is to impose his sentence.

Judge Wanamaker, your original charge – of which you already stand convicted – is engaging in a conspiracy to use your judicial talents and skills for the purpose of assisting criminal offenders in their efforts toward rehabilitation.

Now, even though you've spent years of time in the Wellness Court's program and have met all of its requirements, based on all the evidence currently before me, I have to find that you have failed to correct your original misconduct and are continuing to conspire to use your judicial talents and skills for the purpose of assisting criminal offenders in their efforts toward rehabilitation.

I therefore cannot lawfully order complete release from this program – even though that's what you want to do. For your best interests, and the interests of all others involved in the same conspiracy, I must sentence you to continuing probation and require that you continue to have periodic contact with the Wellness Court, so we can monitor your behavior and allow everyone to continue to make progress."

—Chief Justice Alex Bryner

Supreme Court censures former Anchorage attorney

The Alaska Supreme Court on July 22, 2004, publicly censured former Anchorage attorney Randall W. Patterson for failing to file an appellant's brief in contradiction of numerous court orders.

Patterson represented a defendant on a criminal appeal. Patterson requested additional time to file the opening brief and excerpt of record. He continued to seek extensions of time to file the opening brief, usually after the court notified him that he missed the filing deadline. Eventually the court of appeals dismissed the appeal for want of prosecution.

Patterson's client, representing himself, petitioned the Supreme Court to have the case reinstated. The Supreme Court ordered the case reinstated, noting that an attorney's failure to file a brief should not subject an indigent defendant to dismissal of an appeal.

After reinstatement, the court of appeals directed Patterson to show cause why the court should not impose sanctions. Patterson told the court that he had "no explanation or excuse for missing the deadlines for filing an opening brief and will accept whatever sanctions the court deems appropriate." The court ordered Patterson to pay a $500 fine and issued a new filing deadline for the brief.

Patterson again missed the deadline and failed to pay the sanction. The court removed Patterson and directed the appointment of new counsel.

The court ordered Patterson to appear personally before it. At Patterson's request the court delayed the show cause hearing several weeks. Patterson paid the $500 sanction the day before the hearing. At the hearing he repeated that he had "no excuse" in this case, but noted that he had never failed to comply with court orders in the past. The court fined Patterson another $500, suspending $250 of the fine, and referred the matter to bar counsel.

Patterson and bar counsel agreed that Patterson neglected his client's case and violated court orders directing him to file a brief, thereby delaying the case almost two years for no reason other than Patterson's lack of diligence. Patterson and bar counsel forwarded a stipulation to the court requesting the discipline of a public censure of the court. The court approved the recommendation and publicly censured Patterson for his misconduct under Bar Rule 16(4)(a).

ATTORNEY DISCIPLINE

Lawyer admonished for aiding client's violation of court order

Attorney X represented Client, a party in a divorce. The court told Client to pay one dollar to the opposing party's lawyer for every dollar paid to Attorney X, as of a certain date. Before that date, Client made a lump sum payment into Attorney X's trust account. After the date, Attorney X "transferred" money out of the trust account to cover fees, while Client took the position that these were not "payments" and made no dollar-for-dollar payments to the opposing party. The court discovered this, found that it was an improper contrivance to circumvent its order, directed Client to pay the arrearage, found Attorney X in contempt and ordered the attorney to pay a $500 fine, and referred the matter to the Bar Association. Attorney X had no prior ethical misconduct and was remorseful, and the judge said that the lawyer was professional in other respects and that this was an isolated incident. Bar Counsel found that Attorney X acted incompetently in violation of ARPC 1.1 by failing to give knowledgeable and well-reasoned advice. An Area Division member approved a written private admonition, which Attorney X accepted.

Because justice has a price.

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TALES FROM THE INTERIOR

Big stink

Malodorous substances yield new defense and some offense

By William Satterberg

One of my pet peeves in the courtroom are odors.

And, I am not talking about the occasional rude incidents of gastric indigestion. No, I am talking about the odors that often linger through even a gale-force windstorm. Over the years, I had begun to learn that various clients have various odors which can affect a case's outcome. Unfortunately, Lysol is not yet allowed at counsel tables.

Undoubtedly, the most common odor, which is easily detected, is that of alcohol. But, even alcohol is not a simple odor. Alcohol odors come in two basic types, with numerous nasal subtypes.

Alcohol

The first type is the "old alcohol" odor. This odor reeks heavily of last night's booze, and emanates not only from the oral cavity, but oozes from the dripping sweat pores of the client, as well. In the event that one has never learned the smell associated with "last night's booze", simply attend arraignments in Fairbanks on a Saturday or Sunday afternoon to get a strong olfactory dose. Reminiscent of a scene from the now-defunct television series "Night Court", the first-floor courtroom can literally stink for hours of stale alcohol.

The next alcohol odor commonly experienced is that of "active alcohol." Ironically, this odor is not as uncommon as one might think in the courtroom, *either*. In fact, on several occasions, I have had clients come into my office or to appear in court, who clearly smelled as if they had just finished a stiff drink. When questioned about this phenomenon, the clients ordinarily have one of two responses.

The initial response, quite often, is simply that they had a drink in order to "steady" themselves in preparation for either a meeting with me, or with the judge. Unfortunately, sometimes, the client is far from being steady.

The initial response, quite often, is simply that they had a drink in order to "steady" themselves in preparation for either a meeting with me, or with the judge. Unfortunately, sometimes, the client is far from being steady.

The second response is that of outright denial. Having been faced with numerous instances of uncompromising denial by my clients, approximately one year ago, I bought a portable breath testing device from the Sharper Image Catalog, which has succeeded in displaying to these clients, when tested, that their denials are fruitless. Much to the client's credit, many simply argue that the machinery is broken, even when it reads non-detectable on *most* other members of my office.

Rather than arguing with these recalcitrants, I ordinarily base my decision on whether to engage in a discourse regarding alcohol consumption primarily upon their decision to pay or not to pay my exorbitant fees. Furthermore, the greater the alcohol content, the more exorbitant the fees. This is because I figure that I have another problem child on my hands, which ordinarily proves to be the case.

As a trial tactic, I usually like to seat my clients close to the jury. It is not a casual decision. Rather, it is a Satterberg variation of the "Stockholm Syndrome", by which victims who are held in extended captivity by kidnappers eventually come to identify and sympathize with their captors. Under this approach, I figure that, the more time that the jurors spend in proximity with the client, the more likely they are to acquit or at least to sympathize with the client's poor choice of counsel. After all, it worked for O.J. and almost did for my favorite childhood toy company, Tyco.

"Over the years, I had begun to learn that various clients have various odors which can affect a case's outcome. Unfortunately, Lysol is not yet allowed at counsel tables."

When the client is particularly inebriated, however, the plan changes. Instead, I do my best to keep the jurors at an extreme distance, and couple that with an ample supply of various Lifesavers, breath mints, deodorant and cheap perfume or aftershave to mask the inadmissible Rule 404 character evidence.

Alcohol subtypes are obvious: Beer, whiskey, wine, vodka, Nyquil, Terpin Hydrate, vanilla, sterno, etc. So much for alcohol.

Marijuana & drugs

Another distinctive odor which often comes to mind is that of marijuana.

Similar to alcohol, marijuana also has two subcategories: "smoked" or "waiting to be smoked." Usually, there is very little of the latter form, unless it is still on the vine. Once again, both of these presentations have their distinctive smell.

From experience, I can usually judge what type of case I am dealing with almost as soon as the client enters the office — as either a possession or cultivation case. The pungent cannabis odor, coupled with the veritable name of "dude" usually given to me by the client, normally confirms the fact that we are dealing with a pot case.

Another confirmation almost always occurs when we walk past the complaining officer's car on the way to the courtroom, and the ordinarily sedate German Shepard erupts to tear the vehicle's upholstery apart while frantically trying to get to my client's emergency stash.

Although the more serious drugs, such as cocaine and methamphetamine, do not, in themselves, impart an odor, I invariably find that the clients who have regularly used these drugs have developed their own distinctive odor. Ordinarily, it is a delightful combination of musty clothes and unwashed bodies. Methamphetamine users, as well, ordinarily have some pretty bad breath to go with their rotten teeth. Once again, these are dead giveaways.

And, speaking of dead, I am given to understand that dead corpus not-so-delectis also tend with time to develop distinctive odors as well which are best excluded from the courtroom: Burnt, bloated, or buried. I do not have any significant personal experiences with dead meat which I really care to admit, however, except for one Borough case involving a frozen horse, and another Fish and Game case involving a cooler full of hygraded moose meat.

Environmental

My environmental defense clients have a smell all of their own, as well. Usually, it is petroleum-based, consisting of either gasoline or diesel.

There have been times when these clients come to visit that I have seriously thought about issuing a hazardous waste/fire warning to the entire office, recognizing the volatility of these individuals who seem to bathe in petroleum hydrocarbons. Fuel truck drivers, as well, can cause the strongest eyes to water.

Our clientele is varied. For example, our office enjoys the unique status of representing one of the only septic system pumping and thawing companies in Fairbanks. The entrepreneur has a signature fragrance of all his own. He personally likes to describe himself as "odiferous." The aroma is unmistakable, but actually consists of a concoction of about half of the rural homes in Fairbanks which have each contributed their own unique flavor to his unmistakable, ever-changing bouquet.

Not that my client does not proudly acknowledge his "Pepe Le'Pew" presence.

In fact, each Christmas, he generously delivers a large, symbolic block of Hershey's chocolate embossed with his company's logo. He also takes particular pleasure out of sitting in a closed room on a hot day, engaging in unnecessarily protracted negotiations. Successful deals are usually concluded by correspondence, as opposed to a handshake. Not surprisingly, at office parties, he always ends up with the cocktail nut bowl all to himself, despite his espoused willingness to share.

My dog mushing clients also leave behind a unique trail when they enter the office. The combination of dog yard poo and wet fur leaves much to be desired. Quite often, these smells are enhanced, as well, by Number One stove oil.

Although people often complain about cigar and cigarette smokers, not to mention those who partake of pipes, I actually find these individuals to be rather benign with their secondary smoke, as long as they leave the smoke outside of the office. In a sense, tobacco smoke is one of the least intrusive olfactory offenses.

Another confirmation almost always occurs when we walk past the complaining officer's car on the way to the courtroom, and the ordinarily sedate German Shepard erupts to tear the vehicle's upholstery apart while frantically trying to get to my client's emergency stash.

Perfumes, et. al.

Are some of the smells pleasant? The answer is: of course. In fact, some of my clients tastefully use perfume or aftershave in just the right amounts to accent their appearance and to enhance their natural attractivity. Others, however, err on the side of quantity, apparently to deal with not-so-subtle body odor issues. I call it the "Fairbanks Spice Ball Effect."

Several years ago, I had a secretary who was violently allergic to the smell of cheap perfume. On occasion, clients would enter the office slathered in the stuff, whether to impress us or to cover up some other odor. In protest, my secretary would rapidly break into hives. I always questioned the viability of a workers' compensation claim founded upon excessive use of cheap perfume by a client. Moreover, as far as I could tell, it was not one of the Title 7 violations, even though I wisely preferred not to comment on her sensitivity. (Always better to air on the side of caution.) Besides, perfume is not just a "female thing." In fact, one of my male clients prefers a brand of musk known as "Hoppes#9," a respected gun cleaning solvent (not to be confused with Chanel #5.) WD-40 is another masculine aromatic, which comes in both handy liquid and atomizer forms.

Recently, I have begun to realize, however, that there can be a distinct advantage to the excessive use of cheap aftershave or perfume. Although initially a skeptic, it took two completely unrelated cases to convince me of the advantages of an olfactory bombardment of concentrated cologne.

The Oil of Thieves defense

The first case involved a free-spirited woman who lived in the Nenana area. One summer evening, after she had attended a rather famous wild party in the Healy neighborhood, she was pulled over by the local area Trooper on suspicion of driving while intoxicated. Her defense to her poor driving was that she was simply enjoying the entire width of the highway. (After all, isn't that how everyone drives in Healy?)

After the Trooper determined that my client failed her field sobriety tests, the next step was the reputedly reliable Datamaster test. Because Healy was the closest venue to the stop, my captive client was taken to the Healy State Trooper's post for the test. A self-proclaimed spiritualist, while in route, my client religiously anointed herself with an esoteric massage oil known as "the Oil of Thieves," which she kept concealed on her person in a small vial for unexpected metaphysical emergencies. This anointing was done most liberally, my client remembering that it was reportedly the Oil of Thieves which kept the soldiers in Biblical times from finding the Christ child. The Oil of Thieves was also reputed in the Middle Ages to protect those plunderers who preyed upon the helpless, dying victims of the Black Plague, thus giving the goo its name. According to my client, the mystic properties of this oil, with its

Continued on page 29

TALES FROM THE INTERIOR

Malodorous substances yield new defense

Continued from page 28

remarkable curative and restorative powers, could never be underestimated.

So much for scientific opinions. Personally, I thought she was a nut.

However, when I began to evaluate the police report more closely, I soon realized that my client might have stumbled on to something. My first clue was a notation from the Trooper that, upon entering the Healy State Trooper's post with his prisoner, the Datamaster immediately began to develop unexpected operational difficulties.

Recognizing that the prescribed routine for Datamaster testing is that the machine must first take a sample of ambient room air to determine that the air is fresh and pure, the bureaucratic machine obediently attempted its task. It was at that initial point that something went drastically haywire. Apparently, when sucking in room air, the machine immediately gagged and went into an "interfering substance" report, complaining loudly that it could not find enough clean air to breathe in order to zero itself. Without zeroing itself, the machine simply could go no further.

This malfunction was further evident on the audiotape of the processing procedure, during which the increasingly-frustrated Trooper could not get the machine to zero despite his best efforts. After several worthless attempts, the Trooper wisely gave up on the Healy unit and rapidly drove my client to Nenana to use the Nenana machine.

During the hot trip to Nenana, the Trooper could be heard complaining several times on the audiotape to my client that his entire car stunk miserably. My understanding was that the one hour drive to Nenana was conducted with the vehicle's windows being kept wide open, in a frantic attempt to air the vehicle out.

Upon arrival in Nenana, the same scene took place. Once activated, the Nenana Datamaster, (perhaps having learned of the problems in Healy through some sort of cyber-machine communication) immediately went into its own version of a breath test boycott. After several more attempts to persuade the machine take a reading, the Trooper finally conceded that the Datamaster either could not or would not work. A desperate call to Fairbanks AST for a late night technical solution was equally unsuccessful, and even dragging the device into the outer hallway to try to find marginally clean atmosphere was also an equally useless exercise.

Wanting to prove to the Trooper that the Oil of Thieves actually had magically removed all alcohol from her system and that it was not simply a celestial misalignment of the stars as suspected which caused the dual malfunctions, my client foolishly offered to have her blood tested. That was one of her big mistakes, (next to driving in the first place). To her surprise and later denial, subsequent analysis remarkably showed that the Oil of Thieves apparently was not as effective as represented in the tabloid advertisements. According to two separate laboratories of non-believers, my client had clearly exceeded the legal blood alcohol limit. Fortunately, the Trooper seized both blood samples without obtaining a prior search warrant for one of them, while improperly testing the other which was the defendant's reserved sample, and we were able to do some good in the case.

To assist in her defense, my client gave me my own cherished bottle of Oil of Thieves to use in the courtroom demonstrations. As Fairbanks Assistant District Attorney Jason Gazewood will attest, the stuff stunk terribly.

Each time I opened my file in the courtroom, everyone's eyes watered. Before the case concluded, even threatening a court appearance by telephone became intimidating.

Besides the obnoxious smell, what I found most intriguing about the Oil of Thieves was that there were also certain Constitutional First Amendment Rights of Freedom of Religion implicated, insofar as a person might conceivably demand that they be anointed with the Oil of Thieves prior to taking the Datamaster test, as part of their religious beliefs. We never got that far, however. As expected, a deal was cut.

The "Red" perfume case

After my experience with the Nenana case, I chalked the Oil of Thieves theory up simply to an aberration. Because very few stores in Fairbanks carried the product, I figured that the issue was over. It was not until recently, however, when I learned that there was clear validity to the concept. This confirmation came when another driver was stopped for allegedly being intoxicated. True to form, the individual failed the field sobriety tests, and was transported this time to the Fairbanks police station to provide a breath test. All field tests indicated a substantial probability that the individual likely was intoxicated, but the local Datamaster again thought otherwise.

Apparently, this individual, wanting to subdue various males in the Alaskan Interior, had generously doused herself with a rather expensive perfume known as "Red." To say that the perfume is expensive is an understatement. In fact, after this report is published, the price of the designer fragrance will undoubtedly skyrocket. Moreover, I suspect that more men than women will be using it on weekend nights. Viagra has finally met its match.

After arrival at the police station, the distraught suspect was taken to the Datamaster testing room. As soon as it was activated, the Datamaster curiously reported that it could not function due to "interfering substances." As with the previous Healy/Nenana episode, several unsuccessful attempts were again made to zero the machine. Eventually, the bedraggled police officer simply gave up on his efforts to have any Datamaster test performed due likely to City of Fairbanks overtime issues. In future years, discovery may well show that the machine was retired from service shortly thereafter on the grounds of an unexplained malfunction – but science knows otherwise.

Competent legal research indicates that there is currently no law in Alaska against wearing strong perfume, heavy cologne or cheap aftershave. In time, I suspect Alaska's usually idle legislature probably will pass a statute prohibiting such anti-social conduct, as well.

Meanwhile, in the event that somebody decides to splash themselves with aftershave, massage oil, cologne or perfume before the police officer actually decides to arrest them for a DUI, I see no glaring violation of law. Admittedly, all car windows will have to be kept open, eyes may water and become bloodshot, and people may think that certain rowdy men have developed questionable contrary persuasions. Such social judgments are always a risk, of course.

But, on balance when faced with the dreaded possibility of a successful DUI prosecution, or the politically-incorrect social conclusion being reached by some simple-minded rednecks that a particularly "masculine" individual may not be so macho after all, I strongly recommend that all self-respecting males strive to become more closely in touch with their feminine side. This is especially important when venturing out on the town to the local country/western bar known for its DUI clientele. After all, what's the big stink, fellas?

TVBA RESOLUTION
September 10, 2004

The Tanana Valley Bar Association,

Deploring in the strongest terms the despicable and treacherous act that has taken place, wherein someone has taken the Anchorage Bar Association's banner;

Alarmed by this act of extreme indifference to the sensitivities of our colleagues south of the range;

Noting with regret that the Tanana Valley Bar Association does not know anything about the disappearance of the banner;

Calls upon OJ, while out looking for his wife's killer, to keep an eye open for the banner.

At 2004 dinner, Territorial Lawyers and guests gather for their annual group photo.

Territorial lawyers gather for annual dinner

Continued from page 1

teller.

Barry Jackson, who came to Alaska in 1958, remembers that when he arrived "the criminal cases had priority." Jackson never had a civil case under Judge Vernon D. Forbes of Fairbanks, the last federally-appointed district judge in Fairbanks while Alaska was a territory.

Charlie Cole, Forbes' first law clerk, noted that Forbes' patron was William Langer of North Dakota, elected to the U.S. Senate four times. Judges sent from "the states" always had a patron. Forbes seems to have been competent enough, but he made no friends in 1955 when he openly accused the Alaska legal profession of a "low standard of ethics." The occasion for his remark was a disbarment hearing, but he mostly seems to have been exercised by critics of Judge George W. Folta of Juneau. Folta had a running feud with lawyer-legislator Warren Taylor of Fairbanks, expressed openly in the newspapers.

In retrospect, Forbes' charge seems unfair, but the territorial lawyers conceded there was a certain amount of legal sloppiness, especially in probate and estate matters. Some probate cases dragged on for years, usually because there were no heirs in Alaska to push for closing. The heirs of a North Dakota man who died in Fairbanks in 1941 received a closing check only after John F. Kennedy was elected president.

If as Barry Jackson suggests, "criminal cases had priority" there was a reason — criminals kept the court busy.

For all the growth and prosperity Anchorage and Fairbanks enjoyed during the Cold War, they could be tough towns. A newspaper story from the Golden Heart City describes a prostitute chasing an airman down Cushman St., the main route into the city, shooting at him as he pulled on his pants in what the reporter called "a dispute over personal services."

Territorial court records show local police repeatedly used vagrancy laws to harass prostitutes. One woman in Fairbanks, who went by three different names, was arrested on vagrancy charges three times in one day. Indictments also could remain open indefinitely. In a celebrated Fairbanks case, the murder of businessman Cecil Wells, Johnny Warren was indicted in 1953 but never brought to trial. The indictment was not dismissed until 1960, after Alaska became a state.

Russell Arnett recalls the importance of the U.S. commissioners to the territorial legal system — having been one himself for 10 months in Nome. The commissioners handled misdemeanors, probate, marriage, and divorce as well as sanity hearings.

Sanity hearings were of obvious importance yet were subject to abuse; a fair reading of territorial records suggests that before World War II, on occasion those who went to the authorities to express concern about a neighbor's sanity were motivated by revenge.

Commissioners varied widely in education, ability, and commitment to the job. They were not required to be lawyers. It's common to read about commissioners who were dismissed for dereliction of duty; it's also com-

Continued on page 31

A Lawyers' Banquet of Yesteryear

The Fairbanks papers reported the first bar banquet in the Tanana Valley, April 28, 1903 at the Tokio Restaurant. Seven Fairbanks attorneys advertised their services at the time. They were joined at the banquet by local miners and businessmen.

Bill of Fare

Hooch - Chena Cocktails
Consummé
Olives
Chicken mayonnaise, Oyster Patties
Sauterne
Wine jelly, Cream Sauce
Roast Moose, Prospector Style
Mashed Potatoes, Green Peas
Ice Cream - Yuma Canned
Nuts, Raisins, Cheese, Coffee
Cigars

After dinner, Judge James Wickersham offered the first of many toasts - to Fairbanks.

Larue Hellenthal, Joy Burr and Don Burr enjoy dinner.

Vic Carlson and Bea Rose meet at the buffet.

James von der Heydt and Helen Simpson renew their acquaintance.

L-R: Bob Ely, Barry Jackson, and Della Colver Barry await dinner.

Territorial lawyers fill up the Petroleum Club's dining room in July.

Some Lawyerly Statistics

How many lawyers were there in the "old days"?
Tewkesbury's "Alaska Business Index" for 1947 lists 69 attorneys practicing in Alaska. Twenty-two of them were in Anchorage, 17 in Juneau, 9 in Fairbanks, and 9 in Ketchikan. Nome, with 4, was the only other community with more than one.By way of contrast, Alaska had more than 200 licensed fur buyers in 1947.

In 1961, an Anchorage Daily News headline announced ALASKA LAWYERS FEWEST IN NATION. According to the American Bar Association, Alaska had 198 attorneys, less than half the number of the state with the second-lowest total, Hawaii.

Photos by Tim Lynch

Territorial

Continued from page 30

mon to find commissioners who made Herculean efforts to provide justice. For example, several commissioners involved in estate cases went to great lengths to find heirs as far away as Europe and Australia. On occasion, these heirs were convinced their Alaska relative died rich, an assertion that moved Commissioner Gus Benson of Manley Hot Springs to explain to an heir that his uncle didn't own a gold mine, he owned a hole in the ground.

LaDessa Nordale of Fairbanks was one of the best of the Interior commissioners. A Phi Beta Kappa graduate of the University of Idaho, she taught business administration at the University of Alaska in the Twenties before being forced to give up her teaching career when she married (the president of the university did not believe married women should work). Lawyers who saw Mrs. Nordale in court remember she approached her work with care, maturity and discipline.

Some of the lawyers in attendance at the event were asked — a totally unscientific poll — "It's 1958. Who would you get to defend you if your life depended on it?" The totally unscientific answer was Wendell Kay (see photo insert) or Stanley McCutcheon. McCutcheon, born in Anchorage in 1917, "read law" with George Grigsby and was admitted to the bar in 1939 at age 21. He quickly went into politics winning election to the territorial House of Representatives, and taking the seat of his father, H. H. McCutcheon, who was elected to the Senate.

Stanley McCutcheon was both the youngest territorial House member and youngest speaker. After statehood, he was a member of the Alaska Bar Association Board of Governors.

What made McCutcheon such an outstanding lawyer? "He hadn't been to law school and wasn't saddled by the orthodoxy of legal educations" says territorial lawyer Kenneth Atkinson. "He always thought outside the box. Plus, he was naturally gracious and had a great court room presence."

While Stanley McCutcheon was born in Alaska, most territorial lawyers came from "the states." Kenneth Atkinson was a young man from Iowa. Joe Henri from New York State. Henri and his wife, Aletha, married after meeting on a blind date in Washington D.C., where he worked for Sen. Ernest Gruening. Dinner the night before the wedding was at Gruening's house, and the next day Sen. Gruening gave away the bride.

The late Cliff Groh also was from New York State, although he came to Alaska in 1952 from Albuquerque,

Continued on page 32

Wendell Kay and his wife, Aggie.

Judge J.L. McCarrey Jr. (left) and Judge Thomas Murphy.

George McLaughlin

John Manders

From the good old days of the 1940s, territorial lawyers remembered

John Manders (1895 - 1973) practiced law for more than 50 years. A graduate of the University of San Francisco Law School, he was admitted to the Alaska bar in 1941 after coming north at age 46. Manders was mayor of Anchorage (1945-1946) and active in civic organizations. From his 4th Avenue office, he was a vocal opponent of statehood, a stand that did not endear him to many in the Anchorage bar.

George McLaughlin (1914-1958) came to Anchorage and quickly became well known for his legal ability and civic contributions. He was especially active in juvenile justice and youth issues: The McLaughlin Youth Center in Anchorage bears his name. McLaughlin was a graduate of Fordham University law in the Bronx and a decorated World War II veteran. He served as Anchorage city magistrate - an elected position - in the early '50s and was chairman of the Judiciary Committee at the Alaska Constitutional convention.

Judge J.L. McCarrey (1906-1992) was a missionary, a salesman and from 1945 a member of the Anchorage bar. In 1952, McCarrey, a graduate of the University of Utah law, was appointed federal judge for Alaska's 3rd Judicial District. He is seen here (left) with U.S. District Court Judge Thomas F. Murphy of New York City (right) who was in Anchorage in 1957 to address a backlog of cases, a practice common at the time. McCarrey handled some 36,000 cases as territorial judge but is remembered by one territorial lawyer as a master of the malapropos, having described the arguments before him as "diabolically opposed."

Wendell Kay (1913-1986), seen here with his wife Aggie, was a noted criminal-defense lawyer but had a long career practicing a variety of law. A graduate of Northwestern Law, he entered private practice in Anchorage in 1948. Kay was politically active for most of two decades, serving in the territorial and state legislatures. He was a candidate for governor (1966) and the U.S. Senate (1970). John Rader, a member of the territorial bar, calls him "a generous man, and at the top of list for cutting through the clutter and coming to a reasonable agreement about a case. He was a man of his word — always."

Photos courtesy of the Anchorage Daily News, Anchorage Times archive

Russ Arnett (left) and Gene Williams guard a purse at the table.

L-R: Russ Arnett, Gene Williams, Jack Roderick and Roger Cremo, debate a point.

Priscilla Thorsness strolls past annual dinner photos.

Territorial Lawyers gather

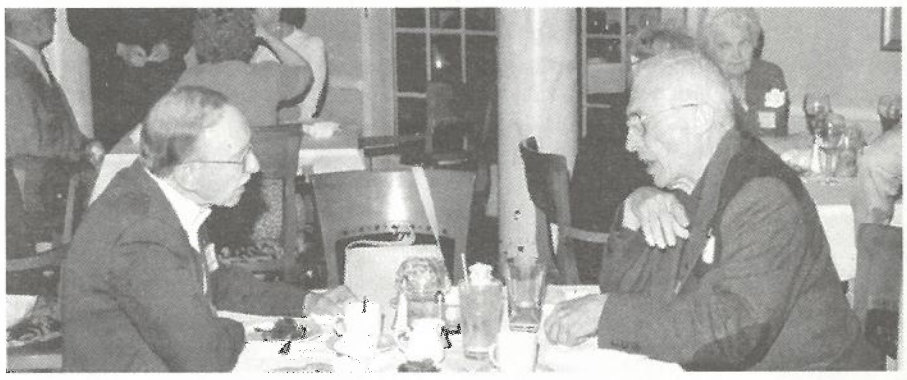
Continued from page 31

where he had attended the University of New Law School. Lucy Groh, his widow, remembers "He said he wanted to go to Alaska for a couple of weeks. I landed here in the middle of the night with no idea I would stay."

What was the Anchorage the Grohs settled in like? Lou Jacobin, whose "Guide to Alaska" rivaled the "Milepost" in influence during the Fifties described Anchorage as follows:

> Today estimates of the population of the entire Anchorage area range as high as 65,000 people. Today's Anchorage is a fabulous, sometimes strange metropolis. It is a mixture of the Old Frontier and the Machine Age — a city where a sled pulled by a team of yelping Malamutes can be seen alongside a 1956-model automobile. It is a town peopled by both sourdoughs and sophisticates, trappers and bankers, parka-clad Eskimos and gals in evening gowns."

This was the Anchorage many of the territorial lawyers and their guests remembered — in an era they recalled with affection and humor.



Virgil Vochoska and Jamie Fisher relax after dinner.

Aletha Henri, Vic Carlson, Bob Erwin and Joe Henri chuckle in the Petroleum Club hallway.

Joyce Strachan, John Strachan and David Ruskin reminisce.

TERRITORIAL JUSTICE 100 YEARS AGO

A Court Reporter's Comments, 1904

The trial of Cornelius Cronin, who on a warrant sworn out by 'Hot Air Bob' Harold was brought from Birches to Rampart, a distance of 135 miles, on a charge of the larceny of five cords of wood, was heard before a jury last Saturday. The jury was out barely ten minutes and returned a verdict of acquittal. The trial and charge was one of the most farcical ever heard in Rampart, and 'Hot Air Bob' accused the defendant's attorney of handing him 'bull con' and criticized the court for allowing it. Bob escaped scot free and the government paid the costs. - The Alaska Forum, a Rampart newspaper, April 30, 1904.

Extra dry and extra-judicial:

A wine lover's guide to judicial ethics

By Peter Aschenbrenner

The wine connoisseur reads the label's "extra dry" to mean that the wine is *not* dry. Does extra-judicial mean *not* judicial?

"Judicial power" is the phrase found in state and federal constitutions and thanks to John Marshall, the power to say what judicial power *is* is also one of the powers of the judiciary. Recent (inherent) authority on this point is provided by *Anderson v. ABA*, 91 P.3rd 271 (Alaska)[Supreme Court has "inherent authority to regulate the practice of law"].

There may be some circularity here, but let's digress to another exercise: if a distant observer were to list all of the things that judges had the power to do, the observer would have to list the power to make the list as one of the powers. The alert reader can refer back to *BarRag*, November-December 2003, in which the Russellian paradox is mooted: Tortoise is torturing Achilles with endless listmaking. Russell and Carroll struggled with much the same problem, describing a designed interaction in venue.

Back to *extra-judicial*. Is it everything that is not judicial? Or is it a turf of its own, lying just about the horizon of judging, of somewhat less scope than judging? A doughnut; perhaps not an extra-fat one. Take what judges do, as time and motion, in chambers and on the bench. Where do they extra-judge?

Some answers can be found in Canon 4 of the Code of Judicial Ethics. "A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations." Do's and don't's abound, with a poverty of do's. Judges attend fundraisers, give speeches, write, buttonhole lawyers and powers-that-be, are solicited to exhibit The Robe on the dais or letterhead of some organization that has a blade to grind, fine or blunt.

In 2003 the Alaska Supreme Court amended RPC Rule 6.1, titled "Pro Bono Publico Service": a lawyer should "aspire to render at least 50 hours of pro bono publico legal services per year", which, for judges, may be fulfilled by participating "in activities for improving the law, the legal system or the legal profession." The Judicial Conduct Commission's Advisory Opinion #2004-01 applies this aspirational standard to judges. It may be worthwhile to ask how the Supreme Court came to tell judges what to do (extra-judicially) by telling lawyers what to do in RCP 6.1.

Article IV, Section 4 (Alaska Constitution) requires that judges be "licensed to practice law in the State" and codelaw (for each level of the judicial pyramid) elaborates that they must be "engaged for not less than [ ] years immediately preceding appointment in the active practice of law, and at the time of appointment be licensed to practice law in the state." AS 22.05.070 and so forth. But a judge who is "sitting as a judge in a state ... court" is deemed to be engaging in "the active practice of law," which may supply, in reverse, the authority for constitutional bodies such as the Supreme Court and Judicial Conduct Commission to regulate the extra-judicial conduct of judges, when lawyering is regulated, so that judges are deemed to be lawyering when they judge.

Of course, judges "may not practice law ... " via AS 22.05.130, so this codelaw tells us that *if* judges judge then they are actively practicing law *but if* they practice law, then they are breaking the law. And now we know (perhaps) that when judges extra-judge they are also deemed to engage in the "active practice of law."

Which leaves us with the Supreme Court talking to judges as lawyers in Rule 6.1, rather than addressing judges quâ judges as the Commission has (at least) done this spring.

So what's going on out there in Canon 4-land? Plato's *Gorgias* may have an answer. I can tell you a story and exercise my performance talent to entertain you; I'm taking a chance here. I can try to persuade you of some point, for the purpose of getting you to articulate a shouldness to my satisfaction. Now the risk is even greater. But if I try to get you to persuade me, I have taken on the greatest risk, if only because I have to get you to buy into a designed interaction between us, in which you're working hard, but I'm working harder. The heavy lifting of getting persuaded is so freighted with pain that Plato said it was the same pain that a doctor must inflict on his patient to restore health. So it hurts when your soul is improved in dialogue, at least when you're in venue with Socrates.

Plato contrasts this heavy lifting with rhetoric, which, he says, is designed to flatter the listener. It wouldn't make any difference what you say to your dialogue partner: the sophist, the rhetorician and the advocate have got the easier job. "What is there greater than the word which persuades the judges in the courts ... ." 452e. Gorgias is speaking and Socrates turns this position around. The "power to convince" makes the persuadee that one with the more difficult job, her soul accepting restraint, chastisement and even pain for the sake of justice. (Lawyers were condemned to traffic in lesser virtue, at least until Aristotle created the art of corrective justice.)

Now imagine that judges step outside of the relationship of advocate and persuadee (a word too ugly to be kidnapped) and let them comment on how that interaction is designed. A judge might explain to pro se litigants how to make a motion in court, or how to write an opposition to a written motion. This is exactly the place where Socrates pontificates, to the utter disgust of his host Callicles and fellow guests: how should *they* behave in discourse with Socrates. Of interest here is that Socrates browbeats each and every one of these men in the art of persuading Socrates, and, in so doing, Socrates makes himself the evening's butthead. Socrates, at Plato's literary whim, is goading his fellow participants in dialogue to persist in *their* persuasive efforts, so that *his* soul may be bettered.

On the other hand, we have the Supreme Court to thank for directing judges to do something with their judicial talent, in extra-judicial turf. When judges show litigants *how to*'s and *what not to do*'s they render service that falls within Rule 6.1. The Supreme Court justices were much more genteel in calling on this aspirational effort than Socrates in the *Gorgias*; perhaps that's because, in the last 24 centuries, we've all learned a lot about making venue work.

Alaska Bar Association Ethics Opinion 2004-3

Responsibilities of an Attorney When a Client Cannot be Contacted.

Question Presented

The Committee has been asked whether a lawyer may file a lawsuit where the statute of limitations is expiring and the client cannot be contacted. The facts presented are these:

A cruise ship passenger was injured in a fall from the gangway to the Juneau dock. A year after the injury, and a year before the statute of limitations expired, the passenger telephoned an Alaska personal injury lawyer and said he wanted to file a lawsuit. The lawyer interviewed the passenger, and told him that she would need to conduct an investigation before deciding whether to take the case.

The lawyer pursued the investigation and decided that the passenger has a colorable claim. Certain facts indicate comparative negligence, but if liability is proved damages will be substantial. The lawyer was not in contact with the passenger during her investigation. Shortly before the statute of limitations ran, the lawyer sent the passenger a letter with questions about the problematic facts together with a proposed contingent fee agreement for signature. The lawyer has tried to reach the passenger by phone several times without success.

The statute of limitations is about to expire. The lawyer is reluctant to file suit without the client's authorization and a signed engagement letter in the file, and is concerned that she may not do so under the ethical rules. May the lawyer file a lawsuit under these circumstances?

Conclusion

The Committee concludes that that the lawyer may file the complaint if the lawyer reasonably believes that the passenger has authorized her to file suit and is relying on her to do so, or if she believes that failing to file would materially and adversely affect the client's interests. See, Alaska Rules of Professional Conduct 1.3 and 1.16.

Analysis

There are several closely interrelated ethical issues that led to the lawyer's dilemma.

1. No Written Agreement. To start with, there is a lack of certainty about the scope of representation. It is not clear whether the client understands the lawyer limited her activities to an initial investigation. The client may believe the lawyer is going to file suit if she decides the case has merit, and may be relying on her to do so. The lawyer, on the other hand, seems uncertain whether an attorney-client relationship has been established at all. There is no written engagement agreement or letter describing the parties' understanding.

Alaska Rule of Professional Conduct 1.2(c) allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation."[1] The Committee believes that, when a lawyer agrees to investigate a case without charge, but has not agreed to take it, the lawyer has undertaken a limited representation. Although this type of limited representation is possible without a signed fee agreement,[2] the Committee's view is that the better practice would have been for the lawyer to have memorialized what she agreed to do in a letter.[3]

2. Diligence. The next issue relates to Alaska Rule of Professional Conduct 1.3 ("Diligence"), which states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client," and to Rule 1.4 ("Communication"), which provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf ...."

In this instance, the lawyer apparently did not finish her investigation until the statute of limitations was about to expire. There may be circumstances beyond her control that caused the investigation to take this amount of time. The Committee recognizes that even the most diligent lawyer can encounter difficulties and delays. Nonetheless, completion of the investigation just before the statute expires indicates a potential lack of "reasonable diligence and promptness."

Then, at that very late date, the lawyer requested additional information about the problematic facts and presented a contingency fee agreement for signature. Contacting the client when the statute of limitations is about to expire is not conducive to a reasoned discussion of the costs and benefits of any lawsuit, especially when it appears there are factual issues that might dissuade the client from proceeding. The Alaska Comment to Rule 1.4 notes that the "client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." Communication as the investigation proceeded would have provided the client with a better opportunity "to participate intelligently in decisions concerning the objectives of the representation," and also might have provided the lawyer with timely information about whether the client still wanted to file a lawsuit.

3. Protection of the client's interest. Given these circumstances, the lawyer is faced with either filing a suit without the express consent of the client or abandoning the matter. Protection of the client's interests is the paramount concern. Either course is potentially to the client's detriment. If the suit is filed, the client may be exposed to defense fees and costs, and may have personal medical information disclosed in the public record. If the suit is abandoned, the claim will be barred.

The scope of representation issue remains central. Comment to Rule 1.3 notes that "[u]nless the [attorney-client] relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter is resolved." The scope of the "matters undertaken for [the] client" here is poorly defined. The Committee cannot say with certainty that the lawyer has "carried through to completion all matters undertaken" for this client, nor that the client has acted in such a manner as to justify termination of representation.[4]

The lawyer needs to carefully consider her dealings with the client. If the lawyer reasonably believes that the passenger has authorized her to file suit and is relying on her to do so, nothing in the ethical rules to bars her from proceeding. Indeed, she may be obligated to file by Rule 1.3. On the other hand, if, after considering all the facts and the factors listed in Rule 1.16(b), the lawyer concludes that withdrawal is appropriate, she may terminate the representation.[5]

The second route does not completely resolve her dilemma. Termination under Rule 1.16 is permitted only if it "can be accomplished without material adverse effect on the interests of the client ..." When terminating representation, the lawyer is obligated by Rule 1.16(d) to "take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client...." The Comment to Rule 1.16 emphasizes that "[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client."

The lawyer may conclude that terminating representation is appropriate, but that failing to file would "materially and adversely affect the client's interests" within the meaning of Rule 1.16(b). If those are her conclusions, the lawyer may ethically file a complaint and then proceed to withdraw as counsel of record in accordance with the rules of court. The complaint should be drafted so as not to unnecessarily disclose any confidential information otherwise protected by Rule 1.6.

The decision as to how to proceed must be made by the lawyer. In future matters, the Committee recommends that the lawyer memorialize her agreements with clients in writing, that she make every effort to complete pre-complaint investigations promptly, and that she communicate with her clients as regularly and diligently as circumstances warrant.

Approved by the Alaska Bar Association Ethics Committee on May 6, 2004.

Adopted by the Board of Governors on September 13, 2004.

(Footnotes)

1 Alaska Rule of Professional Conduct 1.2(c), am. SCO 1544 (eff. 10/15/04).

2 Alaska Rule of Professional Conduct 1.5 requires a written fee agreement where the fee is expected to exceed $500 or where the fee is contingent on the outcome of the matter.

3 The most exemplary practice would have been a limited representation agreement signed by both parties. The Comment to Alaska RPC 1.16 notes, "A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concern[ing] fees or court costs or an agreement limiting the objectives of the representation." The Committee observes that many Alaska engagement agreements require the client to remain in contact with the lawyer as an express condition of continued representation. A client's unexplained disappearance or failure to communicate as agreed will then provide a basis for withdrawal. A limited representation agreement could have such a provision, which under these circumstances would have been prudent.

4 Rule 1.16(b)(5) provides that a lawyer need not continue representation when "the representation has been rendered unreasonably difficult by the client." At least one other Bar Ethics Committee relied on this rule to conclude that a lawyer hired on a contingency fee basis in a personal injury matter who is unable to locate her client, despite diligent efforts to do so, can assume that the representation has been terminated and is not obligated to file suit on the client's behalf. South Carolina Ethics Op. 98-07; http://www.scbar.org/opinions/9807.htm. That opinion is distinguishable, since in this instance there is no signed fee agreement, and it is an open question whether "the representation has been rendered unreasonably difficult by the client" or by the lawyer herself.

5 Withdrawal under Rule 1.16(b)(4), (5) or (6) is potentially appropriate in these circumstances.

Children in Alaska's courts

Children in Alaska's Courts, a community forum sponsored by the Alaska Court System with support from the State Justice Institute, was held July 12, 2004, in the Dimond Courthouse in Juneau. The third forum in a five-forum series, the Juneau session brought over 35 members of the Juneau children's justice community together for an afternoon of roundtable discussions on what's working and what isn't in the court system's responses to cases affecting children. Roundtable participants were asked to identify the strengths and weaknesses in four types of proceedings, namely Child in Need of Aid, Juvenile Delinquency, Domestic Violence and Divorce/Custody. They were then challenged to propose solutions to any problems identified. Following the roundtables, the recommendations generated were presented at a public forum attended by many concerned members of the community, who where also invited to offer comments and recommendations. To date, successful forums have been held in Barrow (April 9), Anchorage (May 19), Juneau (July 12), and Fairbanks (September 15). The final forum will take place in Bethel on Wednesday, November 10, 2004. All information gathered at the statewide sessions will be included in a final report on the Children in Alaska's Courts project that will be completed by the end of the year. For further information about the project, please contact the Alaska Court System at 907-264-8230.

Judge Larry Weeks, Presiding Judge of the First Judicial District (foreground) served as facilitator of the Child in Need of Aid Roundtable at the Juneau Children in Alaska's Courts forum. Participants in the roundtable included, L-R: Le Florendo, Tlingit-Haida Central Council; Robert Meachum, Public Defender Agency; Judge Weeks; Jeannie Hale, Office of Children's Services; Janine Reep, Office of Public Advocacy (standing); Lauree Hugonin, Alaska Network on Domestic Violence and Sexual Assault; Martha Stevens, CINA Mediator; and Jan Rutherdale, Attorney General's Office.

American Bar releases 2004 lawyer population stats

• The American Bar Association's latest national lawyer population survey tallies Active and Resident members in each state (to avoid duplication). Alaska's population is shown at 2,281 for 2004. However, when Inactive and Active-out-of-state members are included, there are actually 3,628 members of the Alaska Bar.

• Among other statistics, the annual survey indicates that five states have fewer lawyers than Alaska: Delaware, North Dakota, South Dakota, Vermont and Wyoming. New York and California are by far the largest lawyered states.

• The highest growth areas for lawyers from 1998 to 2004 were North Carolina (28%) and Utah (25%). Alaska's active and resident lawyer population grew 4% during this period.

• South Carolina, South Dakota and Virginia had the highest percentage of male lawyers (88%) in 2004, with the lowest percentage found in Delaware (60%), compared to the national average of 78%. In Alaska, 69% of attorneys are male.

• Full charts are at www.abanet.org/barserv/statebars2004.pdf

American Bar Association
National Lawyer Population by State*
1998-2004

STATE		1998	1999	2000	2001	2002	2003	2004	Index 1998/2004
Alabama [1]	AL	8,231	10,376	10,897	11,144	11,426	9,697	12,092	147
Alaska	AK	2,198	2,237	2,209	2,253	2,255	2,257	2,281	104
Arizona	AZ	10,849	10,585	10,683	10,901	11,172	11,376	12,006	111
Arkansas [2]	AR	7,000	5,700	5,350	4,992	5,100	5,144	5,200	74
California	CA	119,494	126,829	128,553	131,139	132,452	134,468	136,571	114
Colorado	CO	15,057	17,085	19,157	16,422	20,000	17,038	17,362	115
Connecticut	CT	16,317	17,117	16,918	17,560	19,000	17,839	18,066	111
Delaware	DE	1,828	1,880	1,986	2,040	2,022	2,118	2,234	122
Dist. of Columbia	DC	33,169	34,401	37,518	38,446	39,393	41,055	41,721	126
Florida	FL	46,671	47,841	49,139	50,342	51,468	52,967	54,643	117
Georgia	GA	20,820	21,268	21,362	22,254	23,134	23,698	24,367	117
Hawaii	HI	3,732	3,727	3,713	3,788	3,794	3,772	3,886	104
Idaho	ID	2,569	2,755	2,859	2,735	2,927	2,934	3,045	119
Illinois [3]	IL	60,439	61,665	63,113	65,231	68,321	54,155	57,531	95
Indiana	IN	11,500	11,947	12,234	12,480	12,620	12,581	13,640	119
Iowa	IA	6,354	6,435	6,433	6,526	6,574	6,611	6,734	106
Kansas	KS	6,848	6,957	6,968	7,095	7,178	7,302	7,383	108
Kentucky	KY	9,757	10,026	10,310	10,417	10,549	10,722	10,912	112
Louisiana	LA	15,353	15,614	15,819	15,975	16,128	16,357	16,638	108
Maine	ME	3,266	3,246	3,268	3,055	3,404	3,249	3,383	104
Maryland	MD	18,436	19,680	18,776	19,943	19,870	20,855	20,603	112
Massachusetts	MA	41,184	41,800	42,701	43,775	46,608	46,622	48,650	118
Michigan	MI	33,450	29,306	29,732	29,928	30,330	30,795	30,734	92
Minnesota	MN	16,593	17,508	18,793	20,183	19,354	19,850	20,057	121
Mississippi	MS	5,600	5,720	5,809	5,925	6,015	6,152	6,361	114
Missouri [4]	MO	14,080	16,807	16,681	20,682	19,764	20,252	20,252	144
Montana	MT	2,569	2,759	2,597	2,652	2,671	2,656	2,675	104
Nebraska	NE	4,726	5,381	4,760	4,768	4,743	4,828	4,905	104
Nevada	NV	4,638	5,098	4,257	4,447	4,640	4,587	5,091	110
New Hampshire	NH	3,013	3,000	3,010	3,038	3,061	3,100	3,132	104
New Jersey [3]	NJ	51,785	53,125	54,581	55,687	36,785	36,860	37,172	72
New Mexico	NM	4,639	4,696	4,749	4,741	4,748	4,803	4,922	106
New York	NY	118,188	110,214	117,781	117,781	122,739	137,108	140,479	119
North Carolina	NC	13,223	14,881	15,239	15,678	16,105	16,534	16,912	128
North Dakota	ND	1,336	1,314	1,324	1,309	1,294	1,297	1,297	97
Ohio	OH	37,319	33,931	32,767	34,435	33,211	33,974	34,856	93
Oklahoma	OK	10,267	10,429	11,335	11,397	11,531	10,633	10,719	104
Oregon	OR	9,724	9,870	9,727	9,835	10,048	10,350	10,494	108
Pennsylvania	PA	39,020	40,175	39,646	40,422	40,575	40,562	41,193	106
Puerto Rico	PR	9,467	9,892	10,195	11,071	10,947	11,209	11,191	118
Rhode Island	RI	3,762	3,975	3,976	4,465	4,490	5,135	4,764	127
South Carolina	SC	7,087	7,442	7,645	7,505	7,615	7,571	7,355	104
South Dakota	SD	1,562	1,570	1,592	1,609	1,606	1,605	1,627	104
Tennessee	TN	12,356	12,626	12,915	13,056	13,354	13,513	13,724	111
Texas	TX	57,950	58,713	60,047	64,461	62,425	64,593	65,983	114
Utah	UT	4,724	4,891	4,967	5,087	5,362	5,368	5,919	125
Vermont	VT	1,995	2,012	1,807	2,050	2,307	2,223	2,182	109
Virgin Islands	VI	423	426	432	444	514	400	450	106
Virginia	VA	19,034	18,649	18,002	19,023	19,500	19,795	20,129	106
Washington	WA	18,055	18,335	19,770	19,920	19,544	20,770	21,300	118
West Virginia	WV	3,837	3,918	3,985	3,971	4,072	4,175	4,290	112
Wisconsin	WI	13,087	13,258	13,079	13,514	13,639	13,813	14,030	107
Wyoming	WY	1,340	1,348	1,296	1,306	1,367	1,334	1,361	102
TOTAL		**985,921**	**1,000,440**	**1,022,462**	**1,048,903**	**1,049,751**	**1,058,662**	**1,084,504**	**110**

* Individual state bar assoications or licensing agencies are asked each year to provide the number of resident and active attorneys.

[1] In 2003, Alabama was able to provide the total number of resident and active attorneys. In all other years, the number reflects all resident attorneys - regardless of whether they were active or not.

[2] In 1998 the figure for Arkansas represents all licensed lawyers in the state. Starting in 1999, Arkansas was able to report only resident attorneys.

[3] For a number of years Illinois and New Jersey were only able to provide the total number of active lawyers - regardless of whether they were residents of the state or not. In 2003 the number for Illinois is reflective of only residents who are active, so the decrease is due to greater accuracy in counting. The same is true for New Jersey starting in 2002.

[4] Missouri changed database providers in 2001, so the increase is due to greater accuracy in counting. In 2004, Missouri was unable to provide the current number of resident and active attorneys due to system issues. The 2003 figure was used.

Teaching Justice Network receives grant

The Alaska Teaching Justice Network (ATJN), a program co-sponsored by the Alaska Court System and the Alaska Bar Association, recently received a grant to promote civic learning in Alaska's public schools from the national Campaign for the Civic Mission of Schools. Together with a coalition of justice and education groups that includes the University of Alaska Anchorage, Alaska Department of Education and Early Development, Alaska Legislative Affairs Agency, Alaska Native Justice Center, Center for Civic Education and United Youth Courts of Alaska, the ATJN will conduct research to identify resources for K-12 civic learning and to assess the state of civic knowledge and experience of Alaska's youth. Surveys and focus groups for students, parents and community members will be developed and conducted by UAA's Institute of Social and Economic Research and College of Education. The research, which will take place over the next two years, will form the basis for recommendations to strengthen civic education in the state. Recently, coordinators for the project attended a conference on law-related education in Washington, D.C., sponsored by Youth for Justice, where the grant awards were first announced, L-R: Prof. Diane Hirshberg, UAA Institute of Social and Economic Research; Barbara Hood, Alaska Court System; and Prof. Letitia Fickel, UAA College of Education. Eleven other states also received awards.

--Courtesy of Alaska Court System

UPDATE

As the Bar Rag went to press, Jim Clark, Gov. Frank Murkowski's Chief of Staff, told Anchorage news media Sept. 17 that the Governor would appoint a new Superior Court Judge on Sept. 21, from the judicial council's list of 3 candidates. The Anchorage Daily News reported that "The governor never planned to challenge the council's constitutional authority to choose the most qualified candidates for judicial appointments, Clark said. The system Alaskans have used since statehood has worked well...The governor simply wanted to ask the council to use its constitutional authority to 'tweak' its own selection process so more of the qualified applicants for judgeships make it to the governor..."

Craig Stowers was appointed to the bench Sept. 21. "While the process of nominating judges has been much debated during this appointment, that debate should in no way take away from the experience and skills that Craig Stowers possesses," said the Governor.

Selection of judges displeases Governor

Continued from page 1

By Sally J. Suddock

"If it ain't broke, you're not trying"

—"Red Green", Red Green Show, PBS TV, Saturdays.

Not since the last round of aerial wolf hunt controversy has a statewide issue stirred up so much political (and apolitical) fuss.

By now, as the *Bar Rag* goes to press, there can't be an attorney in Alaska who is not aware that the Governor (a) has taken aim at the Alaska Judicial Council; (b) rejected "after careful consideration" the three "most qualified" applicants the council sent forward for his appointment to an Anchorage Superior Court judgeship; (c) wants to look at a bigger pool of candidates; and (d) suggests the constitution's selection process should be revisited.

Nor could it have escaped anyone's notice that this flurry of press releases, op-ed columns, TV and radio sound bites and letters to the editor have morphed into a decidedly partisan (as in Democrats vs. Republicans) issue.

At issue is the role and practice of the judicial council, charged in the Alaska Constitution with the sole responsibility for screening, vetting, and recommending candidates for the Governor's appointment to Superior and Supreme Court judgeships (and, since constitutional adoption, Court of Appeals judgeships.)

Constitutional intent

The members of the Constitutional Convention back at the dawn of Statehood were clear in their intent to create a judicial selection process, based on merit, that would remain non-partisan and free from political influence. And thus the Judicial Council was created to run interference between an ideal, independent judiciary and the likes of ward heelers, political cronies, and campaign contributors expecting a payoff for their loyalty.

The council's authority and the governor's role in the process are clear in the constitution: "The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council." (Another, important, check and balance against potential misconduct among sitting judges was the framers' nod to the plus-side of the "politics" column--by requiring appointed judges to stand in the general election for retention from time to time.)

And although the intent of the Alaska Constitution framers was to elevate these important positions above politics, the convention delegates did not leave the governor out of the loop entirely, nor did it leave the decisions entirely to a clubby group of lawyers. Of the 7 members on the council,

- three attorney members serve 6-year terms and are appointed by the Alaska Bar Association Board of Governors (which is composed of attorneys elected by members of the bar and 2 lay members appointed by the governor;
- another three public (non-attorney) members are appointed by the governor for 6-year terms. (The present governor has appointed one member, and only a 2-term governor can likely appoint 3 members because of term lengths.)
- and the 7th member is the Chief Justice of the Supreme Court, rotating semi-annually. The chief justice votes only to break ties on the council.

Gov. Frank Murkowski, like numerous other governors before him who have groused about the Executive Branch's lack of control over these appointments, touched off the current controversy Aug. 26, when he wrote the judicial council that he rejected the three nominees that the council had selected from among nine attorneys who had applied for the seat to be vacated by Judge John Reese. (An unprecedented move by a governor.)

The council has nominated Sidney Kay Billingslea, Craig B. Stowers, and Jonathon Katcher for the vacancy. (1 Democrat and 2 non-partisan individuals, it should be noted.) Passed up by the council were Samuel D. Adams, Michael D. Corey, Scott J. Nordstrand, Stephen B. Wallace, Diane L. Wendlandt, and Paul S. Wilcox.

The council has declined to revisit its process and reconsider the number of nominees it has submitted to the governor; in a special meeting Sept. 3, the council voted unanimously to let its action stand. "We spent a lot of time and a lot of effort to send him the most qualified," said member Bill Gordon. "We've done what we're supposed to do."

Speaking principally through his chief of staff Jim Clark, the Governor has said that "as the official who must stand for election and is thus accountable to the people for the person selected to be a judge, the governor believes we will have better judges if he is able to choose from among the largest possible pool of qualified applicants."

Murkowski's resistance to the three nominees was quickly seized upon by legislative Democrats as "neo-imperialism" and by the Anchorage Daily News as a "power grab."

From the Governor's perspective, the judicial council's procedure to nominate only the "most qualified" of applicants is overly vague and, perhaps, outdated. "A debate regarding the 50-year-old provision of the constitution is healthy," wrote Clark in an op-ed column Sept. 13.

"We have a much larger, more robust bar now than we did 50 years ago when the framers of the constitution reduced the 'three or more' language in the Missouri Plan model to 'two or more' in the Alaska Constitution...To call such discussion a 'power grab' greatly overstates what is going on here and unfairly attempts to demonize the governor for openly leading this important discussion," Clark wrote. The executive branch has persistently criticized as "secret" the executive-session, deliberation process the council undertakes as its final step in the nomination process, and has pressed the council to define its criteria for selection of the "most qualified" candidates.

Broken, fix it, or not?

Alaska is among five states selected by the American Judicature Society as a model for judicial selection process guidelines for the states. (See Marla Greenstein, Handbook for Judicial Nominating Commissioners, 2d ed., 2004).

And aside from limited debate and controversies that might surround specific judges during retention elections, there has been little discussion in political arenas about the suitability of candidates for the bench until now.

Commentary in the current skirmish appears to be weighing heavily on the side of "it ain't broke."

The Bar Association Board of Governors approved a resolution Sept. 14 saying in part "that the Alaska Constitution for selecting judges has served the people of Alaska exceptionally well for more than 45 years..." (8 yeas, 2 abstentions, one nay.)

Minority (Democratic Party) members of the House and Senate Judiciary Committees have argued vigorously in the media that Alaska's process "has worked well for 44 years—in a transparent process except for (the council's) personal interviews and deliberations," said Sen. Johnny Ellis.

The Alaska Public Interest Research Group leaped into the fray early with a lawsuit (as yet unripe) calling for the governor to be compelled to appoint from the list of

Is merit process for judge selection arbitrary?

Among the issues raised over the judicial nominations process is a perceived lack of definition for determining the "most qualified" of applicants. Significant focus in the discussion has been placed on the bar poll used by the Alaska Judicial Council, and the council's deliberations of candidates in executive session.

In reality, significantly more investigatory tools are used by the AJC in the evaluation process, said Larry Cohn, AJC executive director.

The bar poll is one of them. It is sent to all 3,000+ members of the bar or available online as a secure survey. Its intended use is to gather evaluations on the suitability of a candidate, based on first-hand knowledge or peer experience with that candidate in court, as a colleague, opposing party, or other legal work. Opinions and ratings on applicants are compiled on a scale of 1-5 for professional competence, integrity, fairness, judicial temperament, suitability of experience, and overall professional performance—with comments, if any. Results of the poll are posted on the Internet, and response rate among attorneys is generally in the 40% range in the candidate's region or practice area.

In this round of applicants, the number of personal-knowledge surveys returned for each of the 9 candidate ranged from a low of 141 to a high of 385. The 3 nominees forwarded to the governor were ranked a close 1st, 3rd, and 5th. (Ballot-box stuffing is not possible, since each survey is linked to an attorney's unique bar membership number.)

Evaluation procedures extend beyond the bar survey. Each applicant must complete a comprehensive questionnaire and supply references that the judicial council contacts, including three professional references and two character references. Also checked and contacted by staff are parties to three jury trials and three non-jury cases in which the applicant has been a party; and the applicant's present and previous employers. Also investigated are any criminal, civil matter, or attorney discipline, client complaint or fee arbitration histories.

The council also invites attorney and public comments on the candidates on its website, and conducts a public hearing on each.

The process of investigation consumes 3-4 months of activity, with the results then brought before the judicial council as information and background for the council's candidate interviews, discussions and candidate selection in executive sessions.

Alaska Bar Association
Board of Governors resolution, Sept. 14, 2004

WHEREAS the Missouri plan incorporated in the Alaska Constitution for selecting judges has served the people of Alaska exceptionally well for more than 45 years; and

WHEREAS the Alaska judiciary is recognized throughout the United States as among the most qualified and most competent judiciaries in the country;

The Alaska Bar strongly encourages the governor to uphold the rule of law, uphold the constitution, and appoint judges from those individuals that the Judicial Council has found most qualified.

The Committee on Judicial Independence and the Bar staff are instructed to provide information to the public and the Legislature that further explains Alaska's method for selecting judges, the unique role the Judicial Council serves in making judicial selection both fair and non-partisan, and the multiple benefits that this constitutional system provides Alaska.