The Alaska BAR RAG

Alaska attorney named Best of Competition.....pg. 16

- 2 others receive national awards pg. 22

VOLUME 29, NO. 3 | *Dignitas, semper dignitas* | $3.00 | JULY - SEPTEMBER, 2005

Bryners wow Russians at court conference

By Tricia Collins

Marking the fourth year of the Alaska-Khabarovsk Rule of Law Partnership, members of the Supreme Commercial (or "Arbitrazh") Court of the Russian Federation, Commercial Court Judges from each of 10 regions in the Russian Far East, representatives from Alaska and Oregon, and international experts from the United States and Russia met in Khabarovsk in June 2005.

Related story: Jury Trial litigation in Russia pg. 30

Chief Justice Alex Bryner and I represented Alaska at the conference. Justice Bryner's remarkable mother, Zoe Bryner, "wowed" everyone involved.

The Alaska-Khabarovsk Rule of Law Partnership

In 2001, then-Chief Justice Dana Fabe agreed that the Alaska Court System should join other states participating in a "Rule of Law" education and exchange program designed to partner American states with Russian regions. The goals of the program include assisting the emerging Russian legal system and fostering a mutual exchange of information and ideas. Pairing of Alaska with a region of the Russian Far East was a natural fit. The Alaska-Khabarovsk Rule of Law Partnership was born.

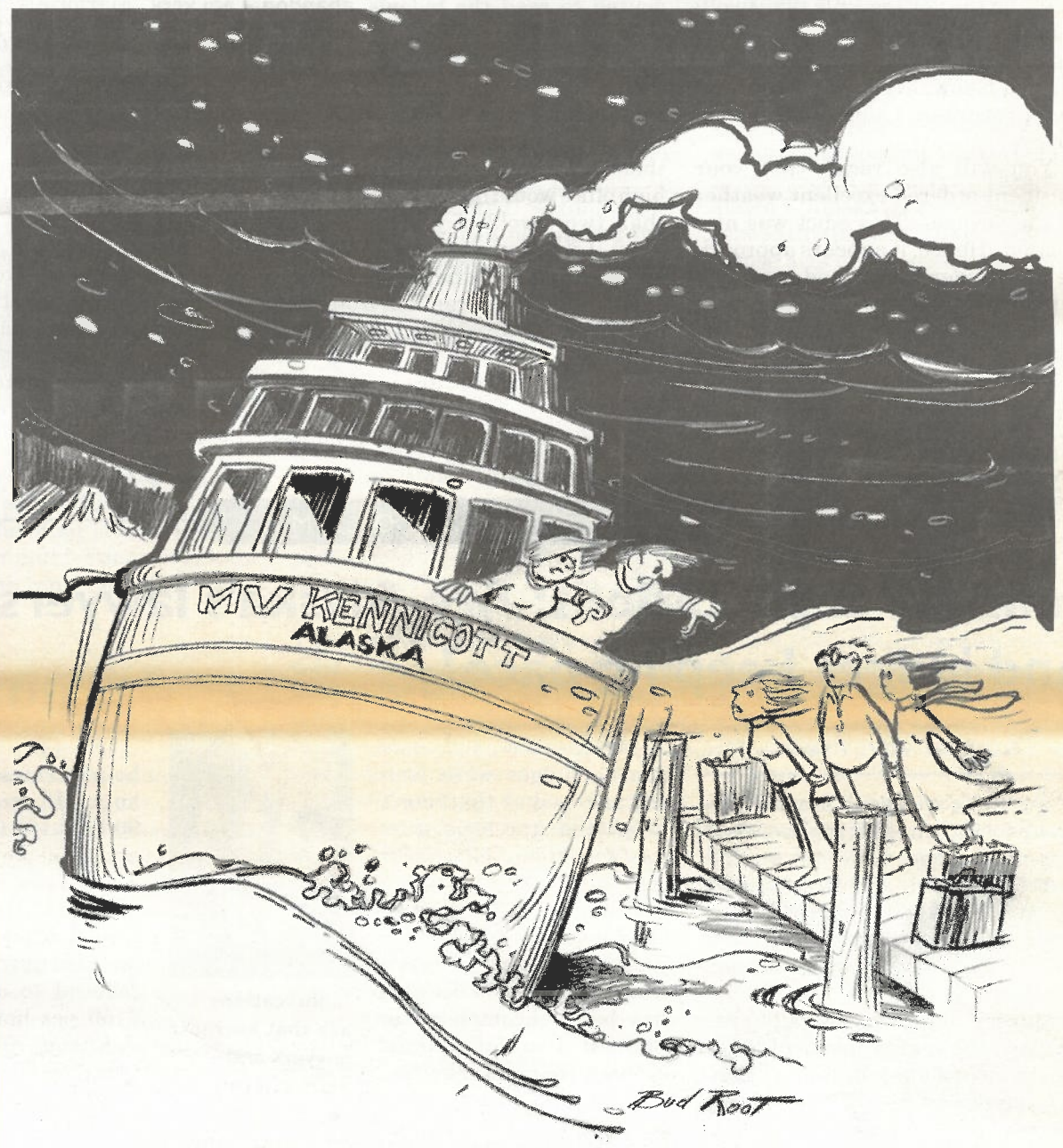
The Rule of Law Partnership is funded through the Library of Congress Open World program and other grants. Alaska's Senator Ted Stevens was and remains one of Open World's strongest supporters. Since its inception in 2001, the Alaska-Khabarovsk Partnership has participated in education programs and attorney/judge/law school exchanges on such topics as judicial independence and ethics, court administration, judicial outreach, bankruptcy proceedings, and use of jury trials. The Partnership also initiated a pilot Trial Observers Program in the Khabarovsk district courts.

The "Bryner Connection"

My advice is simple. If you want to go to Russia, take Zoe Bryner, Chief Justice Alex Bryner's mother. The Chief Justice is a close second. However, Zoe Bryner is a rare gem. Every Russian we met would unquestionably agree. Her life story, steeped in the drama that has defined twentieth century Russia, is one

Continued on page 29

EVEN PRESIDENTS CAN MISS THE BOAT PG. 2



Bar Foundation starts Hurricane Katrina fund

The Alaska Bar Association is coordinating with the Alaska Bar Foundation to collect donations to the Bar Foundation for Hurricane Katrina legal-related relief.

We urge you to make a charitable contribution to the Alaska Bar Foundation Hurricane Katrina Fund. These donations will be forwarded to the appropriate entities, when set up, of the state bar associations in Louisiana, Mississippi and Alabama. These funds will be used to help these states rebuild their justice systems, and to provide legal assistance for individuals affected by this catastrophe. Donations to this fund are deductible as allowed by federal law.

While the Alaska Bar encourages supporting the Red Cross and other relief agencies, we also urge you to make charitable donations that focus on legal relief. Other state bar associations are encouraging similar donation projects that focus on legal-related relief.

We are told that one-third of Louisiana lawyers have lost their homes and/or offices. The state supreme court, as well as numerous city and district

Continued on page 3

FEATURED IN THIS ISSUE

Are Alaska lawyers "underpaid"? .. Page 2
Pedro Rider survives B.C. ..... Page 5
John Hughes turns 90 ..... Page 8
AmBA starts new solo initiative .. Page 19
The enemy within: Staff ..... Page 24
Spreadsheets don't kill attorneys. Page 35
Watch out for "no contact" rule .. Page 39
WAR's totally comprehensive disclaimer ..... Page 40

ALSO inside: Board actions, 2 ethics opinions, Pro bono news & people.

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PRESIDENT'S COLUMN

Presidential powers, planes, ferries, photos, and films

By Jonathon Katcher

The Power of Your President

Some of you may recall that your President ordered all members of the Alaska Bar Association to board the ferry *MV Kennicott* in Juneau this June for what was to be a splendid cruise to Whittier via Yakutat, Tatitlek, and Valdez. Your President promised an excellent time and CLE credit.

It is with much aggravation I report, despite assurances from numerous members that they would join us on the voyage, only two (two!!) members of the Bar actually made the trip. Indeed, for reasons that will be detailed below, even your President was prevented from making the journey.

You will also recall that your President ordered excellent weather for the voyage. This edict was also violated. Hence, it appears appropriate to consider the limited powers of your President.

The Alaska Bar Association Bylaws state that the President shall conduct and preside at all meetings of the Bar and the Board of Governors, serve as the official spokesperson for the Board and the Association, furnish leadership in the accomplishment of the aims and purposes of the Bar, appoint members to standing committees, appoint special committees, request reports from committees, receive resignations from Board members, designate the time and place of Board meetings, call special meetings of the Board, and submit matters to the Board for action.

"Like Moses coming down from Mount Sinai with the sacred tablets, only to find the Israelites frolicking in idolatrous abandon, I am very disappointed."

Perhaps if I had not waited to read the bylaws until just before writing this column, I would have thought twice about issuing orders that do not appear to be within your President's limited powers. Nevertheless, a modicum of respect for this high office would have compelled more than two (two!!) of you to take the ferry. Like Moses coming down from Mount Sinai with the sacred tablets, only to find the Israelites frolicking in idolatrous abandon, I am VERY DISAPPOINTED.

But not nearly so disappointed as I am with Alaska Airlines. You see, much of the reason for the trip was based upon my being joined by two dear friends from high school: Marjorie Schuett of Madison, Wisconsin, and Kim Rancourt of Brooklyn, New York, traveled across the continent for this great voyage. But apparently Alaska Airlines had read the bylaws and was therefore aware of the limit of my Presidential powers.

Ditto the Alaska Marine Highway. The *Kennicott* was scheduled to leave Juneau at 6:00 p.m. Kim and Marjorie were scheduled to arrive from Seattle at 2:00 p.m. Four hours seemed like more than enough time to do a little touring around Juneau and then head for Auke Bay to be greeted by the many members whom I was certain would be awaiting the Captain's order to pipe your President aboard.

Unfortunately, the Alaska Airlines SEA-TAC meltdown we have recently read so much about struck at a very inconvenient time. I made a telephonic plea to Bar member and ferry manager Robin Taylor, but he too must have read the bylaws regarding your President's limited powers. Mr. Taylor did not heed my order that he hold the ferry until we could arrive at Auke Bay. Kim and Marjorie's plane did not arrive until 6:30. After a lengthy wait for their baggage we jumped in a cab and I called the terminal, only to be told that the ferry had already departed without us, leaving us stuck inside of Juneau with the Southeast blues again. So the cab, having only traveled a half-mile, turned around and took us back to the airport.

Earlier that afternoon, as I was making a nuisance of myself in the Juneau offices of Faulkner Banfield, nervously wondering whether Kim and Marjorie would make the ferry, I pondered a terrible dilemma. What was your President to do? Abandon his out-of-state guests to the uncertainty of an indefinite layover in Juneau, or abandon what he assumed would be dozens of Bar members to an unescorted ferry trip? Family blood is thicker than friendship water, and

Continued on page 3

EDITOR'S COLUMN

Inflated expectations: Are Alaska's lawyers and judges keeping pace?

By Thomas Van Flein

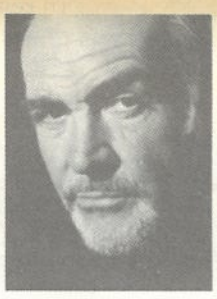
For those who don't practice law, the historical image of the over-paid, tasseled-shoed, custom-suited, Mercedes-driving, latte-sipping, five-star-hotel-staying, first-class-flying lawyer still persists . . . at least if Hollywood movies are any indication.

But for those who actually practice law, the reality, particularly in Alaska, is just a wee different. Don't misunderstand me. I am not saying there are lawyers in bread lines (well, maybe at the Great Harvest Bread Company I saw one or two, but still), or lawyers panhandling, except for that one lawyer with the cardboard sign that says "Will sue for 33% of recovery or the Rule 82 award, whichever is greater." But indications are that for most lawyers and judges in this state, pay has been stagnating.

We will start with the judges.

Alaska judges' salaries averaged $109,032 in 2003. Not bad, but, according to National Center for State Courts, in a report dated April 2004, when adjusted for cost of living in Alaska, our trial court judges rank 49th in lowest judicial salaries (just ahead of Hawaii and just behind New Mexico). It is clear that judges who work where it is sunny and warm, get less pay. And that makes sense to me and it reflects an orderly world imbedded with justice and common sense. But that makes our Alaskan judges quite the anomaly, both getting short-changed on the pay and freezing their patooties off every winter (the banana-belters in Juneau, excepted, of course.) It calls into question whether there really is an intelligent design.

And, just in case Alaska judges were feeling annoyed at that, don't forget that the legislature has forbidden paychecks (or "salary warrants" in government talk) to be issued to judges unless each judge submits an affidavit that no "opinion or decision has been uncompleted or undecided . . . for a period of more than six months." AS 22.05.140(b) & AS 22.10.190(b). If only there was a law withholding pay for legislators in the event they failed to act consistently in accord with some discernible ideology, we could all be richer. So, one could conclude from the pay ranking and law on withholding that the message to the courts is "work faster for less." Rumor has it the new state seal has this as a motto. While that may work when meting out hamburgers, it may not be as desirable when meting out justice.



"...indications are that for most lawyers and judges in this state, pay has been stagnating."

Now lawyers' pay.

There is no warehouse of data on lawyers' pay as there is for judges, but because of Rule 82, we do have some historical basis to track hourly rates. In 1969, a rate of $40 per hour was deemed reasonable. *See Connelly v. Peede*, 459 P.2d 362 (Alaska 1969). Adjusted for inflation, $40 in 1969 would equal $212.40 per hour today. In 1980, $75 per hour was deemed reasonable in *Amfac v State,* 659 p.2d 1189 (Alaska 1980), which would be $190.47 in 2005 after adjusting for inflation. In 1992, $175 per hour was deemed reasonable. *See Bozarth v ARCO*, 833 p.2d 2 (Alaska 1992). Adjusted for inflation, that would be $237 per hour today.

Recent cases show hourly rates of $175 per hour, *Harris v. Westfall* 90 P.3d 167 (Alaska 2004), and $150 per hour in *Dawson v. Temanson*, 107 P.3d 892, 897 (Alaska 2005). A rate of $200 per hour was deemed unreasonable and reduced to approximately $150 per hour in *State v. Johnson,* 958 P.2d 440 (Alaska 1998).

One can argue there is a definite downward trend in inflation-adjusted hourly rates since, based on the 1969 rates, an hourly rate of $212 should be the norm. There could be a reluctance on the part of the courts to accept rates over $200 per hour, except perhaps for the most experienced members of our bar.

A comparison of hourly rates in Alaska with those in other states, adjusted for cost of living, ranks Alaska 49th . . . hmm, where I have seen that number before?

Now it is all becoming clear. The "reasonable" hourly rates under Rule 82 will rise as soon as the judges' pay rises. I've changed my mind. Maybe there is intelligent design at work. This is something to mull over as you sit in first class sipping a latte, eating Great Harvest Bread, wearing tasseled shoes and a custom suit, and heading for a deposition in Cancun that is conveniently being taken at a five-star resort.

See related "this just in" report on page 4

The Alaska BAR RAG

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

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

Board of Governors meeting dates
September 8 & 9, 2005
October 27 & 28, 2005
January 26 & 27, 2006
April 24 & 25, 2006
April 26 - 28, 2006

PRESIDENT'S COLUMN

Presidential power

Continued from page 2

friendship water is thicker than association vapor. I chose my friends over my members. Fine. Impeach me. Please. If, for nothing else, the foregoing nonsensical metaphor.

So there we were in Juneau, ferry gone, the best laid plans of your fearless leader torn asunder. We negotiated with Alaska Airlines for flights back to Anchorage and Valdez. (You see, in anticipation of taking the ferry, I had arranged to have someone drive my car to Valdez so that we could proceed up the Richardson and Edgerton Highways to McCarthy, traveling in the 1903, 1908 and 1913 footsteps of Marjorie's Grandfather Ocha (sounds like mocha) Potter.)

After a day in Anchorage we flew to Valdez and, unlike in Juneau, found the ferry waiting for us. When we looked for someone to give us permission to go on board to look around, we encountered the First Mate, who proudly declared that he was the one who had convinced the Captain to leave without us. Thanks! The First Mate then gave us a very nice tour of the bridge in all its high tech splendor. During the tour we kept an eye out for the many Bar members I was certain were on board, but none were to be seen.

We drove around Valdez and soon met up with Bob Linton and spouse. Bob was very gracious and did not seem the least bit concerned about my absence from the ferry. Mrs. Linton gave me a look that said: "So this is the guy who is responsible for me being on this miserable voyage." The Lintons had actually boarded the vessel in Ketchikan for an extended cruise. They reported that the weather from Juneau to Valdez was not good. Poor visibility blocked the spectacular scenery, but that was not such a big deal as the seasickness which kept everyone pretty much in their cabins. Perhaps Poseidon was sparing your President from the discomfort and disappointment of a voyage spent worshiping at the porcelain altar. Bob also advised that the only other Bar member on board was Monica Jenicek. Reeling from this stunning report of pathetic attendance, I drove Marjorie and Kim north to Thompson Pass and beyond.

More on the road trip following Grandpa Potter's turn of the century footsteps in the next Bar Rag.

Photos and more photos of your President

Some of you have complained that there was a megalomaniacal number of photographs (9) of your President in the last Bar Rag. There is no truth to the rumor that the numerous photos were part of your President's campaign for judge. The Bar Rag is not edited or produced by your President, but rather by the very capable Tom Van Flein and Sally Suddock. They no doubt recognized the great benefit of a transfer of your President, like William Howard Taft, Earl Warren, and Keith Levy, from executive to judicial responsibilities, and decided to do what they could to help. Who was I to interfere with such wisdom?

But there are other photo issues. Your President's spouse Kate Michaels, a woman of impeccable taste, notwithstanding her selection (and, at least so far, retention) of yours truly, and whom you may call the First Lady, does not like the Bar Rag photo of your President that photographer Carl Johnson helped select. Hence, we are calling upon you, the members, to vote for the photo to be used in future Bar Rags. Photo 1 is the one chosen by Carl Johnson and your President. Photo 2 was selected by the First Lady. Photo 3 is from your President's Bar Mitzvah; you will have to come to the April 2006 Bar Convention to see his photo from when he applied for membership. Photo 4 is Love Boat Captain Stubing. Please follow your editor's instructions on how to vote. (All voters who can correctly name at least two songs from the album on your President's shirt in the convention photograph with Justice O'Connor and Charlie Cole will win a beer.)

Photo 1

Photo 2

Photo 3

Photo 4

Cinema Jurisprudence

It is with great pleasure that we announce a series of excellent, law-related movies. Yale "Cannon ball" Metzger has opened up his home to welcome 25 lucky Bar members to what I am told is a world-class viewing room. We have selected some of the best law related American films.

We start on September 14th with "The Life and Times of Judge Roy Bean," a John Huston classic starring Paul Newman as the non-lawyer who was the law west of the Pecos.

On October 19th we watch Steven Spielberg's "Amistad," in my opinion the best lawyer movie ever made.

On November 16th we watch Al Pacino as the trial attorney coming unglued in "And Justice For All."

And for the holidays on December 14th we have "Miracle on 34th Street," where a lawyer must save Santa Claus and Christmas from an insanity proceeding.

All shows start at 6:30 sharp. Yale has agreed to have the bomb squad sweep the theater for cannonballs. We hope you will join us for some popcorn and conversation about how art portrays justice. (For more information on the films, see the ad on page 6).

Editor's voting instructions:
Always use Photo #:
(check one)
fax your vote to
Deborah O'Regan 272-2932 or
e-mail to ORegan@alaskabar.org

1._____
2._____
3._____
4._____

Letters to the Editor

Damage Caps

I'm not crazy about damage caps, and I think $250,000 is lower than a cap ought to be, but I don't think they are unconstitutional. Going all the back to the old English "common law," much of it was the product of legislative enactment by Parliament, not merely the work of the courts. You pose the legitimate concern that if no cap is too low, then could the legislature eliminate damages entirely? The flip side of this question is this: if the legislature can't act in this manner, what is the principled basis for saying that it can act legislatively to alter the contours of any other aspect of tort law (or contract law, for that manner)? If the UCC changes the rules of recovery in contract law; or if the legislature decides that alienation of affections is an outmoded tort and ought to be abolished; or if it decides that a deceptive trade practice committed upon a consumer should result in a minimum recovery of $200, regardless of actual damages; or if it determined that airplane pilots who let guests ride in their aircraft are immune from suit except in cases of gross negligence--what if any rationale would distinguish the constitutional significance of the statute from a non-economic damages cap?

—Jonathan M. Hoffman

Re: "Defending the indefensible"

In regard to the comment in your April-June 2005 column in the *Alaska Bar Rag* (Editor's column, Tom Van Flein), I don't agree that serving as a public defender can be equated, as a patriotic duty, with military service to our country.

All able-bodied men have an obligation to give active-duty military service to their country. In fact, of course, the percentage that does serve is very small. It is common for men who did not serve to seek some moral equivalent in their own lives to remove the stain on their character. These other matters, such as serving as a public defender, are honorable, but they are things a man does after he has served his country, not instead of serving it.

Having failed to serve when he was of serviceable age is a failure of character that a man cannot remove by subsequent service as a public defender, or otherwise. You may reasonably equate public defender service with other patriotic things a man might do in later life. But it does not belong in the category of military service.

Richard S. Ralston, Seattle

Editor's Reply: Military service is an honor, but it does not stand to reason that not serving, particularly in peacetime, is dishonorable, or immoral.

Bar Rag reaches New York

I am writing this slowly because I know you can't read very fast. I read Mr. Kirk's diary of a public defender. I have a diary also. I think public defenders are hot!!!

—Paris Hilton

Hurricane Katrina fund

Continued from page 1

courts, are under water. A description of the effects of Hurricane Katrina on the Louisiana legal system can be found on the Alaska Bar Association's website. (See the website location links below.)

Thank you for your consideration and support.

Jonathon A. Katcher, President, Alaska Bar Association
Dani Crosby, President, President Alaska Bar Foundation

Links:

Contribution Form:
http://www.alaskabar.org/library/Katrinadonate.pdf

Description of Hurricane Katrina's effects on the Louisiana legal system: http://www.alaskabar.org/index.cfm?ID=6076

Firms show moderate growth in 2004, survey says

The newly released Altman Weil Survey of Law Firm Economics, 2005 edition reports median revenue per lawyer in law firms of all sizes throughout the U.S. at $389,000 in 2004, up 3.8% from the previous year. At the same time overhead per lawyer was up only 1.9%, resulting in an income per lawyer increase of 5.1%.

"Revenue growth in 2004 slightly outpaced the 3.4% increase of the Consumer Price Index, while the expense comparison was more favorable," said Altman Weil principal James Cotterman. "This modest industry-wide gain is what we would expect to see in the current slow-growth economy."

The 2004 trend comparisons were drawn from a super-group of nearly 200 law firms that have participated in the survey over sequential years.

Billing rates & billable hours. The median hourly billing rate for partners with 21 or more years of experience was $295/hour in 2004, representing a 5.4% increase over last year's reported rate. Four-to-five year associates billed a median $185/hour, up 2.8% according to the Survey.

Billable hours for partners and associates were virtually unchanged from 2003, according to the Survey. Partners with 21+ years in practice worked a median 1,660 hours, while four-five-year associates reported median hours per year of 1,883.

Compensation. The median total compensation (defined as salary/draw, bonus/distribution in cash, plus benefits/distribution in kind) for all law firm equity partners was $291,000 in 2004, a rise of 6.8%. In contrast non-equity partners saw their total comp increase by only 2.8%. Associate compensation increased by 2.5% overall.

Regional & Practice Variations. The survey identified significant variations in data by region and practice specialty.

District of Columbia law firms reported the highest median hourly billing rates for partners at $405/hour, while West Virginia reported the lowest rate of $168/hour. The highest hourly rates for associates were also reported in Washington, DC at $275 per hour. The lowest associate rate was $100 per hour in Minnesota.

When it comes to billable hours, practice specialty is a determining factor according to the survey. Among litigation specialties, partners with workers compensation practices billed a median 2,179 hours in 2004, followed by product liability practitioners with 1,957 billable hours. By contrast trust & estate partners reported billing just 1,518 hours.

The most highly paid practice specialties for non-litigation partners in law firms in 2004 were municipal finance, securities and mergers & acquisitions. In litigation practice, self-insured defense, securities and antitrust specialists led with the highest median total compensation numbers. Washington, DC led all other states in median comp for partners and associates.

The Survey of Law Firm Economics has been published annually since 1972 by Altman Weil Publications, a subsidiary of Altman Weil, Inc., a legal management consultancy headquartered in suburban Philadelphia. The survey reports on law firm revenues and expenses, billable hours, overhead, margin, billing rates, compensation, leverage and more. It enables law firms to compare performance data with peer firms in similar size, geographic area and practice categories.

This year's survey contains information from 18,478 lawyers from 340 U.S. law firms, including 9,704 partners/shareholders, 7,516 associates, 886 active counsel and 372 staff lawyers. Data was collected in the spring of 2005 and reports 2004 performance.

The survey can be purchased for $775 from Altman Weil Publications. The Altman Weil Small Law Firm Economic Survey, which contains data from participating firms with one to 15 lawyers, is available for $425.

Altman Weil Publications conducts and publishes numerous surveys of the legal profession including the Managing Partner and Executive Director Survey, the Retirement and Withdrawal Survey for Private Law Firms, the Survey of Compensation Systems in Private Law Firms, and the Annual Paralegal Compensation Survey. For additional information: www.altmanweil.com; 888-782-7297 toll-free.

Voluntary Continuing Legal Education (VCLE) Rule – Bar Rule 65
Fourth Reporting Period January 1, 2003 – December 31, 2003
Fifth Reporting Period January 1, 2004 - December 31, 2004

Corrected List

Following is a corrected list of active Alaska Bar members who voluntarily complied with the Alaska Supreme Court recommended guidelines of 12 hours (including 1 of ethics) of approved continuing legal education in the reporting periods of 2003 and 2004.

We regret any omissions or errors. If your name has been omitted from this list and the list previously published in the Mar.-June issue of the Bar Rag, please contact the Bar office at 907-272-7469 or e-mail us at cle@alaskabar.org. We will publish a revised list as needed.

2003	2004
Roberta Erwin	Ron Baird
Marc Jakubovic	Terry Bannister
Tina Kobayashi	Robert Eastaugh
Joseph Palmier	Roberta Erwin
David Seid	Peter Gamache
Randall Westbrook	Joseph Palmier
	Pam Sullivan

Left to right: Former law clerks Rick Vollertsen, Grant Callow, Marcia Davis, Ret. Justice Ed Burke, Justice Dana Fabe, Michael D. White, Tom Van Flein, Jan De Young,Mike Hotchkin, and Nancy Meade gather over the summer.

Burke's clerks honor their mentor

Retired Justice Edmond Burke was honored by his former law clerks with a reunion party on June 17, 2005. Justice Burke was appointed to the Alaska Supreme Court in 1976 and retired from the court in 1994. One of his first law clerks was Dana Fabe, currently an associate justice on the Alaska Supreme Court, who hosted the reunion party.

Retired Justice Edmond Burke

ECLECTIC BLUES

Pedro and rider survive B.C. bike trip

By Dan Branch

The trip started with an international incident on the Northern British Columbia coast involving my touring bicycle named Pedro and a skeptical Canadian customs agent. Rejecting my claim of U.S. citizenship and the idea that I would ride the bicycle 700 miles to Jasper Alberta, the Prince Rupert border agent refused me admission to Canada.

My biking partners, "the Captain" and C.B. gained instant entry into Canada by flashing their passports. I only had my Alaska driver's license. When I suggested that the customs agent ask the Captain and C.B. to verify that I was born in the USA, she responded, "What would that prove?" She then ordered me to secure Pedro and wait in the containment room. There I cooled my heels with a guy whose image probably illustrates an FBI Elevated Threat Level memo.

Someone pounded a keyboard in the next room while I sat wondering if the problem was my bicycle shorts and whether they made me look too European. The shorts must have been OK because in a few minutes they let me join my friends on Canadian soil.

Following a Branch family tradition, we started our British Columbian adventure with a back bacon and eggs breakfast at Prince Rupert's Highliner Hotel. Then, it started to rain.

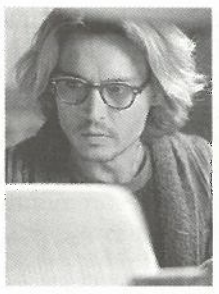
We rode 90 kilometers on the Yellowhead Highway that day--all in the rain. Low clouds obscured the far side of the Skeena River as we worked our way toward Terrace. Late in the afternoon we stumbled onto a wilderness lodge. The owners had closed it down for the weekend so they could fill most of its rooms with family and friends. Looking at our wet, drawn faces they offered us dry rooms, Canadian beer and a chance to join them for dinner.

That first day set the tone for the trip—rain, five or six hours of cycling, and random acts of kindness. We started most mornings wrapped in rain gear, our stomachs full of eggs, hash browns and side meat. It always took some effort to set in motion Pedro since his front and back saddlebags were swollen with gear.

Pedro, a 20-year-old Trek 520 was named after the company that supplied the tools and maintenance fluids he needs to keep rolling. On my first training runs in Juneau, I saw Pedro for what it was----a troublesome old bike with dodgy shifters and cheap tires. By the time he carried me into the campground in Jasper, I'd almost written him into my will.

Before someone files a Title 47-commitment petition with my name on it, rest assured that I know Pedro is only an old construct of Birmingham steel and Shimano components. He has no greater hope of an afterlife than our family's Subaru Impreza. Even so, the old Trek secured a special place in my heart during the trip. (This is common with long distance bike tourists. Most of the former long distance bike riders I know talk lovingly of the 1980-vintage touring bikes that still hang in the garage.)

There were times on the trip that I could barely move Pedro. An hour or two later we could cruise easily along. Either way, we put the miles behind us and drew closer to Jasper. Rain or shine there was traffic rolling by. The logging and chip trucks would swing out as they passed, leaving behind the scent of fresh cut wood. RVs tended to drive closer to the road shoulder, sending a shock wave of air into us before moving on. A lot of drivers honked in encouragement. When the traffic thinned out we could hear birds. Bear, deer or moose would cross the road. In the Rockies we saw elk.



"That first day set the tone for the trip—rain, five or six hours of cycling, and random acts of kindness."

The people we met were generally kind and open. In a couple of logging towns the Captain, C.B. and I caught hard looks from men that didn't approve of guys on bikes. But I imagine even they would have helped us if we had broken down.

In Prince George we took shelter in the Downtown Motel, run by the Sisters of Mercy. They were a couple of older women with a soft spot in their hearts for bikers. The sisters preferred Harley riders, but treated us well. It was in a tough part of town so they let us store our bicycles in an extra room occupied by their cat.

Outside of McBride, B.C. I was hailed by a woman who wondered if I would like some fresh-picked strawberries. The berries were sweet and plentiful. A few miles later Pedro and I passed a man smoking by a small swift stream. He was using his touring bike as a backrest. We met again near Mt. Robson, on the trail to Berg Lake. He was a German attending university in Switzerland who loved hiking in the Swiss Alps. He seemed uncomfortable with the empty land, the animals, and the lack of decent public transportation.

The bike trip ended for me in Jasper where I had to fix a flat tire an hour before boarding the train back to Prince Rupert. This attracted the attention of a Scotch couple in their late 50's who had ridden bicycles from Vancouver to Inuvik, Yukon Territory. They were on their way back to Vancouver after having ridden 8,000 kilometers without a flat. As I pumped air back into the tire the wife told me in a Jean Redpath brogue that they had just "chucked it" and decided to spend their time traveling rather than working. Brave folks.

The lawyers guide to internet research: Become more effective

By Carole Levitt & Mark Rosch

For the past five years, we have traveled from Alaska to Alabama, and nearly everywhere in between, teaching legal professionals how to find free legal, business and investigative information on the Internet. From Family Law to Litigation, we have created customized seminars that help practitioners find the information they need on the Internet quickly.

Because of the nature of our business, we have to keep up with the ever-changing resources on the Internet, and we are constantly online testing out and evaluating different Web sites to update our presentations and books. We've compiled this short list of some of our favorite resources to help save you some time while you're online. This is just a small selection of the resources and strategies we'll cover in our Alaska Bar sponsored CLE, "Discover the Internet: Using the Internet for Factual & Investigative Research," on October 19 in Anchorage and on October 21 in Fairbanks.

Surfing Philosophy I

Our surfing philosophy is, DON'T!

Why bother surfing the Web to locate material when someone else (most likely an attorney or law librarian) has already tested out law-related Web sites, evaluated them and deems them to be current, reliable and comprehensive?

Instead, arm yourself with a few good Internet Research books and legal portals (highlighted below) — created specifically for lawyers and stick with these.

Internet Research Books

Our seminar book, *How to Use the Internet for Legal & Investigative Research,* is a complete, hands-on guide to the best sites, secrets, and shortcuts for conducting efficient LEGAL & INVESTIGATIVE RESEARCH on the Web. All attendees at our October seminars will receive a copy of this book. Our ABA book, *The Lawyer's Guide to Fact Finding on the Internet* (www.internetfactfinder.com), focuses on FACTUAL RESEARCH on the Web. Both books are written specifically for lawyers. Included with the ABA book is a CD-ROM that will save you time, as it includes all the links contained in the book and is indexed in multiple ways so you can easily navigate to the recommended sites without typing the URLs into a browser.

Surfing Philosophy II

When you do need to surf the web, use search engines that return the most relevant results, like **Google.com** and **Yahoo.com** to find the best resources quickly.

Carole Levitt and Mark Rosch will present the following CLEs in October in Alaska:

"Discover the Internet: Using the Internet for Factual & Investigative Research," October 19 in Anchorage and October 21 in Fairbanks. And "Marketing Your Practice Online: Do It Efficiently, Effectively, and Ethically!" on October 19 in Anchorage. Call the Bar at 907-272-7469, e-mail us at info@alaskabar.org or check our website at www.alaskabar.org

Legal Portals

FindLaw is our favorite legal portal because you can link to almost any legal or government web site from here by using the various directories — organized by jurisdiction, subject or type of material. In addition, there are **FREE full-text, keyword searchable databases** for U.S. Supreme Court cases and California state cases (back to 1934) and Federal Courts of Appeal cases (back at least 5 or more years). For State cases other than California, there are also free databases searchable by docket number and party name. www.findlaw.com

Cornell's Legal Information Institute fills in where law school left off. Click on "Law about" (left-hand column of the home page), and then select "All topics alphabetically." Choose a topic (or type it into the search box if not listed) such as "mortgages". A screen pops up summarizing mortgage law and provides links to all codes, cases and regulations (federal and state) relating to mortgage law. www.law.cornell.edu

If you like to cut to the chase (pardon the pun), check out **The Virtual Chase**. Topical guides that include descriptions of each site discussed (and links to each one) have been created to assist you in finding legal, investigative and business information on the Internet. Each source has been hand-selected and evaluated by a Law Librarian/Web Manager. www.virtualchase.com

Have you been thinking about creating an Intranet for your firm and need some background materials and tips or are you looking for recommendations for the best Web sites in a specific area of law? Then, **LLRX** is for you. This site consistently provides outstanding Internet law-related articles with links. It also features a database that links to over 1,400 free sources for local, state and federal court rules, forms and dockets. You can browse the database by jurisdiction, court type, or type of resource or you can search by keyword. www.llrx.com

Legal Search Engine

Our favorite legal search engine, if we must use one at all, is **FindLaw's LawCrawler.** It searches law-related sites only, cutting down the number of irrelevant hits and the sheer volume of hits that a more general search engine will return. LawCrawler is powered by our favorite "general" search engine, Google. http://lawcrawler.findlaw.com

Free Case Law

LexisONE.com is an **ALL FREE, FULL-TEXT searchable case law research Web site** for all 50 states and the U.S. Courts of Appeal (covering the past 5 years) and for the U.S. Supreme Court (1790-). LexisONE offers almost the same robust search engine as its pay site, Lexis--from keyword and phrase searching, to using Boolean connectors, to searching by party, counsel or judges' name and limiting searches by date. However, viewing the document in KWIC (key words in context--where your search words are highlighted) or using the "focus" feature to further narrow a search, are only available at the pay site. www.lexisone.com

The Delaware Corporate Clearinghouse is a business litigator's dream site. In March 1999, it began offering access to selected opinions, briefs, complaints, settlements, motions and other documents filed in business law matters in the Delaware Court of Chancery. Recently, only opinions have been added to the database. http://corporate-law.widener.edu/case.htm.

Public Records Portals

Search Systems is a good starting point for discovering which states provide free access to public records via the Web. It provides links to those sites and also provides links to pay sites. www.searchsystems.net

Pretrieve is a specialized search engine for retrieving public record information. It does not maintain its own database of records, but rather, it reaches into hundreds of other individual, searchable public record databases that are already available on the Internet. Part of the "magic" of Pretrieve is that you can access them all at once via Pretrieve's user-friendly interface. Results from all of these sources are displayed in an easy to access manner. www.pretrieve.com

Carole Levitt & Mark Rosch are principals of Internet For Lawyers. They conduct in-house training at law firms to teach legal professionals how to find free legal, business and investigative information on the Internet, as well as making presentations to professional associations (from bar and law library associations to legal administrators associations) and speaking at law/technology conferences. They are the authors of two books and numerous articles on these subjects.

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Alaska Association of Paralegals elects 2005-2006 Board of Directors

The Alaska Association of Paralegals ("AAP") is pleased to announce the following officers and board of directors for its 2005-2006 calendar year:

President - Deborah Orth of Thomas, Head & Greisen; Vice President - Dena Bryant of Farley & Graves; Secretary - Suzanne Woods of Hosie McArthur LLP; Treasurer - Jennifer Ducharme of the Law Offices of Janet Platt; Board Advisor - Bobbie Ortiz of Farley & Graves; Directors - Deb Jones of BP Exploration (Alaska) Inc.; Dena Bryant of Farley & Graves; Annette Brown of Birch, Horton, Bittner & Cherot, PC; and Jennifer Heck of Lane Powell.

The Alaska Association of Paralegals (AAP) was founded in May 1981 as a non-profit professional membership association of Alaska paralegals committed to the development and growth of the paralegal profession.

AAP focuses on member education to advance and promote the educational and professional standards of paralegals and to encourage and promote the continuing education of paralegals.

The association upholds and elevates the standard of honor, integrity and courtesy in the legal profession and strives to promote, protect and further the public interest, promote the employment, advancement and education of paralegals, regardless of race, sex, creed, color, national origin, age, sexual orientation or political ideology and promote a spirit of cordiality among the members AAP.

For additional information regarding AAP please visit our website at http://www.alaskaparalegals.org or email inquiries to info@alaskaparalegals.org.

GETTING TOGETHER

Mediation is all about helping people function at their best

By *Drew Peterson*

A few issues ago, I resolved to only write short, smart, and provocative articles in this column in the future. That shut me up pretty good for a time. A couple of recent experiences with Alaska judges, however, have roused me from my torpor to once again comment on the state of mediation in Alaska.

Specialization in the Mediation Field – A recent experience with Alaska's most prolific retired judge mediator has helped me recognize my enjoyment as being primarily a family mediator at this point in my career. Some mediators dislike family cases, much as many attorneys detest family divorce and family work. Judge Justin Ripley is an example of a mediator who does not want to mediate family cases. This is true even though I have seen him do settlement cases in family matters in the past and he does a wonderful job of them. He has a sweet collaborative soul, behind his sometimes gruff exterior.

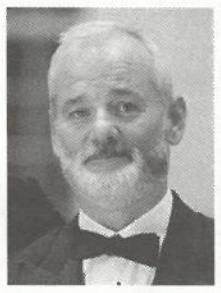
A recent mediation with Judge Ripley in a personal injury matter (I was acting as an attorney, not as a mediator) made me realize that I no longer want to do what he does (i.e., mediating personal injury cases) any more than he wants to do the divorce and custody work that I do. I enjoy the challenge of the emotionally charged and ever-changing family dynamics, and the need of the parties for a continued relationship after the lawsuit has ended. Increasingly my mediation caseload has been specialized in the family area and I am happy that is so. I still occasionally am referred the weird or unusual cases, and I enjoy the challenge of those as well, but am happy to now be thought of as primarily a family mediator.

As the professional mediation field expands and matures, it is increasingly becoming specialized, at least in the types of cases that each mediator handles. This specialization also incorporates the different styles of mediation, which are often appropriate to different kinds of cases. This is a good and healthy trend, in my opinion, and evidence of the maturing of the ADR (appropriate dispute resolution) field overall.

More and More Judges And Other Court Officials Are Getting It About The Use of Appropriate Use of Mediation – A recent meeting between mediators and judges was very interesting. It demonstrated that the sitting judges are becoming increasingly sophisticated in understanding the appropriate uses of, and benefits of, mediation.

Too often in the past many judges have looked at mediation primarily as a method of reducing or managing their caseloads. Particularly frustrating to mediators are those judges who only refer to mediation those worst cases from their caseload which are driving them crazy. Mediation will usually not work for such cases either and the result is that the same judges end up believing that mediation is a waste of time, or worse.

Once judges really get it about mediation, however, they realize that in many cases parties obtain a result in mediation that is better than litigation, and not just because it is cheaper and faster. Mediated settlements are often better because the parties are more invested in them and able to suit the mediated agreements to their individual needs.



"As the professional mediation field expands and matures, it is increasingly becoming specialized, at least in the types of cases that each mediator handles..."

Some of Alaska's more enlightened court administrators have been aware for some time of this phenomenon of achieving better results through mediation.

This is borne out by the studies demonstrating higher compliance rates for mediated agreements versus those resolved in court, including those cases resolved through settlement conferences. The most impressive statistics are in the area of improved payment of child support. Some of Alaska's more enlightened court administrators have been aware for some time of this phenomenon of achieving better results through mediation. More and more judges are becoming aware of such advantages as well.

Most exciting to me has been to see some of the more experienced judges pass on their insights about mediation to their less experienced peers. Anchorage Superior Court Judges Gleason and Tan in particular are wonderful mentors to the other judges in this sense.

Litigation Brings Out The Worst In People; Mediation Brings Out The Best – Speaking of Judge Gleason, a recent discussion with her about rights of first refusal helped clarify for me an essential difference between facilitated mediation and litigation.

As attorneys and others involved in the legal system, we are all familiar with the concept of seeing people at their worst. The litigation process often encourages such traits. Litigation focuses on finding and assessing blame. It focuses on the past, not the future. Parties in litigation often seek to avoid personal responsibility rather than assume it. People at their worst are often angry; their emotions out of control. They are egotistical, selfish, petty, and stingy. Their priorities are on their self and on winning or getting one up on their adversaries. Litigation can encourage such tendencies.

In contrast, facilitative mediation helps parties to negotiate in the ways that they normally do when they are functioning at their best. It helps parties to accept personal responsibility, not avoid it. Mediation examines the effects of parties' behaviors on others, especially the innocent bystanders. Mediation focuses on the future, which can be changed in a mutually beneficial manner, rather than the past, which is rigid. People at their best are thoughtful and generous. They temper their emotions with reason. They are caring and have empathy for others. Their priorities are on their families. They seek harmony and serenity in their lives. Facilitative mediation encourages all these things.

Mediation is not a panacea. It does not work in ever case, nor is it even appropriate in every case. However, the joy of facilitation mediation (some call it transformative mediation) is that when it does work, it provides a wonderful feeling of helping people to function at their very best. Such a phenomenon is seldom experienced in the litigation process.

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$63,500. (Original cost was $157,000.)
Please contact Bud and Patricia Michels. 505-424-3997.

JOB ANNOUNCEMENT

Job Title: **Victims' Rights Advocate**
Employer: State of Alaska, Legislative Branch
Location: Anchorage
Salary: Range 26, Step A ($6,555.00 per month)
Closing date: Friday, November 4, 2005

The State of Alaska's Legislative Branch is recruiting a Victims' Rights Advocate for the Victims' Rights Office. The Advocate's primary responsibility is to perform all tasks that direct, manage and support victims and their rights in accordance with its statutory duties (AS 24.65.100).

The successful candidate will need to be licensed to practice law in the State of Alaska, at least 21 years of age, have significant experience in criminal law, and a resident of the State of Alaska for the last three years. In addition, the successful candidate must have been actively practicing law sometime within the last three years. It is also desirable that the successful candidate have effective managerial, budgetary, investigative, and communication skills, including the ability and desire to provide advocacy services to victims of crimes.

This position is in the Exempt Service and will be located in Anchorage, Alaska. This position serves at the pleasure of the Legislature for a five-year term, not to exceed three terms.

Applications must be received by the Victims' Rights Advocate Selection Committee no later than 5:00pm, Friday, November 4, 2005. Applications may be hand-delivered or sent by mail or fax. To apply, send a complete work resume and cover letter documenting qualifications, knowledge, skills and abilities related to the specific duties of the position to:

Victims' Rights Advocate Selection Committee
C/O Legislative Affairs Agency,
Personnel Office
State Capitol, Room 3
Juneau, AK 99801
Fax No. (907) 465-6557 • Phone (907) 465-3854 • TDD No. (907) 465-4980

The Alaska State Legislature does not discriminate on the basis of race, color, national origin, sex, age, religion, or disability. Persons with disabilities who require special accommodations please contact the Legislative Affairs Personnel Office. Allow sufficient notice for the Agency to accommodate your needs prior to the closing date.

QUOTE OF THE MONTH

"Whenever a man's friends begin to compliment him about looking young, he may be sure that they think he is growing old."

--Washington Irving, 1822

John Hughes celebrates 90 (and 65 years in Alaska)

Long-time attorney John C. Hughes celebrated his 90th birthday over the summer, and his family and friends gathered for dinner on the occasion.

His daughter, attorney Mary Hughes, provided the following excerpts detailing her dad's voyage to his new home in Alaska at the age of 25. These excerpts also are included in a life history of John C. Hughes compiled by Sharon Bushell, and published in the Anchorage Daily News' "We Alaskans" section.

Hughes' story picks up from the Ballard Locks, outside of Seattle, where the vessel he was aboard had just crashed into the locks.

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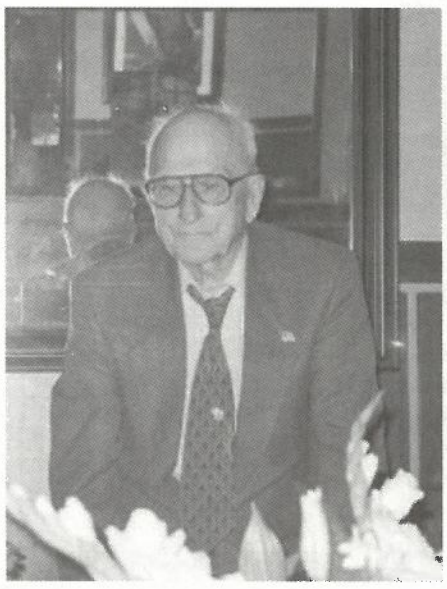
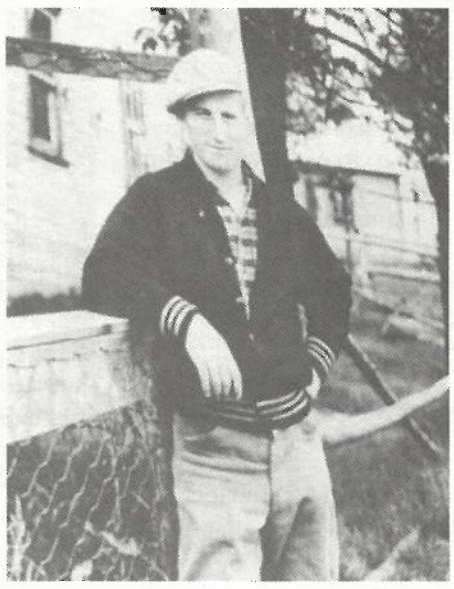


John Hughes talks about his life of nearly a century, and his trek to Alaska.



Hughes lands in Kodiak, 1940.

I stayed back on the fantail. I thought: I'm really in trouble now; this is the end of the voyage for me. We cruised out of the locks and got to ocean level. We were half way to Everett when Johnny came back and said, "I want to shake your hand, John. If you hadn't half-hitched that cleat, we'd have gone in up to the wheel house."

I could hardly believe it, but from then on I was golden.

We got the bow repaired, and then we started taking on cargo, a lot of which was groceries purchased by Father Houdaviski, to be delivered to the Natives out near Sanak Island, one of the islands off Dutch Harbor.

At the last minute, Johnny said, "Hold everything, we're making a little change." The Bowman brothers - sheep ranchers out at one of the islands - had just come in to Seattle. They had decided to give up the sheep ranching business and they had acquired the halibut schooner, *Dorathea*, which Johnny was going to take up to Alaska. That was a big step up; I had my own little cabin; now I was going to Alaska in style. The crew expanded to include Earl Butler, Jack Gustovsen, Leonard Olson, Ted Gilmore and various others. My job was to cook for all of them.

Thirteen days later, in April of 1940, we ended up in Kodiak.

I paired up with Leonard Olson, owner of a leaky tent. He and I ended up out on Mission Road. At that point I had about $6. I also had a frying pan; so every day we'd have oatmeal and syrup, or cornmeal. We'd cook a mush in the morning, then we'd let 'er set and gel up, and fry it for supper. That's what we lived on.

We'd walk to town and try to figure out what was going on, as there was no newspaper. The only thing we could figure to do was to see Glenn Robinson, the Territorial labor representative. Through him we learned that a military base was going to be built.

We kept checking with Glenn, trying to get work. There was a fellow by the name of Carl Brumsead; he had a wind charger that had gone belly up. There was no electricity in Kodiak and, having been raised in the Dakotas, Leonard and I were both wind charger people, so we volunteered. After we fixed the wind charger, Carl said, "Why don't you boys move in? You can sleep on the floor and have sourdough pancakes every morning." After that leaky tent and endless mush, that sounded darn good to us.

Finally toward the end of May I got a call to come out to the base and go to work at 85 cents an hour. I spent three happy years out there, first as a laborer, then on a garbage truck. Later I drove an oil truck, delivering oil to Buskinville, and then the 5-yard dump truck (which was a big rig at the time).

After we finished, we had the option to stick around and go west, where they had further work out at the islands. Instead I went to Fairbanks, to work for the Army engineers. I got to Fairbanks in February of '43 and boy oh boy it was chilly up there. My job was really complex--I worked holding the topog stick for the survey crew at mile 26.

Sometime in May I got a wire from my mother: Dad was in the hospital and there were things that had to be done at the ranch. I returned to the ranch and when Dad got back on his feet, I headed for the west coast.

I went to Los Angeles to join the Merchant Marines. They sent us over to Catalina where we proceeded to take our training. After that, I went over to Manila, where I became the steward on a liberty ship, the Joseph Pulitzer.

When the war was over, I went home and spent Christmas with the folks. There I had the good fortune to buy a Ford from my aunt; cars were very scarce in those days. I drove it to Los Angeles then headed up the coast to Seattle. I had a mind to go back to Alaska as soon as I could.

I had an acquaintance or two in Seattle, so I thought I'd go down along First Avenue, check the waterfront, see what the action was. And wouldn't you know it; the first person I bumped into was Earl Butler. The upshot of our conversation was that I bought his house in Kodiak on Mission Road.

Earl signed a quitclaim deed, plus he also got me a job. Bill and Joe Jones from Orcas Island had a permit to dig clams across the straits at Swikshak Beach, hauling the clams to the old Squeaky Anderson cannery.

I got settled into my "new" house on Mission Road. My old buddy, John Gibbons, and I put a partial basement under the house. That pretty much took care of my activities until that fall, when I went to Anchorage to take the Alaska Bar Exam.

I passed the test on the first try and started practicing law. In Kodiak there were a lot of townsite trustees, and people had to prove that they either lived in possession of the property on the date that the commissioner of the general land office had approved the survey, or that they had taken it over from someone who was in possession on that critical day. Since I knew a lot of people, that fell to be my chore for a good while.

I stayed busy with various other things. John Gibbons and I worked out the boundary lines of the Kodiak Independent School District. I was elected to the school board. I was getting along pretty good, except for one thing.

While at the University of South Dakota Law School, I had met Marjorie Anstey. She and I more or less became engaged. (In those days a fraternity pin took the place of a ring.) Marjorie went on to teach and then, when the war came, she joined the Red Cross and I ended up in Manila.

The family — from children to great-grandchildren — gathers to wish John Hughes a happy 90th at Sullivan's Steakhouse.

Continued on page 9

John C.

He was Dakota born and bred--
Raised on a horse and cattle spread.
A middle child with sisters two,
John C. took his mother's cue.

Whether ranching-it or helping mom,
His learning never gone for long.
Country schools and catechism
Taught John more than long division.

Darn smart and quick of wit,
His shenanigans of legend writ.
Education was his goal--
A lawyer's life became his toil.

Too many Beach books read,
To Kodiak his wanderings led.
In '48 Marjorie joined John C.
And started their Alaskan family.

Mary Katherine and Patricia Ann
On Mission Road their lives began;
And then to the City where fortune lie
And Bridget came with pumpkin pie.

Life was wondrous and so glorious,
The Hughes family blessed so fortuitous.
John's law practice grew as did the Bar
(Alaska even became a star).

The girls matured and were educated
Led by John C. who was so dedicated.
He loved his family and took good care,
Always providing for his lair.

His life has been fascinating--
His stories totally captivating.
Gardening has replaced practicing
But he can't ever give up counseling.

The best part of life is living well
And John C. has certainly done swell.
From Dakota beginnings to Alaskan finishing,
His blend of humor and love ne'er diminishing.

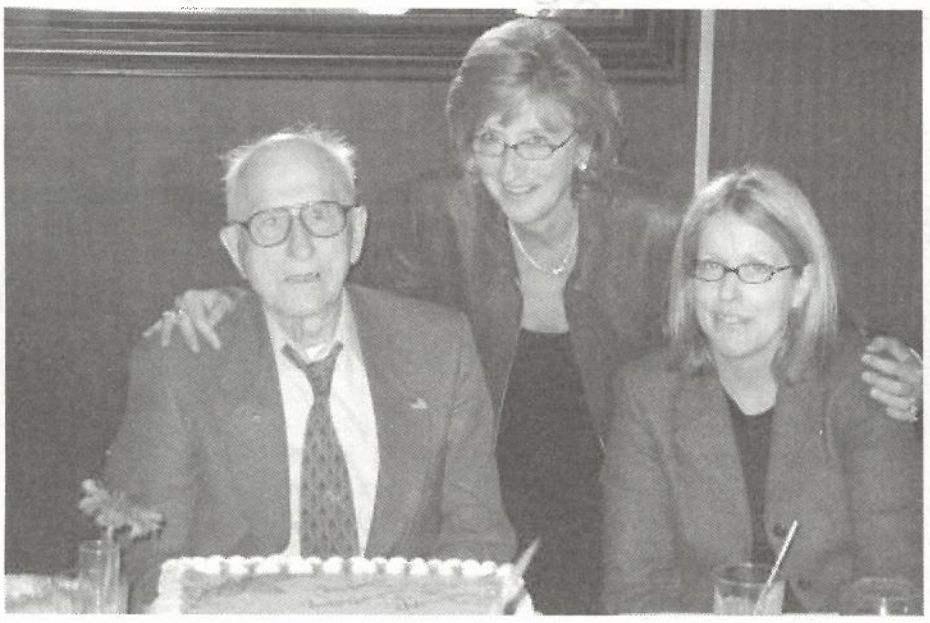
He cuts a large swath this Alaskan legend--
Ninety years young not a curmudgeon.
For all of his years he looks like a kid
And his love of life ne'er a'skid.

What can we say to the wisest among us?
He's ninety today nothing more to discuss.
No disputes, no trials, no appeals
Celebrate his birth with greatest of zeal.

Let's eat, drink and be merry
(To be ninety is a little scary).
But John can do it--this Dakota boy--
With great aplomb he'll be so coy.

You know he loves it this milestone day
And he's lived his life his very own way.
So let's toast the occasion with the greatest of joy
Happy 90th to the Dakota boy.

Mary Katherine Hughes
May 22, 2005



John Hughes, with his daughters, Mary)center) and Bridget.

John Hughes celebrates

Continued from page 8

In the process, we dropped out of correspondence for quite some time.

So after I had been practicing law for a couple years, I got to thinking that maybe I ought to drop Marjorie a line, to see what she was up to. One thing led to another and she came to Kodiak to take a look at the situation. We were married in January of 1948. We didn't have a honeymoon because you couldn't get off the island.

In the course of my work, I had been corresponding with Anchorage attorneys Ed Davis and Bill Renfrew. We had spoken about teaming up, but I got the impression that they wanted me to work for them. I told them, "I don't want to work for anybody. I'm a big trout in a little pond, but I'm doing all right." They said, "We weren't thinking about hiring you, we want you to become a partner." That was pretty good news. I went home that evening and Marjorie said, "If you want to go to Anchorage, that's all right with me." We had two daughters, Mary Kay and Patti Ann, at that point. Our third daughter, Bridget, was born in '54.

So we became Davis, Renfrew and Hughes. I started on April 1, 1951, which, being April Fool's Day, more or less suited my nature.

We bought a home at 511 W. 9th Avenue, where the girls grew up. When we first got to Anchorage, we discovered there were home sites available within six miles of the city center. I liked the sound of that. That first winter, I started exploring land acquisition, as did a whole lot of other people. There were two-year leases on property south of town, three or four sections of five-acre tracts. People would watch and see when those leases expired and become available for reentry.

I managed to get some land on what is now east 88th and Lake Otis, but it wasn't anything like it is now. There was a trail there that had been used by Arnie Link, Bob Dale, and a family by the name of Winchester. There was also a fellow by the name of Dalt who homesteaded 160 acres on the side hill. They were the only people around here, and, of course there were no roads. They'd get the railroad to dump supplies off right next to the tracks, then they'd neck-sled them to their home sites and build their houses. The railroad was very accommodating.

So we became Davis, Renfrew and Hughes. I started on April 1, 1951, which, being April Fool's Day, more or less suited my nature.

After statehood, our law practice continued to grow. A part of my job was recruiting lawyers so I would interview law students outside. I'd travel to various schools. When I went to Harvard the first time, I think they expected me to be wearing bearskin britches! At one time we had upwards of 60 lawyers in four different offices: Juneau, Valdez, Fairbanks and Anchorage.

I retired in 1980. Now I just putter around and do whatever I feel like. That suits me just fine.

In the Supreme Court of the State of Alaska

In the Disability Matter Involving)	
)	Supreme Court No. **S-11985**
James R. Szender,)	
)	**Order**
Respondent.)	
)	
ABA Membership No. 821115)	
)	Date of Order: **7/25/2005**

ABA File No. 2005B003

Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

It is Ordered: The joint motion for transfer to disability inactive status under Alaska Bar Rule 30 is **granted**. Respondent James R. Szender is immediately transferred to disability inactive status until further order of this court. A disability hearing under Rule 30(b) is not required.

Entered at the direction of the court.

Clerk of the Appellate Courts
/s/Marilyn May

ESTATE PLANNING CORNER

Calculating the federal gift tax

By Steven T. O'Hara

The federal government may or may not repeal or reduce significantly the federal estate and generation-skipping transfer taxes. Regardless of what happens with those taxes, it appears we will always have the federal gift tax.

For a variety of tax and nontax reasons, wealthy clients make substantial lifetime gifts. Aggregate taxable gifts of up to $1,000,000 are currently exempt from gift tax regardless of the donees (IRC Sec. 2505). This $1,000,000 exclusion in effect is on top of the familiar $11,000 per-donee-per-year exclusion for certain gifts (IRC Sec. 2503(b)).

For a variety of tax and nontax reasons, wealthy clients make substantial lifetime gifts.

Clients who are considering making aggregate gifts in excess of $1,000,000 plus the $11,000 annual exclusion like to be able to calculate their gift-tax exposure. Calculating the gift tax is generally a four-step process.

The first step is to determine a "tentative tax" on the aggregate sum of taxable gifts (IRC Sec. 2502(a)). For example, suppose in 2005 a client gives $311,000 cash to his adult child. Here $300,000 would be considered a taxable gift (i.e., $311,000 minus the $11,000 annual exclusion). Suppose further that for all prior years the client made taxable gifts of $800,000. Using the rates reproduced at the end of this column, the "tentative tax" on $1,100,000 (the aggregate sum of all taxable gifts) is $386,800.

The second step is to determine another "tentative tax" on the aggregate sum of taxable gifts made before the current year (Id.). Under our example, the aggregate sum of taxable gifts made before 2005 is $800,000. From the rates provided, the "tentative tax" on $800,000 is $267,800.

"It appears we will always have the federal gift tax."

The third step is to subtract the second "tentative tax" from the first "tentative tax" (Id.). Under our example, the result of this third step is a gift tax of $119,000 (i.e., $386,800 minus $267,800).

The effect of these three steps is to assure the application of the marginal tax rates, which begin at 18 percent and generally go up to 47 percent in 2005. In our example, the client is currently in the 41 percent gift-tax bracket.

The final step is to apply any remaining gift-tax credit. This credit shelters from gift tax aggregate taxable gifts of up to $1,000,000 (IRC Sec. 2505).

The gift-tax credit for any calendar year is currently $345,800 minus any gift-tax credit (and, in general, exemption under pre-1977 law) previously used by the taxpayer (Id.). Recall that a credit is a dollar-for-dollar reduction in tax payable.

Under our example the client in prior years made taxable gifts of $800,000, resulting in $267,800 of gift tax, which in turn used up $267,800 of the client's gift-tax credit. Thus the gift-tax credit available to the client is $78,000 (i.e., $345,800 maximum credit minus $267,800 of gift-tax credit used to shelter the $800,000 of taxable gifts made before 2005). Under our example, then, the client owes $41,000 in gift tax (i.e., $119,000 of tax minus $78,000 of remaining gift-tax credit).

As a practical matter, the fourth step is skipped if the taxpayer has previously made aggregate taxable gifts in excess of $1,000,000 -- in other words, if the taxpayer has no remaining gift-tax credit. In our example, the client has now exhausted all gift-tax credit. So for future years, calculating the gift tax for this taxpayer will be a three-step process.

Rate Schedule

Amount with respect to which "Tentative Tax" is to be computed	"Tentative Tax"
Not over $10,000	18% of such amount
Over $10,000 but not over $20,000	$1,800, plus 20% of the excess of such amount over $10,000
Over $20,000 but not over $40,000	$3,800, plus 22% of the excess of such amount over $20,000
Over $40,000 but not over $60,000	$8,200, plus 24% of the excess of such amount over $40,000
Over $60,000 but not over $80,000	$13,000, plus 26% of the excess of such amount over $60,000
Over $80,000 but not over $100,000	$18,200, plus 28% of the excess of such amount over $80,000
Over $100,000 but not over $150,000	$23,800, plus 30% of the excess of such amount over $100,000
Over $150,000 but not over $250,000	$38,800, plus 32% of the excess of such amount over $150,000
Over $250,000 but not over $500,000	$70,800, plus 34% of the excess of such amount over $250,000
Over $500,000 but not over $750,000	$155,800, plus 37% of the excess of such amount over $500,000
Over $750,000 but not over $1,000,000	$248,300, plus 39% of the excess of such amount over $750,000
Over $1,000,000 but not over $1,250,000	$345,800, plus 41% of the excess of such amount over $1,000,000
Over $1,250,000 but not over $1,500,000	$448,300, plus 43% of the excess of such amount over $1,250,000
Over $1,500,000 but not over $2,000,000*	$555,800, plus 45% of the excess of such amount over $1,500,000 but not over $2,000,000*

*See IRC Sec. 2001(c) and 2502(a) for gifts over $2,000,000 or gifts made in 2010.

New attorney general approves of public nudity!

With barely a word about it, workers at the Justice Department Friday removed the blue drapes that have famously covered two scantily clad statues for the past 3 1/2 years.

Spirit of Justice, with her one breast exposed and her arms raised, and the bare-chested male *Majesty of Law* basked in the late afternoon light of Justice's ceremonial Great Hall.

The drapes, installed in 2002 at a cost of $8,000, allowed then-Attorney General John Ashcroft to speak in the Great Hall without fear of a breast showing up behind him in television or newspaper pictures. They also provoked jokes about and criticism of the deeply religious Ashcroft.

The 12-foot, 6-inch aluminum statues were installed shortly after the building opened in the 1930s.

With a change in leadership at Justice, Attorney General Alberto Gonzales faced the question: Would they stay or would they go?

He regularly deflected the question, saying he had weightier issues before him.

Paul R. Corts, the assistant attorney general for administration, recommended the drapes be removed and Gonzales signed off on it, spokesman Kevin Madden said.

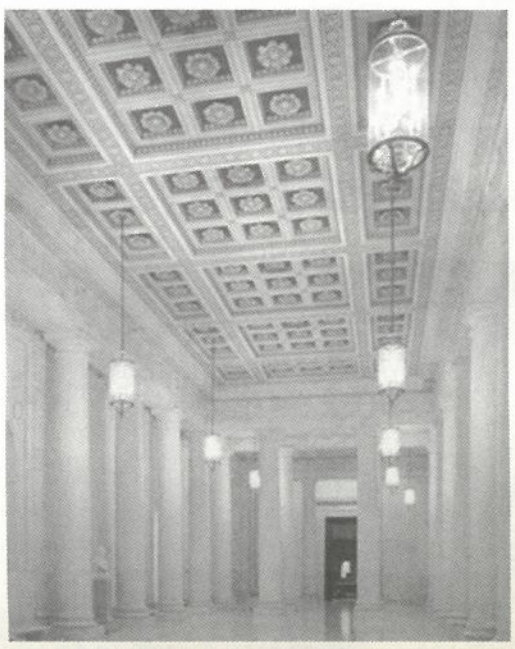
In the past, snagging a photo of the attorney general in front of the statues has been somewhat of a sport for photographers.

When former Attorney General Edwin Meese released a report on pornography in the 1980s, photographers dived to capture the image of him raising the report in the air, with the partially nude female statue behind him.

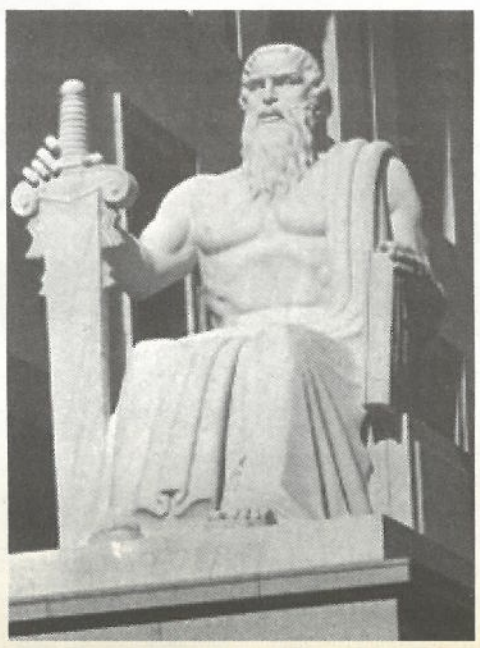
The first attorney general to use the blue drapery was Republican Richard Thornburgh, attorney general under Presidents Ronald Reagan and George H.W. Bush. He had the drapery put up only for a few occasions when he was appearing in the Great Hall, rather than permanently installed as it was under Ashcroft.

Most news conferences now are held in a state-of-the-art conference room, although the Great Hall still hosts speeches and other special events.

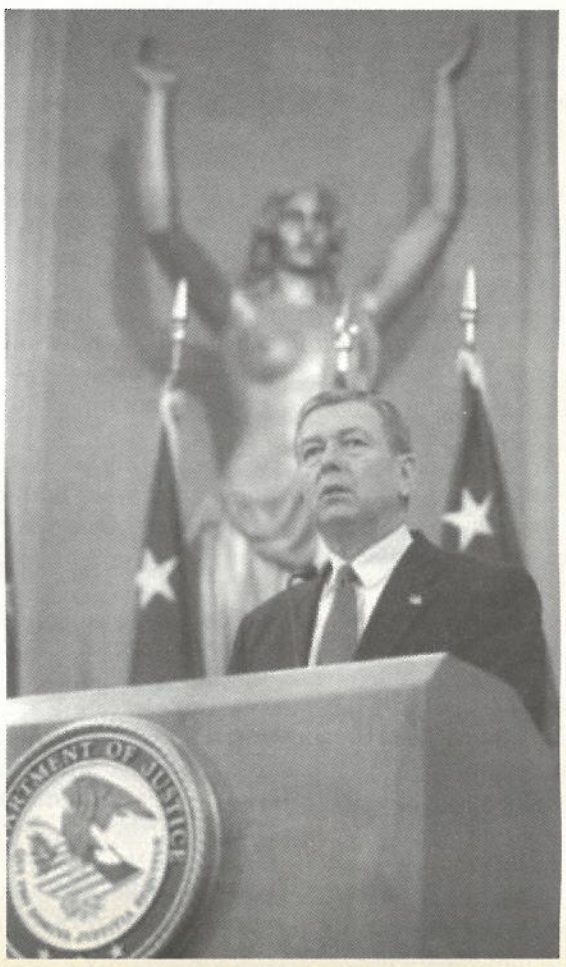
—From AP news story, June, 2005



The Great Hall

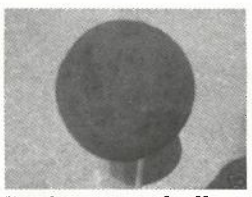


Majesty of Law



John Ashcroft and Spirit of Justice before draping.

Random Staff Encounters



Basic cannonball

Bar pro bono coordinator Krista Scully got the latest update for Alaska lawyerdom's "Celebrity of the Month" (COM) as the Bar Rag went to press.

(The COM being Yale Metzger, the attorney who lost his beloved, perhaps-antique cannon ball to the Anchorage Police Department's bomb squad. He found the cannon ball in Cordova, drove around with it in his truck for months, and had called the police to determine if the device was, as they say, inert. The police blew up the cannonball. Metzger was not pleased, and the story hit the press, presumably worldwide. All that ends well…the cops apologized, gave Metzger $58 to bid on another cannon ball from Hawaii on e-Bay, and the story has faded.)

Metzger shared some post-mortems with Scully, who says:

"I just got off the phone with Yale Metzger and heard the latest developments of the cannon ball fiasco. I innocently asked whether the replacement cannon ball from Hawaii had arrived yet and heard the following:

• In response to the Anchorage Daily News article, the US Army Corps of Engineers Director of the Army Division of Unexploded Ordinance Disposal (really, that's his title) had called to refute APD's assertion that the cannon ball was active. He reportedly told the reporter, "I'm tired of guys with six weeks of ballistics training blowing up antiques."

• Yale got a call from an 81 year old Anchorage resident who stated that after having one of his lungs removed, he's about to die. Before he does, he has a few cannon balls that he'd like Yale to have.

• Thus, Yale now has a cannon ball "collection" of four, not including the one en route from Hawaii.

• A quick Google search using 'Yale Metzger' and 'cannon ball' returns 13,300 hits as of this afternoon (9-15-05). I know because I tried.

• Despite getting interview requests from radio and media all over the world, Yale only granted one interview: a public radio station in Amsterdam.

Good-bye to Judge Kleinfeld

At the Tanana Valley Bar Association, law clerks traditionally must present a poem at the TVBA luncheon at the end of their terms.

A clerkship, I thought, now it could be fun,
Perhaps a year in Miami, where I could lounge in the sun,
But, alas, my grades were more like a joke,
So it was off to Fairbanks to lounge in the smoke.
Now one year has passed, and I've gotten much training,
Though usually the job was not that entertaining.
But at least I've got stories to make me sound exotic,
even if the job made me that more neurotic.
But as I draw near to the time when I'm expelled,
It's time to finally say, good bye Judge Kleinfeld.

--Mark J. Sherer, August 26, 2005

TERRITORIAL LAWYERS

Old Geezers Rule!

By Russ Arnett

On June 7, 2005, we held a party at the Petroleum Club of Anchorage for lawyers admitted in to the Alaska Bar for 40 years or more, their spouses or friends. About 70 attended.

These parties have been held annually since 1998.

These parties started as a result of chance meetings of Dave Thorsness and myself. We frequently discussed having a party for those who passed the Alaska bar when we did (1955). When we realized that there would not be many to attend, we expanded it to all lawyers admitted in Territorial times.

For the first few years they were held for lawyers who practiced in Alaska during Territorial times. As deaths occurred we decided to invite those admitted for 40 years or more.

We considered the World War I soldier buddies in France who purchased a bottle of cognac. They agreed to keep in touch with each other and the last survivor would drink the cognac. We found this a depressing prospect which might appeal to young men in war but did not appeal to us, hence, the change to 40 years.

From the first, the parties were a big success. The first few were held at lawyers' homes and were potlucks. Later we decided to rent banquet facilities. One year we set up horseshoes but discovered that all they wanted to do was to talk.

These parties may have had their origins in the practice of lawyers in most Alaskan communities of having coffee together most mornings. In this larger group of lawyers it seemed that our normal need to communicate reached a "critical mass" and the conversations were more spirited than during those morning coffees. Lawyers who had not seen each other for 20 or 30 years talked and told stories about matters old and new. I personally always leave the parties feeling sorry that I did not have time to talk to more lawyer friends who were present. Previously held bad feelings that may have existed toward any of the lawyers evaporated or appeared of no importance.

It was never intended that this was just an Anchorage affair. We have always invited statewide. Chuck Cloudy has come from Ketchikan, Judge Stewart from Juneau and Warren Christianson from Sitka. Charlie Cole and Barry Jackson of Fairbanks have become regulars as has Jamie Fisher of Soldotna. We welcomed the well-traveled Judge Hornaday of Homer. We have had widows attend from Seattle and the Southwest. Any I have missed mentioning were also valued.

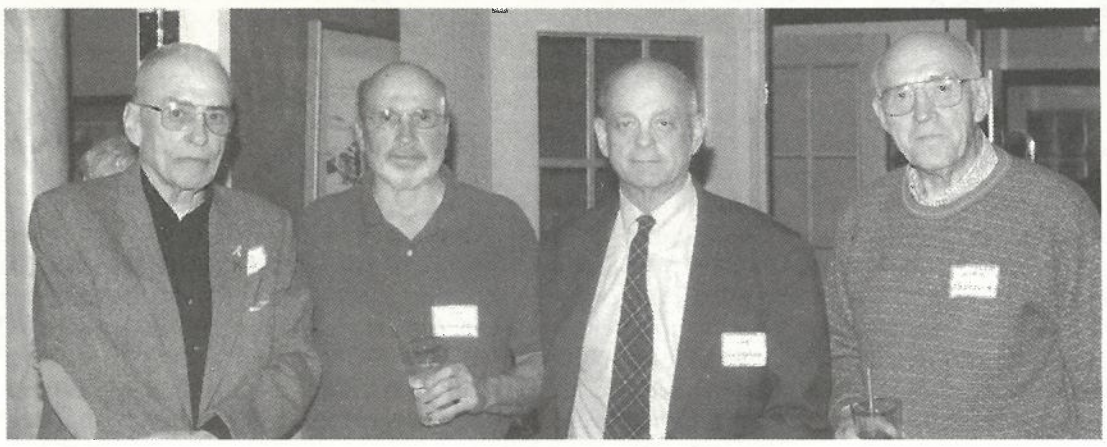
Leroy Barker and his Historians' Committee and Deborah O'Regan of the Alaska Bar Association have been valuable supporters of these parties. We especially appreciate Timothy Lynch who took the photographs for the gathering.

Sometimes things just seem to go well.

The gang's all here for the annual Territorial Lawyers gathering.

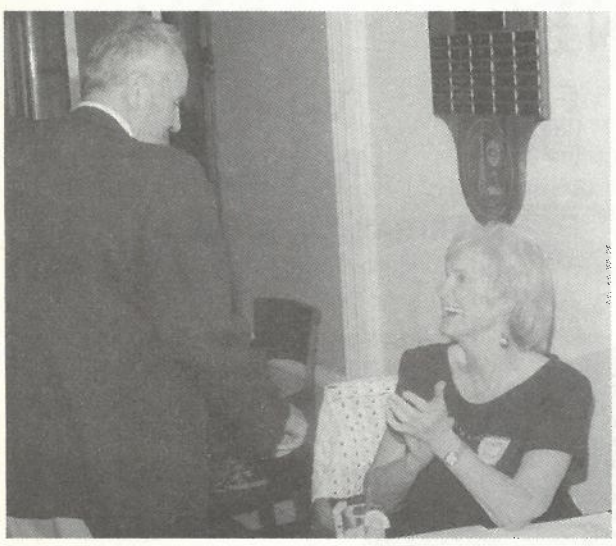
One shot, five conversations!

One of the party hosts, Lucy Groh, and Roger Cremo get organized.



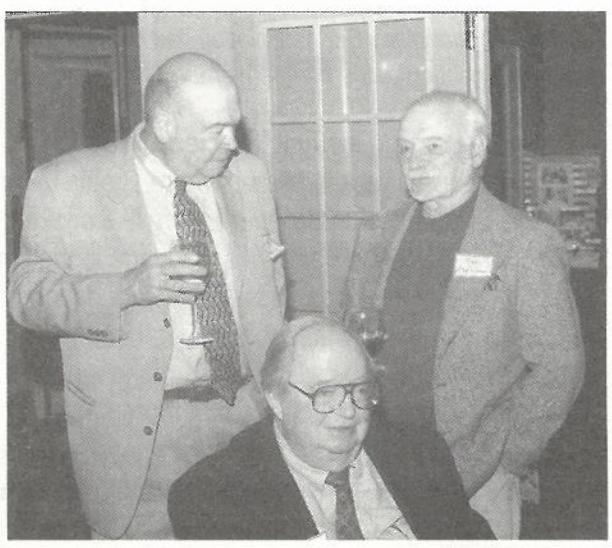
Do politics draw (L-R) Jamie Fisher, James Hornaday, Joe Josephson, and Jack Roderick together for war stories?

Photos by Tim Lynch



Betty Arnett greets one of the guests, Stan Reitman.

M. Ashley Dickerson (seated) and Verona Gentry say hello.



L-R: Jerry Wade, Jim Delaney (C), and Ken Atkinson schmooze before dinner.

Interested in submitting an article to the Alaska Bar Rag? Required Writers' Guidelines

The Bar Rag welcomes articles from attorneys and associated professionals in the legal community. Priority is given to articles and newsworthy items submitted by Alaska-based individuals; items from other regions are used on a space-available basis. We recommend that you follow the writers' guidelines below:

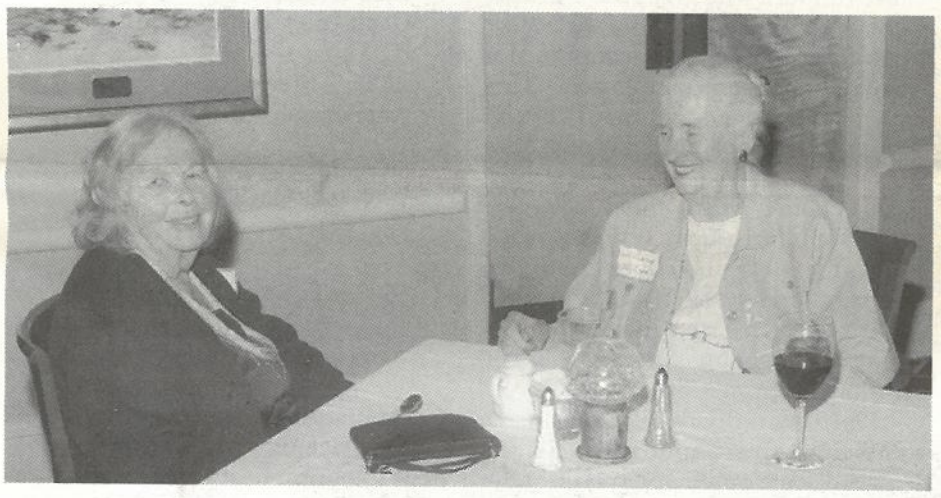
- Editors reserve the option to edit copy for length, clarity, taste and libel.
- Editorial copy deadlines: Friday closest to Feb. 15, May 15, August 15, and Nov. 15.
- Author information: Make certain the author's byline or identity is on the top or bottom of the manuscript.
- Format: Electronic files should be in text, Word, or Word Perfect format only. DO NOT convert to pdf.
- Fax: 14-point type preferred, followed by hard copy, disk, or e-mail attachment.
- Photos: B&W and color photos encouraged. Faxed photos are unacceptable. If on disk, save photo in .tif or .jpg format.
- Digital Photos: If digital photos are submitted via e-mail, please reduce to 70 percent of size if possible and provide at medium-resolution or better. (Low-resolution .jpg format photos do not reproduce well in print.)

A Special Note on File Nomenclature (i.e. filenames)

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

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

Territorial Lawyers



Karen Fitzgerald and Juliana Wilson enjoy the Petroleum Club.

Please save this date! November 8th.

The Historians Committee of the Alaska Bar Association

in conjunction with

Creating Alaska

are presenting a luncheon program

Nov. 8, 2005 from 11:30 to 1:30

at the Captain Cook Hotel.

It is the first in a series of programs celebrating the 50th anniversary of the drafting of our state constitution. The program will focus on the history of the article establishing our judicial selection process.
Justice Warren Matthews will be the principal speaker. He will be joined by the surviving participants of the convention.
The program will also include a representative of Creating Alaska who will preview the upcoming activities that are planned to celebrate this important event.

Call the Bar office at 907-272-7469 to register or go to the Bar website www.alaskabar.org and click on "calendar."

Please plan to join us.

SINCE 1896
ALASKA BAR ASSOCIATION

DID YOU KNOW...

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

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

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

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

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

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

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

Michelle Hall (Nome). 443-2281

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

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

Nancy Shaw (Anchorage).
276-7776

Clark Stump (Ketchikan).
225-9818

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

Teresa S. Williams (Palmer).
Borough Attorney, Matanuska-Susitna Borough
746-7424 (office private line)
745-0725 (home)
teresaw@gci.net (private e-mail)

ALSC President's Column

Many thanks, determining case priorities and zeal for justice

By Vance Sanders

One of the nice things about chairing the board of Alaska Legal Services Corporation is the number of people one gets to express gratitude to on behalf of all the indigent Alaskans helped by and through ALSC.

First, at the Bar Convention, retired Juneau Superior Court Judge Thomas Stewart received, in addition to the American Judicature Society's Herbert Harley Award, the Alaska Bar Association's Jay Rabinowitz Award; and the check which goes to the Rabinowitz Award recipient. Judge Stewart promptly donated the entire check to the Robert Hickerson Partners in Justice fund. This generosity from such a distinguished jurist is very much appreciated.

I also want to extend a special thank-you to the district chairs for the just-ended Robert Hickerson Partners in Justice campaign: Ann Gifford of Faulkner Banfield and Myra Munson of Sonosky Chambers in the First Judicial District, Mark Ashburn of Ashburn and Mason and Walter Featherly of Patton Boggs in the Third Judicial District, and Charlie Cole of the Law Offices of Charles E. Cole in the combined Second and Fourth Districts. Knowing how busy all these folks are makes their willingness to devote their time to the Campaign all the more meaningful.

Thanks also to all the firm liaisons, office liaisons, community liaisons, and especially to the donors, too numerous to list here, but check out the listing which should be elsewhere in this issue of the *Bar Rag*.

Also, thanks to Deborah O'Regan and Karen Schmidlkofer of the Alaska Bar Association; responding to an office survey being conducted by the Standard Insurance Company, for which Standard offered to donate $100 to a designated charity, they chose to designate ALSC.

Heading up ALSC is gratifying in many ways, but one of the foremost is the amount of community and professional support our colleagues are willing to donate towards equal access to justice.

Input

At its September 2005 meeting, the ALSC board will be reviewing and deciding upon the case acceptance priorities for the ensuing twelve months.

Occasionally, ALSC staffers or board members get feedback along the lines of "Why the heck are you guys wasting time doing this kind of case when you're turning people down who need help with that other kind of case?"

(Frequently, "this kind of case" happens to be a case on which the commentor is opposing counsel, and "that other kind of case" is just about anything other than "this kind of case.")

But let me try to respond, first to the second half of the question.

Obviously, we turn down financially ineligible applicants, and we turn down applicants with whom ALSC has a conflict, and we turn down applicants whose cases we determine lack merit; but we are also forced to turn down large numbers of financially eligible, non-conflicted, meritorious applications, simply because our resources, including both staff attorneys and the volunteer efforts of pro bono attorneys, are insufficient to fully meet the ever-growing demand.

We do what we can for as many applicants as possible through brief counsel and advice, or through our pro se clinics, but many such applicants would obviously prefer full extended representation were we able to offer it.

(Any applicant or client is informed of the right to pursue a grievance, first to the office supervising attorney, then to the Executive Director, and then to the grievance committee of the board.)

As to why we do accept the cases we accept, there are three parts to the answer.

First, we turn to the case acceptance priorities, about which I write more below.

Second, we have a responsibility to those funders who give ALSC grants earmarked for service on a particular type of legal problem or earmarked for a particular client population. This category includes our grant to work on Native Allotment cases; local grants for support of our Anchorage, Fairbanks, Nome, Dillingham, Kotzebue and Ketchikan offices; and statewide grants for particular client groups we get from funders such as the Alaska Mental Health Trust Authority, the Alaska Office on Aging; and the Alaska Children's Trust.

Third, we individually assess each application to examine the facts, the merits of each applicant's claim or defense, and the direness of the possible consequences to the applicant should ALSC not provide representation.

These don't mean that our case acceptance decisions are always right on the mark, but we do the best we can with available resources to provide access to justice for as many as we can.

To return to the case acceptance priorities I mentioned: the board sets these region by region.

Each summer, surveys are sent out to social service agencies, both to fill out and to distribute to likely-financially eligible individuals, asking what types of legal problems have been most pressing during the past year.

The supervising attorneys of each regional office tabulate the results of those surveys, and after comparing them with the intake data of applications filed with ALSC over the past year, submit a recommendation to the board for the regional case acceptance priorities over the next twelve months.

The amount of discussion the board has over those recommendations varies quite a bit from year to year; sometimes there's very little, sometimes there's quite a bit.

Anyway, if you really do have a suggestion or comment about what you think ALSC should be doing more of, or doing less of, you can send those to Executive Director Andy Harrington (1648 South Cushman, Suite 300, Fairbanks AK 99701, 907-452-5181), or contact any of our attorney board members (selected from each district) who can act as conduits for your comments or suggestions at this case acceptance priority setting session. I'm listing them here.

Robert C. Bundy
1031 W. 4th Avenue, Suite 600
Anchorage, Alaska 99501

Karen Lambert
323 Carolyn
Kodiak, Alaska 99615

Camerson Leonard
100 Cushman Street, Suite 400
Fairbanks, Alaska 99709

Joseph Miller
P.O. Box 83440
Fairbanks, Alaska 99708

Greg Razo
Cook Inlet Region, Inc. (CIRI)
P.O. Box 93330
Anchorage, Alaska 99509

Janine Reep
Office of Public Advocacy
P.O. Box 110225
Juneau, Alaska 99811

Lisa Rieger
Cook Inlet Tribal Council, Inc. (CITC)
2525 C Street
Anchorage, Alaska 99503

Vance Sanders
P.O. Box 240090
Douglas, Alaska 99824-0090

Bryan Timbers
P.O. Box 1696
Nome, Alaska 99762

Conclusion

Two events since the last Presi dent's column best illustrate the im portance of and continued support fo ALSC. First, the (May) 2005 Alaska Bar Convention in Juneau provide a unique opportunity to spend time with venerable jurists (including U.S and Alaska Justices O'Connor an Stewart), and fellow practitioners among them several ALSC alumni I was then struck by, and continue to be gratified about, the awesom -- and welcomed -- support ALS receives year in and year out fron the Alaska Bar, Alaska's judiciary august ALSC alumni (many of whon are now jurists) and members of th Bar who seek a common goal for al Alaskans: Equal justice. Second former Governor Hammond's recen passing brought to mind an ALS fundraiser jointly hosted by Coun cil & Sanders and Gross & Burk in Juneau in approximately 1995 Governor Hammond regaled al with stories about his early days i Alaska, and the importance of ALS Too, Bill Council, Avrum Gross, an Susan Burke talked about importan cases that so affected this great state and ALSC's role in those cases. An Robert Hickerson soaked it all in Although Governor Hammond an Robert are no longer with us, thei zest for life and zeal for justice re mains. We are truly blessed to hav known them, and to live in a place an at a time which provides continue opportunity to help those who trul need it.

Courts confront need for qualified interpreters

By Suzanne DiPietro & Brenda Aiken

Oral Language Summit participants, Alaska Court System

The lack of qualified interpreters who are qualified to interpret in court and other legal settings is a critical need facing the justice system in Alaska.. This need was documented in the 1997 report of the Alaska Supreme Court's Advisory Committee on Fairness and Access, and was reinforced by recent Census data. According to the most recent Census, about 4% of the total adult population of Alaska speaks English less than very well, which equates to approximately 24,700 adult Alaska residents. Anecdotal accounts suggest that these adults with language challenges access government, nonprofit and other social services at levels disproportionate to their representation in the general population. It is clear that the Alaska Court System currently serves many customers who do not speak English well, and that these people experience barriers accessing court and justice services. Also, it is clear that Alaska's population will continue to become increasingly linguistically diverse in the future.

There is an interpreter scarcity in Alaska. No Alaska residents are federally certified court interpreters.

There is an interpreter scarcity in Alaska. No Alaska residents are federally certified court interpreters. Only a handful of Alaska residents are certified by other state courts and, very few of the people working as interpreters in Alaska have had formal court interpreter training.

Increasing the qualified court interpreter availability is not a simple task. First is the issue of finding additional funding. Only some of the justice system's language interpretation needs are being met by state-funded services. State law provides for state-paid language interpreters in only limited circumstances. So although indigent criminal defendants are entitled to a state-paid interpreter, no such right exists in the vast majority of civil proceedings.1. But even if additional funds were available, only a very few individuals in Alaska are sufficiently skilled to be court interpreters. A competent oral language interpreter in the justice system must be fluent in two or more languages, develop interpretation skills through a course of rigorous study, and possess knowledge about justice system protocol, judicial proceedings, legal terminology and ethics. So the second problem is how to encourage likely candidates to develop language interpretation skills. Assuming that a pool of trained candidates could somehow be developed, the third problem is how to determine whether the trained candidates do actually possess the necessary skills, through some system of testing and certification. The Alaska Court System has joined the National Center for State Courts' Interpreter Consortium in order to obtain access to tests developed by other state courts, but administering and grading the tests, maintaining lists of interpreters who have passed the tests, and providing ongoing support to qualified interpreters would require a significant amount of resources and creation of infrastructure that we currently lack.

Increasing the qualified court interpreter availability is not a simple task.

Sharing of Resources

In 2003, representatives of the Alaska Court System had informal discussions with numerous government leaders, nonprofit and for-profit managers and businesses to determine what is being done to enhance competent oral language interpreting. Through these conversations, we learned that a number of different agencies and entities in Alaska need language interpretation services but have trouble finding qualified and available interpreters. Discussions also indicated that a number of these entities duplicated efforts by sponsoring stand-alone training for interpreters, dedicated staff time to develop a list of potential interpreter sources and researched funding to sustain and support interpreter needs. At the same time, the Alaska Court System was consulting with Bill Hewitt at the National Center for State Courts on the best way to address the interpreter problem in Alaska. As a result of this consultation and these discussions, the Alaska Court System proposed that the idea of pooling resources from a number of public and private entities to develop an organized system for training and procuring interpreters.

Oral Language Interpreter Summit 1

On April 26, 2004, over 40 stakeholders from state and local government agencies, nonprofit and for-profit entities and businesses were invited by Chief Justice Alex Bryner to an Oral Language Interpreter Summit hosted by the Alaska Court System. The purpose of the summit was twofold: (1) to learn from participants about their needs for language interpreters, and (2) to explore possible short-and long-term solutions for meeting those needs. The stakeholders identified shared challenges including: the need for competent interpreters; how to increase the number and availability of qualified interpreters, financial constraints; and raising public awareness of the skills needed for competent oral language interpretation.

State Judicial Institute Oral Language Needs Assessment Technical Grant

The Alaska Court System applied for and was granted a Technical Assistance Grant from the State Judicial Institute to assess government and private sector entities' needs for language interpretation services. In partnership with our technical assistance providers, Catholic Social Services and the University of Alaska Anchorage, two surveys were developed and distributed to state and local government stakeholders, nonprofit and for-profit entities, and businesses to gather information about interpretation needs and to determine resources spent on interpretation services statewide. Another phase of the research studied the feasibility of creating a statewide interpreter referral center that would be available to public and private sector agencies and businesses.

Oral Language Interpreter Summit 2

In September, the Alaska Court System will convene a second statewide Oral Language Interpreter Summit. At this summit, the key stakeholders will review the findings of the statewide needs assessment survey and, discuss how supportive parties and other public officials may work together to provide efficient and effective statewide interpreter services.

Alaska Court System Initiatives

In addition to receiving a State Judicial Institute Grant to conduct a needs assessment, and convening two summits, the court system has joined the Consortium for State Court Interpreter Certification. The Consortium, under the auspices of the National Center for State Courts, is an invaluable resource to state courts in developing oral language interpreter certification programs. Administrative personnel also initiated preliminary discussions with the University of Alaska Anchorage and other oral language certification providers to determine the feasibility of a statewide certification training program. The Alaska Court System continues to research avenues and develop strategies to address the complex issue of training, developing, finding and securing qualified interpreters.

Comments and questions about the Alaska Court System Oral Language Interpreter Initiative can be directed to Susanne DiPietro (sdipietro@courts.state.ak.us) or Brenda Aiken (baiken@courts.state.ak.us)

(Footnotes)

1 The Alaska Court System currently provides temporary grant funding for language interpreters in domestic violence restraining order proceedings. The ACS has been successfully using AT & T's telephonic language interpreter service, called the Language Line, for these short, non-evidentiary hearings.

Addressing the legal needs of Spanish speakers

Alaska Legal Services Corporation (ALSC), in partnership with members of its pro bono panel and representatives from state and non-profit agencies, has created a committee to identify and address some of the civil legal problems affecting the Spanish-speaking community in Alaska.

During their first meeting last June, committee members identified some of the problems that could be targeted with current resources. The language barrier was listed as the most problematic issue. Other problems identified range from the lack of community outreach and education, to the dearth of legal materials in Spanish. The committee also noted the great need for professional and accredited interpreters that would be willing to volunteer or reduce their rates to help low-income and indigent persons.

Some of the goals established include the revival of the Spanish Language Clinics in Anchorage and the establishment of a telephone hotline to complement the clinics. The committee also set goals for getting legal brochures and content from AlaskaLawHelp.org translated into Spanish, and the creation of a standard glossary of legal terms.

"Demand for legal services by Spanish speakers has slowly, but steadily, increased. Our current staffing and financial resources are limited to meet this emerging need, but by working together with our pro bono panel members and forging partnerships with other groups in our community, we can begin to eliminate some of our current obstacles", said Erick Cordero, Director of Volunteer Services and Community Support at ALSC.

Alaska Legal Services Corporation is a non-profit organization established in 1966 and the largest statewide provider of free legal services in Alaska. The Volunteer Attorney Support pro bono program has been assisting low-income Alaskans for over two decades through the generosity of members of the Alaska Bar Association. AlaskaLawHelp.org is a web-based guide to civil legal services and resources for low-income persons and seniors in Alaska.

Zobel's beadwork art wins 'best of competition'

Penny Zobel wears "Bedrock" in her Anchorage office.

When Penny Zobel set out to make a beaded watchband seven years ago, it was a first step that would lead her to beading as an art form.

In September, Zobel's beadwork was recognized in two national competitions. One of her necklaces, "Sea Meets the Shore," was named Best in Competition in the 2005 Bead Arts Awards sponsored by the Lapidary Journal and its associated publications. Another sculptural work she named "Landscape of My Heart" received first place in the beaded object category for the awards. The two works are published in the September-October issues of the Lapidary Journal and Step-by-Step Beads.

One of Zobel's more complex necklace pieces, "Bedrock," appeared in the BeadDreams 2005 juried competition sponsored by Bead & Button Magazine, "to select the finest examples of contemporary bead artistry." The necklace was among 88 beaded projects shown at the national Bead & Button Show in May.

Zobel also is a recognized artist at home; she will be the featured artist for the Anchorage Museum of History and Art's 2005 Alaska Bead Society event in October.

The Anchorage attorney's beadwork is a personal endeavor that began, she said, "when my son entered high school; I found myself with time on my hands." Beadwork, she says, provides the opportunity to free her mind from the stress of work and career—and to bring solace in her personal life.

"Bedrock" has a special meaning to the lawyer-artist. She completed it in Washington state while her husband Ron was undergoing cancer treatment in the hospital there. "It was a piece that brought together both of our strengths," she said. Ron's warmth and introspection reflected in the colors of the desert; her energy and complexities reflected in the colors and textures of the sea.

Zobel works principally in seed beads with freeform right angle weave and peyote stitches, layering patterns and embellishments onto a piece until it's "finished." It's a time-consuming process; the pieces featured in the 2005 awards each took 6 to 9 months to complete. But there's no rush. Zobel creates her beadwork not for competition or sale, but for her own pleasure.

Early on, she said, she took a beading class that went beyond the simple watchband she had in her mind. She was fascinated with the possibilities of creating larger bead pieces and took classes with visiting bead artists Jeanette Cook and Diane Fitzgerald. "The Alaska Bead Co., does an excellent job of bringing up nationally known artists to teach here," she said. "It was a very freeing experience--there was no issue of coloring outside the lines."

Inspiration from other Alaska beadworkers led to a year-long intensive, "the maze project," a series of sessions with NanC Meinhart of Chicago, with artists creating pieces of their own design. "It was an amazing journey," she said, and the beadworkers she gathered with along the way provided continued inspiration and encouragement. "They still do," she says.

In 2004, her fellow beaders encouraged her to enter the prestigious Bead International Awards, sponsored by the Dairy Barn Southeastern Ohio Cultural Arts Center. Her sculptural piece, "Women of the Trail," was completed after a trip she and Ron took along the Oregon Trail. It's an elaborate piece of earth-toned beads constructed of artifacts they found on the trip, anchored by a broken wagon wheel. "Women of the Trail" won the People's Choice award and remains in a traveling exhibit in museums around the country.

Like most beadaholics, Zobel finds beads and pieces for future works wherever she travels. "I have to say, too, that we have great bead stores here," she says with a chuckle. Her works are not limited to beads, alone, however. Most incorporate found objects, charms, ivory, wood, pearls, gemstones, and glass beads elaborately woven together with tiny seed beads.

Zobel had little experience in arts and crafts when she began her beading, although she does have an undergrad degree in photo journalism. As a child she sewed with her mother and recalls doing embroidery work, but her creativity lay dormant as she married, had a son, and pursued a law career as a partner, shareholder and president in the firm of DeLisio Moran Geraghty & Zobel.

Linda Myers, a bead artist colleague and one of Zobel's first bead instructors and mentors at Alaska Bead Co., said of Zobel, "whatever she does, she always does with excellence."

—Sally J. Suddock

"Landscape of My Heart" is a 20" x 12" beaded triptych that can be viewed closed or open.

Zobel's "Sea Meets the Shore" appears in 2 national magazines.

Alaska investigators group aims to start Alaska Innocence Project

Responding to a spate of wrongful convictions across the country in recent years, an investigator's group is spearheading an effort to establish an innocence project in Alaska. The effort could make Alaska the latest in a long list of states that have established similar projects, which seek to provide an avenue of relief for persons convicted of crimes who have a claim of actual innocence.

The AIA would like to hear from anyone wishing to volunteer for the innocence project in Alaska

The Alaska Investigator's Association (AIA), a non-profit group made up of private and public investigators scattered across the state, is bringing together a broad coalition of organizations and individuals, ranging from lawyers groups and investigators to justice groups and college students, to help with the effort.

Rich Norgard, one of the AIA team spearheading the project, talked about the group's plans for the innocence project. "This will be a think tank of sorts. We want to study what's been done in other states, brainstorm some ideas, and come to a consensus on the best way to do it here in Alaska," Norgard says.

The AIA will formally kick off their project by hosting an Alaska Conference on Wrongful Convictions on Thursday, September 29 at the Anchorage Downtown Marriott. According to Norgard, who is also the conference chair, the conference will focus public attention on the problem of wrongful convictions and highlight the need for an innocence project here. "Innocence projects have been established across the country to address this problem and have been remarkably successful," Norgard said.

The conference will highlight the case of Michael Simpson, convicted of sexual assault and later released largely through the efforts of Anchorage Police Detective Joe Austin. "Michael spent time in prison for a crime he did not commit," Austin said. Now a private investigator who sometimes testifies for the defense as an expert witness, Austin and attorney Cynthia Strout will share the podium with Simpson as he tells his story.

Since Barry Scheck and Peter Neufeld founded the first "Innocence Project" at the Benjamin N. Cardozo School of Law at Yeshiva University in 1992, 159 inmates have been exonerated, mostly through DNA testing. The effort has spawned the formation of similar organizations in a number of other states.

Alaska's innocence project, as envisioned by Norgard, will primarily focus on actual innocence claims, but will also work to address the causes of wrongful convictions. For example, statistics compiled by Scheck and Neufeld's Innocence Project show that the number one cause of wrongful convictions is misidentification by the victim.

One remedy for this, according to Norgard, would be to work with law enforcement agencies across the state to erect safeguards in their lineup procedures. Penny Beerntsen, who was brutally raped and nearly killed on a beach in Wisconsin, misidentified her assailant as Steven Avery, who spent 18 years in prison before DNA exonerated him. Beerntsen will speak at the AIA conference about the dangers inherent in witness identification.

Another role of the innocence project, according to Norgard, might be to provide compensation for persons found to have been wrongfully convicted. "We have had people incarcerated for decades who were innocent. I think most people would agree that they should be compensated in some way," Norgard said.

The AIA will have help in its effort from people like Rob Warden, executive director of the Center on Wrongful Convictions at the Northwestern University School of Law, and Jackie McMurtrie, an Assistant Professor at the University of Washington School of Law who directs the Innocence Project Northwest Clinic. Both will speak at the conference and will advise the AIA nn establishing Alaska's innocence project.

The AIA would like to hear from anyone wishing to volunteer for the innocence project in Alaska, make a donation, or register for the Alaska Conference on Wrongful Convictions. For more information, go to the AIA web site at www.akinvestigators.com or call Debra at (907) 337-6211.

Pro Bono Corner

A day in the life of a pro bono coordinator...

"Legends have it that, when I call, last-minute meetings have sprung out of nowhere in deserted office spaces."

By Erick Cordero

While slowly walking towards the emergency exit door, "My clients don't pay me, all I do is pro bono," said the attorney I just met.

"Pro what?" resounded the voice in my ear after calling a local law firm.

Sadly now and then, I get comments like that when making calls or meeting people to place a case. If I am lucky to get past the receptionist, without him or her threatening to report me for violating the "do not call" list, the mere mention of my name can cause fear and anxiety, or so I have been told.

Legends have it that, when I call, last-minute meetings have sprung out of nowhere in deserted office spaces, spouses go into labor and many others have left the country on vacation to Siberia for undetermined lengths of time. If you thought you've heard good excuses, wait until my next article listing all the ones I have collected over the last 4 years.

Now don't get me wrong. I actually enjoy the challenge, as I am sure you do on your daily routine! Having started this column by listing some of the difficulties I face on a daily basis, let me now share something with you about the people that I have come to admire, and in addition would like to publicly thank them for all their efforts. Let's start with a man who lives at the end of the Iditarod race: Bryan Timbers.

Bryan is originally from Yakima, Washington, but has been living in Alaska for more than 30 years. Having studied Psychology in the University of Arizona, he went on to get a law degree from that same institution. Soon after, he moved to Alaska and started working as a clerk in Juneau.

For a few years, Bryan worked as an Assistant Public Defender and later became the shareholder of a law firm in Nome until his retirement in 2000. Just when he thought that he would kick back and enjoy fishing more often, he became instrumental in the incorporation of the Alaska Pro Bono Program Inc. For many years, he has been serving on the ALSC board of directors and has held several offices.

Bryan was recently seen working for Representative Richard Foster in Nome. However, behind the scenes, he kept donating time and effort to make Equal Access to Justice a reality in our state. Bryan has been APBP's President for the last 5 years and has devoted countless hours serving its board and continues to serve on the ALSC board. He is an active member of the Pro Bono Services Committee and has participated in Law Day.

Another Alaskan attorney that has been here for about 30 years is John Treptow from Dorsey & Whitney. If you don't know John, let me tell you that he is the heart and soul of Dorsey's pro bono efforts in Anchorage and an unshakable supporter of Equal Access to Justice.

Originally from "The Windy City of Chicago," and having graduated from the Washington University School of Law in 1971, John moved to San Francisco for a few years to work for a fancy law firm and then moved to Alaska. His practice focuses on the representation of health care providers, but he also represents professionals in malpractice actions and defends insurers in bad faith actions. He lives with his wife Barbara and is a "hockey" parent and has lost count of how many games he has attended.

I am very grateful to count on the support we get from Bryan and from John. They are magnificent people and they always return my calls!

When it comes to pro bono, he is Dorsey's Pro Bono Coordinator and one of the hardest-working individuals I have ever met. In addition, John is one of the original signators of the American Bar Association's "Pro Bono Challenge" and has earned the respect of many people. He has donated hundreds of hours representing low-income persons, coordinating new efforts such as the "Attorney of the Day" pro bono project and helping recruit many of his peers and colleagues. Just last year alone, more than 50 of our clients benefited from John's efforts.

I am very grateful to count on the support we get from Bryan and from John, and I hope that you'll get to know them too. They are magnificent people and they always return my calls!

Judge Thomas Stewart signs over the $1,000 he received for the 2005 Robinowitz Public Service Award to the ALSC.
Photo by Karen Schmidlkofer

Pro Bono Corner

"Read the story and let it serve as a reminder that pro bono makes a difference—in your own city or half a world away."

One lawyer's fight for justice: Marcia Newlands defends imprisoned Mexican environmentalists

A chance conversation between two members of the Alaska Bar Association led to the writing of this story. It details the incredible courage and generosity of Marcia Newlands, a partner of Heller Ehrman White in Seattle (with a satellite office in Anchorage, Alaska), who took on the entire Mexican government on behalf of an activist who was capriciously imprisoned due to his environmental activities.

Stories come to us in a myriad of ways; this story came via Jonathon Katcher while attending the American Bar Association's National Conference of Bar Presidents in February. Author Lewis Gordon is a former partner at Ashburn and Mason in Anchorage and is now an inactive member currently teaching law at the University of Utah School of Law in Salt Lake City. He developed and runs a non-profit, the Environmental Defender Law Center, which coordinates pro bono legal services for environmental human rights cases worldwide.

I encourage you to read the story and let it serve as a reminder that pro bono makes a difference—in your own city or half a world away.

—Krista M. Scully,
Pro Bono Director

By Lewis Gordon

Introduction: Environmental Defenders in developing countries get free legal help

The connection between human rights violations and environmental degradation has attracted increasing attention at the international level in recent years. One aspect of the problem is the flagrant misuse of the criminal justice system by governments that are intent on silencing those who advocate for the environment and for local peoples harmed by environmentally destructive projects. In 2003, I created the Environmental Defender Law Center (EDLC) to identify cases of environmental defenders around the world who had been subjected to abuses of their human rights and who would benefit from legal assistance, and then enlist American private lawyers from premier international firms to work *pro bono* on their behalf.

The need for EDLC had become apparent to me several years earlier as I worked on the defense of Goldman Environmental Prize winner Rodolfo Montiel. The Goldman Prize ($125,000 per recipient) is known as the "Nobel Prize" for environmental grassroots activists, and is awarded each year to six individuals from each of the inhabited continents. Montiel, a campesino anti-logging activist from Guerrero state in Mexico, had been arrested and tortured and convicted of false criminal charges (weapons and marijuana possession) in retaliation for his successful efforts to halt logging of old growth forests in his community. He received the 2000 Goldman Prize in his jail cell in Mexico from Ethel Kennedy, the widow of Senator Robert F. Kennedy. Only when one of his Mexican human rights lawyers was assassinated did Mexican President Vicente Fox bow to international pressure and release Montiel and his fellow campesino co-defendant, Teodoro Cabrera.

I researched and wrote a brief that was submitted on Montiel's behalf to the Inter-American Commission on Human Rights. The brief included the most comprehensive report ever prepared documenting the plight of environmental defenders around the world who have had their human rights abused. As I researched these cases, it became increasingly clear to me that legal assistance for environmental defenders was usually lacking. With support from the Richard & Rhoda Goldman Fund, EDLC was launched.

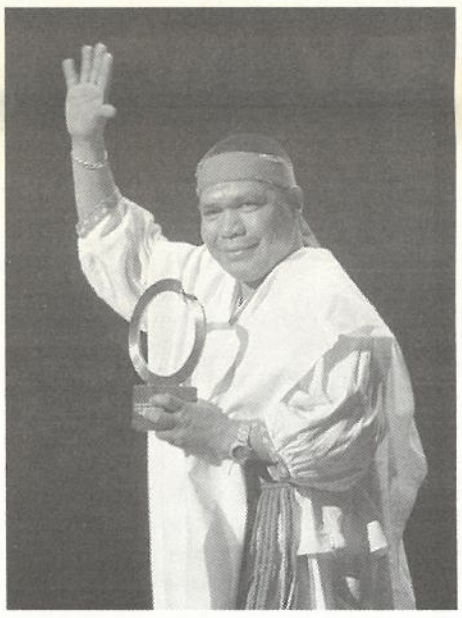
Mexican logging opponents jailed again: the case of Isidro Baldenegro

EDLC didn't have to wait long for its first case: a virtual carbon copy of the case of Rodolfo Montiel. Isidro Baldenegro was a thirty-seven year old Tarahumara Indian living in a remote community near Mexico's Copper River canyon. Baldenegro had been imprisoned in Chihuaha for the better part of a year on trumped up criminal charges (yes, weapons and marijuana possession!) filed immediately after Isidro had obtained a court injunction to halt the logging. (Isidro's father had been murdered years ago for taking a similar leadership position as an anti-logging activist.) On more than a half dozen occasions, the arresting officers in the case had defied court orders to appear and testify at trial. As a result, the judge had recently ordered the officers' arrest.

Isidro Baldenegro in jail. Photo by: Amnesty International USA

Amnesty International had declared Baldenegro a prisoner of conscience, and his case had received some attention from the Sierra Club, but overall the case was languishing. Conversations with Isidro's local attorneys and local NGO's working on his case made it clear that assistance from American lawyers would be very welcome and could be crucial in helping to obtain his release.

In March 2004, a team of attorneys at Heller Ehrman White and McAuliffe, led by Marcia Newlands, a partner in the Seattle office, began working on the case. To my astonishment and delight, Marcia began working nearly full time on the case, and continued to do so in the coming months.



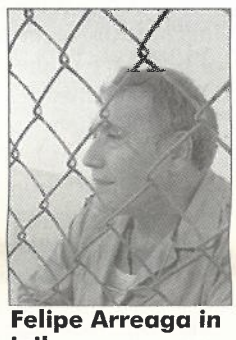
Isidro Baldenegro receiving the Goldman Prize (April 18, 2005).
Photo by: Goldman Environmental Prize

Marcia immediately accepted the local lawyers' invitation to travel to Mexico for a week to meet with the judge (perfectly acceptable in the Mexican legal system), the prosecutor, and others involved in the case. She quickly began to utilize and develop all manner of diplomatic and political contacts. She generated interest and involvement on the part of staff and members of the Sierra Club, Amnesty International, Greenpeace, and numerous Mexican and Latin American environmental NGO's; got articles about the case published in Mexican newspapers; obtained U.N. staff participation, and pressured the Attorney General of Mexico and other Mexican officials to meet to discuss the case. A more comprehensive and strategic effort could not have been mounted.

These efforts succeeded. In June 2004, Mexican Attorney General Macedo de la Concha urged the defense team to back off, suggesting that the pressure being applied was counter-productive. That suggestion was ignored. Shortly thereafter, de la Concha held a press conference to announce that Mexico was dropping the charges against Baldenegro and his co- defendant, Hermenegildo Rivas. Isidro and Hermenegildo were unconditionally released from prison. The arresting officers were then charged criminally for the wrongful arrests of Isidro and Hermengildo. I'm thoroughly convinced that the two men would still be in jail and facing lengthy prison terms were it not for the efforts of Marcia Newlands and her team.

In April of this year, I attended the annual Goldman Environmental Prize ceremony in San Francisco. The Prize winner for North America was none other than Isidro Baldenegro. Marcia Newlands was my guest at the ceremony. We had lunch earlier in the day with Isidro, and enjoyed the incredible experience of watching Isidro accept the award before a wildly cheering audience of 3,000 people at the War Memorial Opera House. The last time Marcia had seen Isidro was in his jail cell in Chihuahua.

The persecution of Mexican logging opponents continues: the case of Felipe Arreaga



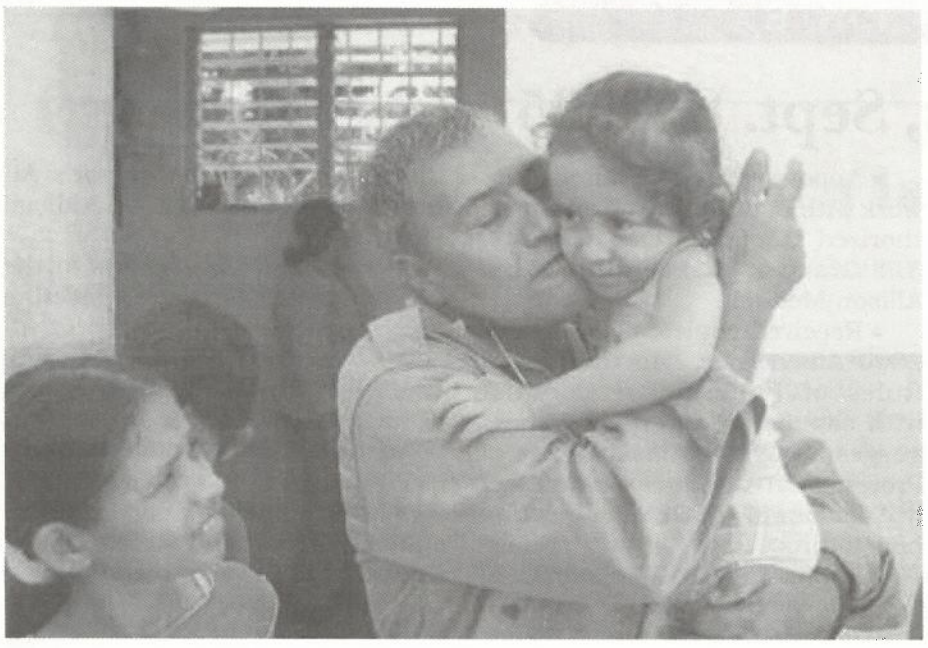
Felipe Arreaga in jail.

But the story of one lawyer's devotion to pro bono work didn't end there. Some months later, I learned of yet another case of a wrongfully imprisoned Mexican anti-logging-activist. The case is that of Felipe Arreaga Sanchez, falsely charged in 2004 in connection with the 1998 murder of the son of the same logging operator thought to be responsible for the original arrest of Rodolfo Montiel. In fact, Felipe Arreaga was one of the co-founders of the OCESP, the anti-logging campesino group started with Rodolfo Montiel and others. In fact, by extraordinary "coincidence," all fourteen of the defendants in the Arreaga case are anti-logging activists, and the complaining witness (another son of the logging operator) brought his complaint on the heels of opposition by the defendants to renewed logging efforts.

The case suffers from a number of glaring defects. One of the defendants had died a year before the murder. A videotape shows Felipe attending a wedding over a hundred miles from the crime scene at the time of the murder. Amnesty International has adopted Felipe as a "prisoner of conscience," not surprisingly fearing that his arrest and the issuing of arrest warrants against the fourteen defendants were reprisals against the men for their environmental activism. Among the defendants is Rodolfo Montiel.

I hesitated to ask Marcia to work on this case, given the huge amount of work she had performed in the Baldenegro case, and that she had just begun work on yet another EDLC case from Ecuador where anti-mining activists had been sued in local courts for defamation by a Canadian mining company seeking to develop a large

Continued on page 19



Felipe Arreaga and grandaughter just after receiving the Sierra Club's "Chico Mendes Award" in jail August 10, 2005.

One lawyer's fight for justice

Continued from page 18

project in a nearby cloud forest. Yet Marcia quickly agreed to help in the Arreaga case.

In the past few months, Marcia has taken two trips to Mexico for numerous meetings and press conferences. Between those trips, one of the defendants (with whom she has also worked) was ambushed by gunmen, receiving near fatal wounds in an attack that cost the lives of his nine- year old and nineteen- year old sons. This attack was the subject of a recent New York Times article, discussing all of the cases described here. We are nonetheless optimistic that Felipe will be released next month. By then, he will have spent ten months in jail on patently false charges.

Recognition of Marcia Newlands' extraordinary pro bono efforts

Marcia's work surely merited recognition, so I nominated her for various pro bono awards from the Washington State Bar Association. Incredibly, one of the letters I obtained in support of her nomination came from a former Attorney General of Mexico who had been instrumental in arranging critical meetings with officials in the Baldenegro case. Another letter of recommendation, written by the Director of our Mexican NGO partner in the Baldenegro case, put Marcia and her firm's efforts in a larger perspective:

"Heller Ehrman must also be commended for assigning such a talented partner to international environmental and indigenous rights cases. It is rare that a U.S. law firm would give pro bono services to indigenous leaders in remote and neglected regions of the world who are engaged in complicated and controversial struggles for their land, forest, and cultural survival. It is even rarer that a U.S. attorney would go far beyond strictly legal strategies in the international sphere. However, Marcia Newlands directed her efforts towards winning keystone cases in the Sierra Tarahumara. In order to do so, she utilized every diplomatic, civic and legal tool available to gain the release of a Tarahumara prisoner of conscience....

Thanks largely to Marcia's efforts, Isidro Baldenegro was released from prison... As an eighteen year veteran of international environmental struggles, it is my hope that the legal community will recognize the significance of Marcia's integrated approach to international environmental and indigenous rights claims, and encourage other firms to adapt similar strategic approaches to international pro bono services."

In September, Marcia will be honored with the "Courageous Award" at the meeting of the Board of Governors of the Washington State Bar Association. The award is presented to "a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession." It is an award that Marcia Newlands richly deserves.

Continued case development is detailed in a recent email from Lewis Gordon: "...the final hearing in the Arreaga case took place the last week of August, and the judge's decision is due no later than mid-September. We're optimistic, as the evidence against Felipe is virtually non-existent, to put it mildly!" Lewis Gordon can be reached at envdlc@msn.com.

Marcia Newlands (second from right) speaking on behalf of Felipe Arreaga at a press conference in Mexico City (June 20, 2005). Photo by: Tlachinollan Centro de Derechos Humanos de la Montana

America's Main Street Lawyers

By Michael S. Greco, President, American Bar Association

Approximately 80 percent of America's lawyers practice solo or in small firms in communities throughout our nation. Their work touches many people at some of the most significant points in their lives – buying a home, writing a will, settling an estate – and they are the legal profession to a majority of Americans.

As president of the American Bar Association I am making a commitment to solo and small firm practitioners, the fastest-growing segment of lawyers in our country, to ensure that the ABA provides more and better service to them as they build their practices and serve their clients.

For many years our ABA General Practice, Solo and Small Firm Section has supported solo and small firm lawyers. Earlier this month, at our Association's annual meeting in Chicago, we took the advice of hundreds of solo and small firm lawyers to make the ABA an even more valuable resource to America's "Main Street lawyer."

We have created a new portal for solo and small-firm lawyers to enter the ABA, and we have thrown open the doors to our more than two dozen substantive law sections, recognizing that these colleagues practice in many areas of the law and work on behalf of a diverse group of clients. Now constituted as a Division of the American Bar Association, this new entity will help guide its members into appropriate substantive law sections and provide practitioners the best resources and expertise that the ABA has to offer.

What does the ABA offer a solo or small-firm lawyer? Lots of things. Advice on building and managing their law practice. Access to a wealth of publications and electronic information to keep their skills sharp and knowledge up to date. The best CLE programs in the country. Opportunities to network with other lawyers and legal experts throughout the country. And a wide range of benefits, including health insurance, travel services and discounts.

Our recent change also ensures that solo and small firm lawyers will be better represented within the ABA. The Division now elects three delegates to the ABA House of Delegates, our policy-making body, and these delegates will bring the perspective of solo and small firm practitioners to issues that affect the legal profession and their place in it, giving solo and small firm lawyers a voice and a vote.

I am very pleased to offer this tremendous benefit to solo and small firm lawyers nationwide, and I am excited about what the future holds for this growing group of practitioners and colleagues. If you are a "Main Street lawyer" please visit our Web site, http://www.abanet.org/genpractice, to see for yourself all that the ABA offers. Whether you are a seasoned professional or just opening your own practice, you will find a home and a voice at the ABA.

NEWS FROM THE BAR

Board of Governors action items, Sept. 8, 2005

• Approved 10 reciprocity applicants for admission.

• Authorized the President and Executive Director to negotiate with a lobbyist to represent the Bar for its sunset legislation and to find a sponsor for the bill.

• Voted to put a line item in the 2006 budget of up to $10,000 for Law Related Education purposes for the purpose of discussion at the October meeting when the Board considers the budget.

• Voted to add another subcommittee to the Joint Task Force on MCLE to investigate the case against MCLE (Jason Weiner and Michael Hurley).

• Rejected a stipulation for discipline for a public censure with probation, and advised the parties of the Board's expectations for a new stipulation or a hearing.

• Adopted the ethics opinion entitled "Ethical Obligation When a Lawyer Changes Firms."

• Adopted an amendment to Bylaw Article III, Section 1(a) which gives the Board the authority to set the amount of active Bar dues.

• Appointed a Subcommittee to work with Bar Counsel on an Unauthorized Practice of Law definition (Bill Granger, Michael Hurley and Allison Mendel).

• Received copies of the Ethics 2000 Amendments to the Alaska Rules of Professional Conduct with comments and amendments suggested by the Alaska Rules of Professional Conduct Committee; will discuss at the October meeting how to proceed.

• Appointed Dan Winkelman to the ALSC Board of Director's Alternate position for the 4th Judicial District.

• Approved the minutes of the May Board of Governors meeting as amended.

• Voted to amend the Standing Policies of the Board of Governors to have a New Lawyer Liaison appointed annually by the president-elect.

• Tabled the evaluation of the Executive Director and the Bar Counsel until the October meeting.

Ethics Opinion

The suicidal client

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2005-1

Responsibilities of the Attorney Representing a Client Who, After Being Charged with a Felony Offense, Informs the Attorney of the Client's Intent to Commit Suicide if Convicted

Question Presented

An attorney represents a client charged with felony sexual assault, but realizes that the client has no credible defense. The client, however, is not interested in a plea bargain and is adamant about taking the case to trial. The client has further informed the attorney that if convicted of the felony sexual assault, the client will commit suicide rather than go to jail.

Must the attorney disclose the client's stated intention to commit suicide rather than go to jail if convicted?

The Committee concludes that under ARCP 1.14, the attorney may disclose the client's stated intent to commit suicide to the proper authorities (*e.g.*, the court, appropriate mental health professionals, or appropriate detention facility personnel) irrespective of the client's custodial status, but is not required to do so.[1]

The Alaska Bar Association joins the American Bar Association and the several other state bar associations that have addressed this issue. These associations have determined that disclosure of a client's suicidal intent is permissible.[2]

Analysis

Generally, an attorney may not reveal a confidence or secret concerning the representation of a client without the client's explicit or implicit consent. ARPC 1.6(a).[3] Of course, there are exceptions where the client engages in criminal or fraudulent conduct, or raises a claim against the attorney.[4] Those exceptions, however, do not apply to the facts here because suicide is not a crime in Alaska. Because no crime or fraud is involved, it may appear that Rule 1.6 prohibits the disclosure of the client's suicidal intent.[5]

In our opinion, Rule 1.14(b) permits disclosure of such information and in this particular circumstance, overrides the prohibitions set forth in Rule. 1.6. *Cf.* 74 Conn. B.J. at 240.

Rule 1.14(b) comes into play "when the lawyer reasonably believes that the client cannot adequately act in the client's own best interest."[6] In those circumstances, the lawyer either may seek the appointment of a guardian or "*take other protective action.*" *See* Rule 1.14(b) (emphasis added). The Committee interprets the phrase "take other protective action" to permit disclosure of the client's stated intent to commit suicide if the lawyer reasonably believes that the client intends to carry out the threatened suicide if sent to jail. Put another way, any differing interpretation of "other protective action" would defeat the purpose of Rule 1.14(b) – namely, protecting the health and safety of a client who the lawyer reasonably believes is unable to act in his or her own interest.

The Restatement recognizes an exception to the general duty of confidentiality and client disclosure based upon "the overriding value of life and physical integrity." Comment b., Restatement (Third) of the Law Governing Lawyers § 66. Other states that have addressed this issue frame the attorney's act of disclosure in such a situation as reflective of "certain principles of conduct that a lawyer is obligated to uphold by the very nature of their office and its relationship to society."

These principles of conduct are the threads of our social fabric. None is more basic than society's concern for the preservation of human life. A lawyer cannot be unmindful of that concern.

N.Y. St. Bar. Assn. Comm. Prof. Eth. Op. 486 (1978). That basic principle – "society's concern for the preservation of human life" – is the foundation upon which each of the seven other state bar associations and the American Bar Association have based their conclusion that an attorney *may* disclose to the proper authorities the client's stated intention to commit suicide.[7] The American Bar Association has concluded that an attorney could disclose the client's declared intent to commit suicide to a third person, rationalizing that this was permissible when the attorney has reason to believe that the client cannot adequately act in the client's own interests. *See* ABA Comm. on Prof'l Ethics and Responsibility, Informal Opinion Op. 89-1530 (1989) (citing ABA Comm. on Prof'l Ethics and Responsibility, Informal Opinion Op. 83-1500 (1983)). *See also* ABA Model Rules of Prof'l Conduct R. 1.14 cmt. at 245 (5th ed. 2003).

The lawyer's disclosure must be limited to the information the lawyer reasonably believes is necessary to aid the client. *See, e.g.*, Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. Op. 90-26 (1990); Utah State Bar Op. 95. *Cf.* Comment, ARPC 1.6(b), "Disclosure Adverse to Client," at ¶¶ 5-6 (explaining that the lawyer has professional discretion to reveal that a client intends prospective conduct that is likely to result in imminent death or substantial bodily harm and that such discretion requires consideration of several factors).

If the lawyer decides to disclose the client's stated intention to commit suicide, the question then becomes to whom is the lawyer's disclosure made? It is the Committee's opinion that depending upon the circumstances known to the lawyer at that time, appropriate entities for the lawyer to contact could include mental health authorities as well as law enforcement authorities. In addition to these entities, individuals such as family members or clergy could be appropriate resources for the lawyer to contact. *See, e.g.*, Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. Op. 93-43 (1993); Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. Op. 90-26 (1990).

This opinion does not address the issue of what kind of non-legal advice a lawyer might give to a suicidal client. The attorney can recommend that the client seek the services of a mental health professional or contact their own doctor, a crisis hotline, or friend or relative who could help arrange for appropriate intervention or care. The attorney also may seek professional guidance as to what to do under such circumstances. *See* 74 Conn. B.J. at 239 n.2; Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. Op. 93-43 (1993).

Finally, there is the question of whether the attorney can continue to represent the client after having made such a disclosure. Alaska Rule 1.14 does not provide express guidance on this issue, but rather implies the continuation of the lawyer-client relationship.[8] The American Bar Association further states that although withdrawal may be an option for the lawyer, depending upon the degree of the client's "impairment," "it is not favored." *See* ABA Model Rules of Prof'l Conduct R. 1.14 cmt. at 242-43 (5th ed. 2003).

Approved by the Alaska Bar Association Ethics Committee on April 7, 2005.

Adopted by the Board of Governors on May 10, 2005.

(Footnotes)

1 ARCP 1.14 provides in pertinent part that a lawyer "may . . . take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

2 *See* ABA Informal Opinion 83-1500 (1983); Alabama Ethics Opinion RO-90-06; 74 Conn. B.J. 238 (2000); Committee on Professional Ethics of the Massachusetts Bar Association Opinion 79-61 (1979); N.Y. St. Bar. Assn. Comm. Prof. Eth. Op. 486 (1978); N.Y.C. Assn. B. Comm. Prof. Jud. Eth. Op. 1997-2 (1997); Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. Op. 93-43 (1993); S.C. Bar Eth. Adv. Comm. Op.99-12 (1999); Utah St. Bar Op. 95 (1989). *See also* Restatement (Third) of Law Governing Lawyers § 66 (2000).

3 Rule 1.6(a) provides, in pertinent part, that a lawyer "shall not reveal a confidence or secret relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) or Rule 3(a)(2)."

4 *See* Rule 1.6(b).

5 *But see* Utah State Bar Op. 95 (1989) (explaining that although suicide or other attempted suicide are not criminal, other bar associations that have dealt with the situation "uniformly" deem such acts "to be *malum in se* and treated as unlawful and criminal and therefore, subject to disclosure").

6 *See* note 1.

7 *See also* note 2.

8 The Comment to Rule 1.14 provides in pertinent part that "if the client has no guardian or legal representative, the lawyer often must act as de facto guardian." Comment, ARPC 1.14. The Comment further provides that "the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication," even if the person has a legal representative. *Id.* Moreover, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Comment, ARPC 1.14.

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.

Ethics Opinion

When a lawyer departs

ALASKA BAR ASSOCIATION ETHICS OPINION 2005-2

Ethical Obligations When a Lawyer Changes Firms

Question Presented

The Committee has been asked to address the ethical considerations which govern the responsibilities of a lawyer departing a firm to work for another firm and whether Alaska would adopt Formal Opinion 99-414 of the American Bar Association, dated September 8, 1999, which addresses this same issue.

The Committee has elected to adopt the ABA opinion, albeit in truncated form, as set forth below.

Conclusion

A lawyer's ethical obligations upon departure from one firm to join another rest on the premise that the client's interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent them. The departing lawyer and the former firm must take reasonable measures to assure that the departure is accomplished without material adverse effect on the interests of clients and the matters upon which the lawyer currently is working.

The departing lawyer and the former firm have ethical obligations to assure that prompt notice is given to clients on whose active matters the departing attorney is working and to protect client information, files, and other client property.

Finally, the departing lawyer is prohibited by ethical rules from making in-person or live telephone contact prior to their departure with clients with whom they have no family or client-lawyer relationship.

Discussion

When a lawyer ceases to practice at a law firm, both the departing lawyer and the responsible members of the firm who remain ("former firm" or "former law firm") have ethical responsibilities to clients on whose active matters the lawyer is currently working to assure that the representation is not adversely affected by the lawyer's departure. These obligations include:

(1) Disclosing the pending departure in a timely fashion to clients for whose active matters the departing lawyer is responsible or plays a principal role in representing the client;

(2) The departing lawyer must assure that client matters to be transferred with the lawyer to the new law firm do not create conflicts of interest in the new firm and can be competently managed there;

(3) Both parties have a duty to protect client files and property and assure that, to the extent reasonably practicable, no client matters are adversely affected as a result of the withdrawal;

(4) Both parties must avoid conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with the planned withdrawal; and

(5) The departing lawyer must maintain confidentiality and avoid conflicts in their new affiliation respecting client matters in the lawyer's former firm.

Notification to Current Clients

The impending departure of the lawyer who is responsible for the client's representation, or who plays a principal role in representing the client, is information that may affect the status of the client's matter. Accordingly, a lawyer who is departing one law firm for another has an ethical obligation, along with the former law firm, to assure that those clients are informed the lawyer is leaving the firm. This can be accomplished by the departing lawyer, the former law firm, or the lawyer and the firm jointly. Because clients have the ultimate right to select counsel of their choice, information that the lawyer is leaving and where they will be practicing will assist the client in determining whether the legal work should remain with the law firm, be transferred to the new firm, or be transferred elsewhere. Accordingly, informing the client of the lawyer's departure in a timely manner is critical to allowing the client to make informed choices as to who will represent them.

Because lawyers have a present professional relationship with their current clients, a departing lawyer does not violate Rule 7.3(a) by notifying those clients that they are leaving for a new affiliation. However, a departing lawyer is prohibited from making in-person or live telephone contact with firm clients with whom the lawyer does not have a prior professional or family relationship. A lawyer does not have a prior professional relationship with a client merely by having worked on a matter for a client along with other lawyers in a way that afforded little or no direct contact with the client.

The Committee is also of the opinion, for those clients who elect to transfer their existing matters to the departed lawyer and the new firm, the former firm must take steps pursuant to Rule 1.16(d) to protect the departing client's interest in terms of surrendering papers and properties to which the client is entitled and refunding any advance payment of fees that has not been earned.

Notice to the Clients Must Fairly Describe the Client's Alternatives

Any initial in-person or written notice informing clients of the departing lawyer's new affiliation that is sent before the lawyer resigns from the firm generally should conform to the following:

(1) The notice should be limited to clients whose active matters the lawyer has direct professional responsibility for at the time of the notice, or whom the departing lawyer has performed significant professional services while at the firm;

(2) The departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue responsibility for the matters upon which they are currently working;

(3) The departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and

(4) The departing lawyer must avoid statements involving dishonesty, fraud, deceit or misrepresentation in describing or characterizing the former firm.

In order that the client may make an informed decision, the departing lawyer may also inform the client whether the representation can be continued at the new law firm. If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever information is reasonably necessary to assist the client in making an informed decision about future representation including, for example, billing rates and a description of the resources available at the new firm to handle the client's matter. The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the former firm, the departing lawyer and the new firm, or some other lawyer will continue the representation.

The best approach to protect the client's interest is for the departing lawyer and the former law firm to give joint notice of the lawyer's impending departure to all clients for whom the lawyer has performed significant professional services while at the firm, or at least notice to the current clients. Unfortunately, this is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt immediate termination. When the departing lawyer reasonably anticipates that the firm will not cooperate in providing such a joint notice, the lawyer must provide notice to those clients for whose active matters they are currently responsible, or play a principal role in the representation, according to the manner described above, and preferably any in-person conversations should be confirmed in writing so as to memorialize the details of the communication and compliance with Rules 7.3 and 7.1.

Entitlement to Files, Documents and Other Property

A departing lawyer also may wish to take files and other documents such as research memoranda, sample pleadings and forms when they leave. To the extent that these documents were prepared by the departing lawyer and are considered the lawyer's property or are in the public domain, they may take copies with them. Otherwise, the lawyer may have to obtain the former firm's consent to do so.

The Committee is of the opinion that, absent special circumstances, the departing lawyer does not violate any ethical rules by taking copies of documents prepared or created for general use in their practice. However, the question of whether a departing lawyer may take continuing legal education materials, practice forms, or computer files generated during their practice turns on principles of property law and trade secret law. For example, the outcome might depend on who prepared the material and the measures employed by the law firm to retain title or otherwise to protect it from external use or from taking by departing lawyers.

Client files and client property must be retained or transferred in accordance with the client's direction. A departing lawyer who is not continuing the representation may, nevertheless, retain copies of client documents relating to the representation of former clients provided, however, there are assurances that confidential client information is protected in accordance with Rules 1.6 and 1.9.

Conclusion

Lawyers who are terminating their association with the law firm to join another and the responsible members of the firm who remain have ethical obligations to clients for whom the departing lawyer is providing legal services.

Before preparing to leave one law firm for another, the departing lawyer should take steps to be informed of applicable law other than the Alaska Rules of Professional Conduct, including the law of fiduciaries, property and unfair competition. They should also take care to act lawfully in taking and utilizing the former firm's information or property, intellectual or otherwise.

Approved by the Alaska Bar Association Ethics Committee on September 1, 2005.

Adopted by the Board of Governors on September 8, 2005.

Bar People

Robin L. Koutchak, after 7 years, closed her Anchorage and Mat-Su private criminal defense practice on January 1st. Robin and her family moved to Barrow where she is now an assistant borough attorney with the North Slope Borough handling planning and environmental law. Her husband, **Rich Koutchak**, who previously managed her office and provided investigative services to her and the attorney general's office, has accepted a position as the Tribal Court Administrator for the Tribal Village of Barrow. Robin says, "Life without cell phones is wonderful! I tell everyone that I meet that I am a "recovering criminal defense attorney." Rich is enjoying the seal hunting and cultural reunification and the schools are fabulous for the kids. With the good pay and benefits, we feel we are in a sort of Utopia. Except for the weather...but never mind."

Feldman & Orlansky announced Sept. 10 that **Eric T. Sanders** has rejoined the firm as a member. **R. Scott Taylor** also has become a member of the firm. **Jonathan W. Katchen**, a law clerk to Honorable Matyanne T Barry of the United States Court of Appeals for the Third Circuit (2004-2005), has joined the firm as an associate. The firm has changed it name **to Feldman Orlansky & Sanders**, practicing at 500 L St., Suite 400. The firm will continue to concentrate on tri-

Richmond & Quinn is pleased to announce that **Laura J. Eakes** had become a partner in the firm. Ms. Eakes is a life long Alaskan and former school teacher. She joined the firm in 2000. Her primary area of practice is civil litigation.

Laura J. Eakes

Stacy L. Walker also has become a partner in the firm. Before coming to Richmond & Quinn in 2002, Ms. Walker worked as a criminal defense attorney for the United States Air Force and then for the Public Defender Agency. Her practice at Richmond & Quinn focuses on civil litigation defense.

Stacy L. Walker

Four attorneys join law firm

Birch Horton Bittner & Cherot has announced that four attorneys have recently joined the firm.

Kenneth Vassar and **Shelley Ebenal** joined the firm's public finance practice in Anchorage as "Of Counsel" and serve as counsel to Alaska Industrial Development and Export Authority and Alaska Housing Finance Corporation. Their joint practice includes drafting of bond indentures, supplemental indentures, resolutions, tax and arbitrage certificates, and all closing documents; tax and general law research; volume cap coordination; communication and negotiation with underwriters, credit enhancers, trustees, and other parties; and other work related to bond financings.

Jon DeVore joined the firm's Washington, D.C. office as "Of Counsel" and represents 8(a) firms. Prior to joining Birch Horton, Mr. DeVore served as Chief Counsel and as Legislative Director for U.S. Senator Lisa Murkowski, where he worked extensively with the small business community and firms owned by Alaska Native Corporations and worked on matters related to confirmation of Federal judges, judiciary issues, bankruptcy reform, Department of Justice, Federal Communication Commission, telecommunications and broadcasting matters. From 1989 to 2003, Jon was the District Counsel for the U.S. Small Business Administration (SBA) and a Special Assistant to the U.S. Attorney. Mr. DeVore's primary areas of concentration are in the areas of business transaction, small business development, natural resources, bankruptcy, transportation and administrative law.

Gregory Fisher joined the firm as an Associate on June 1st. Mr. Fisher served as Law Clerk to the Honorable Barry G. Silverman, United States Court of Appeals Ninth Circuit, in Phoenix, Arizona, and the Honorable John W. Sedwick, Chief Judge United States District Court, in Anchorage, Alaska. Mr. Fisher returned to Alaska from Phoenix, Arizona where he was a Senior Associate at Jaburg & Wilk. In 2004, Mr. Fisher was named as one of Arizona's Top 15 up and coming attorneys by BizAz® magazine. Mr. Fisher's practice at Birch Horton focuses on labor and employment issues; appellate practice and civil and commercial litigation.

Don Edwards joins Dorsey & Whitney's Anchorage office

The law firm of Dorsey & Whitney LLP is pleased to announce that Don Edwards has joined the firm as of counsel.

"We are very pleased that Don decided to join Dorsey," said Jim Reeves, head of Dorsey's Anchorage office. "Don has a well-earned reputation as an excellent lawyer. We look forward to working with him to serve our public utility clients."

Don joins Dorsey from Chugach Electric Association in Anchorage, where we was general counsel for 17 years. His practice provides general counsel on public utility law, corporate law and governance, and strategic business advice A substantial portion of Mr. Edwards's practice is before the Regulatory Commission of Alaska on regulatory issues affecting electric utilities. He received his B.A. in history from the University of California at Riverside and his J.D. from the University of San Diego.

Stock receives AILA award

The American Immigration Lawyers Association (AILA) has awarded its 2005 Advocacy Award to Alaska Bar member Margaret D. Stock. AILA presents this award annually to the attorney whose work with Congress and the media has been central to the advancement of AILA's advocacy agenda. According to AILA's award citation, "Margaret Stock . . . has effectively educated Congress and the general public about national security issues and their relationship to immigration. Margaret is an important voice in the post-9/11 world. She has been quoted extensively in the press, testified before Congress, the New York State Legislature, and the Maryland Governor's Task Force on Driver's Licenses; briefed congressional staff about how immigration can most effectively enhance our security; given numerous presentations at conferences; and published extensively. She has a well-deserved reputation as one of the premiere national experts on security and immigration issues."

The nonprofit American Immigration Lawyers Association (AILA) is the national association of over 8,000 attorneys and law professors who practice and teach immigration law. AILA Member attorneys represent U.S. families who have applied for permanent U. S. residence for their spouses, children, and other close relatives. AILA Members also represent U.S. businesses and industries who sponsor highly skilled foreign workers seeking to enter the United States in a temporary or — having proven the unavailability of U.S. workers — permanent basis. AILA Members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. Founded in 1946, AILA has 35 chapters and over 50 national committees.

City attorney receives national award

Anchorage Municipal Attorney Fred Boness has been selected for the 2005 Distinguished Public Service Award by the International Municipal Lawyers Association (IMLA). Each year the IMLA accepts nominations nationwide for the award that recognizes significant and surpassing achievements in the field of local government, and enhancement of the image of the local government attorney.

The Distinguished Public Service Award winners must demonstrate characteristics of integrity, honesty, leadership, selflessness, dedication, tact, diplomacy, political acuity and astuteness in dealing with the news media and the public.

"Fred serves as one of my principal advisors. I meet with him at least daily where he provides sound legal and political advice," Anchorage Mayor Mark Begich said in a letter supporting Boness's nomination. "I cherish his willingness to say "no" when necessary and I cannot remember a time when his legal judgment has been flawed."

Boness became Anchorage municipal attorney in August, 2003 following a 39-year legal career in both the public and private sectors. In 1974, his law career began with public service, including three years as an assistant attorney general representing the Alaska Department of Natural Resources during the formative years of the oil pipeline. He then served as deputy commissioner of the Department of Natural Resources for two years serving the administration of Gov. Jay Hammond.

Boness was the co-founder, with John Messenger, of the Anchorage office of the law firm Preston Gates Ellis, and continued representing the State of Alaska, Native and municipal corporations, and other public entities. In 2000, he came out of retirement to work as a law clerk for Superior Court Judge Morgan Christen.

Boness plans to travel to Savannah, Georgia in September to receive the award.

Dorsey Alaska attorneys receive Chambers ranking

Six practice groups and six individual attorneys in the Anchorage office of Dorsey & Whitney LLP earned top rankings from the independent legal research firm Chambers USA. Based on thousands of client interviews nationwide, Chambers USA ranks law firms and individual attorneys on a scale of 1 – 6 according to technical legal ability, professional conduct, client service, diligence, commitment, and other qualities most valued by clients.

In Anchorage, Dorsey capabilities in Corporate/Mergers & Acquisitions received Chambers' highest designation, Rank 1, with Richard Rosston earning individual Rank 1 honors. In Environment, Natural Resources and Regulated Industries, Dorsey also received Rank 1, with attorneys Heather Grahame and James Reeves achieving Rank 1. In General Commercial Litigation, Dorsey received Rank 1, with Robert Bundy earning Rank 1 and Spencer Sneed Rank 2.

The Anchorage Employment Law practice earned a Rank 2 mark from Chambers USA, with a corresponding Rank 2 for William Evans. Dorsey Bankruptcy capabilities in Anchorage also earned Rank 2, with Spencer Sneed earning Rank 1. The office made Rank 2 in Real Estate law, with Richard Rosston earning Rank 1.

—Press Release

ALASKA BAR FOUNDATION

IOLTA awards $72,000 in grants; appoints members, officers

By Dani Crosby

The Board of Trustees of the Alaska Bar Foundation held its annual meeting on June 14, 2005. The board considered applications for grants from the IOLTA (Interest On Lawyers' Trust Accounts) funds for the fiscal year 2006. In response to the proposals, the board made the following grants: (1) $37,400 to Alaska Legal Services Corporation (ALSC); (2) $30,600 to Alaska Pro Bono Program, Inc. (APBP); and (3) $4,000 to United Youth Courts of Alaska.

ALSC and APBP submitted a joint grant application. The application noted that the Immigration and Refugee Services Program of Catholic Social Services (IRSP) had been closed, and that ALSC and APBP had agreed that the portion of the IOLTA funding which would have supported the work of the former IRSP under the joint grant formula the agencies had worked out in the past should go to APBP, with the understanding that this money will be earmarked to support the work formerly performed by IRSP.

The board had $72,000 available for grant purposes for fiscal year 2006. This compares to fiscal year 2005, when the board was able to make grants totaling $58,800, and fiscal year 2004, when the Board was able to make grants totaling $77,500. This year the board received grant proposals that totaled $103,500. The board hopes the financial situation will improve before it considers grants for next year.

The board wishes to thank all lawyers and law firms for their participation in the IOLTA program.

David Eisenberg, senior vice president, Alaska Communications Systems, was appointed to serve a three-year term on the Board of Trustees effective July 15, 2005, as the non-lawyer member of the public citizenry at large. David replaced Juneau CPA Karen L. Smith who served two, three-year terms on the board. Attorney Larry Ostrovsky was appointed to serve a three-year term on the Board of Trustees effective July 1, 2005, as an active member of the Alaska Bar Association residing in the Third Judicial District. Larry replaced Ken Eggers who served two, three-year terms on the board. Other board members and officers for the upcoming year are Anchorage attorney Dani Crosby (who will serve as president), Juneau attorney Beth Chapman (who will serve as vice president), Fairbanks attorney Daniel E. Winfree (who will serve as secretary); Anchorage businessman William A. Granger (who will serve as treasurer); and Anchorage attorney Mary K. Hughes.

The board wishes to thank all lawyers and law firms for their participation in the IOLTA program. In addition, the board sincerely thanks outgoing board members Ken Eggers and Karen Smith for their dedication and service.

News from American Bar site explores Constitution

The American Bar Association in September launched a new website that it says "will help Americans rediscover a resilient document that has guided our nation through crises ranging from the Civil War to the current recovery from Hurricane Katrina - the U.S. Constitution."

The new site, www.abaconstitution.org, offers educational discussions, interactive knowledge tests and a segment on how the Constitution affects young people. Visitors to the American Bar Association site also can receive a free pocket-sized Constitution.

The site was unveiled in time to help schools and workplaces cope with a new law that calls for educational programs honoring Constitution Day, which takes place Sept. 17. "A day devoted to the Constitution might seem odd at a time when many Americans are battling the tragic and life-threatening conditions of Hurricane Katrina," said ABA President Michael S. Greco. "Actually, it's a very appropriate time. The Constitution has seen us through many of our nation's greatest crises, and it continues to do so."

Greco said a poll conducted in July for the ABA showed that many Americans don't understand key concepts of the Constitution. For instance, only 45 percent of American adults correctly defined the Separation of Powers doctrine, which gives each branch of government distinct powers. Only 55 percent correctly identified Congress, the judiciary and the Executive Branch as the three branches of the federal government; 22 percent thought the three branches were Republicans, Democrats and Independents. And most could not identify one of the core duties of the judiciary.

Greco said the ABA wants to help workplaces and schools that are not fully prepared for a new law that raises the profile of Constitution Day. The little-known annual celebration takes place on Sept. 17 - the day the Constitution was signed by its drafters in 1787. For the first time, Congress is requiring that dialogues or lessons on the Constitution be held at schools, federal agencies and other entities that receive federal funding. Because Sept. 17 fell on a Saturday this year, the commemorations are to be held in the days shortly before and after.

In addition, Greco formed a new ABA Commission on Civic Education and the Separation of Powers after the country witnessed an unwarranted series of high-profile attacks on federal judges - including irresponsible threats of impeachment of judges by some members of Congress - that he said undermine the independence that the Constitution gives to judges. The bipartisan commission, which held its first meeting Sept. 15 in Washington, D.C., will propose school curriculum and other civic educational reforms in the coming year.

The honorary chairs of the commission are Supreme Court Justice Sandra Day O'Connor and former U.S. Senator Bill Bradley. Also on the commission are former U.S. Secretary of Education Richard W. Riley, and former FBI Director and federal judge William Sessions.

Disgruntled employees in your law firm: The enemy within

By Sharon D. Nelson, and John W. Simek

"I can take these guys out of business anytime I want"

— a law firm IT administrator

If that doesn't chill your bone marrow, you need to lower your dosage of Xanax! The truth is, most law firms give the keys to their kingdom (their data) to their IT employees and pay very little attention to the inherent dangers in trusting them. Hackers and other external intruders surely remain a legitimate threat, but the greatest threat invariably comes from within.

Why do employees become disaffected? Perhaps they didn't get a raise, or feel they are not treated with sufficient respect. Perhaps they want to prove their machismo or illustrate how stupid their high paid bosses are. Some are not disgruntled but greedy, and seek to win the lottery by lifting their employer's data. The worst threat of all is the fired employee. This employee is always unhappy, and sometimes vengeful. What better way to seek revenge than to bring the law firm's technology to its knees? Without its networks, the average law firm today is virtually paralyzed.

So what can happen? Here is an example that we once had to cope with. The head of a local lawyer referral office resigned under pressure. Angry at her bar association, she performed wholesale deletions on the server, wiping out agency forms, procedures, correspondence, and historical records. Fortunately, she was not technically adroit and, with a little technical wizardry, all the deleted material was recovered despite the inexplicable absence of backup tapes. Not every employer is that lucky.

What law firms tend to worry about are power failures, system crashes, hackers, spyware and viruses. To be sure, those are all things that can and should be worried over, but the greatest danger is often close to home. It is much easier to create all manner of mayhem from within given an insider's knowledge.

Real Life Nightmares

• *An AOL software engineer stole the personal information of 92 million (million!) customers in May, 2003 and sold the data to various and sundry spammers. He originally sold the data for the less than princely sum of $28,000 but got smarter along the way and began charging $100,000 per sale. By the time this article is published, Mr. Jason Smathers is expected to be a guest of federal authorities for an anticipated 18-24 months.*

• *Apple filed two lawsuits in December 2004 accusing insiders and partners of leaking proprietary information.*

• *A Forbes computer technician, angered at his termination, brought down five of eight network servers. All the data in those servers was deleted and none of it was recoverable. Forbes was compelled to shut down its New York Office for two days and sustained losses of more than $100,000.00.*

• *A Lockheed Martin employee crashed its e-mail system by sending 60,000 colleagues a personal e-mail message requesting an electronic receipt. Lockhead Martin had to fly in a Microsoft emergency response team to repair the damage.*

• *Prudential Insurance Co. had an employee merely frustrated with his sense that he was underpaid. His revenge consisted of purloining electronic personnel files for more than 60,000 Prudential employees. He not only sold the information over the Internet, but incriminated his former supervisor in the theft.*

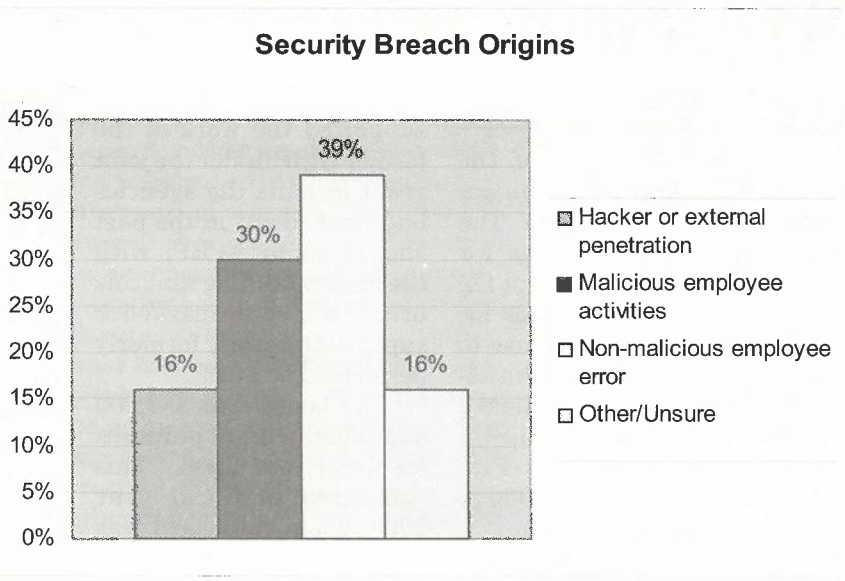
• *Omega Engineering suffered $10 million in losses when a network engineer, agitated about his termination, detonated a software time bomb that he had planted in the network he helped to build. The bomb paralyzed Omega, which manufactures high tech measurement and control devices used by the Navy and NASA. When the bomb went off in the central file server, which housed more than 1,000 programs as well as the specifications for molds and templates, the server crashed, erasing and purging all programs. The incident resulted in 80 layoffs and the loss of several clients.*

As horrific as these stories are, they are only the tip of the iceberg. If you want the hair on the back of your neck to stand up still further, check out the stories at http://www.cybercrime.gov/cccases.html.

Don't assume that disgruntled employees are all you have to worry about! There are other, often overlooked, "insiders" such as independent contractors, vendors and clients - and yes, those cleaning folks who come in late at night. If you left everything up and running, you have no idea what your computer may be doing at midnight.

Statistics

The Gartner Group reports that 84% of high-cost security incidents occur when insiders send confidential information outside the company. It's easy to see why. Hacks have to figure out how to break into the network, then locate, obtain and distribute the target data, all without being detected by increasingly sophisticated security systems. People within the firm have authorized access to data AND access to the Internet – a deadly combination from a security standpoint.



The Computer Security Institute/FBI 2003 Computer Crime and Security Survey found that of 488 companies surveyed, 77% suspected a disgruntled employee as the source of a security breach. Vontu, a company which makes software designed to prevent confidential data loss, conducted assessment studies which showed that one out of every 500 outbound e-mails contains confidential data.

A 2004 study by the Pokemon Institute clearly indicates that the great threat to law firm security comes from within, whether the employee action is malicious or merely inadvertent.

The Dark Side of Security

All law firms have come to recognize glumly that some level of security is necessary. With further reluctance, they acknowledge that they will have to spend serious sums on security. But they usually underestimate their needs, especially if they have not yet been burned by a security breach. It's no joke to say that security comes at a price, both literally and figuratively.

Security done right can be doggone expensive. Without question, it is always an extensive burden, and the aggravation factor doesn't decrease over time. Implementing security can slow systems down and impair productivity. There is almost always a tradeoff between security, system access and productivity. Yet the absence of security is always sorely lamented - after the fact. Tracing security breaches, remedying their effects and preventing recurrences - all of this costs a great deal more than careful preventive measures.

How to Achieve Security and Sleep at Night

• Have strong, enforced policies about computer, e-mail and Internet usage.

• Have computer security training for new employees, particularly emphasizing the dangers of social engineering.

• Check references, and run background checks on system administrators!

• Use firewalls and specialized software designed to prevent your data from leaving your firm, such as products from Vontu, Vericept, Authentica, Liquid Machines and Websense. Modern software can do such things as look for contextual clues in messages to see if they are ok to send or be coded such that particularly sensitive files can be identified and blocked from transmission. Software has evolved to the point where it can analyze a range of variables, from content patterns and relationship to sender and recipient attributes, as well as network protocols and gateway locations. Of course, this doesn't prevent a miscreant from putting the data on a thumb drive and walking out the door.

• Back up your data and do test restorations religiously.

• Use off-site "cold" storage as well as "warm" storage onsite.

• Run virus/spyware protection software that self-updates on a regular basis.

• Restrict employee access to confidential information.

• Require the use of strong passwords and regular password changes.

• Physically secure your servers and make sure all workstations are turned off when employees leave for the day.

• Monitor/filter employee activity and announce your intention to do so, making that notice a part of the dialog box when employees log-on to the network.

• Terminate employees carefully, without notice and requiring the immediate return of any company property, including laptops, PDAs, cell phones, loose media, etc. Do not allow the employee access to a computer while packing personal belongings (or have those items pre-packed) and make sure their ID is disabled so remote access is no longer possible. If misconduct is suspected, take the computer out of service until the machine can be forensically imaged and analyzed.

• Check out cyberinsurance (which we will cover in another "*Hot Buttons*" column) and make sure you have coverage appropriate for your firm.

In the end, the best prophylactic is using the suggestions above and constant vigilance. Disgruntled employees are a constant, but their ability to inflict severe financial damage has increased exponentially with the technological juggernaut. Only eternal vigilance really works - and even that only buys you a better shot at avoiding or surviving technological assaults.

The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology and computer forensics firm based in Fairfax, VA. 703-359-0700 (phone) www.senseient.com

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TALES FROM THE INTERIOR

The price of boredom: Taking a "middle-age" bar exam

By William Satterberg

As I entered my 28th year of the practice of law, I began to go through one of those self-assessment phases that are often experienced when one begins to look into the mirror and realize that things are not always as they used to appear to be.

As I scrutinized my sagging chin, baggy eyes, and wrinkled visage, I began to slowly understand that I was no longer the "young pup" attorney that I once was, eager to kick the bologna out of some older, established attorney. It did not take long to realize, as well, that I was no longer in the middle age of my professional years, either.

The middle-aged phase of practice had either secretly passed me by, or was rapidly drawing to a close. True, the concept of old age had been regularly extended by me, but even that exercise eventually had to cease.

For example, where people were once "old" if they were over the age of 40, I began to look at old age as being something which occurs after the age of 60. By way of example, Bob Downes is in old age, even if he does deny it. I am not. And, by the same standards, ex-Attorney General Charlie Cole is downright ancient.

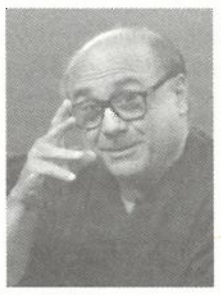
Given the above framework, I reluctantly came to the conclusion that I needed to do something to feel young again. Something drastic. Although racy sports cars and Harley Davidson's have certain attractions, they both tend to hurt the back. Active sports, as well, such as snow skiing, have definite liabilities for the body, as Judge Jane Kauvar will attest with her 2005 downhill skiing crash. Bike riding can also be treacherous, as Judge Jane Kauvar will attest from her 2005 bicycle crash.

Clearly, the solution has to be mental. So why do I digress so much?

It is because I decided in 2005 to take the Washington State Bar Exam. Although my justification for this decision was founded in politically acceptable arguments of old age, once again, explaining that I intended to retire someday to the Washington area, the reality was that I wanted to take the examination in order to prove, at least to myself, that I still had the fortitude to withstand such an endurance contest. Admittedly, the endurance contest I had to endure was only two hours and fifteen minutes in length, since it was designed for the older members of the bar and consisted of the Professional Responsibility Exam only. The young pups could take the two and half day extravaganza. Still, even two hours and fifteen minutes could be an endurance contest, especially if one has a bad back, I am told.

Immediately following my announcement, my friends told me I was nuts. "Why study for two months, only to subject yourself to the incessant nail biting and worry that invariably accompanies such a feat?" they asked. I saw distinct merit in their inquiries and decided not to study much. Yet, others asked me, "If you fail the Professional Responsibility Section, how will you explain that you flunked Ethics?" I saw distinct merit in their position as well, and decided to study incessantly. Others asked "Why not simply not take the test at all?" They were all good questions.

In the end, I continued with my folly. By taking the Washington Bar, I would be able to prove that I still had what it took, hopefully, to gain admission and social acceptance to a new environment. Moreover, in the event that I were actually successful in passing the bar, I might even decide to relocate some of my practice into the Pacific Northwest.



"I began to slowly understand that I was no longer the "young pup" attorney that I once was, eager to kick the bologna out of some older, established attorney."

After having made the decision to tackle the Washington Bar, I conducted initial inquiry into the requirements for acceptance into the examination process. The first step was to investigate the process. Not being particularly computer literate, I dialed information and learned the number for the Washington Bar Association. I then called the Bar Association, and listened to its automated answering device which told me to visit the Association website. Times had certainly changed.

Eventually, I learned that the requirements for admission to the Washington State Bar were, in fact, rather simple. Provided I filed an application, produced an authentic certificate of good standing, survived the required background checks and passed the Professional Responsibility Exam, I could pay lots of money to the State of Washington and become a member. It was encouraging that I did not have to take the three day bar exam, due to Washington's reciprocity with Alaska. Instead, I would only have to sit for a two hour and fifteen minute Professional Responsibility Exam, during which I would answer six short questions. Assuming that I scored an average of just seven out of ten points on each question, allegedly I would pass the test.

When the application arrived, I quickly filled it out and sent in my check. I was careful to make sure that all of the attachments on the application were accurate, and that I had checked all appropriate boxes.

Realizing, furthermore, that all bar examiners are reputedly anal and have a most meticulous approach to screening applications, I took special care to disclose my prior transgressions with the law.

My first encounter involved a commercial fishing violation in Bristol Bay when I was 18 years old. The incident resulted in an SIS which I completed successfully.

The second, more egregious transgression was my more recent battle with the State of Alaska, where I beat the rap on my infamous Pink Thing. That last incident, which resulted in countless hours of enjoyment, and at least three *Bar Rag* articles, ended with the filing of a notice of dismissal by the Fairbanks District Attorney's Office. The arrest was expected to have little, if any, effect upon my otherwise superb qualifications. After all, how many other attorneys have been arrested of weapons misconduct in the past? Apparently, I underestimated my post 9/11 status. I soon learned that the Patriot Act is quite alive and well.

I will concede that the State of Washington has a very efficient Bar Association. In short time, I was contacted by an agency out of the Midwest indicating that it had been retained to investigate me. I was required to elaborate upon my two brushes with the law. It was obvious that this was a serious request.

Initially, I thought about simply attaching copies of my *Bar Rag* articles regarding my past exploits. I then decided that the standard of admission in Washington might very well be much higher than that for Alaska. I also acknowledged that the examiners might not find humor in my escapade. As such, I sent a rather serious response to the Bar Association regarding the status of my criminal background, pointing out, like Arlo Guthrie did in Alice's Restaurant, that I had rehabilitated myself.

Not that the issue is over. In fact, once I have enjoyed a period of admission to the Washington bar, I intend to then expose my real self to them. Figuratively speaking, of course, given the nature of the last offense. Just not now. In some respects, I may very well be the last Alaskan to obtain admission by reciprocity to the Washington Bar, once Washington realizes the hidden risks that reciprocal admission entails.

Fortunately, my plaintive explanations passed scrutiny. Like Lisa Murkowski being elected, I was finally legitimate. Approximately 30 days before the scheduled bar exam in Washington, I received a notification that I had been qualified to "sit for the bar." I also received extensive instructions on how to process myself into Bellevue, Washington, on February 25, 2005, where I would take the Washington State Bar Exam.

I may very well be the last Alaskan to obtain admission by reciprocity to the Washington Bar, once Washington realizes the hidden risks that reciprocal admission entails.

Some history is in order. I was admitted to the Alaska Bar in 1976. At the time, I was in one of the first groups to take the multi-state professional responsibility exam. Testing for ethics was a new concept in the profession, the genesis of which arose out of the Watergate scandal. Although I did not know what my score ended up being on the Alaska test, I am comfortable that I must have passed, since I was admitted.

Five years later, while stationed as an Assistant Attorney General in the Commonwealth of the Northern Mariana Islands, also known as Saipan, I decided to take the bar exam for that jurisdiction, as well. Because Saipan did not really have an attorney bar exam at that time, and because I was one of the first attorneys who stated that they actually wanted to take an attorney bar exam, the presiding judge made a special effort to come up with something that would work. Previously, every attorney simply practiced law under a local waiver of the rules of admission. As such, the local bar was quite perplexed over my unusual request. "Why torture yourself when you can go sailing, instead?" was the most asked local question. I had no ready reply. Perhaps it was because I had a compulsive personality.

Eventually, the decision was reached that I would have to take the multi-state professional responsibility exam only. In retrospect, I think that this may had been because nobody wanted to try to figure out some bar examination questions for an attorney applicant. Too much of a challenge, especially given the unique tribal issues of the area.

Moreover, at the time, the only two senior attorneys on Saipan primarily had made their legendary arguments out of either Black's Law Dictionary or Corpus Juris Secundum, frowning heavily upon anybody who conducted extensive legal research such as using a digest system or, even more shockingly, case law — even if such case law only involved citations to headnotes. Having to prove one's legal qualifications was virtually unheard of.

Although studying for the test would probably be considered poor etiquette, I decided nonetheless to study for the exam, likely totally upsetting the local apple cart in the process.

At the time, I had only been an attorney for five years. I still took my responsibilities seriously. To prepare for the test, I contacted a friend of mine in Alaska, and asked if he still had his BAR-BRI preparation materials. My friend quite kindly sent me an outdated manual that he had used for the three previous exams that he had attempted. Although the manual was outdated, the price was right. Besides, who cared if he was unsuccessful the first two tries?

I studied diligently from the manual, reading up on the various professional responsibility codes. I next took the accompanying unused practice exam. I then graded the practice exam and found that I had missed only five questions. I studiously retraced my steps and studied again, taking the practice exam one more time. On the second try, I quickly scored 100%. Without doubt, I was prepared to take the first ever intimidating Saipan Bar attorney exam. It was to be a most historic occasion. It was to be the first attorney bar exam ever offered on the island, and I was its only victim.

On the day that I reported to the presiding judge for the purposes of taking the bar exam, he shook my hand graciously and escorted me into the empty law library. Finding a location for the test was not difficult. The law library was always empty in Saipan. Handing me the testing materials, the judge then announced that I would have whatever time I needed to take the test. It was to be an honor system. There would be no proctor. When I was done taking the test, I was simply to turn it into him and he would grade it, himself. The waiting period for results would be an interminable thirty minutes, at best. Hardly even enough time to work up a good neurosis, let alone a deep-seated psychosis.

My instructions given, the judge left the room. I settled in at the desk and opened to the first question. To

Continued on page 27

TALES FROM THE INTERIOR

The price of boredom

Continued from page 26

my surprise, I immediately learned that I was taking the same exam that I had taken as the practice exam the previous day. I knew that I could score 100% on the exam in less than twenty minutes. In fact, it would probably take the judge longer to grade the exam than for me to take it. As such, it was in Saipan, a beautiful tropical island paradise that my first real professional ethical dilemma arose. Although I had come by the materials most honorably, I was still taking an exam which was essentially a non-event.

I thought about the ethics of the issue. Obviously, one option was to take the test without comment. The other was to disclose the situation. I felt the "little devil" on my left shoulder and the "little angel" on my right - both arguing in their lawyerlike styles. Ultimately, my conscience dictated the latter approach. The rotten little angel had prevailed.

The decision made, I left the examination room to speak with the judge. I went to the judge's chambers and explained the dilemma. I expected that his response would be that Saipan would simply order another test, thus delaying my admission by several weeks, at least. Instead, the learned jurist's response was the unexpected. "Mr. Satterberg, are you telling me that you have already taken this examination in your studies?" asked the wise judge. I responded affirmatively. " And, how did you score?" was the next thoughtful question. "One hundred percent on the retest" was my humble reply. The intelligent Court then continued, "Mr. Satterberg, one of the hallmarks of our profession is the assumption that those attorneys who prepare for their cases and do their work are justly rewarded. Might I therefore suggest that you go back and complete the examination and do the best that you possibly can? It sounds to me that you may well be the first person in Saipan to score 100% on the ethics exam."

I did exactly that and scored 100% on the multi-state ethics examination. To this day, I doubt if there are many, if any, attorneys who can claim that honor, especially on Saipan. Still, even today, there are very few attorneys sit for the Saipan bar examination, regardless.

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The Washington Bar Exam, however, obviously would be different than Saipan. I seriously doubted if Washington would use the approach that Saipan did in developing its test. Upon reflection, it was obvious that the court clerk in Saipan had apparently contacted somebody who had taken the examination in the United States and had likely asked them to send over an old practice exam, thus saving expenses. Maybe they had a dusty old copy of the same BAR/BRI materials that I had used to study from. Undoubtedly, Washington would not be as relaxed about the process. To the contrary, I fully expected that Washington would have its own exam, especially recognizing that it did not have a multi-state bar examination process, but an ethics examination which was based on essays. Clearly, I would have to study, once again.

I bit the bullet and ordered some bar review materials from the State of Washington. Fortunately, my old friend, BAR/BRI, was still in business, and was apparently doing quite financially well, considering the cost of the latest study guides. Despite the cost, I recognized that history is often the best teacher. I decided to benefit from the experience of others having taken the examination, rather than simply winging it. The materials arrived by overnight courier. To my dismay, the materials which I received were most comprehensive in nature. They included not only a study manual, but also a short and extended outline, a reproduction of the Washington State Professional Responsibility Code, and a three hour lecture on a compact disc by an entertaining, yet somewhat caustic attorney who lectured in the classic, law professor style of creative intimidation. I was not going to be required to study just a little bit. To do the job correctly, I was going to have to study a lot. Fortunately, the lectures, which could be enjoyed while driving to and from work, were actually quite informative and provided the necessary guidance, especially recognizing that I soon misplaced my extended outline of the Professional Responsibility materials which would not be located until the night before the examination.

I tried to resurrect my long lost study skills. Rather than listening to classic rock while driving to and from work, I endured the audio taped lectures on a regular basis, until I got to the point where I virtually had them memorized. At night, when I was suffering from insomnia, I would read bar exam materials. I even glanced at the Professional Responsibility Code once. I soon learned where I had been making professional mistakes. I felt like a hypochondriac medical student discovering that he had all sorts of exotic, incurable diseases. Still, as my studies progressed, I once again began impressed with the overall development and purpose of the Professional Responsibility Code. I also recognized a distinct benefit of going through the review process, even if the Alaska Bar Association does not recognize the experience as deserving of CLE credit. I also became panicked, from time to time, when I learned that I had possibly engaged in an ethical breach in years gone by. In fact, with respect to one hypothetical fact circumstance, I even sought independent legal advice to clarify whether I hypothetically did or hypothetically did not have an issue. Fortunately, the hypothetical advice was that I had addressed the hypothetical ethical issue correctly, even if I did have to go to six different lawyers to get the hypothetical opinion that I felt was most legally accurate.

One point the guest lecturer had made in his lectures clearly sank in. The lecturer stressed that, although ethics is considered often to be the easiest part of the exam, it can also be a dangerous trap. The basis for the trap is because many applicants do not study as hard as they should for ethics, assuming that it is essentially a "no brainer" and that studying is not necessary. My faceless teacher wisely pointed out in rejoinder, however, that everyone had to pass the ethics exam in order to pass the Washington State Bar exam. The importance of this was not lost on me. For example, where a person could conceivably fail one portion of the bar exam, such as Commercial Transactions, and pick up the missing points on another portion, such as Contracts, the same was not true of Ethics. The short answer was that, if one failed Ethics, one failed the entire exam. The impact of this revelation furthermore concerned me insofar as, as an attorney of over 25 year's experience, I would have a hard time explaining to my many fans that I had failed the ethics portion of the exam should such a tragedy occur. In short, if I were to take the ethics exam, I had to pass. My limited honor was at stake.

During the course of preparing for the examination, I made another mistake. Perhaps seeking sympathy or support, I told many people that I as going to be taking the test. This created additional "pucker factor" for me, since I was now being expected to perform. In short order, I began to experience a new type of performance anxiety. By way of comparison, Anchorage attorney, Wayne Watson took the smarter approach. Wayne did not tell me that he had taken the Washington Bar exam until after the results came out in May and he learned that both he and I had passed. As Wayne explained it, in the event that he failed the exam, nobody would be the wiser. Although Wayne preferred to view his approach as the cautious approach, I preferred to view my approach as the confident approach, born of braggadocio. In the end, it is simply a matter of how one views the world.

On Wednesday, February 24, 2005, I departed Fairbanks for Seattle. My accompanying baggage was quite minimal, consisting of my bar review materials, some underwear and a few toiletries. There was nothing on my agenda except to take the bar exam. Although I had the honor of riding first class on Alaska Airlines, due to my high caste standing of being an MVP Gold, I still chose not to partake of the free libations, contrary to my usual style. Instead, I continued to read my materials, actually choosing to prepare for something. I also needed a clear head for the morning.

Upon my arrival in Seattle, I traveled to the hotel and checked in. Scoping out the territory, I next located the building where the bar exam was being given. The Washington State Bar Association has chosen the massive Meydenbauer Convention Center in Bellevue. The Hall was longer than a football stadium, and made the Holiday Inn conference room in Anchorage, where I took my first exam in 1976, look like a closet.

Because I only had to take the Professional Responsibility portion of the exam, and not the entire three-day affair, I had missed out on the first two days of festivities. As I entered the foyer of the building, the examination was just drawing to a close for the second day. The smell of nervous sweat permeated the air. Signs were posted in conspicuous locations cautioning individuals to "Be Quiet! Examination in progress". Throughout the room, little grey haired ladies sat at desks, wearing name tags which designated them as "proctors." For the life of me, I still could not figure out the difference between a proctor or a proctologist, but I chose not to ask these sweet little individuals. Experience had previously taught me that they could turn rabid in an instant.

When the main doors finally opened to the convention hall, I was able to obtain firsthand an appreciation of the terrible trauma which had gone on within. Literally well over two hundred tables were neatly arranged in mathematically precise rows. Two applicants sat adjacent to each other at each table sharing the limited space. At first count, it appeared that well over 500 people were taking the examination, which was later confirmed. As the prospective attorneys staggered from the room, I noted the all-to-familiar "1000 yard stare" on the faces of many. The now-forgotten neurosis of my first examination began to return as I saw people talking insanely to themselves, beckoning to imaginary figures in the sky, or engaging in other bizarre forms of behavior. It was the same psychosis which I felt during my own bar examination in 1976. Times had not changed. It looked like a remake of the famous movie, "Night of the Living Dead." Zombies - all of them! To boot, there was not a lot of amusement or friendly discussion going on. Rather, the walking dead filed slowly from the room like prisoners of war, contemplating either what they had done or not done wrong, or what they would do or would not do wrong on the following, final day of the sacred rite of passage.

Accepting that there was nothing that I could do for the moment, I adopted one of the techniques which many of my friends have also used

Continued on page 28

TALES FROM THE INTERIOR

The price of boredom

Continued from page 27

when faced with times of stress, I went in search of food. Lots of food. My diet could wait yet another day.

Although I have placed myself on a low carbohydrate diet, and have been rather successful in losing a fair amount of weight, I threw caution to the wind on the day of the bar exam. In short, I slipped. I didn't just slip. I fell on my face. Recognizing that carbohydrates are known to stimulate brain activity, and taste good, as well, I went for Mexican food. To say my brain was stimulated would be an understatement. The choice was devastating. I was up all night. I felt like a three-year-old who had gorged himself on a bag of Snickers bars. What sleep I did manage to get was filled with some of the most active dreaming I have had in years. As such, as a practice pointer for future bar examinees, do not eat Mexican food. To the same degree, I would not recommend Korean Kim Chee, either. Although these foods ordinarily will guarantee you that you will have a rather large area reserved for yourself at the examination table, the trade-off in terms of sleep is simply not worth it.

Following my dinner, I returned to my room and finally located the previously-lost extended bar review outline. As I read through the long outline, I began to realize that I still had much to learn. Panic set in, and my endorphins took over. When I finally decided to stop studying, I was at least confident that I had probably embedded as much as I could in my mind in preparation for the exam the following day.

When I took my seat on the day of the exam, I recognized that the appointed time had finally arrived. I organized my three cups of coffee neatly in front of me. I then was quickly told by my tablemate that coffee was not allowed on the table, but only on the floor. Taking her literally, I started to pour out my valuable coffee on the floor. She then hastily clarified that the coffee was to remain in cups on the floor, and not just on the floor. Fortunately, I had just started the exercise, so I blamed the spill at my feet on pre-test jitters. On balance, the "coffee rule" made sense. Coffee spills can be devastating. Besides, better to kick the high octane brew onto somebody's study guide than to elbow it onto their priceless little test. I then did a last hasty review of my bar materials, said a quick prayer to my Higher Power, and strained to see the front of the auditorium, where an ominous black podium stood like the impermeable Monolith in Stanley Kubrick's movie, 2001.

At exactly one minute before the hour, a scholarly looking gentleman stepped up to the podium. The loudspeaker boomed as he solemnly informed the attendees that the final day of examination was about to commence. We were given explicit instructions with respect to how to sit at our table, how to arrange our belongings, and reminded to put our coffee cups on the floor if we had not already done so. (Apparently, on the two prior days, others might have been thinking literally, too, about the "coffee on the floor" rule. After all, it was Starbucks Country. Coffee does strange things to people. Consider Fairbanks attorney Don Logan as a prime example.) As I did one final glance around the auditorium, I saw that several of the examinees were still frantically flopping through papers, biting their nails, or trying to force the last minute of productivity into their brains. As for myself, the die was already cast.

When the big hand on the clock struck straight up on the hour, the proctor droned, "You may commence. You have exactly two hours and fifteen minutes to take this examination."

I opened the exam booklet and immediately reviewed the first of six fact patterns. Following the fact pattern were several lines upon which to write the answer. The answers were to be written only in ink. I did not realize until the end of the first question that you could not write on the back of the page, in the margins, or more than one line to a line. As such, as I would write the answer, my writing tended to get progressively smaller, commencing with large macroscopic characters at the beginning of the page and ending with nanomicrographic at the end.

Still, there was a nice thing about having to write the answers in ink. With ink, I could not go back and change the answers if I had second thoughts. The advantage to having limited page length, as well, worked out also. Once I was out of paper, I was out of answer. In short, given ink and lack of space, I soon adopted a very fatalistic approach to the examination, figuring that, when I ran out of paper, I would run out of the room.

Approximately one hour and fifty minutes into the exam, I reached the final line of the final page. At that moment, I recognized there was no sense worrying about what I had or had not written. The answers were in "their hands" now. I figured that the smartest thing that I could do would be to leave and catch an earlier flight back to Alaska, which is exactly what I did. (Practice Pointer: There is an old rule in Italian road racing that says "What's behind you doesn't matter!" The same applies to the bar examination.)

Recognizing that the results were not to be released until the middle of May, I soon simply forgot about the entire event. I figured that my efficient office computer calendar would remind me when it was time to check. Before my computer could remind me, however, I received the memorable telephone call from Wayne Watson in Anchorage, congratulating me on passing the bar.

The final step of the process was to gain actual admission to the Washington Bar. Recognizing that I could not afford to fly to Seattle to be sworn in with the other several hundred applicants, I adopted the procedure which allowed me to be sworn into the bar by a judge in my home state. I elected to use Judge Robert Downes, newly sworn in as a superior court judge, himself, to perform the last rites. I specifically selected Judge Downes because of the complexity of the process. The decision was crucial. I could not afford any mistakes, having finally arrived at the last step along my arduous path to admission. In some respects, it had been a modern day version of Pilgrim's Progress.

On July 15, 2005, the swearing in ceremony for me was held at the Fairbanks Superior Court House in a vacant courtroom. As a matter of self-esteem, I ordered everybody in my office to voluntarily attend, as well. We even took along our two life-sized office Austin Powers cut outs of Dr. Evil and his trusty companion, Mini-Me, in order to help fill the courtroom.

Once everyone was assembled and the obligatory opening remarks made, Judge Downes, resplendent in his ironed black robes, instructed me to raise my hand and to repeat after him, which is exactly what I did. I followed the good judge verbatim, including even scratching the tip of my nose as he did at one point.

Following the auspicious, yet surprisingly lightly attended ceremony, we then returned to my office, where all present enjoyed cake, libations, and a small, but touching, ceremony. There wasn't a wet eye in the house. The only thing that was missing were the patronizing speeches, but I figured I could do those myself next time. After all, there are still 48 states left to conquer.

But, the real reason that I took the bar exam actually had nothing to do with wanting necessarily to be an attorney in Washington, or even to challenge myself intellectually. Nor do I accept that it was born of the spectra of old age. Instead, the truth be known, I was running desperately short on Bar Rag articles.

FOUR DEER & A CATBIRD

By Ed Reasor

Eighty miles north in Buffalo
citizens are complaining that
white-tailed deer
are eating their gardens
and neatly mowed lawns.

It's true - both the complaining
and the eating.
I heard it on the radio
before I started my six AM
walk around my pond
looking to see if my bass
were happy with the thick fog
and the very, very heavy dew.

I was rising from a close
inspection of a Beaver's trail
that crossed mine.
The summer's sun had dried
most plants to the root
But now the dew fed
the trampled grass so his trail
was like a green paint line on
those paved highways city folks use,
only perpendicular to my own.

A grey, flighty catbird
awoke from yesterday's play
and in a loud squak gleefully
gave my position away.

Yesterday this same fellow spent
considerable time and effort
teasing my Chinese bride from Tahiti.

First he sung a perfect MEOWW
not knowing whether Tahiti
had cats or not.

And then almost cruelly
he moaned the soft sounds
of a baby's gentle cry
which brought her off the porch
into my apple trees with a question:
WHY wasn't I helping her
look for the lost babe in the brush?

When I pointed out her singer
and told her of his
mischievous but harmless ways,
she threw a solid, good apple at him
But missed!

Today this same catbird's alarm caused
four beautifully tanned deer to leap
from their morning breakfast
of apples and dew-kissed leaves
into a short, fast run, then
to jump and clear the boundary's
five foot fence of wire and vines.

They ran across the clear creek,
all in a close line
into my neighbor's cornfield
uncut, tall and inviting
where they found a refuge fine.

It's a fulfilling morning.
Teased by a catbird,
startled by breakfast-interrupted deer,
spied on by a nervous beaver
quite certain that I am the foe -
Better than living in Buffalo!

And, no, I won't tell the folks working on the radio.

Editor's note: Ed Reasor, now residing in upstate New York, is the Bar Rag's former movie critic, who departed Alaska to practice and participate in the world of film in the 1980s.

Bryners wow Russians at Commercial Court conference

Continued from page 1

of bravery and adventure. She was a wonderful ambassador for America during our stay.

I first discovered the "Bryner Connection" when, on a prior exchange program, one of our facilitators learned that Justice Bryner was a member of the well-known Bryner family of Vladivostock. Justice Bryner is writing an article about his trip with his mother to Vladivostock so I will not elaborate here. It is enough to say that his family's history and his own history, as a Russian immigrant who worked hard and achieved great success in America, is well known in Russia. By the way, Justice Bryner is also related to Yul Bryner. If Justice Bryner shaved his head and started dancing with (or like) Deborah Kerr, I would have guessed sooner.

Khabarovsk – the Paris of the Russian Far East

Khabarovsk has been described as the Paris of the Russian Far East, with good cause. Nestled on the banks of the wide Amur River separating Russia from China, the City is marked by rolling hills dotted with golden onion domes of recently restored Russian Orthodox churches. Wide tree-lined boulevards are in abundance and flowers were blooming throughout the city. The strikingly beautiful architecture of much of the old city, an interesting mix of European and Oriental influences, contrasts with the blocky high rise apartment buildings of the Stalin era scattered on the outskirts of the city.

Everyone walks in Khabarovsk. The hustle bustle starts early and by late evening the boulevards remain filled with people of all ages, headed for the riverside parks or the dozens of outdoor beer kiosks – all of which seem to do a brisk business.

Men dress fairly conservatively, with a definite penchant for black, especially black leather. Women, young, old, and in-between, are fashion mavens. Towering high heels are the norm, often with show-stopping outfits.

Day One in Khabarovsk

Arriving one day before the Commercial Court conference, our first full day in Khabarovsk was spent observing a mock jury trial. The mock trial was conducted by students of Khabarovsk Law School and other regional law schools, following a two-week training seminar jointly presented by Federal Public Defender Rich Curtner of Alaska and Supreme Court Justice Paul DeMuniz of Oregon. The case involved a trial of two defendants charged with robbery and murder, with the fact pattern taken from a real criminal case recently tried to a Khabarovsk jury. It was great – if a little different.

The courtroom looked much like a typical Alaska court – except that the defendants sat throughout the trial in a floor-to-ceiling cage, strongly resembling a jail cell. I was also surprised that the prosecution can simply show evidence and read police reports and expert reports to the jury, so long as (apparently) the judge "approved" the evidence at a preliminary hearing. On the other hand, although represented by counsel, these defendants were given the opportunity to directly question witnesses and make final argument to the jury. Although criminal jury verdicts must be unanimous in Russia, the unanimity requirement only lasts for three hours. After that point, a simple majority vote will support a guilty or not guilty verdict.

The Commercial Court Conference

Russian Arbitrazh Courts are, like much of the current Russian legal system, part of a reform movement that began in response to Russia's shift from a largely closed centrally-planned economy to a market-based economy. Considering that the Russian Constitution was passed in 1993 and that the most recent comprehensive civil and procedural codes were adopted in 2002, the Russian court system has come a long way.

The Russian court system is divided into three branches: courts of general jurisdiction (including military courts), with rights of appeal to intermediate appeal levels and, ultimately, to the Supreme Court; commercial or arbitrazh courts, with rights of appeal to the Circuit Courts, and final appeal to the High Court of Arbitration; and the Constitutional Court. Commercial Courts hear, in general, cases involving business disputes and appeals from administrative agencies. They also hear most international commercial disputes, making their decisions of particular interest to Americans and others doing business in Russia.

The 2005 Khabarovsk Conference was a collaborative effort of the Khabarovsk Commercial Courts (trial and intermediate appellate courts), the Russian High Court of Arbitration, Alaska and Oregon Rule of Law representatives, and the Russian American Judicial Partnership Project. The reason for so much interest in the commercial courts is reflected in the statistics we were given at the start of the conference. In 2004, 1,300,000 cases were filed in the commercial courts, an increase of 41% from 2003.

The significant increase in court filings is viewed as a positive sign by Russian judges. They believe that it reflects growing confidence in the judicial system and a growing economy. However, the sheer volume of cases being filed, coupled with what has been, until very recently, an institutional resistance to alternative dispute resolution, presents significant challenges.

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Other aspects of the Russian legal system also complicate the processing of cases. As most proceedings are not recorded, appeals are de novo. There was much justifiable grumbling about being reversed on appeal based on evidence at the de novo appeal that was not presented to the initial trial judge. And being reversed is a very big deal in Russia, as pay increases and decreases are tied to reversals. In addition, the notion of default and summary judgments is a novel one. Until recent procedural reforms, it was simply assumed that all cases go to trial. Also, the system is set up so that the court, rather than the parties, does most, if not all, of the discovery.

Naturally enough, the conference focused on practical application of settlement techniques, pre-trial discovery, summary judgment procedures, and enforcement of judgments. I learned a great deal at the conference and found that Russian lawyers and judges share many of the same challenges and rewards as their Alaskan counterparts. Without exception, all of the people I met were fascinated by stories of Alaska, with many having read Jack London's works .

There are also many law schools in and around Khabarovsk. The students we met are smart, with a vision for the future that focuses on making the world a better place. I grew up in a time when people were afraid of Russia and all it represented. It is rewarding to think that mutual understanding and respect just takes a little effort.

Future Projects

For those interested in working on future Rule of Law programs, please feel free to contact the coordinator of the Khabarovsk-Alaska Rule of Law Partnership, Brenda Aiken. Her e-mail is baiken@courts.state.ak.us. Our Fall 2005 conference is on human trafficking and violence against children. We will be hosting the delegation in Anchorage and Juneau in September.

Chief Justice Bryner and his mother, Zoe, visit with Nellie Miz, in Vladivostok.

The people of Khabarovsk turn out for a parade celebrating the city's 147th anniversary.

Russian law students learn jury trial litigation

By **Rich Curtner**

In 2001, the United States Agency for International Development (USAID) requested that the Russian American Rule of Law Consortium (RAROLC) establish a new partnership between the legal communities of Alaska and Khabarovsk, the second largest city and cultural center of Russia's "Far East." The Khabarovsk-Alaska Rule of Law partnership (KAROL) was born.

Since 2001, three delegations of Khabarovsk judges and lawyers have visited Anchorage and Juneau as part of the KAROL partnership. Alaska has responded in kind by sending three delegations to Khabarovsk. In the fall of 2002, I was invited as part of the Alaska delegation for a week-long conference in Khabarovsk that included over 100 Russian and American judges, lawyers and law students.[1]

That conference inspired a number of publications on legal reform, judicial independence and legal ethics. Working groups were organized to explore legal education, development of the legal profession, legal ethics, court administration and judicial outreach. Since 2002, the partnership has initiated a pilot Trial Observers Program in the Khabarovsk regional courts, provided technical support to Khabarovsk courts, and founded the Association of Jurists of the Khabarovsk Krai.[2]

In 2003, KAROL received a grant from the Foundation for Russian American Economic Cooperation (FRAEC) to support implementation of jury trials in the Khabarovsk Krai under Russia's new criminal code. Judge Eric Smith and I participated in a jury trial seminar in Khabarovsk in December of 2003, to assist the trial lawyers of Khabarovsk in jury trial litigation techniques.[3] The Jury Trial Support Program has worked with the media of Khabarovsk to create a positive attitude about the jury concept among the citizens of Khabarovsk. In 2004, eighteen cases were brought before juries in Khabarovsk. The law faculty of the Khabarovsk State Academy of Economics and Law published a guide on the jury process that is used as a textbook for law students in Khabarovsk universities.

This May I was again fortunate to be invited to Khabarovsk by the Jury Trial Support Program. The Khabarovsk Academy of Economics and Law, RAROLC, KAROL, and the Khabarovsk Krai Court of General Jurisdiction co-sponsored a "jury trial litigation seminar for law students" at the law school in Khabarovsk on May 18-31, 2005. Twenty-four law students from Khabarovsk, Vladivostok and Sakhalin were chosen for this intensive litigation seminar that would conclude with a mock jury trial in a Khabarovsk courtroom.

For me, that seminar offered an exciting opportunity. After witnessing the rebirth of the jury trial in the Russian Far East, I have been able to observe its growth in the Khabarovsk courts, in spite of the initial skepticism of the Khabarovsk bench and trepidation of the bar. The next stage of this evolution would necessarily involve the new lawyers graduating from law schools and representing the next generation of the Russian legal community. Could they bring the openness and enthusiasm of youth to this process? I would not be disappointed.

Rich Curtner, Federal Public Defender, pictured with Project faculty and several members of the Chamber of Lawyers of Khabarovsk: (L to R) Interpreter Vladimir Bourenin, two members of the Chamber, Rich Curtner, Oregon Supreme Court Justice Paul DeMuniz, Chamber of Lawyers member, and facultymember Vladimir Derbyshev of the Ivanovo Chamber of Attorneys.

Getting there

What could be more tedious than the Tom Hanks film, "The Terminal?" You might try traveling from Anchorage to Khabarovsk.

In the good old days (early 1990s), you could fly directly from Anchorage to Khabarovsk on a less-than-luxurious, but relatively short (five hour) flight on Aeroflot, the Russian national airline. My itinerary for this trip was not so user-friendly, and changed several times. I was originally scheduled for Anchorage-Los Angeles-Tokyo-Seoul-Khabarovsk. I was pleased to get a second itinerary that took me from Anchorage directly to Kamchatka, then on to Khabarovsk. That fell apart when Magadan Air canceled its weekly flight to Alaska for my return.

The final itinerary started with a red-eye to Seattle. After eight hours at the Seattle airport, there was a ten-hour flight to Tokyo, then a two-hour flight to Seoul. The next stage involved a twenty-four-hour layover before the three-hour flight to Khabarovsk. Twenty-four hours in the artificial environment of the Seoul airport is tolerable only with a twelve-hour nap at the Transit Hotel in the airport.

The Constitution of the Russian Federation, adopted in 1993, reestablished the right to a jury trial in serious criminal cases after a seventy-five-year absence.

What saved me on this schedule was the perfect companion book for this trip, *Reeling in Russia*,[4] loaned to me by a friend, Venable Vermont. The book was an account of the author's fly fishing expedition across Russia during the 1996 turmoil of the "New Russia." I would highly recommend it to anyone taking the forty-eight-hour junket from Alaska to the Russian Far East.

After leaving Anchorage late Thursday night, I finally arrived in Khabarovsk Sunday evening. (You lose a day crossing the international date line.) I was met by Elena Wilson (RAROLC staff member and coordinator of the seminar) and Ludmila Plotnikova (associate professor at the law school).

I have always felt that I have been lucky in my travels. I arrived in Khabarovsk on a beautiful warm spring day. Everyone was outside enjoying the weather. I was surprised that the trees were just beginning to leaf out. Elena told me this was the first nice day in a week. Spring was about three weeks late to Khabarovsk. The weather had been miserable, cold and wet. Our hotel had been without hot water for two days; then without cold water for another.

But on this beautiful Sunday evening, all was well. Over a light dinner of blini (caviar-filled crepes), Ludmila shared her recipe for preparation of salmon eggs (for caviar, not for bait). Elena briefed me on what I had missed the first two days of the seminar, the introduction to the program and investigative stages of jury trial preparation. We had an excellent faculty and enthusiastic students. The seminar would be in full swing the next morning.

The faculty

Clearly the lead for this faculty is Lidya Voskobitova, a Professor of Criminal Procedure at the Moscow State Academy of Jurisprudence. She has the command and presence of those in academia who are truly gifted as teachers. She had the students thoroughly engaged and easily drew them into a discussion of the subject matter. Ever the tough professor and task master, Lidya pushed the students hard, but sincerely supported their efforts.

The Constitution of the Russian Federation, adopted in 1993, reestablished the right to a jury trial in serious criminal cases after a seventy-five-year absence. Most regions, such as Khabarovsk, were not required to institute jury trials until 2003. Lidya had previously conducted jury trial seminars in Moscow and across Russia.

Vladimir Derbyshev provided the practitioner's perspective. He is a member of the Ivanovo Chamber of Attorneys, and probably has tried more jury trials than anyone in Russia. The Ivanovo Region was chosen as a "pilot" when the Constitution of the Russian Federation was adopted, and now has a ten-year track record of jury trials. Vladimir is the passionate, entertaining and engaging trial lawyer, with a repertoire of war stories.

Olga Zadovina is a prosecutor in Khabarovsk who has tried four jury trials thus far. The factual problem used by the students for this seminar and mock trial is from a case she tried in December of 2003, the second jury trial tried in Khabarovsk.

I was already somewhat familiar with the case. While taking a break from the jury program in which I participated in 2003, I had heard that a jury trial was going on in a courtroom on another floor. I stopped in to watch, without benefit of an interpreter. But I could perceive the drama as a reluctant witness, standing in the witness box in the middle of the courtroom, was being grilled by the judge. More on that later.

The American side of the program included myself and Paul DeMuniz, Justice on the Oregon Supreme Court. Paul and I typically followed the presentations of the Russian faculty with commentary, practice pointers and/or demonstrations from the American viewpoint.

Paul was a trial attorney in Oregon for fifteen years (several as a public defender) before joining the Oregon Court of Appeals and then the Oregon Supreme Court. He has been very involved and is co-chair of the Oregon-Sakhalin Rule of Law partnership, and has written an informative article entitled *Judicial Reform in Russia: Russia Looks to the Past to Create a New Adversarial System of Criminal Justice*.[5]

Several local law professors, judges and attorneys participated from time-to-time. Elena had assembled an experienced and professional faculty, and an ambitious agenda for the week.

The seminar

The full title of the program is: *Jury Trial Litigation Seminar for Law Students; Practical Skills of Handling a Case*. The course syllabus promises to address "cutting-edge issues and developments in Criminal Procedure and Constitutional Law," with "special emphasis on the constitutional rights of the criminal defendant." Course highlights include "admissibility of evidence, search and seizure issues, prosecutorial and judicial misconduct, ineffective assistance of counsel, and jury selection and in-

Continued on page 31

Jury trial litigation seminar for Russian law students

Continued from page 30

structions." Students are required to "prepare and participate in a series of trial problems, and research, write and argue two motions." It is an ambitious agenda for the week.

Each day's schedule was jam-packed from 8:30 a.m. to 5:30 p.m., with an hour for lunch, and students working in the law school classroom with faculty members after class on the next day's assignments. I was pleasantly surprised at the energy these students brought to the classroom each day. And they had an additional incentive: the top student at the end of the seminar was to be offered a semester externship with the Oregon Supreme Court and classes at the Willamette College of Law by Justice DeMuniz.

Because of some scheduling conflicts, the class actually numbered twenty-one by the time I arrived. They were divided into three teams of seven; one for the prosecution and one for each of two co-defendants. Each morning and afternoon they had to make a presentation and were graded by the faculty. Individual presentations were graded on a scale of a possible twenty-five points; ten for legal analysis, ten for presentation, and five for originality.

The case

The problem involved the prosecution of Dmitriy "Dima" Zabalukhin and Aleksandr "Sasha" Sychugov for the robbery/murder of S. A. Kornev. The prosecution "investigation" alleged that Zabalukhin had conspired to collect a debt from Kornev, and to murder him in the process. Zabalukhin convinced Sychugov to join in. Both went to Kornev's apartment, suffocated him with a plastic bag and "scotch tape" (a Russian version of duct tape?) and rope, and then stole Kornev's Toyota "Levin."

According to the prosecution, Zabalukhin and Sychugov had to go to the garage where Kornev's car was kept several times before they could get it started. Once they did, they only drove it a short time before four of Kornev's friends, including D. V. Belay, stopped Kornev's car, being driven by Zabalukhin with Sychugov in the passenger seat. Belay and friends took back the car and turned Zabalukhin and Sychugov in to the police. Zabalukhin and Sychugov were questioned, then released. They both finally were arrested at the end of the investigation, months later.

Sychugov had confessed to the crime, although minimizing his involvement. Zabalukhin exercised his right to remain silent. The witnesses at the mock trial would include the security guard at the garage where Kornev's car was kept, who picked both Zabalukhin and Sychugov from a photo line-up; Belay, who also identified both defendants; and Maksim Serazhidenov.

Serazhidenov was the witness I saw testify at the real trial in December 2003. Olga, who prosecuted the case, explained to me that Serazhidenov had told investigators that Zabalukhin attempted to recruit him several times prior to the murder to help Zabalukhin rob and kill Kornev. Serazhidenov also told investigators that Zabalukhin had confessed to the murder afterwards. Serazhidenov resisted coming to trial, saying he could not afford the travel from his village to Khabarovsk. The prosecutor offered to "read" Serazhidenov's statement to investigators at the trial. Zabalukhin objected. So, Olga had investigators bring Serazhidenov to the trial. He was the last witness, reluctantly but efficiently hammering the last nails into Zabalukhin's coffin.[6]

All of the students had a complete copy of the investigative file in order to draft pretrial motions and for trial preparation.

Monday

The Thursday and Friday before my arrival, the seminar already had covered the right to counsel, investigation techniques, and forensic experts.

On Monday we covered "evidence," and the "protection of one's constitutional rights in a criminal case." Evidence was a difficult subject for Paul and me. Russia does not have Rules of Evidence; everything is controlled by the criminal code. If for American trial lawyers, "everything is admissible, unless prohibited," in Russia Anothing is admissible unless provided by statute."

Search and Seizure issues were much more familiar. The Russian criminal code prohibits the use of any evidence that was obtained "in violation of the constitution." Vladimir's lecture included a rudimentary illustration on the chalk board of an apple tree, with the apples representing evidence, lab results, and opinions resulting from an illegal search. Paul and I instantly recognized the "fruit of the poisonous tree" without the aid of the interpreter.

Tuesday

On Tuesday the students presented various motions to suppress evidence. Their motions dealt with the identifications by the security guard and Belay. The basis in each case was that the investigators did not follow the mandated procedures in obtaining the evidence.

The rest of the morning involved discussing case evaluation and strategy. In the afternoon the students were to conduct a mock "preliminary hearing" in preparation for the mock trial. In Russia, the preliminary hearing is an "omnibus" hearing where issues of the presentation of the trial are decided.

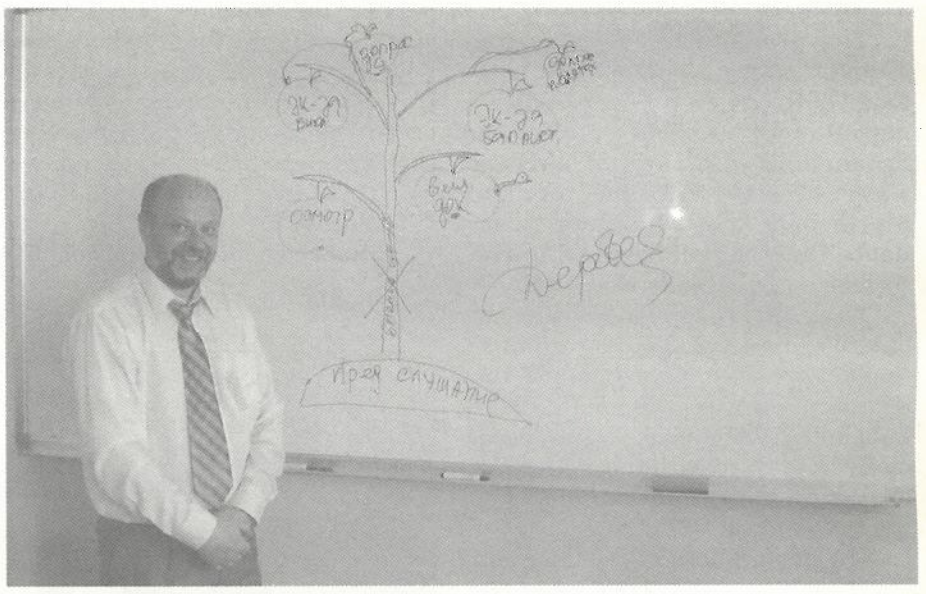
While we were waiting to start our "prelim," Svetlana of the law faculty introduced me to two "keelers" or "keilors." Svetlana doesn't speak much English, so I didn't know if she meant students, reporters, or something else. Only when the hearing began did I realize that these two dudes were playing the roles of the defendants, Zabalukhin and Sychugov.

After the preliminary hearing, the faculty discussed the basic principles of jury selection. The evening homework assignment was to prepare for selecting their jury for the following Monday's mock trial.

Wednesday

Jurors showed up bright and early at the law school classroom. They were selected from the first year law class. Twenty-one of the twenty-seven that were expected were present. This compares to a national rate of ten percent of jurors who appear on a jury summons. In Russia, citizens between the ages of twenty-five and seventy-five have the right to serve on a jury, but have no obligation to do so.

The students who conducted voir dire had prepared excellent questions, addressing the issues they could expect the trial to turn on: proof necessary for a conviction; bias against defendants who have criminal records; who are unemployed; who drink; expecting the defendants to testify. Many hands went up from the prospective jurors during questioning. I was anxious for the followup questions. There were **none**. Oops, I guess the faculty missed one of the basics of voir dire.



Vladimir Derbyshev illustrates types of evidence, "the fruit of the poisonous tree." A member of the Ivanovo Chamber of Attorneys, Derbyshev is one of Russia's most experienced jury- trial lawyers.

One juror was excused for cause. Each side had two peremptory challenges, which meant one for each defendant. In a gesture that may not earn the externship, but to my mind deserves a sportsmanship award, the prosecution student assigned to do voir dire declined to exercise her two peremptories, and graciously offered them to the defendants. The students had their jury by mid-morning.

The rest of the day the faculty covered opening statements, direct and cross-examination. The students' homework assignment was to prepare and present their opening statements for the mock trial and to deliver their openings in class the next day.

Thursday

I had advised the students to give an opening statement that was **strong** and clearly demonstrated the theme of their case, but that was also **realistic** and could be supported by the evidence as developed through the trial. The students' opening statements were certainly strong.

Continued on page 32

Jury trial litigation seminar for Russian law students

Continued from page 31

The prosecutor's opening was straightforward, with a good command of the facts. Sychugov's attorney attacked his client's confession. Zabalukhin's attorney said his client wasn't even there; he had an alibi. My thought was that these defendants, like the real Zabalukhin and Sychogov, were really in trouble.

That afternoon the students practiced direct and cross-examination of a witness: Serazhidenov, the reluctant witness at the real trial of Zabalukhin and Sychogov. I was especially impressed with the aggressive cross-examination of Serazhidenov by the two defense students.

My experience with American law students is that they often are intimidated by the prospect of their first trial or appearance in a real courtroom. These Russian students did not appear to have that problem. They were passionate and outspoken. Although we had to constantly remind them to slow down, I loved their enthusiasm.

Friday

The final day of lectures before the mock trial included jury instructions, jury "questionnaires," the "record of the trial," and Appellate and Cassation Review.

Jury questionnaires involved the four basic questions asked of Russian juries. The first question is basically whether the prosecution has proved that a crime was committed, but can be as long and complicated as the charging document filed by the prosecution. The second question is, if a crime was committed, was the defendant involved? The third question: if the defendant was involved, is the defendant "guilty?" (giving new life to the pre-Soviet concept of jury nullification). The fourth question: if the defendant is guilty, should he receive leniency? An affirmative answer limits the sentence of the defendant to two-thirds of the maximum, and eliminates life imprisonment.

Preserving the "record of the trial" is an exceptional challenge in Russia. Even in the modern age, there is no mechanical recording of the trial. The "record" consists of the handwritten notes of the judge's "secretary." A local judge who lectured on this subject was quite offended by the suggestion that his secretary could possibly make a mistake in "recording" the trial, as if it were an attack on his integrity. While trial lawyers sometimes choose to bring their own audio recording device to court, it cannot be considered part of the record.

Friday afternoon was the exciting part for the students. The final assignment of roles for Monday's mock trial were decided. The students dispersed into their individual groups to prepare for Monday's trial, a process that enveloped their weekend, and much of that of their Russian faculty advisors.

Monday would be the day of judgment.

Alaskans and friends enjoy a banya break.

Evenings in Khabarovsk

In spite of the brutal schedule of the seminar, our hosts were equally committed to sharing Russian culture and hospitality. On Monday evening the faculty was treated to the "Tour of Champions," an ice-skating exhibition at the new "Platinum Arena."

The show included such national stars as **Irina Slyutskaya** (a two-time world and European champion), **Aleksandr Abt** (silver medalist at the European championship), **Andrey Gryazev** (world junior champion), and the skating pairs of **Maria Petrova** and **Aleksey Tikhonov**, **Irina Lobacheva** and **Ilya Averbukh**, and **Tatiana Navka** and **Roman Kostomarov** (all prior world and European champions).

The audience was enthusiastic, especially our faculty colleagues, celebrating the skaters with rock star status. The Platinum Arena is a large and extravagant facility that would rival some NHL arenas, built by the prosperous gold-mining industry in the Khabarovsk region.

On the way into the arena, I ran into an old friend, Vladimir Matelsky, an attorney who had been to my house for dinner when he visited Anchorage with a delegation from Khabarovsk. He insisted I visit his home for dinner before I left. I was beginning to feel like a member of the Khabarovsk community.

Tuesday night Paul DeMuniz and I were invited to the offices of the Chamber of Attorneys for the Khabarovsk region. The president, Viktor Kushnaryov, had been in Anchorage as part of a KAROL delegation. The vice-president, Alexander Kosenko, was a member of the jury trial program faculty. Over shots of Russian cognac, the discussion transitioned from legal matters to the "banya," the unique Russian version of the sauna. It was decided that we should conduct the "first annual Khabarovsk-American Criminal Defense Bar Banya" in honor of Justice Paul DeMuniz (who had not yet experienced the "banya") later in the week.

By Thursday our Russian colleagues had not forgotten their pledge of the banya. Viktor, his wife and young son, picked up Paul, Vladimir and me at our hotel (in Viktor's new Toyota van). We drove about an hour to the country home of Viktor's friend, Sasha. Sasha is an obviously successful "small businessman" who had built a new house and banya outside of Khabarovsk. Alexander met us at the house.

After a few trips to the sauna, between beers and smoked salmon, Sasha came home. Sasha was the "banyameister," and treated Paul and me to the Russian traditional beating with birch leaves. After the banya we were treated to a wonderful dinner of garden fresh tomatoes, cucumbers, potatoes, fresh herbs, and plenty of vodka toasts.

The combination of long days in the classroom and Russian socializing was taking its toll. I was ready for a quiet weekend.

Star ice-skaters drew a large crowd to the new Platinum Arena, built by the mining industry in the Khabarovsk region.

The weekend

I was invited by my good friend Sergey to his country lodge 120 kilometers outside of Khabarovsk. I met Sergey on my first trip to Khabarovsk in 1991. He now works for a company that organizes trips for Russian students to Australia, New Zealand and Malta, and also receives foreign students in Khabarovsk.

Sergey's wife, Nina, and their twelve-year-old dog accompanied us on the two-hour drive to the lodge. On weekends they escape the city for the quietude of their lodge situated on a small lake next to a remote village. The weekend before was the last of the winter, with some snow still on the ground. This weekend green had exploded in the countryside, along with this year's crop of mosquitos.

The banya is a ritual at Sergey's lodge (and my second in two nights). I had wanted to discuss with Sergey the possibility of bringing a group of Anchorage students from Steller High School to Khabarovsk during their two-week intensives scheduled for May of 2006. Over beer, smoked trout and rose hip tea, we planned a Khabarovsk-Alaska student exchange program.

Dinner after the banya consisted of "sharban" (fish cooked in a metal box over an outdoor wood fire), and fresh country vegetables. It was a welcome change of pace from the bustle of Khabarovsk to fresh country air and the sounds of the many birds around the lodge.

I returned to Khabarovsk on Saturday to meet the Alaskan reinforcements: Chief Justice Alex Bryner, his lovely mother, and Judge Patricia Collins had just arrived for a consecutive seminar on commercial law and to observe the law students' mock trial.

Saturday was the celebration of Khabarovsk's 147th year. I missed the parade, but made it to dinner at Khabarovsk's finest restaurant, and the fireworks display afterwards. It was another beautiful evening (the weather had been sunny and warm all week), and the people of Khabarovsk were in full celebration mode. The "ohs" and "ahs" of the crowd outdid the fireworks display. It was a fantastic feeling to walk along Khabarovsk's wide main boulevard among thousands of people all in a happy mood of celebration.

On Sunday our group was invited to visit the "Ecological-Tourists Complex" about an hour outside Khabarovsk on the Amur River. The complex is similar to the Alaska Native Heritage Center in Anchorage. There are reconstructed structures similar to the dwellings of the indigenous peoples who have inhabited the area over thousands of years. The "Nanai" dwellings, artwork and artifacts are strikingly similar to those of Alaska's Native peoples. But the present-day Nanai people in the village reflect a Japanese ancestry.

We inspected the few remaining petroglyphs along the Amur. Unfortunately the petroglyphs are not protected, and graffiti carved into the soft rock vastly outnumbered the original native carvings. Equally devastating is the natural destruction as the frequent high waters of the Amur erode the original petroglyphs.

For lunch we had the traditional Nanai staple of fish soup. But the highlight of our tour was the afternoon performance by nine young people from the village of some of the native Nanai dances.

It was a full and relaxing weekend for us, while the students arduously prepared for trial.

The mock trial

By Monday morning all the players were set. The students were dressed for courtroom battle, each group of seven bunched at a counsel table. The jurors dutifully filed into the jury box. The "keelers," Zabalukhin and Sychugov, were in their cage behind Zabalukhin's defense team. The faculty and audience filled the two rows of public seating. Also crammed into the small courtroom of Judge Anatoly Luzhbin were television, still cameras, and reporters from all the local media.

Continued on page 33

In memoriam

Memories of Judge Nora Guinn

An important era in the history of Alaska and the Alaskan judicial system came to a close with the passing of retired District Court Judge Nora Guinn on July 6, 2005. A brief look at her career reminds us of earlier days when Alaskans dealt with the problems of their communities with practical wisdom and common sense and of how much Alaska has changed in a single lifetime.

Nora was born to Joe and Anna Venes of Akiak, Alaska on November 11, 1920 and grew up in that small Native community. She attended the Eklutna Boarding School and a high school in Portland, Oregon before she met and married Charlie Guinn in Bethel in 1939. They moved to the village of Tununak where Charlie and Nora taught school for the Bureau of Indian Affairs and, in those days before modern communications and scheduled air service, did double duty at health aides and as advisors and negotiators with the outside world. In 1945 the growing Guinn family moved to Bethel where Charlie and Nora would raise ten children and care for numerous others needing a temporary home.

Nora is best known for her contributions to the Alaska Judicial System. In territorial days she dispensed local justice as a United States Commissioner and, after statehood, became Bethel's first magistrate. In 1967 she was elevated to the position of District Court Judge with the Alaska Court System, one of the few non-lawyers to ever hold this judicial office. As a judge, and together with her colleague and friend, Magistrate Sadie Brower Neakok of Barrow, Nora Guinn helped Alaska's legal system and its policemen, lawyers and judges, pay attention to and understand the concerns, needs and viewpoint of the first Alaskans, Alaska's Native people.

Once, in a speech to the first Bush Justice Conference in 1970, to an audience which included Alaska's Chief Justice George Boney, lawyers, law professors, state commissioners and other experts, Judge Guinn began her remarks with a statement several minutes long entirely in Eskimo. Then she asked the bewildered assembly how that felt, and pointed out that Eskimo people in court feel the same way about the judicial system.

Judge Guinn often conducted court in both English and Yupik Eskimo so the people there – usually criminal defendants – would understand why they were there, the procedure, and what the law (or, more correctly, Judge Guinn) expected of them. Occasionally she would digress and translate what was happening into English so the lawyers and the officers wouldn't be left too far behind. I was one of those lawyers who appeared before her often in the early 1970's. Rarely did I hear a litigant or a community member disagree with one of her decisions, and I don't recall ever appealing one to a higher court.

Judge Guinn demanded, and received respect. She did so not for herself but, instead, for the legal system and the people involved in it. I remember thinking that things should be done differently. As a young lawyer who came to Alaska to get away from the buttoned-down business world of the Lower 48, my generation believed we could grow our hair long and dress as we pleased because conformity was out and we should be free to do our own thing.

Judge Guinn wasn't buying it. But she didn't get her way just by dictating a set of rules and ordering the lawyers to follow them. Instead, she'd point out that for the people coming into her court in Bethel, this was a big event in their lives and, if they were there with a lawyer, the lawyer should look like one. If we had a client who was a rich person or a big corporation in the city, she said, we would have that coat and tie on and look the part. Clients in her court deserved no less, she believed. I cleaned up my act.

Nora Guinn served as District Court Judge for nearly ten years. During those years Bethel changed from a frontier outpost served by circuit-riding Superior Court judges and attorneys to a regional center with resident district attorneys, public defenders and probation officers. Despite the increasing complexity of the system and her lack of formal legal education, Nora continued to lead, educating the lawyers and law enforcement officers about the Native way of doing and looking at things, and about fairness and justice for all.

Nora was made a special master of the Superior Court so she could hear cases involving placement of children, and often produced results never thought of by the social workers and attorneys because of her knowledge of the local people and the area. Until her retirement in 1976, Judge Guinn continued to hold hearings in both Eskimo and English, serving as interpreter for the non-English-speaking participants, and she continued to be held in the highest esteem by all those who appeared before her and by the Alaska Court System.

Although fluent in two languages, there was one word Judge Guinn apparently did not know: the word "can't". Undoubtedly along the way there were those who said, "You can't be a judge because you're a woman," or "You can't because you are a Native" or "You can't because you don't have a college degree or a law school education." But these obstacles didn't stop Nora Guinn. Hidden within her tiny frame was fierce determination and an iron will which enabled her to do whatever she set her mind to, and. showing that she didn't believe in the word "can't." She could, and she did.

Nora Guinn was an Alaskan original. She enriched the lives of all those who knew her. Bethel, the villages and the state of Alaska are better places because of all she did. Hers was a life well-lived and an example for others to follow. We may never see another like her.

— Christopher R. Cooke
former Superior Court Judge, Bethel (1976-1986).

Jury trial litigation seminar for Russian law students

Continued from page 32

With jury selection already complete, opening statements began promptly at 9:00. The opening statements were focused in spite of the distractions of the cameramen freely strolling through the courtroom. The examination of the witnesses seemed somewhat subdued compared to that presented in the classroom the week before. The case was completed by noon, including the testimony of both defendants. Judge Luzhbin called a recess. The local television stations wanted interviews with the Americans during the break.

The shining moment of the trial came in closing arguments, the one segment of the trial the students had not practiced during the seminar. The intensive two weeks of trial advocacy all came together in two exceptional closing arguments.

The prosecutor started by stepping into the witness box in the middle of the courtroom to address the jury. It was surprising (I don't know if it is even allowed in a real trial), and a brilliant strategic move. She was suddenly taller than anyone else in the courtroom and carried the aura of a sworn truth-teller. Her argument was organized, her delivery flawless. She struck me as the type of prepared, professional prosecutor I would enjoy dueling with in a courtroom, but with apprehension.

Sychugov's attorney went next. He had the distinct disadvantage of having his client confess again in his testimony to the jury, asking for mercy. All the student defense counsel could do was echo the request for leniency.

Zabalukhin's attorney was fearless. In spite of two eyewitnesses that put Zabalukhin in Kornev's car the day after the murder, the damming testimony of his buddy Serazhidenov, and the testimony of his co-defendant, Zabalukhin had told the jury he was innocent and had in fact been with a girl named Natasha that he met at a bar the night Kornev was killed.

Zabalukhin's counsel paced slowly before the jury box, maintaining eye contact with the face of sincerity. He methodically chiseled at the prosecution's case. There were no eyewitnesses, other than Sychugov, to put Zabalukhin in Kornev's apartment. There was no physical or forensic evidence linking Zabalukhin to the crime scene. (Where are the fingerprints?) The investigators never bothered to try to contact "Natasha" or check out Zabalukhin's alibi. How could a jury be convinced beyond doubt on such evidence or lack of evidence. It was a sterling performance.

We broke for lunch at 2:00 while the jury deliberated. Normally a jury has three hours to reach a unanimous verdict. For the time warp of the mock trial, this jury only had one hour. After that, a majority vote would carry the day.

At 3:00 the jury had answered the questionnaire. Yes, the prosecution had proved the crimes. No, they had not proven Zabalukhin guilty of murder, only car theft. Yes, Sychugov was proven guilty of all charges, but deserved leniency. It was either the thrill of victory or agony of defeat for each team.

After awards, recognitions, certificates and announcement of the six finalists for the Oregon externship (the student with the highest grade who can pass an English proficiency exam will be selected), we all retreated to the old "B-52" club across the street from the courthouse for our closing banquet. The students were primed to release two weeks of hard work. They had prepared their own jestful certificate for each of the faculty. After more than a few bottles of wine, they hit the dance floor like only the truly young can.

It was a day, and a night, I will long remember.

Conclusion

The Russian people had an admirable judicial system based on adversary principles before the revolution in 1917. A critical component of the Russian adversarial system of justice was the trial by jury.

The Russian Constitution adopted in 1993, and the Code of Criminal Procedure that followed, reestablished an adversarial system of criminal justice and the right to a jury trial. After eight decades of Soviet government, several generations of judges and lawyers are naturally apprehensive of the transition of power to citizen jurors. I feel that the Khabarovsk-Alaska Rule of Law partnership has helped to address those anxieties and smooth the transition. The fact that 34 jury trials have been conducted in Khabarovsk, far more than anywhere else in the Russian Far East, speaks to the impact of this partnership.

My experience with the faculty and students at this jury trial seminar gives me great hope that acceptance of the jury system of justice in Russia will continue to improve. The excitement and enthusiasm of those law students indicates that the legal community in Khabarovsk will truly embrace the jury system, and an adversarial system of justice will flourish.

(Footnotes)

[1] The delegation also included Marla Greenstein, Executive Director of the Alaska Commission on Judicial Conduct, Rita Hoffmann of Dorsey & Whitney, and judges John Lohff, David Mannheimer, and Michael Thompson.

[2] For more information on the KAROL partnership, click on the Alaska-Khabarovsk page of the RAROLC website: www.rarolc.net.

[3] See the January-March 2004 issue of the Bar Rag for an article concerning this seminar.

[4] Fen Montaigne, St. Martin's Press, 1998.

[5] Willamette J. Int'l L. & Dispute Resolution, Vol. 11:8.

[6] Both Zabalukhin and Sychugov were convicted at the real trial. Zabalukhin received a sentence of 28 years; Sychugov, 26 years.

The pitfalls of HIPAA

The sticky wicket of psychotherapy notes

By Daniel B. Lord

The Privacy Rule, 45 C.F.R. pts. 160, 164, of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936, is fully in effect for "covered entities," that is, health plans, health care clearinghouses, and health care providers. *See* 45 C.F.R. § 160.103.

Its implementation signals significant changes in the ways health information is viewed and understood. Take the term "medical record." Under HIPAA, this is ramified with the newer concepts of:

• "designated record set" (defined as a "group of records" that includes "any item, collection, or grouping of information that includes protected health information and is maintained, collected, used, or disseminated by or for a covered entity"), 45 C.F.R. § 160.501,

• individually identified health information ("IIHI") (any health information that identifies or could identify a person and that "relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment of the provision of health care to an individual"), *id.* § 160.103, and,

• protected health information ("PHI") (defined as IIHI transmitted by or maintained in electronic media or "in any other form or medium"). *Id.*

Under the Privacy Rule, "psychotherapy notes" are distinguished from other PHI. 45 C.F.R. § 164.508(a)(2). While the release of PHI for other than purposes of treatment, payment and health care operations must be accompanied by a valid authorization, *id.* § 160.508(a), use and disclosure of psychotherapy notes must be preceded by a separate, valid authorization. *Id.* § 164.508(a)(2). In addition, an authorization for the release of psychotherapy notes cannot be combined with one for other PHI; authorization "for a use and disclosure of psychotherapy notes may only be combined with another authorization" for psychotherapy notes. *Id.* § 160.508(b)(3)(ii).

Consequently, attorneys "will not be able to request psychotherapy notes using a general authorization that requests other types of PHI," and they are advised that "every authorization of psychotherapy notes should be carefully crafted for its unique purpose." Elizabeth Robinson, *HIPPA for Litigators*, Hawaii Bar J. 5 (Nov., 2004).

There are few exceptions to the requirement for a separate, valid authorization for psychotherapy notes. Such notes may be used without authorization by the originator of the notes for treatment purposes, and used and disclosed by the covered entity for its own training programs in counseling and by the covered entity to defend itself in a legal action brought by the individual. 45 C.F.R. 164.508(a)(2)(i). Psychotherapy notes may be used or disclosed without authorization only when required for an investigation under HIPAA conducted by the U.S. Department of Health and Human Services ("DHHS"), to a health oversight agency charged with oversight of the originator of the notes, to coroners and medical examiners for identification purposes, or to avert a serious and imminent threat to the public. *See id.* § 160.508(a)(2)(ii).

Psychotherapy notes may be used or disclosed without authorization only when required for an investigation under HIPAA conducted by the U.S. Department of Health and Human Services ("DHHS"), to a health oversight agency charged with oversight of the originator of the notes, to coroners and medical examiners for identification purposes, or to avert a serious and imminent threat to the public.

Other uses and disclosures are prohibited under the Privacy Rule, and even the individual who is the subject of the psychotherapy notes has no right of access to inspect or obtain a copy of them. 45 C.F.R. 164.524(a)(1)(i).

These protections address a concern found across the spectrum of mental health professionals, whether psychiatrists, psychologists, psychiatric nurses and social workers, or licensed professional counselors, on maintaining the privacy of communications and the confidentiality of psychotherapist-patient relationships.

The special status afforded to psychotherapy notes is similarly consistent with the holding of the U.S. Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), recognizing a psychotherapist-patient privilege at the federal level. *Id. at* 14. DHHS explained, it its commentary to the Privacy Rule, "Generally, we have not treated sensitive information differently from other protected health information; however, we have provided additional protections for psychotherapy notes because of *Jaffe v. Redmond* and the unique role of this type of information." 65 Fed. Reg. 82,652 (Dec. 28, 2000).

Yet, the provisions of the Privacy Rule on psychotherapy notes are often viewed as confusing, if not uncertain. *See, e.g.*, Joseph E. Maio, *HIPAA and the Special Status of Psychotherapy Notes*, 8 Lippincott's Case Manag. 24 (2003) (finding "some confusion regarding the provision of HIPAA as it pertains to psychotherapy notes."); Paul W. Mosher & Peter P. Swire, *The Ethical and Legal Implications of Jaffee v. Redmond and the HIPAA Medical Privacy Rule for Psychotherapy and General Psychiatry*, 25 Psychiatr. Clin. N. Am. 575, 583 (2002) (concluding that it is "not surprising to have uncertainty as a major rule goes into effect" and "uncertainty as to its details" of HIPAA Privacy Rule); Judith A. Wilson, *HIPAA One Year Later: Effects and Pitfalls*, 42 J. Psychosocial Nursing & Mental Health Svs. 4, 6 (Apr., 2004) (reporting to representative of DHHS "a lot of confusion nationwide about the meaning of psychotherapy notes").

Part of the perplexity about psychotherapy notes resides in the definition. Maio, *supra* at 26. Under the Privacy Rule, such notes are "recorded (in any medium) by a healthcare provider who is a mental health professional documenting or analyzing the contents of a conversation during a private counseling session and that are separated from the rest of the individual's medical record." 45 C.F.R. § 164.501. Expressly excluded in the definition are "medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of . . . [d]iagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date." *Id.*

In a sense, the definition is broad because the format of the psychotherapy notes, whether scribbled on some paper or typed in a word processor, or audio taped, does not seem to matter. 65 Fed. Reg. 82623. All formats are given protected. Moreover, such notes are not specific to the practice of a particular professional discipline, *id*, and thus, may be derived from the various forms of counseling or psychotherapy.

Actually, though, the exception for psychotherapy notes is "exceedingly narrow," Rebecca W. Brendel & Eileen Bryant, *HIPAA for Psychiatrists*, 12 Harv. Rev. Psychiatry 177, 182 (2004), and the definition should call to mind a number of cautions.

One is that psychotherapy notes are not "progress notes." In other commentary, DHHS explained that what is meant by psychotherapy notes are "process notes." 65 Fed. Reg. 82,622. These notes "capture the therapist's impressions about the patient," and "contain details of the psychotherapy session considered to be inappropriate for the medical record, and are used by the provider for future sessions," and are "relevant to no one other than the treating provider." *Id.* Fed. Reg. 82,622-86,623.

In a sense, the definition is broad because the format of the psychotherapy notes, whether scribbled on some paper or typed in a word processor, or audio taped, does not seem to matter.

It is interesting to note that the American Psychiatric Association criticized the characterization of psychotherapy notes as "process notes," arguing that the later term is "imprecise . . . for which there is no universally accepted meaning," and that safeguards for privacy under HIPAA "could be eroded by an unduly narrow interpretation based solely on the misleading use of the phrase 'process notes'." APA Resource Document, Reference No. 200201, "Psychotherapy Notes Provision of HIPAA Privacy Rule" 1, 2 (Mar., 2002).

Another caution is that psychotherapy notes are not presented at multidisciplinary treatment team or treatment plan meetings. Maio, *supra.* The rationale for heightened protections for such notes is based on the assumption that "they are personal notes of the treating provider and are of little or no use to others who were not present at the session to which it refers," 65 Fed. Reg. 82,623, and this will preclude sharing them with other members of a mental health treatment team. *Cf. id.* ("any notes that are routinely shared with others . . . are, by definition, not psychotherapy notes"). Psychotherapy notes may be used or disclosed without an authorization by a covered entity for "conducting its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or individual counseling." 45 C.F.R. § 508(a)(2)(B); *cf. id.* Fed Reg. 82,515-82,514 (consent, rather than authorization, is required).

Still another caution is that psychotherapy notes are clearly "separated from the rest of the individual's medical record." There seems to be a "debate" among some legal or mental health practitioners on whether this aspect of the definition requires that psychotherapy notes are kept separate from the rest of the patient's medical record or kept in an entirely separate file. *See* Maio, *supra.* Based on reports of their established patterns of practice, many if not most mental health professionals favor the former, keeping the notes separate from the rest of a patient's record.

For example, one practitioner related the following: "For psychotherapy notes, I selected salmon-colored paper and used my laser printer to add the following to the top: 'Psychotherapy Notes. May Not Be Disclosed Without a Specific Authorization of the Patient.' These notes are part of the patient's folder but can be easily extracted." *See* Norman A. Clemens, *HIPAA: A Report from the Front Lines*, J. Psychiatr. Prac. 237, 238 (2003).

There is also this "implementation tip," which may be downloaded from the website of the Oregon Association of Hospitals and Health Systems, on the necessity of maintaining psychotherapy notes and other PHI separately from a patient's record: "The separation requirement does not necessarily mean the records must be maintained in a separate file from the medical record. Rather, separating the psychotherapy notes from the rest of the medical file with a tab or other conspicuous separator likely will suffice." OAHHS HIPPA Taskforce, HIPAA Compliance Guidelines, Special Rules for Special Records (retrieved Sept. 11, 2005).

But this is contrary to DHHS commentary and the prevailing view of authorities. In responding to arguments that the Privacy Rule would result in having to maintain two sets of notes, or create a "shadow" record, DHHS could have simply emphasized that psychotherapy notes are optional. Instead, it reasoned that just as process notes "are often kept separate to limit access, even in an electronic record system," psychotherapy notes are not routinely found in the medical record. 65 Fed. Reg. 83,623. In contrast to information "critical to the treatment of the individual" contained in the medical record, psychotherapy notes are "solely for the use of the provider who created them" and "of little or no use to others" not present at the counseling sessions. *Id. See also* Maio, *supra* ("commentary by DHHS makes it clear that its intent was an entirely separate file").

Commentators share in this understanding that psychotherapy notes are kept in a file separate

Continued on page 35

TALES FROM THE INTERIOR

Spreadsheets don't kill attorneys; attorneys kill attorneys

By Kenneth Kirk

Hey Jimmy, start me off with a double this time. What a day. If I see one more spreadsheet I'm gonna slug somebody.

No, I haven't switched professions to accounting. Although now you mention it, in a way maybe I have. I've just been working on some fresh divorces. And it's not really the spreadsheets that have me worked up, it's the lawyers.

See here's the deal: All these years I've been practicing, when it came to the property division part of a divorce, each side did their own little list. I listed all the things they owned, with my client's view of what each item was worth and who should get it.

They had a court rule that required it[1] although some of the sloppier attorneys would never submit them. But the problem was, once they were submitted, they weren't always easy to harmonize. He'd list "husband's retirement accounts" as one item, whereas she'd list "Schwab accounts" and include one of his retirement accounts there, with some non-retirement accounts, and she'd list the rest of his retirement accounts separately. Try sorting that out if you're the judge. Or you'd have a Vanguard GNMA fund, and he'd call it the Vanguard fund but she'd call it the Ginnie Mae fund. Or he lists a green couch, and she lists it as a Sears BarcaLounger. And of course both lists are in completely different orders.

Yeah I know I drank that first one pretty fast, so what? Okay, I promise I'll slow down on the next one. I have a dang mother, Jimmy, okay?

So anyway, this whole system is a mess, until a few years ago. This Fairbanks judge[2] comes up with a new idea. He takes a spreadsheet program, and tweaks it up for property divisions. Then he gives it to the lawyers[3], tells them to take turns passing it back and forth, filling everything in. When it's done he has a list using the same names for the items, that also tells him, in a neat and useable format, what each party thinks it's worth and so forth. Then he customizes it a little further so once the judge plugs it in, he can start indicating, on the same program, what decisions he's made about each item, and it even adds it all up for him. Neat, huh? Yeah, that's what I thought when I first filled one out. But then I tried using it in actual practice.

"See, I shoulda seen this coming. Years ago, before this judge came out with this program, I had an idea I thought would solve it all."

See, I shoulda seen this coming. Years ago, before this judge came out with this program, I had an idea I thought would solve it all. I had this divorce where there were only a few things were actually disagreed on. I called up the other attorney and said look, I'll put together a detailed stipulation for trial, with all the things we agree on, and where we disagree I'll set out what the disagreement is. Then the judge can focus on the real issues, and we don't have to waste time putting testimony on about stuff we don't actually disagree about. And he says yes, so I put this stip together, and we went back and forth on the details, and ended up with a good solid document. We tried the case in half the time, the judge was able to give us a quicker and cleaner decision, the clients were happy and paid their bills. Big winners all around.

Okay, Jimmy, I been nursing it but that's just melted ice now, so let's keep on top of things here.

So anyway, I think I've built a better mousetrap here, until I try it a few more times. You know, these first drafts take six, eight hours to put together, so I make sure before I do it that I've talked to the other lawyer about the concept, and she says she's 100% committed to doing it.

The first time, the other lawyer just writes "yes" or "no" in the margin beside each paragraph, won't give me details on the "no" paragraphs. Like I might say the parties have a green Toyota that's worth $5,000 and should go to the wife, and she just puts "no". What part does she disagree with? She won't say! So we end up with a stip but it's only partial, and we still have to litigate a lot of stuff that probably wasn't in issue.

You think that's bad? The next time, it gets even worse. Wanna guess when this bozo gives me his responses? On the morning of trial! Right, when it's too late to be useful because I've already prepared everything. And now my client's pissed because I "wasted" all those hours putting the draft stip together.

Speaking of getting pissed, top it off here, okay? Hey I'm just kidding, I'm not three sheets yet. C'mon, a little more here.

So do you think this new spreadsheet thing is gonna work? Fat chance. I've already had lawyers ignore it, refuse to do it, list things again that you've already listed.... It's not the system, it's the participants. (Take the U.S. Constitution, for example. Give it to a bunch of gang members, you think you'll have democracy?)

Sure, it worked in Fairbanks, but that's because they have the lawyers so trained there that they'll do whatever the judges say. And also, if you show up there without the spreadsheet in hand, they take your trial date away and make you spend that day putting it together. Of course that has its own problems, because a lot of the time one party has an incentive to delay the trial, and they can do it by not cooperating.

But at least it gets done the second time around. That doesn't happen here in Anchberg, because the judges don't enforce anything. It's just a suggestion. Like that's going to make any difference to some of these clowns. The only way it's ever gonna work here is if the judges have some stones, and make them do it. Maybe set a status hearing a week before trial, and if they don't have it done, they can't leave the courthouse until they produce it. No continuances, no excuses. Go in the back room right now and get it done.

Ah, what's the use? If the judges here get the attorneys and parties together, they just want to talk settlement, not get the case ready for trial. Some of these people never want to try any divorce case. That's probably why the attorneys don't prepare better, they just figure it'll settle. I think the judges feel the same way. But that's not what the client hired you for, right?

Oh, hey, sorry about that, Jimmy. Toss me that bar rag and I'll clean it up. Hey, what do you mean you're cutting me off? I haven't even told you about judges not enforcing time limits yet! C'mon, Jimmy, let me have one more! I need it to deal with this stuff.

(Footnotes)

[1]Civil Rule 90.1(e).

[2]Richard Savell.

[3]Available online at www. propertydivision. net

The sticky wicket of psychotherapy notes

Continued from page 34

from the medical records. *See, e.g.*, Brendel & Bryant, *supra* at 182 ("But in order for clinicians to be confident that their notes are protected, careful documentation and storage apart from the remainder of the psychiatric and general medical record are critical."); Robert R. Harrison, *Discovery of Medical Records after HIPAA: New Federal Privacy Protections Change the Rules*, 32 A.B.A. Brief 30, 34 (Summer, 2003) (HIPAA provisions regarding psychotherapy notes are for those separate from a patient's medical record, and hence, mental health records that are part of the medical record do not require a separate authorization for use or disclosure); Diane Kutzko *et al.*, *HIPAA in Real Time: Practical Implications of the Federal Privacy Rule*, 51 Drake L. Rev. 403, 419 (2003) (Privacy Rule "exempts from the designated record set" psychotherapy notes). *See also* Paul S. Appelbaum, *Privacy in Psychiatric Treatment*, 159 Am. J. Psychiatry 1809, 1815 (2002) (psychiatrist stating that to qualify for special protection as psychotherapy notes, "the notes in question must be kept separate from the patient's medical record, requiring a separate chart in many cases"); Peter G. Gillman, *A New Era of Documentation in Psychiatry: Advice on Psychotherapy, Progress Notes*, Behavioral Healthcare Tomorrow 48, 50 (Feb., 2004) (clinical neuropsychologist advising that "if you insist on preparing a psychotherapy notes, you *must* keep the note separate from the patient's medical record. Not in the same file, same drawer, same cabinet -- preferably not in the same room.").

Mental health professionals would be well advised to follow the requirements for psychotherapy notes under the Privacy Rule, and to change those practices that conflict with the requirements and would result in forfeiting the special protections for their private notes of counseling and psychotherapy sessions.

A separate, valid authorization is not required for release of psychotherapy notes if they are kept in the medical records. *Cf.* 65 Fed. Reg. 82,623 (special protections not extended to information in notes found at "other locations"). According to one authority, "Covered entities may not legitimately argue that an authorization for 'the complete medical record' is inadequate to obtain psychotherapy notes maintained in the medical record, or that HIPAA requires an authorization rather than a subpoena for such records." Robert R. Harrison, *Obtaining Medical Records After HIPAA: New Federal Privacy Protections Change the Rules for Attorneys*, 16 Utah Bar J. 16, 19 (2003).

Conversely, physically integrating information on medication prescription and monitoring, counseling session start and stop times, the modalities and frequency of treatment furnished, clinical tests results, and any summary of diagnosis, functional status, treatment plan, symptoms, diagnosis, prognosis, and progress as well as progress to date, into a separate file does not transform such health information into psychotherapy notes. *See* DHHS CMS Manual System, Pub. 100-08, Trans. No. 98, Change Request 34576 (Jan. 21, 2005).

Taking this line of reasoning still further, even if the health information on its face were to meet the definition of psychotherapy notes, if it was at any time maintained in a patient's medical record, the information would not be entitled to the extra protections otherwise afforded to it as psychotherapy notes.

As the case of psychotherapy demonstrates, implementation of the Privacy Rule not only introduces new concepts, but also some adjustments in practice. Mental health professionals would be well advised to follow the requirements for psychotherapy notes under the Privacy Rule, and to change those practices that conflict with the requirements and would result in forfeiting the special protections for their private notes of counseling and psychotherapy sessions. Similarly, community mental health centers and physician mental health clinics, psychiatric inpatient treatment facilities and residential psychiatric treatment centers, would be well served if helped to develop policies and procedures that take into account the implications of the Privacy Rule.

Attorney Discipline

Court Disbars Anchorage Attorney

On April 19, 2005, the Alaska Supreme Court disbarred Anchorage lawyer Harland H. "Chip" McElhany, II, for failing to turn over client monies and failing to account to the client when asked. By mishandling funds entrusted to him as a fiduciary, McElhany acted dishonestly.

McElhany represented a client who received a serious head injury in a car accident. The case settled and McElhany distributed proceeds to various lien holders. His client requested periodic disbursements to draw down the remaining funds. After a period of months McElhany told his client that the IRS had taken the remaining funds. His client did not believe McElhany and hired a lawyer to find out what happened. The lawyer learned that liens remained unsatisfied and that McElhany took the money.

The client obtained a default judgment against McElhany. The client submitted his claim to the Lawyers' Fund for Client Protection and the Board of Governors approved the Lawyers' Fund findings that a reimbursable loss had occurred and approved reimbursement of $46,119.35

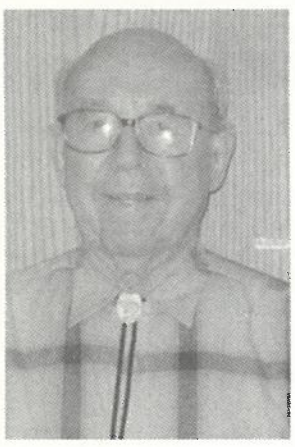
An area hearing committee issued a report finding that that McElhany intentionally converted the money for his own use. The committee found several aggravating factors including a dishonest or selfish motive, a pattern of misconduct, multiple offenses, a bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with disciplinary rules and orders, a refusal to acknowledge the wrongful nature of the misconduct, vulnerability of the victim, and indifference to making restitution. The committee found that McElhany had no prior disciplinary record as the single mitigator.

The area hearing committee recommended disbarment with conditions which the Disciplinary Board approved and forwarded to the Supreme Court. On April 19, 2005, the court ordered McElhany disbarred from the practice of law effective May 19, 2005. The court imposed conditions for reinstatement including restitution, satisfactory completion of the Multi-State Professional Responsibility Examination, and CLE attendance. The court noted that satisfaction of the conditions carried no implication that McElhany would be reinstated, as no disbarred attorney has any basis for an expectation of reinstatement.

If the court orders reinstatement and if McElhany returns to the active practice of law, the court ordered that an independent auditor, accountant or bookkeeper monitor his financial and trust accounting practices for as long as bar counsel deems necessary, but for a minimum of two years.

The clerk's file regarding this matter is available for review at the office of the Alaska Bar Association.

Call for nominations for the 2006 Jay Rabinowitz Public Service Award



JUDGE THOMAS B. STEWART
2005 Recipient

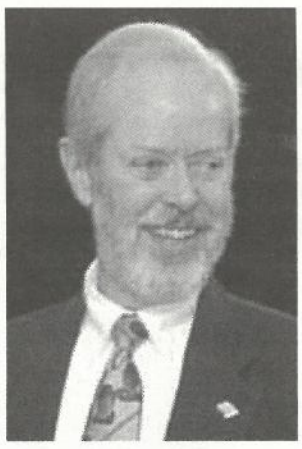
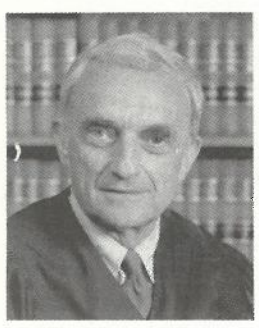


Photo courtesy of the Juneau Empire.

ART PETERSON
2004 Recipient

MARK REGAN
2003 Recipient



Jay Rabinowitz

The Board of Trustees of the Alaska Bar Foundation is accepting nominations for the 2006 Award. A nominee should be an individual whose life work has demonstrated a commitment to public service in the State of Alaska. The Award, established in 2003, is funded through generous gifts from family, friends and the public in honor of the late Alaska Supreme Court Justice Jay Rabinowitz.

Nominations for the award are presently being solicited. Nominations forms are available from the Alaska Bar Association, 550 West Seventh Avenue, Ste. 1900, Anchorage, AK 99501 or at www.alaskabar.org. Completed nominations must be returned to the office of the Alaska Bar Association by March 1, 2006. The award will be presented at the Annual Convention of the Alaska Bar Association in April 2006.

Since 1896
Alaska Bar Association

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New version of litigation software includes 75 feature improvements

CaseLogistix, makers of the revolutionary CaseLogistix evidence management system, today announced CaseLogistix 4.0, a major new release incorporating 75 distinct and powerful improvements that make it possibly the most convenient and resourceful litigation software yet available to the legal community.

CaseLogistix, introduced in 2004, was designed to give attorneys and legal staff what they really needed: litigation software that is simple enough to actually use. Unlike competing products that require days, even weeks, of training time to use, the CaseLogistix user interface is modeled after Microsoft Outlook—the world's most popular email program and a product most attorneys have already mastered.

CaseLogistix easily and quickly collects, annotates, organizes, analyzes and researches virtually any amount of evidence, in any digital format. The application can accept Microsoft Word, Excel or PowerPoint files; digital videos; Portable Document Format (PDF) documents; X-rays; email; and HTML web pages, among others, enabling smart searches of information to be conducted in literally seconds.

Among the many upgrades and new features in CaseLogistix 4.0 are the following:

- A new Windows XP-style interface using XP graphical guidelines that make it even easier to navigate through data;
- Self-organizing Sentinel folders that automatically categorize and organize documents to make them easier to find. By automatically indexing documents when items are added or moved into them, users are able to organize their libraries in multiple ways for easier access. What's more, a more advanced and faster document text index and searching engine yields anywhere from 33% to 3,000% improvement in search speed;
- Unlimited user/data fields in CaseLogistix case libraries allow users to define and contain certain types of data (e.g., numbers, dates, text, etc.) to create an extensive library of documents and media; and
- IndyGo Publisher exports data to a variety of database formats, and converts documents to various formats with or without endorsements such as watermarks, bates numbering, etc. This allows the user to create production lists for co-counsel, experts, and opposing counsel.

"Version 4.0 is a breakthrough upgrade of CaseLogistix," said T. Roe Frazer II, CEO and General Counsel of CaseLogistix. "We've taken CaseLogistix to the next level in almost every way. From its capacity to hold, organize, analyze and search millions of documents at a moment's notice, to its automatic and intelligent organizational features, CaseLogistix not only puts a user's entire case at his or her fingertips, but gives the user more power over that information than ever before."

CaseLogistix is equally at home in "static" use outside the courtroom or in "dynamic" mode during trials or depositions. For instance, users can bring up any portion of any document, transcript, or even a portion of a video deposition during cross-examination simply by typing in a keyword. With the look and feel of Microsoft Outlook, attorneys can feel instantly comfortable with CaseLogistix in any situation.

Document Management, Import/Export Support

CaseLogistix 4.0 also features a number of enhancements that make managing case libraries easier and more efficient. For example, the category manager interface has been improved, enabling the administrative/case library manager to have a greater degree of control and flexibility over the design and implementation of the case library. Admins can create new user fields, assign them to categories, alter the "smart foldering" for categories and much more. Document layout, categories, icons, foldering, user fields, and other document library settings can be saved as a template and applied to new case libraries when they are being created.

To make file transfers to and from competitive litigation manager products easier, CaseLogistix now supports either full integration or support for TrialDirector, Sanction II, Doculex Goby Capture, Lanier Capture, Summation, and Concordance.

CaseLogistix is priced according to a tiered schedule that makes quantity seat purchases affordable for law firms or organizations of any size or budget. The base unit price, $1,550, drops to under $350 per seat, depending on quantity purchased.

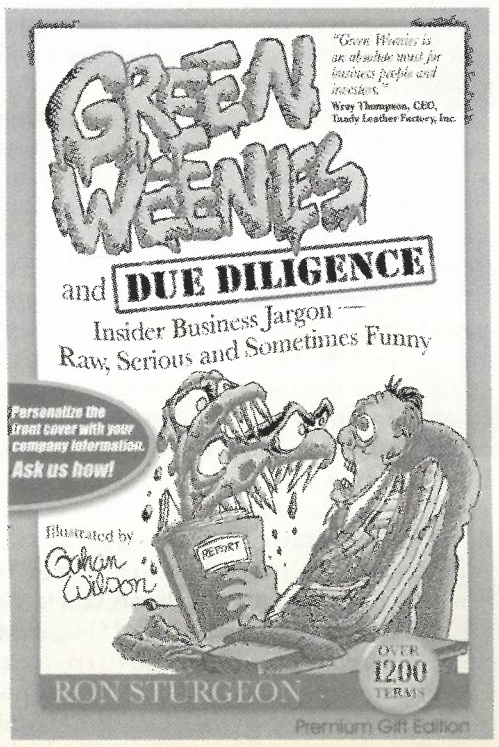
CaseLogistix 4.0 is now in its final development phase and is expected to go into general release September 2005. For more information, visit www.caselogistix.com.

New book is great for bathroom reading!

Better bathroom reading than Black's Law Dictionary!

A Washington state author and publisher have found an interesting angle to sell their book to businesses, law firms, and other potential audiences that deal in business acquisitions, negotiations, and commercial transactions: Publish an abridged version and offer *custom covers for bulk purchases*!

Green Weenies and Due Diligence is the new business book written by Ron Sturgeon, received by the Anchorage Bar Association for inclusion in its "newsletter" (aka the *Bar Rag*, which has fallen for the free-book-for-review ploy to fill an editorial hole at the last minute.) The publisher's bullet-pitch is:



• *Green Weenies and Due Diligence,* illustrated by Gahan Wilson, is the artist's first foray into the business world. He applies his macabre sense of humor to the 1200 plus actual backroom business terms in more than 70 new illustrations, spread over 300 pages. (The customizable, abridged version has 650 terms.)

• The terms--hilarious, raw, and even outrageous--are actual backroom jargon used by dealmakers, executives, managers, and venture capitalists. Many are previously little known or even secret.

• These are serious and much needed business terms that you won't find in business dictionaries. They include deal and transaction terms, both educational and entertaining, and could only have been gathered by someone with tenacious street savvy.

Green Weenies and Due Diligence was written over a six-year period by Sturgeon, a high school graduate with no college education. Sturgeon was left to fend for himself after his father died when he was only a senior in high school. He went on to build from scratch one of the largest salvage operations in the US, which he then sold to Ford Motor Company. In addition, the entirely self educated author completed several other transactions with public companies, dealing with financiers, venture capital firms, real estate professionals, lawyers, and other deal makers along the way.

This is Sturgeon's second book, following *How to Salvage Millions from your Small Business,* which is in its second printing, and has been licensed and printed in Korea, China, and the Czech Republic.

Further information on the book can be obtained from Mike French Publishing, 1619 Front Street, Lynden WA 98264, but if you don't plan to invest a plane ride, postage stamp, or long distance phone call, try www.greenweenies.com. (It is not intuitively obvious or prominently explained the meaning of "green weenies." Perhaps it is a pickle.)

CLE Course Materials
available for free download on the Bar website

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

Alaska Bar Association 2005 CLE Calendar

Date	Time	Title	Location
September 22	8:00 – 11:15 a.m.	Advanced Estate Planning Practice Update ALI-ABA Live Satellite TV Broadcast CLE #2005-040 3.0 General CLE Credits	Anchorage KAKM Boardroom, APU Campus
September 23	8:30 a.m. – 5:15 p.m.	Masters in Trial Presented in cooperation with the American Board of Trial Advocates (ABOTA), Alaska Chapter CLE #2005-007 6.5 General + .5 Ethics = 7.0 Total CLE Credits	Anchorage Hotel Captain Cook
September 29	1:00 – 5:00 p.m.	Medicine for Lawyers: Interpreting Medical Records, Medical Witnesses and Medical Evidence, with Larry Cohen CLE #2005-038A 3.75 General CLE Credits	Fairbanks Westmark Fairbanks Hotel
September 30	9:00 a.m. – 4:30 p.m.	Medicine for Lawyers: Interpreting Medical Records, Medical Witnesses and Medical Evidence, with Larry Cohen CLE # 2005-037 5.75 General CLE Credits	Anchorage Hotel Captain Cook
October 3	1:00 – 5:00 p.m.	Medicine for Lawyers: Interpreting Medical Records, Medical Witnesses and Medical Evidence, with Larry Cohen CLE #2005-038B 3.75 General CLE Credits	Juneau Centennial Hall
October 5	8:30 a.m. – 12:30 p.m.	Managing Paper and Electronic Documents: Using Adobe Acrobat Pro 7 CLE # 2005-036 3.5 General CLE Credits	Anchorage Hotel Captain Cook
October 14	8:30 a.m. – 12:30 p.m.	11th Annual Workers' Comp Update - "The Dukes of Hazzard": Just When You Thought You Knew Everything about WC, They Done Gone and Changed It All! CLE #2005-012 3.75 General CLE Credits	Anchorage Hotel Captain Cook
October 19	9:00 a.m. – 12:15 p.m.	Investigative Research on the Net with Carole Levitt & Mark Rosch CLE #2005-017A 3 General CLE Credits	Anchorage Hotel Captain Cook
October 19	1:30 – 4:45 p.m.	Marketing Your Practice Online: Do It Efficiently, Effectively and Ethically! With Mark Rosch & Carole Levitt CLE #2005-018 2.0 general + 1.0 ethics = 3.0 Total CLE Credits	Anchorage Hotel Captain Cook
October 21	9:00 a.m. – 12:15 p.m.	Investigative Research on the Net with Carole Levitt & Mark Rosch CLE #2005-017B 3.0 General CLE Credits	Fairbanks Westmark Fairbanks Hotel
FALL 2005	TBA	18th Annual Alaska Native Law Program CLE #2005-014 CLE Credits TBA	Anchorage TBA
November 2	8:30 a.m. – 12:30 p.m.	The Legal Writer: Results-Oriented Writing for Busy Practitioners with Steven Stark CLE # 2005-031 3.75 General CLE Credits	Anchorage Hotel Captain Cook
November 9	8:30 a.m.– 12:30 p.m.	Making Landlord Tenant Law Work in Alaska CLE #2005-019 3.5 General CLE Credits, including .25 Ethics Credits	Anchorage Downtown Marriott Hotel
December 2	8:30 a.m. – 12:30 p.m.	Medicaid Planning with the Sleeves Rolled Up CLE # 2005-0032 3.75 General CLE Credits	Anchorage Hotel Captain Cook
December 8	9:00 – 11:00 a.m.	U.S. District Court Electronic Filing Update CLE #2005-041 CLE Credits TBA	Anchorage Hotel Captain Cook
December 13	Morning	Ethics at the 11th Hour CLE #2005-020 2.0 Ethics CLE Credits	Anchorage Hotel Captain Cook

Mandatory arbitration and the outsourcing of justice

By James Laflin

The problem with Rome is that everything is for sale.

– *Sallust*

The context

Whereas voluntary arbitration enjoys a long history of acceptance, a compulsory variant of the process, binding mandatory arbitration, has quietly appeared on the scene in recent years, provoking controversy because of its impact on increasing numbers and kinds of cases.

Only a decade ago, relatively few were aware of contractually mandated arbitration. Now, pre-dispute mandatory arbitration clauses routinely appear in contracts touching the entire gamut of peoples' lives; from employment to healthcare to credit, banking, insurance, real estate, securities, and more. Moreover, the current legal momentum is clearly toward more of such clauses, with the result that large classes of legal claims are being swept from the public justice system and rendered into a private arbitral system that is largely without judicial oversight. This outsourcing from the civil court system to a private arbitral system has not gone unnoticed. Rather, it has occurred amid widespread opposition by consumer groups and elements of the organized bar. Nevertheless, the trend has continued unabated with the imprimatur of the courts, which until now have scrutinized the phenomena only according to narrow contractual principles deferential to mandatory arbitration clauses except in the most egregious, overreaching of circumstances.

Now, pre-dispute mandatory arbitration clauses routinely appear in contracts touching the entire gamut of peoples' lives; from employment to healthcare to credit, banking, insurance, real estate, securities, and more.

For its part, the ADR community has been largely silent on the subject. Despite public controversy, relatively few articles have been written by practitioners or scholars about the questions raised by binding mandatory arbitration. Nor has this calmed suspicions. After all, the past decade has witnessed for the first time the rise of large private arbitration firms with lucrative (sometimes exclusive) contracts selling their arbitration services to the very corporations that originated binding arbitration clauses in the first instance and who are typically defendants in the resulting arbitration proceedings themselves. In these circumstances, the public has been left to wonder whether the abitral playing field is level or fundamentally unfair; whether a formerly non-controversial legal alternative (traditional arbitration) has been usurped by large business interests and transformed into an unfair, compulsory process that for all intents and purposes occupies a legal dark zone of private, unreviewable decisions and shadowy, long-term relationships between arbitration firms and their corporate clients. Some now argue that if ever there were a question about the potential for creating a two-tier legal system, the answer is finally in; that we have indeed arrived at such a bifurcated apparatus; one public and one private, with all indications that the privatized tier is a fast-growth industry.

Thus, two major developments have occurred. First, ADR, and in particular mandatory arbitration, has become a primary vehicle for restricting, not enhancing, alternatives to the civil justice system. Second, the "for sale" version of adjudication offered through mandatory arbitration is separate but assuredly not equal to that available in the civil justice system; triers of fact are different, rules of discovery, evidence and review are different, the burden of attorney fees is shared differently, outcomes and settlements are different, and so on with respect to virtually every axis of comparison. As a result, many questions are raised. What ethical imperatives arise? Does the ADR community care? How should it respond? Is (continued) public trust in the processes of private dispute resolution warranted?

The ethical problem

The primary, but by no means only, ethical issue raised by binding mandatory arbitration is, of course, that of fairness; is binding mandatory arbitration a fair process? If it is, then presumably no significant questions arise. *If it is not, then can an arbitrator participate in it without being complicit in its unfairness; without losing his neutrality?* Defenders argue mandatory arbitration is fair for two main reasons, and therefore that ethical problems do not arise. First, the parties themselves have, by contract, selected the process and pledged to be bound by it. Therefore, it is voluntary in the sense of a social compact having been reached and even though, at first blush, it might appear compulsory. Second, arbitrators work within a framework of ethical canons and/or minimum standards that function in the nature of due process requirements and effectively ensure procedural fairness. If the parties have agreed to the process, and it is procedurally fair, nothing further is required.

Critics of mandatory arbitration, on the other hand, counter it is unfair for a variety of reasons. First, it is unfair because it is biased against consumers; its advocates are universally corporate interests that correctly perceive it to be a forum that is favorable to them, as compared to civil trial. This bias results in lower arbitral awards and, equally important, settlements that are benchmarked to those awards. Second, it is a fiction that consumers bargain at arms length over the presence of binding arbitration clauses in their credit card, insurance, employment, etc., contracts. These are classic take-it-or-leave-it contracts of adhesion in which the weaker party has no bargaining clout. Specific terms are never negotiated and often parties are not even aware of the presence, much less the effect, of compulsory arbitration clauses buried in the fine print of their agreements. Hence, the process is not entered into knowingly and voluntarily, at least not in any meaningful sense. Third, the cozy relationship between arbitration providers and heavy repeat-users is hardly an abstract problem. In its latest manifestation this issue has resurfaced in the context of the battle over whether class action waivers should be enforced.

Arbitration firms have been caught in the middle; earlier this year JAMS reversed its policy of not enforcing such waivers, while AAA reversed its position on whether to administer a major ratepayers' class action amid circumstances that in each case critics warn demonstrate their susceptibility to pressure from the corporate clients at whose pleasure they serve. Both organizations have denied such influences. See *The Recorder*, "JAMS reverses class action policy", March 11, 2005; and *In re Universal Service Fund Telephone Billing Practices Litigation*, USDC, District of Kansas, No. 02-MD-1468-JWL (5/27/05). Finally, ethical canons and minimum standards that focus on the neutrality of the arbitrator, disclosure requirements, etc., all miss the seminal point that the process itself is structurally biased toward the repeat-business corporate client and, therefore, inherently unfair to the one-shot consumer regardless of best efforts at neutrality by the arbitrator. In effect, the arbitrator cannot be neutral in an unfair process; he or she is tainted by the unfairness of a system that produces skewed outcomes relative to those rendered in court.

Regarding the issue of structural bias, there is little real controversy. That it exists and drives the forum-shopping push for mandatory arbitration is less an open secret than a tacit given. Thus, at the recent April 15, 2005 ABA Annual Conference in Los Angeles, a panelist specializing in representing financial services providers listed in his program materials the reasons for preferring mandatory arbitration over going to court. They come as no surprise, as several examples suffice to show: "Level the playing field The court system (particularly, the state court system) is clearly skewed in favor of consumers and plaintiffs' attorneys, ...Elimination of irrational, biased jury verdicts and elected state court judges who may be beholden to plaintiffs' bar, ...Tempering of punitive damages claims, ...Possibility of curtailment of class action lawsuits, ...Limited discovery, ...Limited right of appeal." See "The Use of Pre-Dispute Arbitration Agreements By Consumer Financial Services Providers", Alan Kaplinsky, Esq., (2004, Revised February 18, 2005).

If arbitral neutrality means anything serious, as it should, then it is as a lynchpin that imposes on arbitrators some responsibility to administer a system that is at least as fair as the courts.

In the meantime, empirical research on the subject remains stymied. Again, at the April 15th ABA Annual Conference, professors Lisa Bingham (Indiana University) and Jean Sternlight (UNLV) presented the results of their empirical study of compliance by AAA and JAMS with California's new disclosure requirements for consumer arbitration information. (CCP Section 1281.96.) Their findings were hardly complimentary of either provider. Summarizing their conclusions the authors wrote:

This report represents a first, preliminary analysis of the disclosed data. It suggests that the private arbitration services providers in question are not providing the information that is critical to an analysis of how the consumer party fare in commercial arbitration. On these disclosures, one cannot examine arbitration award outcomes in relation to which party, consumer or nonconsumer, won the case. This makes it impossible to form a judgment on macrojustice, that is, the overall pattern of outcomes in a private justice system. It also makes it difficult for the consumer party to make an informed judgment about the acceptability of individual arbitrators. The information disclosed is not analogous to the institutional memory of a repeat user of arbitration services. In sum, the information we have is incomplete. We need to know who is winning and who is losing in commercial arbitration.

In other words, compliance with reporting requirements is so inadequate that empirical analysis of the question of structural bias is impossible, as is informed choice by individual consumers. No doubt the ramifications of this state of affairs go well beyond the inability of social scientists to conduct reliable research. We can safely predict the opening of the next legal frontier for challenging arbitration awards; that the arbitration provider failed to meet his or her disclosure obligations. See "New Advice For Arbitrators: Disclose, Disclose, Disclose", by Ruth Glick, *San Francisco Daily Journal* (11/26/04). For an excellent scholarly treatment of the subject of pre-dispute mandatory arbitration, see Lisa Bingham's 2004 article "Control Over Dispute-System Design And Mandatory Commercial Arbitration", 67 *Law and Contemporary Problems* 221, (2004). Finally, in another noteworthy development concerning ethics rules (not) binding on arbitrators, on May 23, 2005 the California Supreme Court unanimously held that California's ethics rules (CCP Section 1281.85) for arbitrators are preempted by the SEA in NASD arbitrations. (*Jevne v. Superior Court, JB Oxford Holdings, Inc.*, S121532, 5/23/05.)

It will be argued that the critique leveled in this article is extreme and inappropriate; that in the worldly realm of legal affairs it is pedantic to question the ethics of arbitral neutrality where the courts have not. I disagree. The controversy surrounding mandatory arbitration is a case study in the profound inter-relatedness of process, substance and outcome, particularly where the points of comparison are not internal to a single system of adjudication but cross-platform between two parallel systems; judicial and arbitral. Indeed, distinctions between substance and process, imprecise at best, are overwhelmed by systemic differences when claims undergo transplantation from a court system to an arbitral system. Reassurances that the many differences in the two systems are merely "procedural", and that minimum standards are sufficient to equalize the two surely ring hollow in the context of actual experience to the contrary. Whatever the imperfections of the civil justice system, and they are many, it remains our gold stan-

Continued on page 39

Making contact: The "no contact with represented parties" rule

By Mark J. Fucile

Alaska RPC 4.2 governs communications with represented parties. The "no contact" rule is designed to protect clients by channeling most communications through counsel for each side. Although RPC 4.2 is simple on its face, it can be difficult in application. At the same time, it involves situations lawyers encounter often and where there can be stiff penalties for guessing wrong.

In this article, we'll first look at the elements of the rule and its exceptions. We'll then turn to how the rule applies when "the other side" is a corporation or the government. Although the focus will be on the litigation context where the rule comes into play most often, the concepts discussed apply with equal measure outside litigation.

The Elements

The "no contact" rule has four primary elements: (1) a lawyer; (2) a communication; (3) about the subject of the representation; and (4) with a party the lawyer knows to be represented.

A lawyer. The "lawyer" part is easy (and includes lawyers acting pro se under Alaska Bar Ethics Opinion 95-7). But what about people who work for lawyers—such as paralegals, secretaries and investigators? And what about our own clients? Although RPC 4.2 doesn't specifically mention communications channeled through others, RPC 8.4(a) defines "professional misconduct" to include violating the professional rules "through the acts of another[.]" Moreover, RPC 5.3(c)(1), which governs lawyer responsibility for staff conduct, states that "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if

> . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved."

A lawyer, accordingly, can't use staff to make an otherwise prohibited contact. Clients, by contrast, are not prohibited from contact with each other during a lawsuit and, in fact, often continue to deal with each other on many fronts while disputes are under way. The comments to RPC 4.2 recognize this: "[P]arties to a matter may communicate directly with each other[.]" Nonetheless, a lawyer should not "coach" a client for a prohibited "end run" around the other side's lawyer.

Communication. "Communicate" is not defined specifically in the rule. The safest course, though, is to read this term broadly to include communications that are either oral (both in-person and telephone) or written (both paper and electronic).

Subject of the Representation. RPC 4.2 does not prohibit *all* communications with the other side. Rather, it prohibits communications "about the subject of the representation" when a party (or a person) is represented "in the matter." Or as the comments to RPC 4.2 put it by way of example: "[T]he existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter." In a litigation setting the "subject matter of the representation" will typically mirror the issues as framed by the pleadings. For example, in an automobile accident case, asking an opposing party during a break in a deposition whether the light was green or red likely runs afoul of the rule. By contrast, exchanging common social pleasantries during that same break should not.

Party the Lawyer Knows to Be Represented. RPC 4.2 is phrased in terms of actual knowledge that the party is represented. Actual knowledge, however, can be implied from the circumstances. *See* Alaska Ethics Opinion 98-1.

The Exceptions

There are two principal exceptions to the "no contact" rule: permission by opposing counsel and communications that are "authorized by law."

Permission. Because the rule is designed to protect clients from overreaching by adverse counsel, permission for direct contact must come from the party's lawyer rather than from the party. *See* RPC 4.2. The rule does not require permission to be in writing. A quick note or e-mail back to the lawyer who has granted permission, however, should protect the contacting lawyer if there are any misunderstandings later.

Authorized by Law. Contacts that are expressly permitted by law do not violate the rule. Service of a summons, for example, falls within the exception. At the same time, the phrase "authorized by law" is more ambiguous in its application than in its recitation. Alaska Ethics Opinion 94-1 suggests taking a conservative course: "The Committee is of the opinion that the phrase 'authorized by law' does not apply to all laws of general application permitting communications. Rather, to be effective as an exemption from Rule 4.2, a provision of law authorizing direct attorney contact . . . must specifically allow the communication[.]" The safest course is to read this exception narrowly and to rely on permission from opposing counsel if direct contact is necessary.

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline.

The Corporate/Governmental Context

A key question in applying the "no contact" rule in the corporate/governmental context is: Who is the represented party? Or stated a little differently, if the corporation or agency is represented, does that representation extend to its current and former officers and employees?

The comments to RPC 4.2 and the ethics opinions set out a four-layer hierarchy of who's "fair game" and who's "off limits."

Corporate Directors and Officers. The comments to RPC 4.2 note that the "rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization." Directors and officers fall within this circle. *See* Alaska Ethics Opinion 90-1. Lower-level managers who do not direct the entity's general or legal affairs management typically fall outside this circle. *See* Alaska Ethics Opinion 84-11. For example, a corporate director of a grocery store chain would be "off limits," but the night shift manager for the produce department at one of the company's stores would likely be "fair game."

Employees Whose Conduct Is at Issue. In interpreting RPC 4.2's very similar predecessor, DR 7-104(A)(1), Alaska Ethics Opinion 90-1 found that "[w]here the opposing party is a corporation, an officer *or employee* with authority to commit the corporation is considered a party." (Emphasis added.) Alaska Ethics Opinion 91-1 echoed this point: "[T]hose employees whose acts or omissions are binding on the corporation, are considered to be 'parties' to litigation involving the corporation." Party admissions under Alaska Rule of Evidence 801(d)(2)(D) include statements by a "party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" Therefore, an employee whose conduct is attributable to the corporation will fall within the company's representation. For example, if a company truck driver runs a red light, causes an accident, jumps out of the cab and yells "it's all my fault," that employee will fall within the company's representation and will be "off limits."

Employees Whose Conduct Is Not at Issue. Current employees whose conduct is not directly at issue are generally "fair game." To return to the truck driver example, let's add the twist that another company driver was following behind and both witnessed the accident and heard the admission. The second driver would simply be an occurrence witness and would not fall within the company's representation.

Former Employees. Former employees of all stripes are "fair game" as long as they are not separately represented in the matter by their own counsel. *See* Alaska Ethics Opinion 91-1. The only caveat is that a contacting lawyer cannot use the interview to invade the former employer's attorney-client privilege or work product protection. *See* Alaska Ethics Opinion 88-3.

Summing Up

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline. *See generally In re Korea Shipping Corp.*, 621 F. Supp. 164 (D. Alaska 1985) (discussing possible remedies). Given those possible sanctions coupled with the natural reaction of opposing counsel who learns of a perceived "end run" to get to his or her client, this is definitely an area where it's better to be safe than sorry.

For more information about Mark J. Fucile go to the Alaska Bar website under Ethics, www.alaskabar.org.

Mandatory arbitration

Continued from page 38

dard of publicly acknowledged norms of "fairness". If arbitral neutrality means anything serious, as it should, then it is as a lynchpin that imposes on arbitrators some responsibility to administer a system that is at least as fair as the courts. Realistically, this demands that ADR processes be supplemental to, not exclusive of, the civil justice system and that ADR regain its mission to provide real alternatives to the courts rather than preclusive, inferior substitutes which, face it, mandatory arbitration is.

Conclusion

Dickens wrote in his *Bleak House* satire that it was the business of the English common law to make business for itself. If so, we have indeed now arrived at something of a legal milestone; with mandatory arbitration the American justice system has broken with its jurisprudential ancestor and reversed direction, opting to all but shut itself down and cede de facto jurisdiction over ever increasing numbers and kinds of claims swallowed-up by contractually mandated arbitration clauses. Why the courts would choose to do so is a worthy question, ultimately encompassing far larger issues and political-economic trends ranging from tort reform to globalization; obviously well beyond the scope of this article.

More to the point of this paper is the question of what individual arbitrators should do when faced with the choice of undertaking mandatory arbitration assignments. Due to the compulsory and exclusive nature of the process, coupled with its structural bias, I have suggested that such cases raise serious ethical doubts over the arbitrator's neutrality. Whether practitioners agree or disagree, and whether the field will choose to address this issue are matters for public discourse.

Finally, it is worth contemplating the recency of ADR's arrival into the mainstream of legal affairs, our relative inexperience with it, and the cautionary lessons being suggested by our recent experiences with mandatory arbitration. Clearly, ADR is a great success story in its consensual idioms such as mediation, facilitation, and neutral evaluation. Likewise, voluntary arbitration enjoys an even longer period of proven utility and legitimacy. I have suggested that mandatory arbitration is another matter. Despite its broad endorsement by most courts, the jury of public opinion has clearly not accepted it. Whether the ADR community listens to or ignores that jury will go far in determining how the public views the integrity of ADR as a whole and whether it is willing to continue to accept dispute resolution as an adequate substitute for justice. If instead of listening, practitioners of *alternative* dispute resolution choose to partner with means and methods that exclude individuals from their primary dispute resolution system, the civil courts, they will risk the consequences.

This article previously appeared in the San Francisco Daily Journal, Los Angeles Daily Journal (June 21, 2005), and California Tort Reporter, Thomson-West (2005). It is reprinted with permission by the author.

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Get A Life: Write A Disclaimer

Dear Editor:

I enjoyed Mr. Kirk's satirical piece entitled *The Public Defender Diaries.* However, in view of the harsh and unwarranted criticism of Mr. Kirk's humorous article, printed in the April-June 2005 *BAR RAG,* it is apparent that being a Public Defender can cause a person to lose his or her sense of humor. That is a shame.

I put out a newsletter once a month called *Truck Tracks* for the Alaska Territorial Cavalry, a group of people who collect and restore military vehicles. When one "difficult" member complained about some political content in my newsletter, I decided that I would print a disclaimer with my articles. Perhaps Mr. Kirk might decide to do likewise. Here is my disclaimer:

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To the writers who took offense with Mr. Kirk's humor, and wrote letters of protest to *The Bar Rag,* let me suggest they take to heart the last sentence of my Disclaimer: "if something offends you, lighten up, get a life, and move on."

—Wayne Anthony Ross