The Alaska BAR RAG

VOLUME 27, NO. 3 | *Dignitas, semper dignitas* | $3.00 MAY - JUNE, 2003

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20 questions for Judge Kleinfeld

BY HOWARD J. BASHMAN

Reprinted with permission is a lengthy interview with U.S. 9th Circuit Court of Appeals Judge Andy Kleinfeld. Author Howard Bashman's online "How Appealing" series of appellate judge interviews can be found at http://appellateblog.blogspot.com/

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Judge Kleinfeld joined the Ninth Circuit in September 1991, when he was in his mid-40s. His first stint at judicial service occurred from 1971 to 1974, while he was in his mid- to late-20s, when he served as a part-time U.S. Magistrate in the U.S. District Court for the District of Alaska. In 1986, President Ronald Reagan nominated, and the U.S. Senate confirmed, Judge Kleinfeld to serve as a U.S. District Judge for the District of Alaska. He remained a district judge until he joined the Ninth Circuit in 1991. Judge Kleinfeld attended college at Wesleyan and law school at Harvard. His chambers are based in Fairbanks, Alaska, and the Ninth Circuit has its headquarters in San Francisco.

See related story page 9

Questions appear below in italics, and Judge Kleinfeld's responses follow in plain text.

Q: What are your most favorite and least favorite aspects of being a federal appellate judge?

A: The most enjoyable part of the job is studying the excerpts of record and the briefs, and studying the relevant law. I especially enjoy the scholarly research, and the chance to delve into the details of lives, occupations and industries other than my own. The most satisfying part is being able to go home feeling like what I do is worthwhile.

My least favorite aspect of the job is that there is so much volume.

Q: Identify the one federal or state court judge, living or dead, whom you admire the most and explain why.

A: The judge I admire the most is the first Justice Harlan. I admire his independence of mind and the great courage that he had to stand against both his Court and the society of his times to do the right thing in *Plessy v. Ferguson*.

Q: How did you come to President Reagan's attention in 1986 to fill a brand new judgeship on the U.S. District Court for the District of Alaska and to President Bush's attention in 1991 to fill a vacancy on the Ninth Circuit, and do you have positive, negative, or mixed memories of the confirmation processes that followed those nominations?

A: In 1986, Senator Murkowski took the lead on the nomination. He used a merit selection system. After obtaining expressions of interest from a number of people, he asked the Alaska Bar Association to poll the bar members by region on suitability of those who'd expressed interest. I came in highest on the bar poll in my region of the state. Senator Murkowski sent three names to the White House, as the President then required, and when President Reagan selected me, Senator Stevens, Senator Murkoswki and Representative Young all endorsed my nomination. So I suppose you could say that the way I came to President Reagan's attention in 1986 is that the lawyers in Alaska, in response to Senator Murkowski's decision to consider their views, brought me to his attention through the Senator.

In 1991, Senator Stevens had obtained an agreement

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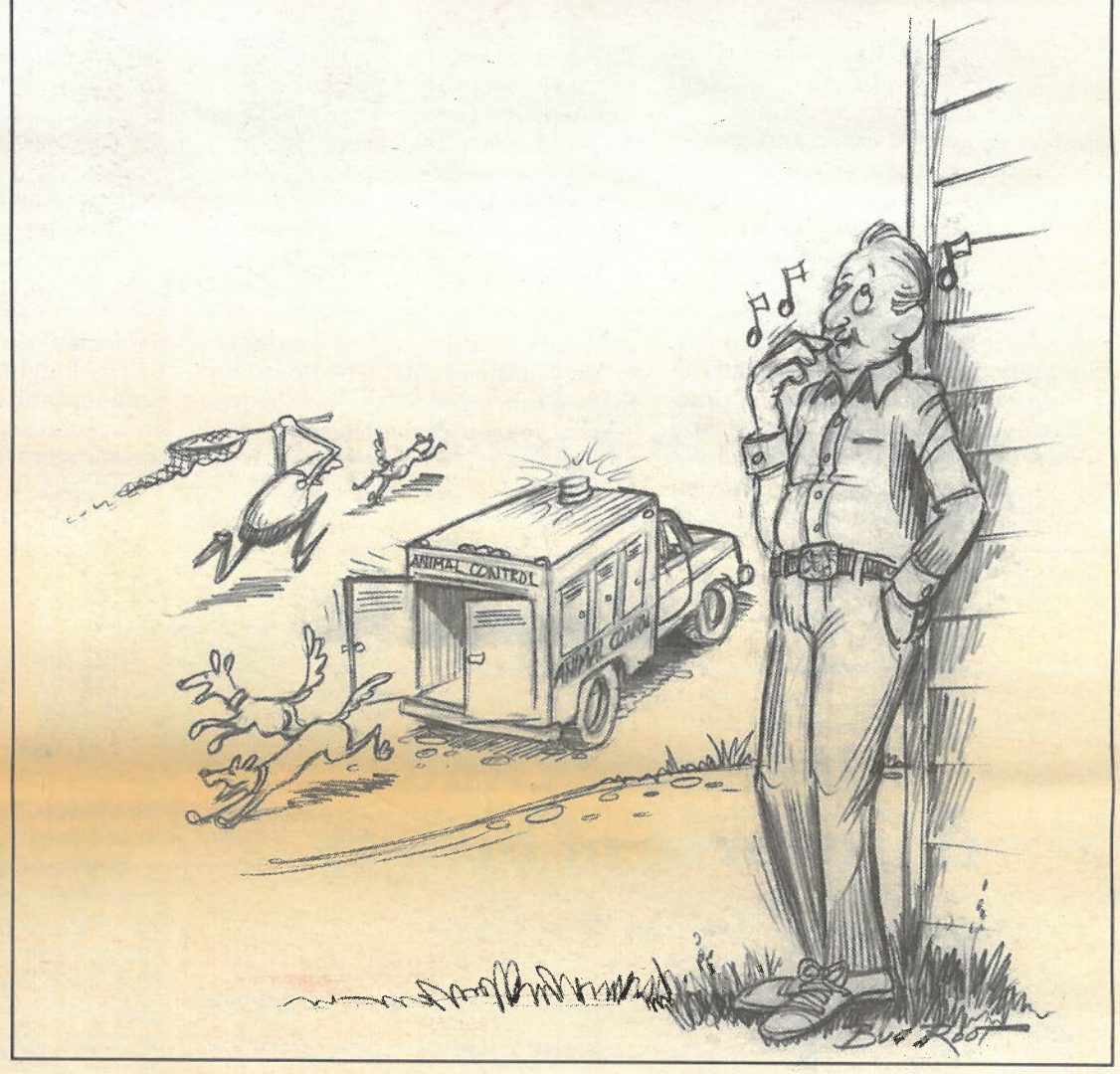
Beware of those dog bite cases — See page 20



Chambers ranks U.S. business lawyers; 37 Alaskans on the list

London-based Chambers & Partners published its Guide to America's Leading Business Lawyers in April, ranking top firms and attorneys in commercial law. Thirty-seven Alaskans were included, representing national and international law firms to solo offices.

Chambers says theirs is the only legal directory to rank law firms and individual lawyers; they investigated the top firms and lawyers for each state in over 20 areas of commercial law. The publisher says its detailed research distinguishes it from any other attorney listing in the nation.

The book was launched at an invitation-only event in New York April 24, where leading lawyers saw the book for the first time, and learned how they fared according to the reputation they hold with clients and peers. Copies of Chambers USA have been sent to in-house counsel in major corporations, to nominated clients, and to attorneys in practice. It is available in bookstores and online at www.chambersandpartners.com/usa.

Chambers USA researchers conducted more than 4500 interviews with leading private practice attorneys and key in-house counsel. They applied a ranking of 1-6 to distinguish levels of seniority or significant activities of lawyers. The directory also contains detailed and independently researched editorial describing each practice and its strengths, details of recent work, quotes from clients and peers, and a list of active clients within each practice.

"Chambers Guides are the only ones in the world that truly reflect the judgment of the market," said Fiona Boxall, director of Chambers and Partners and managing editor of the UK, Global, and USA directories. "Unlike most legal directories, Chambers

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President's Column

Alaska — a true community of lawyers

☐ Lori M. Bodwell

One of the best things about practicing law in Alaska is that despite the geographic size and diversity, we still enjoy a true community of lawyers. In other parts of the country, lawyers often view civility and collegiality as inconsistent with the race for billable hours. Consequently, the reputation of the legal profession suffers from the image of lawyers as underhanded and greedy, more focused on exacerbating rather than resolving issues.

I often forget how different things are in Alaska until an outsider comments, as Justice Scalia did while visiting the convention, that Alaska must be a fun place to practice law. Our state proves that civility and collegiality and high standards of practice are not mutually exclusive, and in fact, may work together to bolster the quality of legal representation as well as the reputation of the legal profession.

The annual convention is one of the primary tools that fosters this environment and I cringe whenever I hear the suggestion that the Bar stop sponsoring the convention or have it only in Anchorage. Moving the convention around the state not only provides access to local attorneys who would otherwise always incur the cost of travel, but also adds local flavor each year contributing to the continuing vitality of the events. The Board has made a concerted effort over the past several years to revive the convention and increase participation. It must be working - while other states are suffering declines in participation to the point that they are forced to cut back or cancel conventions, participation and interest in our convention has increased.

We had over three hundred bar members from around the state attend the convention in Fairbanks this month. A diverse offering of CLEs brought in packed crowds. At the annual business meeting, members engaged in a lively debate on Bar spending and a not so serious, but equally energetic discussion of proper court attire. Numberous members were present to receive their 25 year pins and relive 1978, complete with pictures and music.

In the evening, a standing room only crowd of over 200, including Justice Scalia, laughed to the musical satire of Bob Noone and the Well Hung Jury. Where else can you get to see the reaction of a Supreme Court Justice to a song on sodomy written in honor of a recent court opinion? I know people were nervous when I said I wanted to have a barbeque in a bar with a band that sings about sodomy. On paper, I must admit that it does not look like a good idea. But judging by the laughter, the smiles, and the comments afterwards, I think it was a great success. (For those who missed the show or who forgot to buy a CD at the show, you can go to lawsongs.com for more information.)

Justice Scalia entertained a sold out crowd with his keynote address at the banquet. His appearance was certainly a draw, but for many the chance to catch up with old friends, or meet new ones, and the chance to honor several of our own members for their contributions to the bar was just as important. The Board of Governors presented the Lay Person award to former Board member Joe Faulhaber. Bob Groseclose received the Distinguished Service award and Dick Madson accepted the Professionalism award. Christine McLeod Pate, currently with the Alaska Network on Domestic Violence and Sexual

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Editor's Column

Headnotes and the course of history

☐ Thomas Van Flein

Everyone remembers a law professor warning about relying upon or referring to headnotes. A few years ago I was in a Los Angeles court appearing for oral argument on a commercial litigation case, and my opposing counsel, who was capable and, judging by his briefing, a very able researcher, tried to save time by referring to a headnote in a case he had attached. But he got snarled up with the judge like this:

The Court: Where is that in the decision?

Counsel: Well, if you look at Headnote 5 . . .

The Court: Any lawyer who comes into my courtroom and starts citing headnotes is going to have real problems. Headnotes aren't the law. The court's opinion sets forth the law, and even most of that is dicta. Headnotes are written by lawyers who couldn't pass the bar and had to take a job with a publishing company . . . .

Counsel: I know, your Honor, I was just, for expediency . . .

The Court: You are going to have to read the decision and cite something the court wrote, not some editor . . .

.

So, the classic law school admonition came back to haunt this lawyer, even though the headnote in that case correctly summarized the court's decision on that point.

But what if a headnote was wrong? And what if a court relied on an incorrect headnote, and that headnote took a life of its own and changed history? Well, that is claimed to be how corporations in America gained legal status as "persons" for constitutional protections in 1886 instead of "artificial entities," a classification that had existed for a century or more and did not provide constitutional protections. Of course, if one has legal status as a "person," one has constitutional protections, including freedom of speech (lobbying and political contributions), Fifth Amendment privilege, due process, etc. An artificial entity would have no such constitutional protections.

This is not to say that corporations did not at that time or before have "person" status under statutes or in court to sue and be sued. Cf. J. Angell & S. Ames, *"A Treatise on the Law of Private Corporations Aggregate"* p. 4 (rev. 3d ed. 1846) ("The construction is, that when "persons" are mentioned in a statute, corporations are included if they fall within the general reason and design of the statute"). But apparently they lacked constitutional protections.

Professor Richard W. Behan writes that "Orthodoxy has it the Supreme Court decided in 1886, in a case called *Santa Clara County v. the Southern Pacific Railroad*, [118 U.S. 394 (1886)] that corporations were indeed legal persons. I express that view myself, in a recent book. So do many others. So do many law schools. We are all wrong."

Thom Hartmann writes in his book "Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights" that The Supreme Court decision in *Santa Clara County vs. The Union Pacific Railroad* never made any such holding. Instead, the Recorder of the court, a man named J. C. Bancroft Davis, wrote into his commentary–the headnote—that the court had said that "corporations are persons" under the law. Specifically, the headnote said "The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment...which forbids a State to deny to any person within its jurisdiction the equal protection of the laws."

But the decision itself said no such thing. Apparently the headnote writer was aware it did not say this. Researchers have found a handwritten note in the J.C. Bancroft Davis collection in the Library of Congress, from Chief Justice Waite to the headnote reporter, explicitly saying, "we did not meet the constitutional issues in the case." Nothing in the text of the decision mentions this headnote principle. The reporter may have taken this from a statement made before the oral argument, where apparently Justice Morrison Waite pronounced before the beginning of

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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	December 20
March	February 20
May	April 20
July	June 20
September	August 20
November	October 20

*Note: Publication dates are mid-month

Board of Governors meeting dates
Sept. 18 & 19, 2003
Oct. 30 & 31, 2003 (July Bar Exam results & budget)
Jan. 15 & 16, 2004
March 4 & 5, 2004
April 26 & 27, 2004
April 28 - 30, 2004 Annual Convention (Anchorage)

Bar Letters

'Judges on Wheels' a keeper

Many thanks for the delightful travel reports filed by Jim Blair and Allen Compton. Best articles I've read in the Rag in years! I'll keep this issue, tucked cozily next to Homer on my bookshelf.

— Margot Knuth

From the mail

Received by the Bar Association was this letter in March:

Is it possible to obtain a sample copy of your magazine.

We are interested in purchasing a bar somewhere in Alaska. Preferably in a small town.

We thought your periodical might be of help to us.

If you need money for it I will gladly send it.

Thanks

— Hilger, MT Reader

(Editors Note: This explains the cocktail napkins, olives and crushed ice at the Bar Rag headquarters).

A true community of lawyers

Continued from page 2

Assault, was honored with the Robert Hickerson Public Service Award.

The business portion of the convention closed with the appellate off the record, allowing participants to pose questions to state and federal judges, including Justice Scalia. The events closed with a reception sponsored by the Tanana Valley Bar Association.

The reviews of the convention have been overwhelmingly positive. One concern I heard voiced was that newer attorneys were, as a group, underrepresented in the crowd. One excuse I heard was that the convention is too expensive. In relative terms, the Bar Convention is one of the best bargains around. This year, the bar staff worked hard to get discounts on travel and hotel rooms and recruited a larger than usual number of sponsors. As always, the cost of CLE programs is significantly less than just about anywhere in the country.

Another excuse I heard was that new attorneys do not know anyone. To that I say, you will never meet people if you do not attend. Just several years ago, I was in that same situation. This month, I was able to put a name with the face of a great majority of the attendees. New lawyers are the future of the Bar. The time to get involved is now and one day you will be one of the old timers who seem to know everyone around.

If you have any doubts about the value of the convention, talk to a few people who have attended in the last several years. I am confident they will agree that the opportunity to meet and mingle with colleagues and judges is an invaluable experience unequalled in any other portion of your practice. Next year's convention will be in Anchorage April 28-30. Mark it on your calendar now and make a commitment to come and keep the tradition alive.

Headnotes and the course of history

Continued from page 2

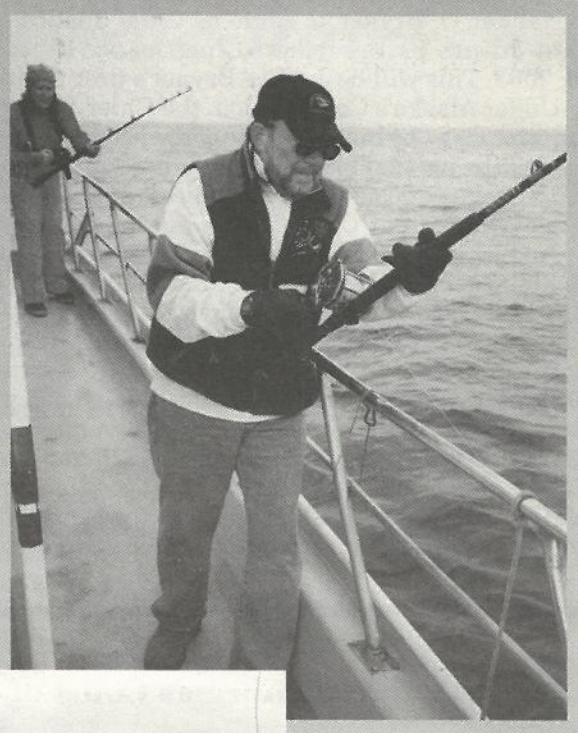
argument in the case that the "court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations." It is said that he also said—orally—that "we are all of opinion that it does." But the decision never addresses this.

The damage was done. By incorrectly writing a headnote stating a principle of law that was not in the body of the opinion, a reporter, not the Supreme Court, issued a proclamation of law that, according to Mr. Hartmann, would change history and give corporations enormous powers that were not granted by Congress, and not even granted by the Supreme Court. Davis' headnote was taken as precedent by generations of lawyers (including later decisions by the Supreme Court) who followed the headnote, but not the actual decision.

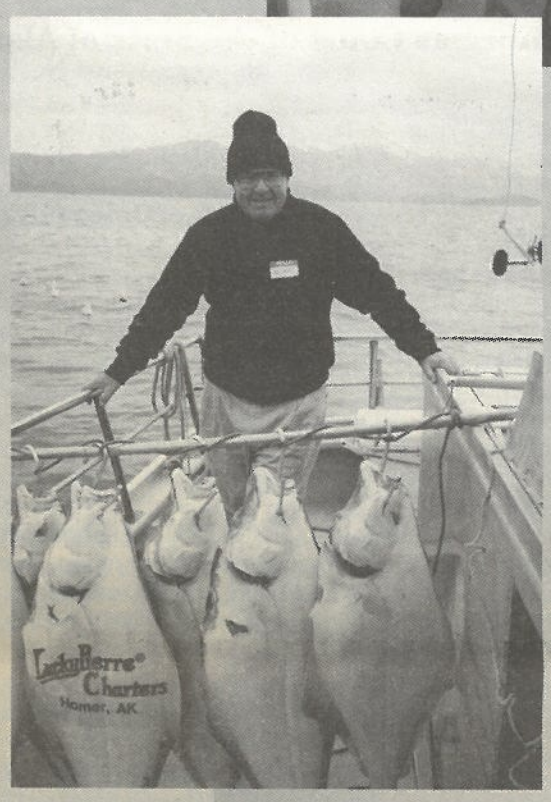
There is one other twist. Some believe the reporter inserted the erroneous language on purpose. The question of whether corporations were "persons" under the constitution was hotly litigated for over 20 years prior to this decision, mainly by railroads who sought such status—but perpetually lost in court. Professor Behan notes the reporter was a former railroad lawyer who had unsuccessfully tried to get the courts to establish the point he wrote into the headnote. Professor Behan believes that the reporter sought "to achieve by deceit what corporations had so far failed to achieve in litigation."

The genie is out of the bottle now. We all take it as a given that corporations have status as "persons" under the constitution. To achieve this status in 1886—before women, Native Americans, and most African Americans achieved this—is even more of a coup. And all because of a headnote.

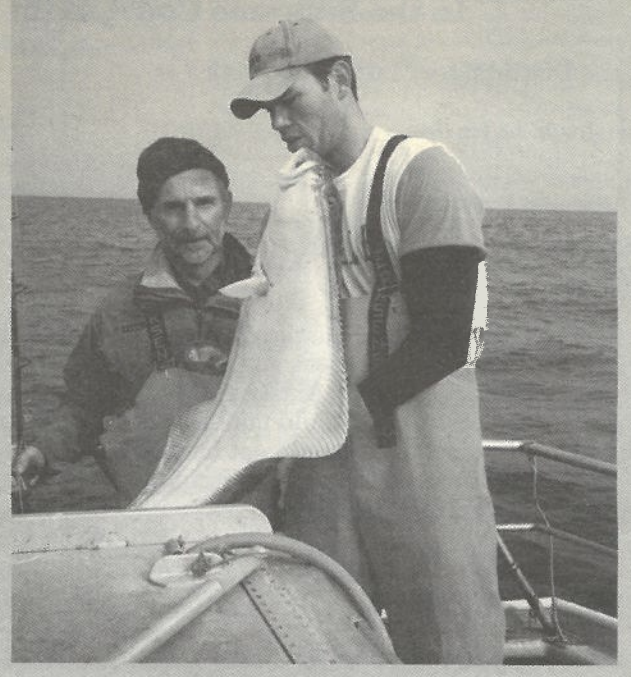
FISHING IN HOMER



Judge Richard Savell catches the first fish.



U.S. Supreme Court Justice Antonin Scalia with the boat's catch.



Judge Philip Volland and crew member — the judge caught the biggest fish.

Photos by Lori Bodwell

CLASSIFIED ADVERTISING

Next Chief Justice selected

By unanimous vote May 29, the members of the Alaska Supreme Court selected Justice Alexander O. Bryner to serve as Chief Justice commencing July 1, 2003 for a three year term. Justice Bryner follows Chief Justice Dana Fabe, whose three year term expires June 30, 2003. This will be Justice Bryner's first term as Chief Justice.

Under Alaska's Constitution, the Chief Justice is selected from among the justices of the supreme court by majority vote of the justices. The Chief Justice serves as the administrative head of the judicial branch of government, provides policy direction for all courts statewide, and appoints presiding judges for all judicial districts. A justice may serve more than one three-year term as Chief Justice but may not serve consecutive terms in that office.

Justice Bryner has served on the supreme court since February 1997. He was born in Tientsin, China. Justice Bryner moved to Alaska in 1969. He holds an A.B. degree in French Literature and a J.D. degree from Stanford University. He served as law clerk to Alaska Supreme Court Chief Justice George Boney from 1969 to 1971. He moved to San Francisco in 1971 and was legal editor for Bancroft Whitney Company. After returning to Alaska in 1972, he worked for the Public Defender Agency in Anchorage. In 1974 he entered private practice as a partner in the firm of Bookman, Bryner and Shortell. He was appointed to the district court bench in Anchorage in 1975 and served until 1977. In 1977, he was appointed U.S. Attorney for Alaska and held that position until his appointment to the Court of Appeals in 1980. He served as Chief Judge of the Court of Appeals from 1980-1997. He is married to Anchorage artist Carol Crump Bryner and has two children, Paul and Mara.

In the Supreme Court of the State of Alaska

	)	Supreme Court No. S-10817
	)	
In the Disciplinary Matter Involving	)	Order
	)	Alaska Bar Rule 7(a)
David E. Grashin	)	
	)	Date of Order: 01/02/2003

ABA Membership #8011082
ABA File # 2002D122

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

David E. Grashin has been disciplined by the Supreme Court of Washington in an order dated March 4, 2002, suspending him from the practice of law from March 4, 2002, to March 3, 2003, and to engage in eight hours of Washington State Bar Association ethic credits before engaging in the practice of law. Pursuant to Alaska Bar Rule 27(a) Grashin responded to a notice asking him to show cause why identical discipline to that imposed in Washington should not be imposed in Alaska.

IT IS ORDERED: Identical discipline is GRANTED. Grashin has evidently not practiced in Alaska during the period of his Washington suspension. A concurrent one-year suspension is appropriate. Reinstatement in Alaska will be subject to Alaska Bar Rule 29 and conditioned upon satisfaction of the eight hours of WSBA ethics credits imposed by the Washington court.

Entered at the direction of the court.

Clerk of the Appellate Courts
/s/ Marilyn May

In the Supreme Court of the State of Alaska

	)	Supreme Court No. S-10826
In the Disciplinary Matter Involving	)	
	)	Order
Charles F. Loyd, Jr.	)	Alaska Bar Rule 27(a)
	)	
	)	Date of Order: 01/02/2003
	)	

ABA Membership #8606029
ABA File #2002D120

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

Charles F. Loyd, Jr., has been disciplined by the Utah Supreme Court in an order dated March 8, 2002. Pursuant to Alaska Bar Rule 27(a), Loyd responded to a notice to show cause why identical discipline should not be issued in Alaska, stating that he knows of no reason why identical discipline should not be imposed.

IT IS ORDERED: Identical discipline, namely, a public reprimand, is GRANTED.

Entered at the direction of the court.

Clerk of the Appellate Courts
/s/ Marilyn May

In the Supreme Court of the State of Alaska

	)	
	)	Supreme Court No. S-10972
In the Disability Matter	)	Order
Involving Scott Jay Sidell	)	Alaska Bar Rule 30(b)
	)	Date of Order: 3/14/

ABA File No. 2003B001
ABA Membership No. 8411138

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Carpeneti, Justices [Bryner, Justice, not participating].

On consideration of the joint motion dated 2/5/03, by bar counsel and the respondent, together with respondent's counsel, for the respondent's transfer to disability inactive status under Alaska Bar Rule 30,

IT IS ORDERED:

1. The joint motion for transfer to disability inactive status under Alaska Bar Rule 30 is GRANTED. Respondent Scott Jay Sidell is immediately transferred to disability inactive status nunc pro tunc January 1, 1998 until further order of this court. A disability hearing under Rule 30(b) is not required.

2. The Bar Association shall provide the notices required in Rule 30(e) and (f). The respondent may not practice law until reinstated by order of this court under Rule 30(g).

Entered by direction of the court.

Clerk of the Appellate Courts
/s/ Marilyn May

Hi-Tech in the Law Office

Techno Lawyer

Seeing is not always believing

The Internet contains the largest library of self-published material in all the world. Anybody with a few dollars and access to a computer (or access to a friend who has access to a computer) can publish all kind and manner of material on the Internet without editorial checks and balances and without any form of peer review.

This is not to say that material on the Internet is inherently unreliable. Probably 90% to 95% of everything that appears on the Web is published by men and women of good will, honestly putting forth information that they believe will be of value to the general public. From corporate Web sites setting forth product information to educational institutions publishing the works of their faculty and students to news media publishing current events and analysis for all to see, there is a wealth of valuable information to be had.

However, there are at least two circumstances that can blindside the unwary.

The first consists of material from a self-published author who has an axe to grind or who simply lacks the research skills to publish accurate information. Such material may be published by organizations whose motivation is to persuade rather than to inform, or simply by individuals who are seeking to advance their own fame and fortune. When there is no truly independent check on these materials, the risk of advertent or inadvertent error is high.

The second circumstance deals with the hacked Web site. Stories are all too common of legitimate Web sites being invaded by outsiders who substitute their own content for that of the Web site owners. The substitute content may look in all respects like bonafide content, but it's often inaccurate, misleading or scandalous. One notorious example of such intrigue occurred last year when hackers posted a story on the CNN Web page announcing that Britney Spears was dead (see <http://urbanlegends.about.com/library/blspears.htm>). A more common example are the many computer virus hoaxes that make the rounds.

The moral of this tale of woe is: Seeing Is Not Always Believing — when it comes to Internet research. You should look at the Internet using a proverbial grain of salt and should evaluate the reviewed content with a critical eye.

ASK YOURSELF THESE QUESTIONS:

- Is the Web site's owner reputable and reliable?
- Is the content consistent with your own common sense and experience?
- Is the information found verifiable from independent sources if the need arises?
- Is the content likely to be in place three or six months from now when you might want to refer back to it?

CONCLUSION

The Internet is unquestionably an extraordinarily valuable resource for everyone. It's much more than a place to simply find out show times or buy movie tickets or check the latest sports scores. It is an essential addition to the library of every lawyer in every law firm in the country. Like all library resources, however, its use requires a good bit of judgment and common sense.

Arthur L. Smith is a member of the St. Louis law firm of Husch & Eppenberger, LLC where he leads the firm's e-Business Team. He is a former co-chair of the Technology and the Practice of Law Committee of the Bar Association of Metropolitan St. Louis. Arthur encourages comments as well as suggestions for future articles. You can contact him via e-mail (arthur.smith@husch.com).

My second life: Jamming after hours

By Gerald T. Giaimo

It is often said that everyone needs an outlet. Lawyers who spend their days surrounded by client concerns and problems may find this particularly true.

For many of my colleagues, escape is possible only during weekend hours when they take part in activities that typically include recreation, home projects, or other hobbies. These, sprinkled with socializing, business development, and the pursuit or maintenance of relationships, provide the context in which many of us live our lives outside the practice of law.

I, however, live a second life on weekends (and sometimes weeknights as well). It is a routine that begins after the sun sets and the children are put to bed. This is when I put on my "gig clothes," tune my guitar, and meet the band to assemble our equipment for the one-and-a-half hour journey from Connecticut to New York City. While the children and wife sleep, "Mokijam" (www.mokijam.com <http://www.mokijam.com/>) hits the stage in Greenwich Village for a 12:00 a.m. showcase of original jazz/funk fusion music. The setting assaults us with its volume, flowing libations, and choking cigarette smoke, which contrasts sharply with the silent and surreptitious tip-toeing back into the house and up to bed, where we carefully remove smoke-reeking clothing at 4:30 a.m. Two hours later, it is time to change a diaper or two and make breakfast for the kids. Despite the sharp penalty of sleep deprivation, this is an escape I will repeat three or four times each month. And I love it.

Music has been a habit that neither college, law school, marriage, nor parenthood has been able to break. I joined my first rock band at age nine. Already a two-year veteran of the electric guitar, I found myself the leader of a cacophonic ensemble that included another guitarist and drummer-his twin brother-that were three years my elder. With a nascent understanding of four or five chords, we had the building blocks for a significant repertoire of rock hits. What we lacked in ability, however, we ultimately made up for in endurance and dedication. In five years' time, we were playing local bars and dances (the former of which required parental supervision). Twenty-four years later, that band still performs together for weddings and other private functions.

DESPITE THE SHARP PENALTY OF SLEEP DEPRIVATION, THIS IS AN ESCAPE I WILL REPEAT THREE OR FOUR TIMES EACH MONTH. AND I LOVE IT.

With a steady gig, I never escaped the need to practice, maintain technique, and improve. Throughout that period, my guitar lessons began to venture into new territories that included classical, jazz, and country/bluegrass. Drawn to improvisation, I became more and more interested in original composition. Two years ago, an opportunity arose to audition with Mokijam, an original, instrumental fusion band. I jumped at the chance.

With a new CD under our belt, we are marketing our music in New York, concentrating our efforts on performances in Greenwich Village clubs that include the Bitter End, the Lion's Den, and the Baggott Inn. With the culture of the New York music scene so far removed from the weekday business world, I am often made to feel that I commute to a different planet on the weekends. As you might imagine, I have a very supportive wife and family.

Despite the pursuit of my legal career, I have been unable to let go of the fun and expression that comes with music performance. Playing guitar is an important emotional and creative release for which I have found no substitute. It is challenge and escape, release and stimulant. More than a hobby, it is best described as a second life that I hope will continue on and on.

Gerry Giaimo is an associate at Tyler, Cooper & Alcorn, LLP in New Haven, Connecticut, practicing in the areas of civil and criminal litigation. Mr. Giaimo serves the ABA/YLD this year as Co-Coordinator of the Member Service Project entitled "Life in the Balance: Achieving Equilibrium in Our Personal and Professional Lives." He can be reached at giaimo@tylercooper.com.

From GPSolo New Lawyer. Reprinted by permission of the American Bar Association."

Family Law
Self-Help Center website launched

The Alaska Court System has launched an expanded Family Law Self-Help Center (FLSHC) website at www.state.ak.us/courts/selfhelp.htm.

The new website is designed to provide a wealth of information to people handling their own family law-related legal matters. Topics include dissolution, divorce, child custody, and child support. Website users will find forms, instructions and referral information, as well as a glossary of family law terms.

The FLSHC also continues to offer a statewide telephonic Helpline, with toll free access and services in English and Spanish for people who have unique circumstances or require help completing forms. Helpline staff provide detailed and comprehensive information about complex procedural issues, and coordinate with courts and agencies throughout the state to facilitate the public's access to the courts. The Helpline number is 264-0851, or 866-279-0851 outside of Anchorage. The hours are Monday and Wednesday from 8:30-Noon, and Tuesday and Thursday from 1:30-4:30.

Contact FLSHC director Katherine Alteneder at 907-264-0484 or kalteneder@courts.state.ak.us for more information.

ESTATE PLANNING CORNER

Securities Laws

☐ Steven T. O'Hara

Estate planning means property planning. People who work in the estate planning field, therefore, need to be able to recognize the property that belongs to a client and what rights and obligations attach to that property.

Consider a client who buys stock in Alaska directly from the corporation issuing the stock. The client did not participate in the organization of the corporation or its business, although she was advised of every material fact concerning her investment.

Being more concerned with other matters, the corporation failed, quite innocently, to comply with Alaska's securities registration law. This law requires the issuer or seller of a security to register the security transaction with the Alaska Division of Securities unless an exemption from registration is available (AS 45.55.070). There are numerous exemptions. For example, there is an exemption that deals with the sale of a security by the Personal Representative of an estate (AS 45.55.900(b)(3)). But often the exemptions do not fit the circumstances and the security transaction must be registered before the security may lawfully be offered for sale.

Suppose in our case no exemption applied and the issuer failed to register the transaction. As a result, here the client's rights would include, under the securities laws, the right to rescind her investment, plus obtain interest, costs, and attorneys' fees (AS 45.55.930(a)(1)). The client's rights are not only against the issuing corporation, but may also be against each of its officers, directors, and controlling persons (AS 45.55.930(c)).

In general, there is no defense to the client's rescission rights. The only restriction on the client's rights is the three-year statute of limitations (AS 45.55.930(f)).

If the client dies, her rights carryover to her estate and, upon the closing of the estate, to the successor owner of the stock.

Property planners also need to recognize the flip side of this scenario. If a client is raising capital, either directly or through an entity, the client needs to comply with all securities laws, including federal and those of every applicable jurisdiction. By failing to register or exempt the transaction, the client will not only have a significant footnote in the equity section of his balance sheet, but he may also face criminal prosecution (AS 45.55.925).

A share of stock is quintessentially a security (AS 45.55.990(32)). An ownership interest in a Limited Liability Company is also a security (*Id.*).

Other instruments and arrangements can also get clients entangled in the securities laws. In general, a security is a transaction whereby a person (1) invests money or money's worth (2) in a common enterprise with (3) the expectation of profits that (4) will be derived primarily by the efforts of another (*Id.* and *American Gold & Diamond Corp. v. Kirkpatrick*, 678 P.2d 1343, 1345-46 (Alaska 1984)).

If a client is raising capital or making a contribution to capital, a security is likely involved.

If a security is involved in a transaction, even a typical sale from one shareholder to another, the securities registration laws apply. If an exemption is not available, the issuer or seller of the security will need to register the transaction in order to avoid breaking the law and facing suits for rescission.

A Trial Lawyer's Delight

From "We, the Lawyers," a compilation of humorous anecdotes, compiled by William F. White, Oswego, OR. (We,the lawyers@webTV.net)

A winter spring that sprung

As told by Lawyer, John J. McCullough III, of Montpelier, Vermont.

Henry Blakely (known as "Jack") of Michigan was the kind of lawyer that you don't see much any more. Solo practitioner, never charged anybody very much, and if they couldn't afford to pay, he generally didn't charge them at all. Had an office downtown, and when you went in you would see files stacked up on all the chairs, as well as any other horizontal surface. He was also in perennially rumpled clothes that looked like he slept in them, shoes that looked like he painted in them, and a red plastic watch band.

Anyway, Jack was trying a traffic case to a jury. Yes, to a jury. His client had been charged with proceeding when she didn't have the right of way; she had pulled out of her driveway smack into another car, which she hadn't been able to see because of the snow piled up on both sides of the driveway. At jury selection the prosecution got all the members of the jury to agree, that, yes, the law is the law, and every driver has the responsibility to make sure the way is clear before they proceed, and the fact that it was winter doesn't excuse carelessness. Both sides finished their proofs, and the prosecutor reminded the jury once again of their promise, and how the law is the law, and how people can't just go around pulling out of their driveways whenever they want, and the jury sits there and nods as he finishes up. At this point jack stands up, kind of frowns, and scratches, and trudges up in front of the jury. Looks down at the floor, then looks up again. "Well, what do you want her to do, wait for spring?" And sits down.

Do I need to say more? The jury did go out of the room, just to be polite, but it didn't take long before they came back with their "Not Guilty."

Bar People

Inactive Bar member **Ed Reasor** of Anchorage is in Nuka Hiva and Hiva Oe in the South Seas, islands made famous by Herman Melville's "Moby Dick" and Paul Gauguin, who is buried there. Reasor is writing and producing a full length feature film of the Islands' true love story between an American youth and a Marquesan beauty that occurred during America's Civil War.

Jane Sauer joins Anchorage office of Perkins Coie

Law firm Perkins Coie announced that Jane Sauer has joined its Anchorage office as of counsel. Her practice will focus on the formation and governance of business entities (including regular and subchapter-S corporations, limited liability companies, general and limited partnerships, and 8(a) firms), commercial transactions, business planning and advice, and estate planning.

Ms. Sauer has 17 years of business law and estate planning experience and has represented a wide array of business organizations and their owners, especially those involved in the construction and commercial fishing industries. Prior to joining Perkins Coie, Ms. Sauer was a business lawyer with the law firms of Bankston & McCollum in Anchorage (where she was a shareholder) and Jamin, Ebell, Bolger & Gentry in Kodiak. More recently, she served as executive vice president and in-house counsel of Summit Alaska, an Anchorage-based civil construction company.

Jane Sauer

Ms. Sauer received her law degree from Stanford Law School and her undergraduate degree from the University of Wisconsin-Madison. She also attended Indiana University in Bloomington, Indiana.

Perkins Coie's Anchorage office celebrated its 25th anniversary last year. The office serves local, national and international clients in corporate and commercial law, construction law and government contracts, labor and employment law, and municipal and environmental law.

Lawrence joins law firm as associate attorney

The Law Office of Baxter Bruce & Sullivan is pleased to announce that David A. Lawrence has joined their firm as an Associate Attorney.

Mr. Lawrence received a Bachelor of Science from the Massachusetts Institute of Technology and a Master of Science in Management from MIT's Sloan School of Management, Cambridge, Massachusetts, in September 1971. He earned his Juris Doctor, *cum laude* from the University of Minnesota in June 1974. David has been practicing law for 27 years. He is admitted to practice in the states of Minnesota, Vermont, and Alaska.

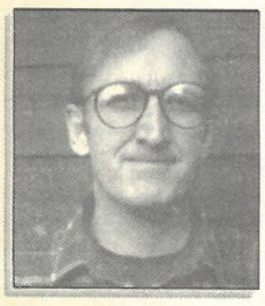
Currently, David practices in the areas of administrative, energy and regulatory law, taxation, transactions, contracts, corporations, commercial and business law, government relations, and non-profit corporations.

If David can be of any assistance, you may contact him at (907) 789-3166; fax: (907) 789-1913; or at his e-mail address at dlawrence@baxterbrucelaw.com.

ECLECTIC BLUES

St. Augustine, Girls Scouts and a cell phone

Dan Branch



The 2003 Girl Scout cookie campaign is over. It ended when some nice person at Foodland bought the last box of Ole Ole's from a member of my daughter's troop. I thank that person and all the others who parted with greenbacks for thin mints and other examples of the Girl Scout cookie line.

Past cookie campaigns haven't been a big deal. The girls go door to door in their neighborhoods, taking orders. The cookies arrive and are distributed. This year, my daughter's troop decided to sell 2000 cookies at booth sales, rather than take pre-orders door-to-door.

I wasn't present when the five scouts in her troop decided to sell 2000 boxes of cookies. In fact, no one in the family told me about their ambitious goal until the cookie order arrived on an AML barge. At that point all I could do was move cookie cases from car to our bedroom where they formed a impassable barrier to the book shelves.

WHAT HIGHER PURPOSE, I ASKED, WAS BEING SERVED BY TYING UP EVERY SPARE WEEKEND MOMENT PUSHING TAG ALONGS AND TREFOILS AT BLOCKBUSTER OR DOWNTOWN VIDEO?

Two weeks into the cookie campaign, code name No More Samoa, I asked for the civic-minded motive behind it. What higher purpose, I asked, was being served by tying up every spare weekend moment pushing Tag Alongs and Trefoils at Blockbuster or Downtown Video?

"It's simple Daddy," my daughter explained. "If we sell 2000 boxes, we each get matching pajama sets."

With perseverance and planning, the troop made the goal. In the end, they had $1,000 more in their bank account. The Girl Scouts of America and a happy bakery split the other $6,000 in cookie proceeds. I was left to take a carload of empty cardboard cookie cases to recycling.

On a snowy April day, I drove out to the Lemon Creek dump, wondering what Paris designer was then overseeing the final hem work on the matching Girl Scout PJs.

When I arrived at the one-stop recycling center, I saw a man dressed in Carhartts standing by the Glass Only dumpster. He held a three-prong rake in one hand and a cell phone in the other.

After seeing to proper disposal of the Girl Scout cardboard, I walked up to the glass dumpster with a bucket of empty bottles that once held discount Australian wine. The guy with rake and cell phone was dialing in a call. Somewhere deep inside the glass dumpster, another phone rang. The guy started moving glass bottles and jars away from the sound.

"I dropped a cell phone in here," he explained. I started to help him clear away an empty half rack of Miller bottles, but he asked me to stop. He had the rake and the other phone and he knew how to make the missing phone ring. I was like an amateur offering to help the bomb squad defuse old ordnance. It was better to step back a safe distance and watch the man work.

SOMETIMES DADS SHOULD JUST WATCH THEIR TEENAGERS WITH AMAZEMENT AND WONDER AT THEIR ENERGY. AND WE SHOULD NEVER UNDERESTIMATE THE POWER OF GOALS SET BY GIRLS.

I watched and listened from a respectful distance. The man would dial and then rake, but gravity seemed to pull the cell phone deeper in to the dumpster. The diffuse ring softened as the phone slipped ever downward towards the bottom.

Suddenly a story that St. Augustine told on himself came to mind. He was walking down a North African beach, lost in his thoughts trying to solve a deep metaphysical problem, when he spied a young child carrying a bucket of sea water to a small hole in the sand.

"What are you doing, kid?" he asked.

"I am going to pour all the water in the ocean into this hole," she explained.

"You are wasting your time, the ocean won't fit in the hole," he counseled.

"I have a better chance of getting the ocean to fit in this hole than you have of solving your mystery," she retorted, before disappearing into the ocean mist.

It took me a while to connect St. Augustine with the cell phone guy.

In the end I figured out that at the dump, the role of the beach child was played by the cell phone guy. He was undertaking the impossible task of digging out his phone through a sea of glass. Was I the Augustine character in this drama? I wasn't puzzling through a great metaphysical mystery. I just wanted to figure out why my daughter and her friends sold $7,000 worth of cookies to earn matching sets of PJs.

The beach child helped Augustine recognize the folly of his question. In the end the cell phone guy helped me recognize my folly. Sometimes dads should just watch their teenagers with amazement and wonder at their energy. And we should never underestimate the power of goals set by girls.

QUOTE OF THE MONTH

"The American press is all about lies! All they tell is lies, lies and more lies!"
Mohammed Saeed al-Sahaf,
Iraqi Minister of Information
(currently on administrative leave).

International Red Cross & Geneva Conventions

A talk to the Juneau Bar Assn., by Nancy Barros, April 25, 2003,

Synopsis by Dr. Joe Sonneman

This talk sketches the Geneva Conventions, or, the Law of War, or, still more accurately, Red Cross history.

Clara Barton began the American Red Cross; but Henri Dunant, a Swiss citizen, earlier began the International Red Cross.

Dunant wanted to grow crops for European tables in North Africa. He tried to get Napoleon III to help him, and found Napoleon at the War of Solforino.

That war resulted in 40,000 dead in 18 months--due to exposure, thirst, wounds and disease. Dunant, aghast, tried to help ease the suffering, tried to raise money to help both combatants and non-combatants, just out of his humanitarian responses. He wrote in 1854 a book about the horrors of this war, *Memory of Solforino*.

The book sold badly, but in 1862 Dunant and 4 Geneva businessmen formed an action plan to organize relief societies in time of peace, to help all people hurt in times of war. They needed a symbol for the 'safe zone' that would be needed. Hospitals then used a black flag--a color which did not encourage people to enter. Because Dunant was Swiss, they used a reversed Swiss flag, red on white.

So the *Red Cross emblem* has no religious significance. It is a square cross--though nevertheless Islamic nations used the Red Crescent; Persia used the Red Sun and Red Lion, and Israel uses the Red Star of David.

The first Geneva Convention was just 16 countries. As the number of symbols grew, the Red Cross grew concerned that if symbols multiplied, confusion [and nationalism] would result. So in 1940, "Persia" then having become Iran, and Israel not yet born, the *International Committee of the Red Cross* [ICRC], as the collective organizations were and are called, decided to limit the symbols to two only: the Red Cross and the Red Crescent. [International Red Cross and Red Cresent Day is May 8--Dunant's birthday]. So Israel, because of its use of a diffferent symbol, is not part of the IRC but abides by its rules [and is in the UN].

There are 5 parts to the IRC, Red Cross-Red Crescent: the ICRC, Geneva Conventions, Red Cross Societies, Red Cross Conferences, and the Federation.

GENEVA CONVENTIONS

The 1st Geneva Convention (1864) protects military personnel wounded in war, on land. The 2nd (1907) is similar, but concerns the wounded at sea. The 3rd (1929), with 143 articles, concerns treatment & prohibitions regarding POWs [prisoners of war]. The 4th Geneva Convention (1949)deals with civilians.

Two civil war Protocols (1977) exist: one dealing with international armed conflict and the other dealing with non-international armed conflict.

The Red Cross ONLY visits and gives humane treatment. The IRC does not report conditions, is almost secretive about what it does to gain access to prisonsers, the IRC lets others publicize facts; the IRC is not a police officer and may not make reports unless subpoenaed; and Amnesty International or the UN--but not the IRC--usually testifies, even at international tribunals.

Still IRC presence usually improves conditions.

Rules differ for 'occupying powers' and for 'liberating powers'. . .but the Geneva Convention's do not say who is to define these.

The United States signed the Conventions, and ratified the first, in 1882, but perhaps never will ratify all, in part because the Geneva Conventions prohibit 'child soldiers', with 'child' defined as under 18, but 17-year-olds serve in the U.S. military.

Who interprets the Conventions? International tribunals, but otherwise, they are like a 'gentlemen's agreement,' a 'Golden Rule.'

But a nation must agree to the Geneva Conventions to be in the UN: the CIRC is the only United Nations non-governmental organization. [Joe's note: Soroptimists International also claims U.N. NGO status]..

Each country has its own Society; each with its own special direction; these all meet at a Conference every 3-4 years. The IRC has over 100 million members worldwide. Henry Davidson [U.S.] proposed a Red Cross Federation, to do capacity-building, to help other countries build up, learn how to do CPR, keep water clean and safe, etc., and there is indeed a Red Cross Federation now.

Another reason for the Federation is that--though all ICRC members must be Swiss--there are not enough Swiss to do all IRC work worldwide.

Fairbanks judges installed

Randy Olsen

Winston Burbank

The Alaska Court System is pleased to announce the installations of Randy M. Olsen as Superior Court Judge and Winston S. Burbank as District Court Judge in the Fairbanks Trial Court.

Olsen has been an Alaska resident for 51 years. He is a graduate of Brigham Young University and has a law degree from J. Reuben Clark Law School at BYU. He has worked as an assistant attorney general in Fairbanks since 1982, specializing for the past 15 years in tort defense for the state. Before his service as an assistant AG, Olsen was assistant DA for Fairbanks. He and his wife, Jerri, have eight children and six grandchildren.

Burbank has been in private practice for the past 25 years, and served as a temporary District Court judge while Judge Jane Kauvar was on sabbatical leave. He has been semi-retired for the past five years, but before that was a partner in the Fairbanks firm of Call, Barrett and Burbank. The bulk of his practice was personal injury law for both plaintiffs and defendants. He has a bachelors degree from University of Nevada-Las Vegas and a law degree from Southwestern University School of Law. He and his wife, Glenda, have three children.

The installation will be held on Friday, June 20th, at 3:00 p.m. in Ceremonial Courtroom 304 at the Rabinowitz Courthouse. Chief Justice Dana Fabe will perform the swearing in. Other dignitaries planning to attend the ceremony are Fourth Judicial District Presiding Judge Niesje Steinkruger and Area Court Administrator Ron Woods. A reception will follow at 4:00 p.m. The public is welcome.

The American Russian Center at the University of Alaska Anchorage Presents:

an Overview of the Russian Criminal Justice System

Featuring Guest Legal professionals from Khabarovsk, Russia
Presentation & Discussion of
Russian Criminal Justice System
Tuesday, June 3, 2003
12:30 - 2.00 p.m.
University of Alaska Anchorage
Business Education Building, 2nd Floor, Room 207

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Breaking up is hard to do:

A brief summary of new congressional action to split the Ninth Circuit court

By Gregory S. Fisher

INTRODUCTION

It's hard to imagine a court more reviled or ridiculed than the Ninth Circuit. Perhaps the Warren Court excited more agitation in its heyday, but the passions it stirred have settled with time, and even its more provocative decisions are now accepted, if not firmly embraced, by mainstream America. The Ninth Circuit, in contrast, is dismissed by critics as a "dysfunctional" court that is "out-of-touch with American jurisprudence, common sense, and constitutional values."[2] As a result of its remarkable penchant for launching "bunker buster" opinions into the Nation's psyche, the court has been called an "ongoing spectacle,"[3] and its judges described as "ghoulish poster children for what is fundamentally dishonest about liberal judicial activism."[4]

I've been a student of the court for almost 12 years now which includes my years as a law student, time spent as a practicing member of the Bar, and a stint as a law clerk with a federal district judge in Alaska and, yes, the Ninth Circuit itself. In my personal and professional opinion, the Ninth Circuit is unfairly criticized. But I acknowledge my bias, and further concede that problems, real or perceived, do exist. And these problems have sparked yet another round of circuit re-organization proposals. On February 27, 2003, Representative Simpson (R. Idaho) introduced H.R. 1033 to split the Ninth Circuit. Senator Murkowski (R. Alaska) introduced a parallel initiative, S. 562, in the Senate on March 6, 2003.

The purpose of this article is to briefly summarize key features of these proposed Bills, along with arguments supporting and opposing a split, in the expectation that such a summary may prove useful to members of the Bar. I also review previous reorganization efforts in order to place the latest measures into historical perspective, and propose some less-drastic options to address perceived problems affecting the Ninth Circuit without requiring a circuit split. I imply neither support nor opposition for a split.

WHAT: KEY FEATURES

HR 1033 and S 562 are substantially similar, but not identical. They would create a new Twelfth Circuit composed of Alaska, Guam, Hawaii, Idaho, Montana, Oregon, Washington, and the Northern Mariana Islands with arguments principally heard in Seattle and Portland. In addition, under HR 1033, Arizona would shift to the Tenth Circuit, joining Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. S 562 places Arizona in the new Twelfth Circuit. The Ninth Circuit would shrink to two states, California and Nevada, under both measures.

Both HR 1033 and S 562 envision maintaining a comparable number of judges as are presently in the Ninth Circuit, but the Senate measure adds additional judges now while the House proposal increases the number of judges in 2005. The current Ninth Circuit is authorized 28 active circuit judges.[5] With Judge Bybee's recent confirmation, there are presently 25 active circuit judges and 21 senior circuit judges for a total of 46 judges.[6] HR 1033 provides a clean split by allocating 8 judges to the new Twelfth Circuit, and 20 to the new Ninth Circuit. HR 1033 also provides for additional judges commencing February 1, 2005. At that time, the Ninth Circuit will be allocated 5 new judges (to 25) and the Twelfth Circuit will add 2 judges (to 10). S 562 allocates 13 judges to the Twelfth Circuit, and 25 to the new Ninth Circuit.

These allocations are comparable to current staffing levels. States in the proposed Twelfth Circuit currently have 8 active judges (Judge O'Scannlain, Judge Trott, Judge T. Nelson, Judge Kleinfeld, Judge S.R. Thomas, Judge Graber, Judge Gould, and Judge Tallman),[7] and 5 senior judges (Judge Skopil, Judge Betty Fletcher, Judge Farris, Judge Beezer, and Judge Leavy).[8]

WHEN (DATE AND CONSEQUENCES)

Both HR 1033 and S 562 project an effective date of October 1, 2003. HR 1033 provides that judges in the Ninth Circuit outside Arizona as of the effective date would have the election of joining the new Twelfth Circuit or remaining with the Ninth. Those judges in Arizona (including Chief Judge Schroeder, Senior Judge Canby, Judge Hawkins, and Judge Silverman) would have the choice of moving to the Tenth Circuit or staying with the Ninth Circuit. HR 1033 provides that, for 10 years after October 1, 2003, the new Ninth Circuit and the Twelfth Circuit may meet in either court's jurisdiction.

An interesting wrinkle not addressed by either HR 1033 or S 562 is the circuit residency requirement. Currently, judges are required to be residents of a jurisdiction within their respective circuit.[9] If HR 1033 is enacted, four circuit judges in Arizona, including the Ninth Circuit's current Chief Judge, would (in theory) have to move if they wanted to stay in the Ninth Circuit. Presumably, further amendment would be required to account for any judges who elected to stay with the Ninth Circuit but who lived outside its newly configured borders.

In addition to the preceding, HR 1033 provides that cases submitted (that is, briefed, argued, and ready for decision) as of October 1, 2003 would not be affected. Similarly, petitions for panel rehearing or for rehearing en banc will be processed without regard for the Act. Appeals filed, but not submitted, in any of the states or territories of the new Twelfth Circuit, will be transferred to the Twelfth Circuit. Appeals filed from the District Arizona before October 1, 2003 will remain with the new Ninth Circuit regardless of whether they have been submitted or not. S 562 does not address what will happen with pending appeals on its effective date.

WHY: MOTIVES AND ARGUMENTS SUPPORTING AND OPPOSING A SPLIT

Efforts to split the Ninth Circuit are not new. Indeed, Congress has visited the issue with some regularity over the past thirty years.[10] Beginning with the Hruska Commission in 1972, Ninth Circuit Reorganization Acts have been studied or introduced in the House or Senate (or both) in 1972-73, 1983, 1989, 1991, 1993, 1995, 1996, 1997, 1999, and 2001.[11] Almost all sponsors and co-sponsors have come from states in the Pacific Northwest, principally but not exclusively, Washington, Oregon, Idaho, Montana, or Alaska.[12]

At one time, splitting the Ninth Circuit was perceived as solely (or primarily) a political maneuver to separate states in the Pacific Northwest from California.[13] It was widely assumed that the Ninth Circuit was dominated by liberal judges from California who were disconnected from political and social realities affecting people elsewhere.[14] More currently, proponents of a split usually identify size and efficiency as the primary factors that support breaking up the Ninth Circuit.[15]

OF THOSE WHO HAVE TAKEN PUBLIC POSITIONS SUPPORTING A SPLIT, THE PRIMARY REASON OFFERED IS THE CIRCUIT'S SIZE.

Of those who have taken public positions supporting a split, the primary reason offered is the circuit's size. According to recent statistics released by the Administrative Office, the Ninth Circuit's filings rose to 10,342 cases during the 12 month period ending September 30, 2001, an increase of 13.1% from the previous year.[16] No other circuit comes close. In addition, proponents observe that it is difficult for judges to keep abreast of intra-circuit developments and police errors given the number of filings with corresponding published opinions.[17] Some contend that this accounts for the high percentage of Ninth Circuit cases that are reversed by the United States Supreme Court.[18] These problems are further compounded by a limited en banc court of 11 judges necessitated by the Ninth Circuit's size.[19] For most circuits, an en banc court is composed of all active judges. In the Ninth Circuit, however, only 11 out of 25 active judges randomly selected hear cases en banc. Those supporting a split argue that the Ninth Circuit's limited en banc process makes it difficult for the circuit to identify and correct panel errors, and introduces a measure of arbitrariness into circuit-wide precedent because a minority of judges randomly selected are speaking for the full court.[20]

Opponents suggest that the current system, although admittedly not ideal, is not broken. The Ninth Circuit is current on its caseload and timely resolves pending disputes.[21] It is also noted that states in the Ninth Circuit share common interests and demographics, militating in favor of a uniform body of federal law.[22] For example, states in the Ninth Circuit share similar maritime, federal land management, natural resources, mining, and environmental concerns all implicating federal statutes or federal

Continued on page 10

A brief summary of action to split the Ninth Circuit

Continued from page 9

common law. Opponents also question the administrative costs associated with a split, and profess doubt whether reorganization will actually improve efficiency.[23]

Senator Murkowski's introductory comments merge the old and new, relying on both clear references to political motives and judicial efficiency as support for splitting the Ninth Circuit. The Pledge decision appears to have been the catalyst.[24] Decrying the Ninth Circuit's failure to take the case en banc, Senator Murkowski observed:

> The Pledge Decision rendered by the court is not an aberration. It is symptomatic of a court that has become dysfunctional and out-of-touch with American jurisprudence, common sense, and constitutional values. Unfortunately, citizens in the states that are within the Ninth Circuit's jurisdiction have had to contend with the court's idiosyncratic jurisprudence for decades.[25]

Senator Murkowski criticized the Ninth Circuit for its high reversal rate, noting that in "the last three years, one-third of all cases reversed by the Supreme Court came from the 9th Circuit. That's three times the number of reversals for the next nearest circuit. And 33 times higher than the reversal rate for the 10th Circuit." [26] She attributed the reversal rate, in chief part, to the circuit's size and its limited en banc process. Senator Murkowski remarked:

> In fact, some commentators believe a majority of the 24 members of the court may have disagreed with the Pledge decision, but were concerned that a random pick of 11 members of the Court to hear the case, en banc, *might* have resulted in the decision being affirmed. It is inconceivable to me that a circuit court would render a decision based on its concern about the potential makeup of an en banc panel. What kind of jurisprudence is that? Citizens in no other circuit face that type of coin-flip justice.[27]

Discussing motivations animating prior reorganization acts, Senator Murkowski stated:

> The uniqueness of the Northwest, and in particular, Alaska, cannot be overstated. An effective appellate process demands mastery of State law and State issues relative to the geographic land mass, population and native cultures that are unique to the relevant region. Presently, California is responsible for almost 50 percent of the appellate court's filings, which means that California judges and California judicial philosophy dominate judicial decisions on issues that are fundamentally unique to the Pacific Northwest. This need for greater regional representation is demonstrated by the fact that the East Coast is comprised of five Federal Circuits. A division of the Ninth Circuit will enable judges, lawyers and parties to master a more manageable and predictable universe of relevant case law.[28]

She concluded, "[a] new Twelfth Circuit, comprised of states of the Pacific Northwest, would respect the economic, historical, cultural and legal ties which philosophically unite this region."[29]

HOW LIKELY?: YOUR 20 CENT PREDICTIVE ANALYSIS

Regardless whether one favors or opposes a circuit split–and to emphasize, I take no position--it is probable that the latest measures will not succeed. The political subtext animating Senator Murkowski's proposal is apt to give some legislators doubts. Even those who favor a circuit split usually emphasize that the circuit should not be split just because of the way certain cases are decided.[30] To do so would threaten the judiciary's independence. Moreover, although proposals introduced in the past differ to some degree, there is little to distinguish the 2003 circuit split model from its predecessors. Past is prologue.

The California delegation will have a significant role in deciding whether to split the Ninth Circuit, and unless and until California's senators and representatives perceive a need to split the circuit, it will probably be difficult to get any such measure enacted. To the extent that the Ninth Circuit's purported liberal bias is believed to affect the court's deliberation, conservative members of the California delegation will be unlikely to sever California from the Northwest states where the perception is that more conservative judges reside. Liberal members of the California delegation will be unlikely to restrict the reach and influence of their favorite circuit.

Finally, I do not intend any criticism of Senator Murkowski, but she is a new senator with no seniority. Although we may expect that Senator Murkowski will develop into an excellent senator, it is a fair question to wonder whether she will or would have the political muscle at the present time to steer such a major project through Congress. Even assuming she has the political weight, or may bank on her father's name and goodwill, or successfully ride Senator Stevens' coattails, it would seem to be a difficult year to push through a re-organization act with Congressional attention focused on Iraq and a faltering economy.

WHAT OTHER OPTIONS EXIST TO ADDRESS PROBLEMS (REAL OR PERCEIVED)?

However, just because the political muscle may not yet exist to create a new Twelfth Circuit does not mean that problems do not exist (or are not perceived to exist) or that other potential options for correcting perceived problems should be ignored. The White Commission recommended dividing the Ninth Circuit into divisions, a sort of compromise split which failed to attract enough supporters to be enacted.[31] It therefore seems probable that intra-circuit divisions or circuit splits are unlikely to be accepted as solutions to perceived problems.

The difficulty in restructuring the Ninth Circuit does not mean that other less-drastic yet constructive solutions should be ignored. In the spirit of exploring other options, I offer a few ideas that, separately or collectively, could perhaps solve some of the administrative and substantive problems either affecting or *perceived* as affecting the Ninth Circuit. Some of these ideas are similar to previously suggested proposals; others I have not encountered in the sources I've reviewed, and frankly do not know whether they have ever been suggested or, if they have, what response they received. I freely acknowledge that all of these ideas may be criticized. But, if nothing else, they provide options for review and study even if they are ultimately rejected.

THE DIFFICULTY IN RESTRUCTURING THE NINTH CIRCUIT DOES NOT MEAN THAT OTHER LESS-DRASTIC YET CONSTRUCTIVE SOLUTIONS SHOULD BE IGNORED.

(1) ADOPT PERMANENT OR REGIONAL PANELS.

Currently, judges are randomly assigned to each panel for each calendar week of oral argument or screening. In theory, each 3 judge panel is composed of 3 different judges. In any given year, judges are assigned to approximately 8 argument calendars. This means that, throughout the year, judges are (in theory) sitting with different colleagues each of whom possesses his or her own judicial philosophy, work habits, skills, experiences, and personality quirks.

Random assignment may facilitate circuit-wide collegiality (as that term is correctly defined by Judge Kleinfeld).[32] However, the sheer number of potential panels that are randomly-selected makes it virtually impossible to predict with any degree of assurance just what the Ninth Circuit will do in any given case. One commentator cites sources establishing that there are over 3,000 potential panel compositions in the Ninth Circuit, not counting senior and visiting judges, while other representative circuits have less than 200 potential panels.[33] Predictability and stability are twin concepts deeply rooted in our common law tradition. As Judge Kleinfeld has previously noted, it is difficult to predict how the Ninth Circuit will analyze and resolve issues because of the number of potential panel compositions, and that number erodes stability by creating inconsistent decisions.

Moreover, in my experience, any team works most efficiently when its members know and are familiar with each other's work habits, personalities, skills, and experiences. I believe probably all or most states have fixed panels for their highest court of record.

If fixed panels were not adopted, thought should be given to composing panels by region along the lines recommended by the White Commission and others.[34] This would draw panels from pre-determined regional pools. For example, there could be a Northwest panel pool composed of judges from Alaska, Washington, Idaho, Oregon, and Montana, or a Southwest panel pool composed of circuit judges from Arizona, Nevada, and the Southern District of California.

Fixed or regional panels are not an assurance of judicial efficiency. But I believe fixed or regional panels are preferable to unlimited rotating panels particularly when the number of judges and panels results in thousands of potential panel compositions that may be randomly selected.

(2) ASSIGN JUDGES TO DOCKETS ADDRESSING CERTAIN SUBJECTS

Judges are expected to be general practitioners in an era of increasing specialization. One might question whether unfamiliarity with substantive law causes delay and increases error. Many state courts have assigned dockets that typically involve something as generalized as a "civil docket" or "criminal docket." All this means is that judges are assigned cases in that docket and no (or few) others.

I wonder whether it might be useful to explore assigning judges to a generalized docket; e.g., "civil," "criminal," or "administrative." Regular active judges would have first choice on a seniority basis. These docket assignments would not be permanent. Instead, such assignments would last for a pre-determined period of time–perhaps something like between 2 to 5 years–at which time judges could rotate out to different dockets.

(3) ABANDON THE PREFERENCE FOR ORAL ARGUMENT.

This would require amendment to the Federal Rules of Appellate Procedure, something that is beyond the Ninth Circuit's power. Nevertheless, I respectfully believe that it is an option warranting study. At present, there is a preference mandating oral argument unless the panel acts to submit a case on the briefs for certain reasons set forth in the rule.[35] The preference for oral argument is so strong that argument will be held if one judge

Continued on page 11

A brief summary of action to split the Ninth Circuit

Continued from page 10

on the panel deems oral argument necessary even if the parties stipulate to submit a case on the briefs.[36]

I recognize that the final arbiters of this issue must be the Article III judges who hear and decide each case. However, I respectfully question how useful oral argument can actually be for the parties or the court. Parties are only allotted 10 minutes per side for average appeals. In more complicated cases, parties may be allowed 20 minutes to argue. En banc cases are typically scheduled for 1 hour argument (30 minutes per side). If parties have had months to finalize their respective briefs, it is unlikely that 10 minutes of argument is apt to shed substantial light on the issues being reviewed. To the extent that the briefing is inadequate, or does not answer questions that one or more judges would like to have addressed, the court may direct the parties to file supplemental briefs.

I believe that relaxing the preference for oral argument would reduce the cost and time associated with week-long calendars especially for those judges traveling long distance to and from Pasadena and San Francisco. It would also save tax dollars. Government lawyers are often flying to California from Washington D.C. for a 10 minute oral argument in an Immigration case. I do not propose scrapping all oral argument. Instead, judges would remain free to order oral argument sua sponte, and parties could move for oral argument. Oral argument would thus be limited to those cases where it was truly needed, thereby (I believe) saving the court time and money. At a minimum, if the preference for oral argument is maintained, the court should consider scheduling telephonic oral argument.

(4) TACKLE BRIEFS AS THEY FALL RIPE.

Those who have attended the Ninth Circuit's Bench and Bar program in the past have heard different Judges discuss and describe how calendar weeks are structured. For those who have missed these sessions, all filing is currently maintained in San Francisco. Court personnel ship calendar material to outlying Chambers as calendar dates approach. This means that, for each calendar week, any given 3-judge panel is getting swamped with briefs and excerpts at around the same time that work on previous calendars is being finalized making it easier to miss arguments or facts, and making judges and law clerks more prone to fall into an assembly line frame of mind. By contrast, at the district court level, most judges tackle each motion or brief (in administrative appeals) as the matter falls ripe. There is little or no delay. In short, at the district court level, Judges judge–they manage their own dockets. At the appellate level, circuit judges have much less control over what cases they will hear and resolve, and when. Admittedly, the proposal I submit here would present administrative challenges as panels would have to be selected and tracked with each appeal that fell ripe. But it is at least open to question whether a consistent river of cases would not be easier to manage than the intermittent floods that currently hit Chambers every month or two.

(5) MINORITY EN BANC ACCEPTANCE.

At present, the Ninth Circuit employs a limited en banc court of 11 judges. But a majority of the regular active non-recused judges most vote to take a case en banc. As seen, a common criticism of the Ninth Circuit is that its size frustrates effective en banc review. It is too difficult to get cases re-heard en banc. I believe this could be addressed by slightly lowering the threshold needed to secure en banc review. Instead of requiring a majority of regular active non-recused judges to secure review, en banc review should be secured if 1/3 (rounded up) + 1 of the regular active non-recused judges voted in favor of review. By way of illustration, that would require 10 judges voting in favor of review with the current total of 25 active judges (1/3 of 25 is 8.3 [rounded up to 9] + 1 = 10). This is only 3 votes shy of the current requirement, but still represents a substantial number of judges supporting review. In my book, if 10 Article III judges see a problem with a particular case, that should be enough to justify further scrutiny. This formula could be revised or scrapped in favor of another–the only point is that there should be a way to secure en banc review when a substantial (if minority) number of active circuit judges wish to rehear a case. There is existing support for a rule providing for discretionary review on minority vote. The United States Supreme Court only requires 4 votes to grant a writ of certiorari.[37]

REGARDLESS OF WHETHER ONE SUPPORTS OR OPPOSES A CIRCUIT SPLIT, I BELIEVE THE COURT WOULD WELCOME, AND BE WELL-SERVED BY, COMMENTS FROM MEMBERS OF THE PRACTICING BAR.

STATUS: WHERE CAN YOU GET ADDITIONAL INFORMATION?

Again, I fully appreciate that one, some, or all of these ideas could be criticized for any number of reasons. But, given that efforts at radical surgery have failed, and that problems are perceived to affect the Ninth Circuit's operations, it may be time to aggressively look for less drastic forms of treatment.

As of the time this article is being submitted, both HR 1033 and S 562 have been referred to committees. Those interested in registering support or opposition may contact sponsors or co-sponsors. HR 1033 was introduced by Representative Simpson, and is currently co-sponsored by Representatives Walden, Nethercutt, Otter, and Hastings. Representative Simpson's general contact information is noted below.[38] Senator Murkowski introduced S. 562, and this measure is currently co-sponsored by Senators Stevens, Burns, Craig, Crapo, Inhofe, and Smith. Senator Murkowski's general contact information is noted below.[39] The Library of Congress' website may be used to track legislative history (http//:thomas.loc.gov).

CONCLUSION

My object in submitting this article was to briefly review key features of proposed measures to split the Ninth Circuit, along with arguments supporting and opposing a split, in the expectation that such a summary may prove useful to members of the Bar. Regardless of whether one supports or opposes a circuit split, I believe the court would welcome, and be well-served by, comments from members of the practicing Bar. I encourage my colleagues to submit their views to Senator Murkowski and Representative Simpson.

Footnotes

[1].J.D., University of Washington (1991); B.A., with honors, State University of New York, Binghamton (1988). I welcome criticism, constructive or otherwise. Comments may be directed to me at Jaburg & Wilk, P.C., 3200 North Central Avenue, Suite 2000, Phoenix, Arizona 85012 [tel: (602) 248-1000; e-mail: gsf@jaburgwilk.coml. I am a former law clerk to the Honorable Barry G. Silverman, United States Court of Appeals Ninth Circuit, whose Chambers are in Phoenix, Arizona, and to the Honorable John W. Sedwick, Chief Judge United States District Court, Alaska. This article reflects my views, and not necessarily those of the Ninth Circuit or any Circuit or District Judge in the Ninth Circuit. Although my experiences as a district court and Ninth Circuit law clerk have necessarily shaped my views of court processes and procedures, no confidential information is disclosed in this article. Any mistakes are mine alone.

[2].*See* Introductory remarks of Senator Lisa Murkowski, 149 Cong. Rec. S325-01, S3319 (March 6, 2003).

[3]."In Zeus We Trust, Cont.," Wall Street Journal (March 3, 2003).

[4].Mark Q. Rhoads, "Outside View: God Bless the 9th Circuit," UPI National Desk (March 29, 2003).

[5].28 U.S.C. § 44(a).

[6].*See* http://www.ce9.uscourts.gov ("Court of Appeals Active and Senior Judges" table) (last visited April 8, 2003).

[7].Although the Ninth Circuit's public website reflects that Judge McKeown's resident Chambers are located in Seattle, she now maintains Chambers in San Diego.

[8].Judge Goodwin is from Oregon, but maintains Chambers in Pasadena, California.

[9].*See* 28 U.S.C. § 44(c).

[10].For an informative summary of reorganization history, please *see* Sanford Svetcov and Janelle Kellman, "The 'No Split' Split of the Ninth Circuit–The End of the World as We Know it?," 15 J. L. & Pol. 495 (1999).

[11].For brief but comprehensive summaries of Congressional action, please *see* Jennifer E. Spreng, "The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split," 73 Wash. L. Rev. 875, 876-79, 885-93 (1998); Senator Conrad Burns, "Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue," 57 Mont. L. Rev. 245, 247-50 (1996).

[12].*See* Jennifer E. Spreng, "Three Divisions in One Circuit? A Critique of the Recommendations from the Commission on Structural Alternatives for the Federal Courts of Appeals," 35 Idaho L. Rev. 553, 559-60 (1999).

[13].*See* Alan B. Rabkin and George M. Duff, "The Fracture of the Ninth," 6 Nevada Lawyer 14, 15, 17 (July 1998).

[14].*See* Aaron H. Caplan, "Malthus and the Court of Appeals: Another Former Clerk Looks at the Proposed Ninth Circuit Split," 73 Wash. L. Rev. 957, 979-81, 984-85 (1998) (arguing against a split of the Ninth Circuit).

[15].*See* Greg Mitchell, "It's Time to Split the Circuit," The Recorder (March 21, 2003). Judge O'Scannlain recently granted Howard Bashman an interview in which he echoed similar concerns. *See* http://20q-appellateblog.blogspot.com (March 3, 2003) (last visited April 8, 2003).

[16].*See* http://www.uscourts.gov/cgi-bin/cmsa2001.pl (last visited March 8, 2003).

[17].*See, e.g.*, Testimony of Judge Andrew Kleinfeld before the Senate Judiciary Committee on July 16, 1999. Judge Kleinfeld's testimony may be accessed at the Ninth Circuit's website, http://www.ce9.uscourts.gov ("Court Restructuring Issues") (last visited April 8, 2003). I should clarify that I cite Judge Kleinfeld's testimony as representative of general concerns sometimes voiced by circuit split proponents. I do not know, and do not intend to imply, whether or not Judge Kleinfeld has any opinion concerning the new circuit reorganization acts that are the subject of this article.

[18].*See* Senator Conrad Burns, "Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue," 57 Mont. L. Rev. 245, 252 (1996).

[19].*Id.*

[20].*Id.*

[21].*See, e.g.*, Testimony of Chief Judge Procter Hug, Jr. before the Senate Judiciary Committee on July 16, 1999. Judge Hug's testimony may be accessed at the Ninth Circuit's website, http://www.ce9.uscourts.gov ("Court Restructuring Issues") (last visited April 8, 2003). I cite Judge Hug's testimony as representative of general concerns sometimes expressed by those opposing a circuit split. I do not know, and do not intend to imply, whether or not Judge Hug has any opinion concerning the new circuit reorganization acts that are the subject of this article.

[22].*See id.*

[23].*Id.; see also* Rabkin and Duff, *supra* note 12 at 16-17.

[24].*See Newdow v. U.S. Congress*, 321 F.3d 772 (9th Cir. 2003).

[25].*See* 149 Cong. Rec. S325-01, S3319 (March 6, 2003). Senator Murkowski's remarks may also be accessed at 2003 WL 832170 (Cong. Rec.).

[26].*Id.*

[27].*Id.* at S3319-20.

[28].*Id.* at S3320.

[29].*Id.*

[30].*See, e.g.*, Judge O'Scannlain's interview with Howard Bashman cited *supra* note 14.

[31].For comprehensive reviews of the White Commission and its recommendations, please *see* Spreng, *supra* note 11, and Svtecov and Kellman, *supra* note 9.

[32].*See* Judge Kleinfeld's testimony, *supra* note 16. Judge Kleinfeld instructs:

> The word "collegiality" in its traditional meaning is critical to the en banc process. The word is sometimes used in contemporary speech to mean some combination of civility and bonhomie. That is not its dictionary definition. The traditional definition is "shared authority among colleagues." The word is derived from "the doctrine that bishops collectively share collegiate authority." Because we do not rehear cases as a full court, we cannot assure that our decisions represent shared authority among all our colleagues.

Id.

[33].*See* Spreng, *supra* note 11 at 564 n.73.

[34].*See* Svetcov and Kellman, *supra* note 9 at 507, 511-12 (for discussion).

[35].*See* Fed. R. App. P. 34(a)(2). Reasons for submitting cases on the briefs include that " appeal is frivolous. . .the dispositive issue or issues have been authoritatively decided" or the facts and law have been adequately briefed and oral argument would not assist the court. *Id.*

[36].*See* Fed. R. Civ. P. 34(f). The Circuit Advisory Committee Note provides, "Oral argument will not be vacated if any judge on the panel desires that a case be heard."

[37].*See* Remarks by Chief Justice Rehnquist, Lecture at the Faculty of Law of the University of Guanajuato, Mexico, September 27, 2001 (discussing operations and procedures of the United States Supreme Court), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_09-27-01.html (last visited April 12, 2003).

[38].Representative Simpson's website is http://www.house.gov/simpson/ (last visited April 8, 2003). His office phone number in Washington D.C. is (202) 225-5531. His Boise office telephone number is (208) 334-1953. His mailing address is 1339 Longworth, Washington D.C. 20515.

[39].Senator Murkowski's website is http://murkowski.senate.gov/ (last visited April 8, 2003). Her office phone number in Washington D.C. is (202) 224-6665. Her regional office phone numbers are (907) 271-3735 (Anchorage) and (907) 456-0233 (Fairbanks). Senator Murkowski's mailing address is 322 Hart Senate Office Building, Washington D.C. 20510.

Law Day 2003 focuses on judicial independence

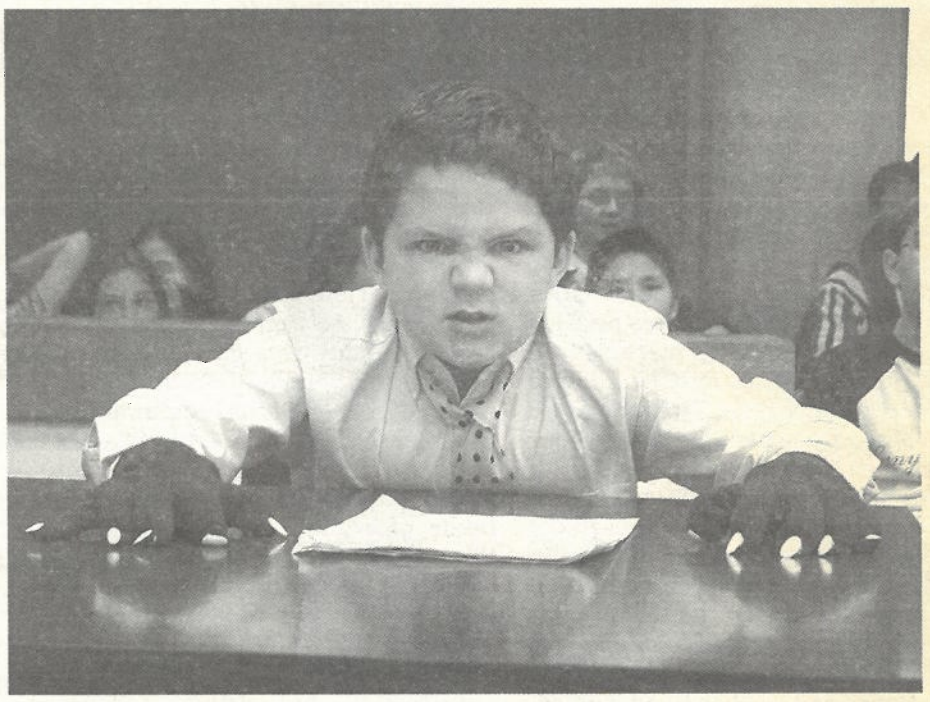
The Alaska Court System and the Alaska Bar Association once again joined forces this year to sponsor Law Day, which embraced the theme "Celebrate Your Freedom: Independent Courts Protect Your Liberties." Judicial officers across Alaska set aside at least part of May Ist to make presentations in schools or conduct tours and mock trials at courthouses. Many attorneys also volunteered to participate in a wide range of creative activities designed to foster better understanding about the role of courts in the American system of justice. In Bethel, the court summoned several high school classes to the courthouse for jury duty, and in Anchorage, Judge John Reese and retired Judge Rene Gonzalez teamed with Assistant D.A. Ben Hofmeister to conduct a mock trial for elementary students—entirely in Spanish.

Justice Walter Carpeneti presents an award to Stephanie Joyce of Juneau Youth Court for her winning entry in the Law Day poster contest "Liberty is a 3-Way Street: The Importance of Judicial Independence

In addition to outreach at schools, many courts sponsored events for the public, such as open houses and educational programs. The Barrow court developed a "Quiz-O-Rama" to test visitors' knowledge about the role of independent courts. In Juneau, Judge Larry Weeks coordinated a panel on Alaska's Constitutional Convention that featured several original delegates and focused on the judiciary article and the history of merit selection in Alaska. The program was well attended and broadcast live statewide on Gavel to Gavel. Other events with statewide impact included an appearance by Chief Justice Dana Fabe on "Talk of Alaska," the statewide call-in show on public radio; and a TV presentation by Justice Walter Carpeneti on sentencing issues, which also aired statewide on Gavel to Gavel.

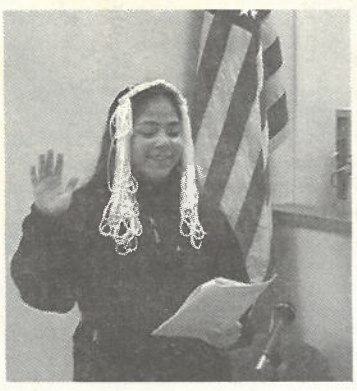
This year's Law Day activities again featured visual backdrops—two photo-text exhibits on the theme of judicial independence. The first, created by Alaska's Youth Courts, is entitled "Liberty is a 3-Way Street: The Importance of Judicial Independence." Youth Court members statewide submitted photos and short essays to the exhibit as part of a contest, and four award winners were selected statewide: Peter Bradley of Anchorage Youth Court, Weston Eiler and Stephanie Joyce of Juneau Youth Court, and Sarah Jones of Mat-Su Youth Court. The second exhibit, created by the court system, features Alaskan judges, lawyers and historical figures, and their views on judicial independence, and is named after this year's Law Day theme: "Celebrate Your Freedom: Independent Courts Protect Our Liberties." Both exhibits are on display at courthouses, schools and community centers across Alaska throughout May, and many will remain on display throughout the year.

Enthusiasm continues to build for this annual celebration of our legal system, and participation is growing. If you have comments or suggestions about Law Day 2003, or would like information about how to participate in this or other educational outreach opportunities, please contact Barbara Hood, ACS Law Day Coordinator, at 264-8230 (bhood@courts.state.ak.us).



"The Wolf (aka Samuel Wright, Dillingham 4th grader) protests his innocence after being convicted of eating the Three Little Pigs at the Dillingham courthouse. Superior Court Judge Fred Torrisi presided over the mock trial, which was presented by Samuel's class. Photo by Craig Dirkes, courtesy of The Bristol Bay Times.

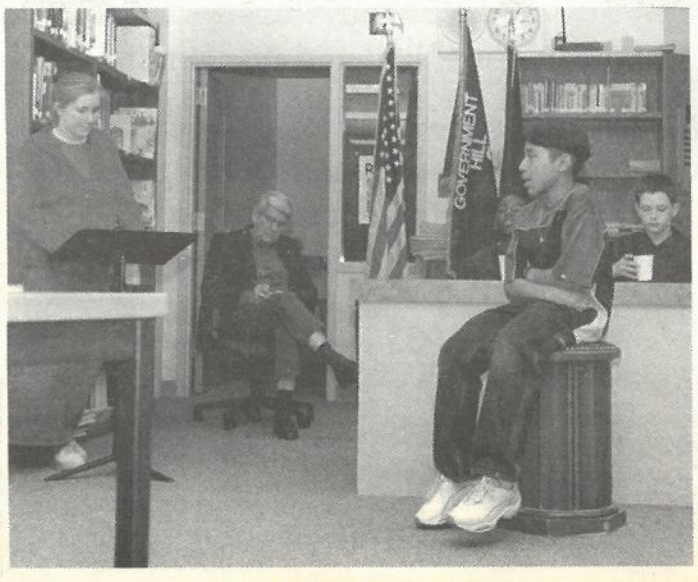
The Sitka High School Drama Club presented the trial of Cinderella v. Estate of Padre Mia Tremaine to a courtroom full of elementary students. Here, Cinderella's wicked stepmother and stepsisters prepare to present their defense.



Goldilocks swears to tell the whole truth in a Kotzebue courtroom. The Kotzebue court also sponsored a Law Day Coloring Contest.

Members of the Young Lawyers Division of the Anchorage Bar Association presented a workshop at the Anchorage Law Day Academy entitled So You Want to be a Lawyer? Careers in Justice. Participants included, L-R: Brendan Murphy, Amy Doogan, Kara Nyquist, Michelle Meshke, Michael Shaffer, and David Gross.

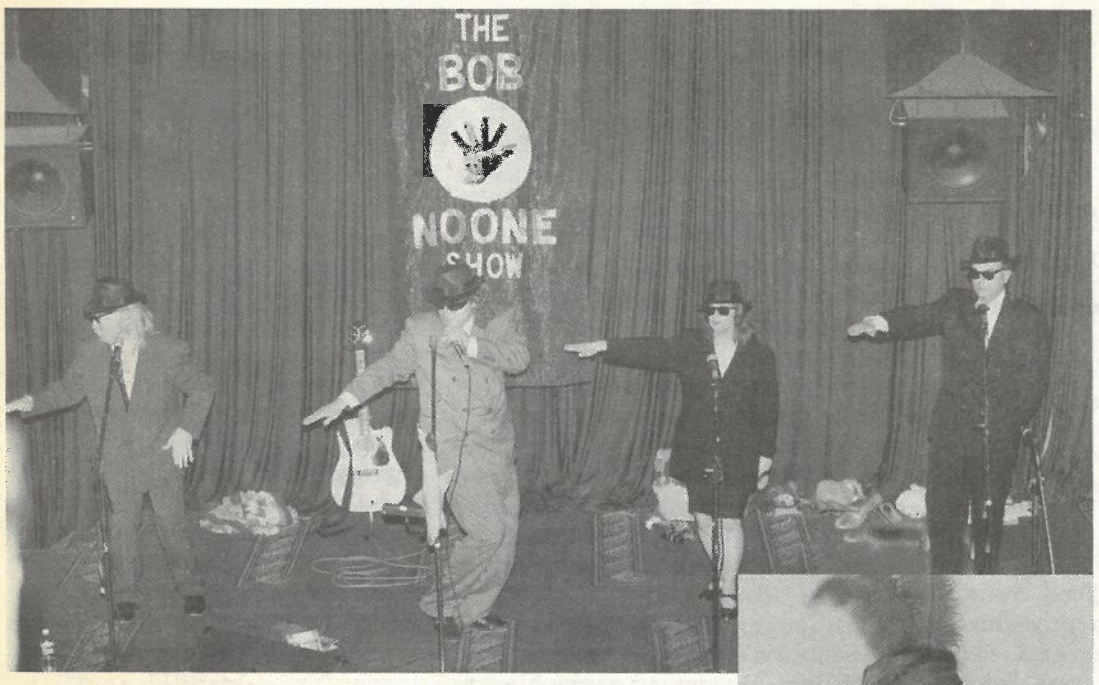
Chief Justice Fabe, center, presents awards and certificates to the four members of Anchorage Youth Court who participated in the Law Day poster contest, "Liberty is a 3-Way Street: The Importance of Judicial Independence." L-R: Peter Bradley, Award Winner; Kalyn Brewer; Chief Justice Fabe; Ki Jung Lee; and Breena Apgar-Kurtz.



Left: Retired Judge Rene Gonzalez coaches students at Government Hill Elementary School in Anchorage as they conduct a mock trial in Spanish. Photo by Judge Reese.

L-R: Judge Sig Murphy, Carmen Clark and Assistant District Attorney John Bandle, along with Judge Stephanie Rhoades, presented a panel at the Anchorage Law Day Academy entitled "So You Don't Want to be a Defendant? Minors, Alcohol and the Law in Alaska." Over 70 high school students and adults attended the session in the supreme court courtroom.

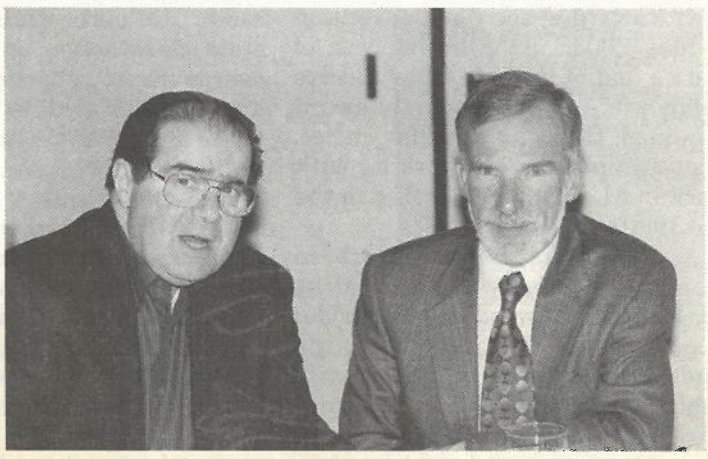
2003 CONVENTION HIGHLIGHTS



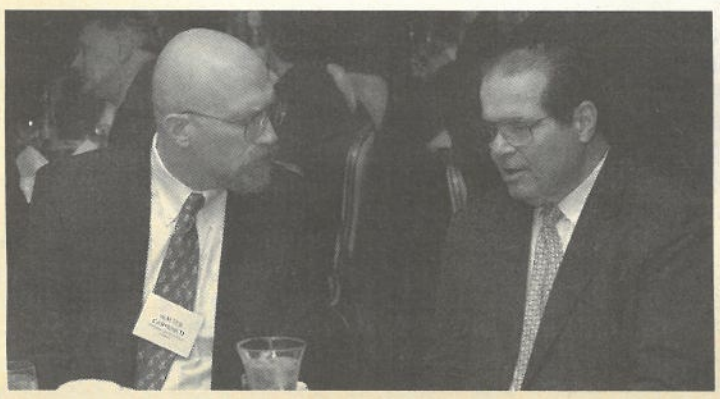
Bob Noone and the Well Hung Jury. Photo by John Reese

U.S. Supreme Court Justice Antonin Scalia and Judge Kleinfeld at banquet reception.

Milli Link reprises her Palace Saloon role for the judges' session.

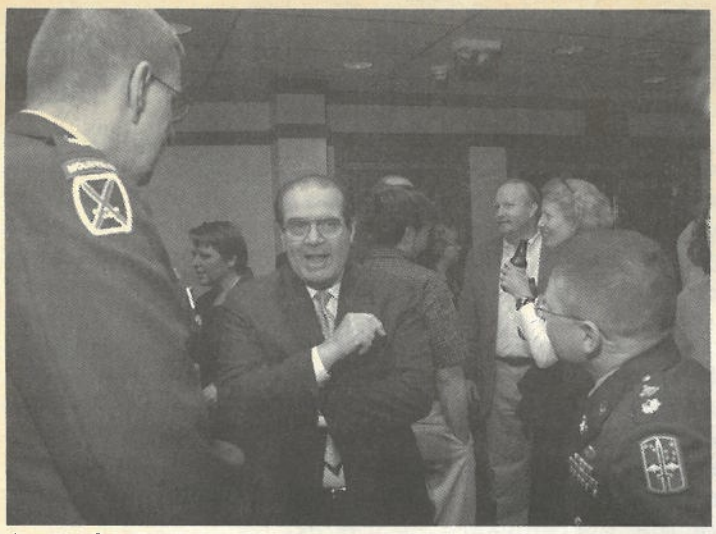


L-R: Justice Scalia and Alaska federal district court Chief Judge John Sedwick. Photo by John Reese



Justice Carpeneti and Justice Scalia at awards banquet.

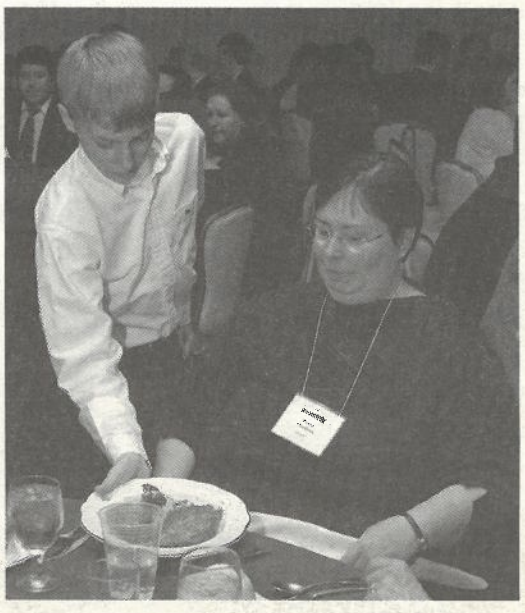
L-R: Judge Elaine Andrews, Chief Justice Dana Fabe, Linda Wilson and Brad Owens. Photo by John Reese



Justice Scalia chats with representatives from the military Judge Advocate's office at banquet reception.

Photos by Kevin L. Bishop

Members of the Fairbanks Youth Court pose with Justice Scalia after serving the banquet.



A Fairbanks Youth Court member serves Juneau attorney Terry Thurbon her meal.

ALSC President's Report

Five stars

☐ Vance Sanders & Andy Harrington

In early May 2003, I concluded my last ALSC meeting as Board President. In my final column, I wanted to talk about five stars – not the "five stars" that are awarded in one of those obnoxious American TV shows, but five of our fellow Alaskan attorneys who, in my humble view, deserve special recognition.

MARK REGAN

Mark was awarded the first Rabinowitz award at the Bar Convention in May 2003. As a friend both of Mark's and of the late Chief Justice Rabinowitz, in whose honor the award is named, this was a stellar choice. I had the pleasure of working with Mark in ALSC's Juneau office in the late 1980's and early 1990's.

As Fairbanks attorney Barbara Schuhmann noted while presenting Mark with the award, most Alaskan attorneys are familiar with the landmark career of Chief Justice Rabinowitz. Educated at Syracuse University and Harvard Law School, Jay Rabinowitz accepted a job as law clerk to U.S. Territorial Court Judge Vernon Forbes in Fairbanks in 1957. He went on to serve as Assistant U.S. attorney in territorial Fairbanks, then as chief of the Alaska Department of Law's Civil Division. At age 33, he was appointed to the Fairbanks Superior Court by Governor Bill Egan, and five years later, he was appointed to the Alaska Supreme Court, upon which he served for more than three decades, writing more than 1200 opinions including almost 200 dissents. After retirement in 1997, his truly unquenchable thirst for justice led him to continue to serve the State of Alaska as a pro tem trial judge in Juneau until his death in 2001. In 1980, the Anchorage Daily News recognized Justice Rabinowitz's extraordinary contributions to the state and the nation when he was named ADN's 'Citizen of the Decade.' The developing law of our young state could not have been in better hands during its infancy.

One of the many bright young clerks Justice Rabinowitz brought to Alaska (actually in this case, brought back to Alaska) was Mark Regan. A *magna cum laude* 1983 graduate of Harvard Law School (Justice Rabinowitz's own alma mater), Mark worked for Justice Rabinowitz himself in a one-year judicial clerkship in Fairbanks in 1983-84.

Afterwards, Mark began work for Alaska Legal Services Corporation in its northernmost office in Barrow. Despite the fact that he was the lone attorney in that office (which prior to his arrival had been staffed by as many as three attorneys), and was maintaining a day-to-day caseload of general service cases, he also found time to work on larger issues with statewide impact, including the highly complex interplay between ANCSA Village Corporation land distributions and public assistance programs.

After three years in Barrow, in 1987 Mark transferred to ALSC's Anchorage office to offer some badly-needed work exclusively on Alaska Native Allotment cases for a few months. He then transferred again, to ALSC's Juneau office, where he undertook a general caseload from 1987 to 1991, and again combined the day-to-day service cases with work on larger cases. He successfully concluded a state class action on Food Stamps overpayment collection procedures, and co-counseled in several cases dealing with hunting and fishing rights and Indian clan property.

Taking a breather from ALSC for a while, Mark worked for the State of Alaska as a temporary Assistant Attorney General working on child-in-need and juvenile delinquency cases from 1991-1992. He then spent several months as a contract attorney with Sonosky, Chambers, Sachse, Miller and Munson in Juneau, working on that decade's reapportionment case.

Later in 1992, Mark returned to the area of poverty law, but on a national level, working for the National Health Law Program from 1992 to 1996. He acted as a consultant to legal services programs throughout the country on Medicaid and related issues, becoming a nationally-recognized expert.

When Mark returned to Alaska in 1996, ALSC was undergoing a funding crisis, which involved the closing of several bush offices. Mark offered to return to work for ALSC in Juneau, and when it developed that there was not enough money to pay him at the salary level for which his experience more than qualified him, he selflessly offered to accept a lower-than-scale salary while ALSC worked through its fiscal woes. He again combined general service cases with outstanding work on statewide issues; his litigation acumen included *Pacana v. CSED*, 941 P.2d 1263 (Alaska 1997); *Jordan v. Jordan*, 983 P.2d 738 (Alaska 1999); co-counseling in *John v. Baker*, 982 P.2d 738 (Alaska 1999) and *John v. Baker (II)*, 30 P.3d 68 (Alaska 2001); *Willis v. CSED*, 992 P.2d 581 (Alaska 1999); and *Chilton-Wren v. Olds*, 1 P.3d 693 (Alaska 2000). Also, as one of ALSC's experts (and nationally-recognized experts at that), he contributed to numerous other ALSC briefs on which his name does not appear.

During this latter stint in Juneau, Mark visited as often as he could with the still-active Justice Rabinowitz, then living (and still working!) in Juneau until shortly before his passing.

Mark became the supervising attorney in Juneau in 1999. However, the administrative aspects of the position were less satisfying for him than the case work, and when ALSC found itself in need of a staff attorney in Bethel, Mark again offered to make the transfer to help Alaskans in yet another part of the State. He moved to Bethel in April 2003, where he currently lives and works for ALSC.

It is also noteworthy that Mark is one of the largest single contributors to the Robert Hickerson Partners in Justice campaign. Through a very generous salary withholding, Mark has contributed over $10,000 to this year's (2002-03) campaign.

It is difficult to quantify in this chronology the magnitude of Mark's contributions to the indigent citizens of Alaska. He has an amazing intellect for legal analysis and the esoterica of the law; he frequently asks of colleagues such questions as "did anyone else happen to catch the item on page 16358 of the Federal Register last week?" (which, of course, none has).

Mark has also been an active participant in statewide and local bar activities. He served as Treasurer of the Juneau Bar Association in 1998-99, and as Secretary in 1999-2000. He worked on the ICWA Advisory Committee to the Children's Rules Committee in 1986-87, and on the Children's Rules Committee from 1987-1992. He also sat on the Alaska Medicaid Rate Committee from 1987 to 1990.

On a personal note, my son Logan is Mark's Godson. Rachel and I could not have chosen a better model of humility and service to others than Mark.

Born and raised in Alaska, Mark would be an outstanding member of the Bar in any state in which he chose to practice; it is Alaska's good fortune that he has chosen to return here and put his passion and considerable skill to work for Alaska's poor.

Justice Rabinowitz would have been very proud. As are we.

CHRISTINE MCLEOD PATE

The Robert Hickerson award was given to Christine McLeod Pate of Sitka, presented by outgoing Bar President Lori Bodwell of Fairbanks.

It was my honor to know and work closely with Robert during his years as ALSC's Executive Director; initially he supervised me while I worked for ALSC in Juneau, and subsequently I served on the ALSC Board. My respect for Robert and his dedication to equal justice knows no bounds – as is the case for everyone else who knew him. He came to Alaska in 1981 to serve as ALSC's Chief Counsel, shortly thereafter becoming its Executive Director. Best known for his forceful advocacy on behalf of Alaska's poor, he was chiefly responsible for bringing the Native American Rights Fund office to Alaska in the 1980s. He developed ALSC into such a leading Native Law program that the National Legal Aid and Defender Association (NLADA) created a national award, the Pierce-Hickerson Award, specifically honoring Native law advocacy. Robert loved the outdoors and was an avid runner and cross-country skier. His untimely demise in 2001 left us all bereft.

Christine, currently the Pro Bono Mentoring Attorney for the Alaska Network on Domestic Violence and Sexual Assault (ANDVSA), was exactly the type of attorney Robert liked to work for ALSC. She's a member of the Bar Association's Pro Bono Service Committee and on the Board of Directors of Alaska Pro Bono Program Inc. She has been extremely effective in pushing the pro bono effort forward in Alaska, and bringing much-needed attention to the role lawyers should be playing in preventing and remedying domestic violence.

Before going to work for ANDSVA, she was the Executive Director of the women's shelter in Sitka (SAFV). And before that, she worked as a staff attorney in ALSC's Fairbanks office, from September 1994 to December 1996. This was a particularly harrowing time to be an ALSC attorney, as the program had to close several offices and understaff the remaining offices. During this time, she was supervised by Andy Harrington, who presently serves as ALSC's Exective director (more about him below). Accompanied by the ALSC supervising attorneys currently working under his supervision, at the Bar Convention Andy addressed the Board of Governors on giving this award to Christine and touched on the point of how difficult it must have been for Christine while under his supervision. (I understand there were sympathetic sighs and emphatically nodding heads from that quadrant. Just kidding, Andy.)

Prior to her stint with ALSC in Fairbanks, she worked as a law clerk and deputy magistrate judge for Judge Zervos in Sitka in 1993-94. She graduated from NYU School of Law cum laude in 1993. During law school, Christine worked in the spring of 1991 for the Battered Women's Legal Services in New York, and in the summer of 1991 as a clerk for ALSC's Juneau office (with Mark Regan and me). She was one of only ten NYU students selected to work in a clinic representing parents in termination proceedings in 1992-93, for Washington Square Legal Services.

She just last month completed the fifth annual in a series of highly successful CLEs on the impact of domestic violence on the practice of law, and in so doing has brought several nationally noted experts to Alaska to speak.

Her career, both before and after leaving ALSC, has been exemplary for its public service and its emphasis both on the pro bono dimension of practicing law in Alaska and on the efficacy of the law as a shield to protect battered victims.

There's a picture from my days at ALSC, of myself, Mark Regan, and Christine, each struggling to carry some ungainly pile of documents that related to a large brief we had just filed. Although I don't remember the precise issue, I will always treasure my time working with Mark Regan and Christine Pate in the same office, while being supervised by Robert Hickerson. Oh, to be so lucky.

MIKE GERSHEL

Several pro bono awards were distributed at the business luncheon by Chief Justice Fabe, whose own support for pro bono work has been stellar.

One of the lifetime achievement awards went to an attorney who has in fact worked part-time for ALSC for several years and additionally maintained a private practice: Mike Gershel of Anchorage.

Mike had joined ALSC in 1985, and immediately showed a tremendous aptitude for working in that most challenging of areas: domestic relations. He administered a municipal domestic violence project for ALSC, and conducted DV training sessions for law enforcement personnel and several shelter programs. He produced a vast collection of statewide staff training materials and form templates. He prepared the yearly family law updates for the Alaska Bar Association Family Law Section for years, and everyone started looking forward to his concise, sometimes sharp but always humorous, analysis. He represented more women in Alaska domestic violence proceedings than

Continued on page 15

Five stars

Continued from page 14

any other attorney in the State.

But he didn't allow his specialty in this area to limit him. He's also one of the program's most proficient practitioners in Medicaid-Qualifying Trusts, Native allotments, Social Security, and other cases in a variety of areas. His appellate work has been most impressive.

Mike became the supervising attorney for ALSC's Anchorage office in the mid-1990s. But the same budget crunch that led Mark Regan to accept an under-scale salary to come back to Juneau hit the Anchorage office hard as well. Mike, in an act of outstanding selflessness, offered to sacrifice his own position to save others in the program from losing their jobs; he stepped down as supervising attorney, cut back his hours to part-time, and opened his private practice.

This didn't detract from his dedication to ALSC's mission; in fact, in his private practice, he wound up taking on a large amount of pro bono work. This award was given to him in recognition of the fact that he had donated significant amounts of time to all four of Alaska's pro bono programs – ALSC's Volunteer Attorney Support, the Alaska Pro Bono Program Inc., the Alaska Network on Domestic Violence and Sexual Assault Pro Bono Mentoring Project, and Catholic Social Services' Immigration and Refugee Services Project.

I don't want to short-shrift the other fine attorneys who won pro bono awards; the annual individual award went to Jim Kentch of Anchorage, and the annual firm award was a tie between Clapp, Peterson and Stowers (Anchorage/Fairbanks) and Niewohner and Associates (Fairbanks). Besides the lifetime pro bono achievement award to Mike Gershel, another lifetime pro bono achievement award was given to Faulkner Banfield of Juneau, for its long-term (and much appreciated) commitment to pro bono work. These are all terrific attorneys who do our state, our Bar Association, and our profession, proud. So, Mike, who has announced that he will be leaving ALSC as of the end of this month, is among an elite group of pro bono all-stars, and he will be sorely missed at ALSC.

ANDY HARRINGTON

Andy Harrington graduated from Harvard in the late 1970's. Since then, with the exception of a couple of years working for Charles Cole, Andy has selflessly devoted his time and considerable talent to public service. He joined ALSC as a staff attorney in 1982. In 1996, he became the supervising attorney of the Fairbanks office, and became Executive Director of the program in 2002. Andy has also served as adjunct professor in the Paralegal Studies program at the University of Alaska, Tanana Valley Campus, and as a presenter at numerous Alaska Bar Association CLE's on elderlaw, family law, domestic violence, and Alaska Native law.

During his career with ALSC, Andy has been a leading force in the advancement of Native rights in Alaska, including serving as lead counsel in *John v. Baker*, 982 P.2d 738 (Alaska 1999) and *John v. Baker (II)*, 30 P.3d 68 (Alaska 2001), as well as numerous other federal and tribal court matters.

By example and commitment, Andy's distinguished career of public service is a shining example to us all.

GREG RAZO

Greg Razo of Kodiak wasn't at the Bar Convention, but I nominate him for the Vance Sanders Everlasting Gratitude Award, for his willingness to serve as ALSC's President this coming year.

ALSC's Board members work very hard and put in a lot of extra time for the agency (such as Art Peterson, who has served, without compensation, as an ALSC Board member for 29 years – a remarkable accomplishment), and although the staff realizes and appreciates this, I don't think the Board members get enough public acclaim and recognition for their endeavors.

Greg is a great example. Low-key and level-headed, he brings a common-sense approach and good humor to our meetings that are both essential to both the Board and the agency itself.

Greg was born and reared in Alaska, and did some studying in UAA's Master of Public Administration program before going to law school at Willamette, where he graduated in 1984. He clerked for Judge Roy Madsen in Kodiak, then worked as an Assistant D.A. and Assistant A.G. in Kodiak for about three years before going into private practice in Kodiak, where he is currently a partner in Cole and Razo.

He's truly a Renaissance man, interested in sport fishing, hunting, gardening, reading, theater, and singing. He's been on ALSC's Board since 1990 and has taken pro bono cases, and served on the Alaska Pro Bono Program Inc. Board during some its infancy, but that's only the beginning. He's been a member of the Kodiak Borough Assembly, he's currently on the CIRI Board of Directors. He's been a member of the Kodiak Alutiq Museum Personnel Committee, the Kodiak Arts Council Board of Trustees, a Little League T-Ball Coach, a member of the Kodiak Repertory Theatre and Kodiak Community Choir, a past member of the Kodiak Women's Resource and Crisis Center Board of Directors, and a past member of the Kodiak Public Library Association Board, plus appearing in "The King and I," "Jesus Christ Superstar," "Much Ado About Nothing," "South Pacific," "Fiddler on the Roof," "My Fair Lady," and "Hello Dolly."

I don't know how he finds the time for all that, but he also puts a priority on spending time with his wife Niki, son Jack, and daughter Mollie.

We were worried we might lose him for a little while earlier this year when some medical problems laid him low for a little while, but he came back from those with the same determination he brings to all his tasks, and at this point he's back and better than ever.

I know how challenging it can be to preside over ALSC during these times of rapid change and new challenges, but I also know that there are very few people as well-equipped to handle that as Greg is. I'm not stepping down from the Board, and I look forward to a good year under Greg's leadership.

Alaska has a lot of attorneys to be proud of – and Mark Regan, Christine McLeod Pate, Mike Gershel, Andy Harrington, and Greg Razo are five of the best!

THANK YOU!!

The **Alaska Court System** and the **Alaska Bar Association** would like to thank the following people who helped make

LAW DAY 2003

a statewide success:

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Brant McGee
James McGowan
Sam McQuerry
Robert Meachum
Tye Menser
Michelle Meshke
Richard Monkman
Joe Mrstik
Brendan Murphy
Kara Nyquist
Melanie Osborne
Daniel Patrick O'Tierney
Susan Parkes
Michael Jude Pate
Michelle Power
Andrea Russell
William Satterberg
Krista Schwarting
James Scott
Mike Shaffer
Thomas Slagle
David Stebing
Scott Sterling
Frederick Triem
Tom Waldo
Steve Wells
Taylor Winston
John Wolfe

Other Volunteers:
Loraine Carpenter
Geraldine Cayabyab
Steve Ex
Filipino Arctic Folk Ensemble
Thelma Buchholdt, Coordinator
Michael Howard
Jennifer Jones-Molina
Janice Larsen
Rod Rau
Corey Renell
Sudarushka Dance Group
Elena Farkas, Coordinator
Christina Wells
Maureen Weeks

"Liberty is a 3-Way Street" Exhibit Participants

Ahne Schield
Peter Bradley
Weston Eiler
Stephanie Joyce
Sarah Jones
Peter Bradley
Ki Jung Lee
Breena Apgar-Kurtz
Kalyn Brewer
Ketchikan Youth Court
Kenai Peninsula Youth Court
Kotzebue Youth Court

"Independent Courts Protect our Liberties" Exhibit Participants

Larry Cohn
Vic Fischer
Judge James M. Fitzgerald
Marla Greenstein
Katie Hurley
Judge David Mannheimer
Justice Warren Matthews
Magistrate Sadie Neakok (Ret.)
Judge Thomas Stewart (Ret.)
And: David Allen
Dylan Kentch
Randy Redrick

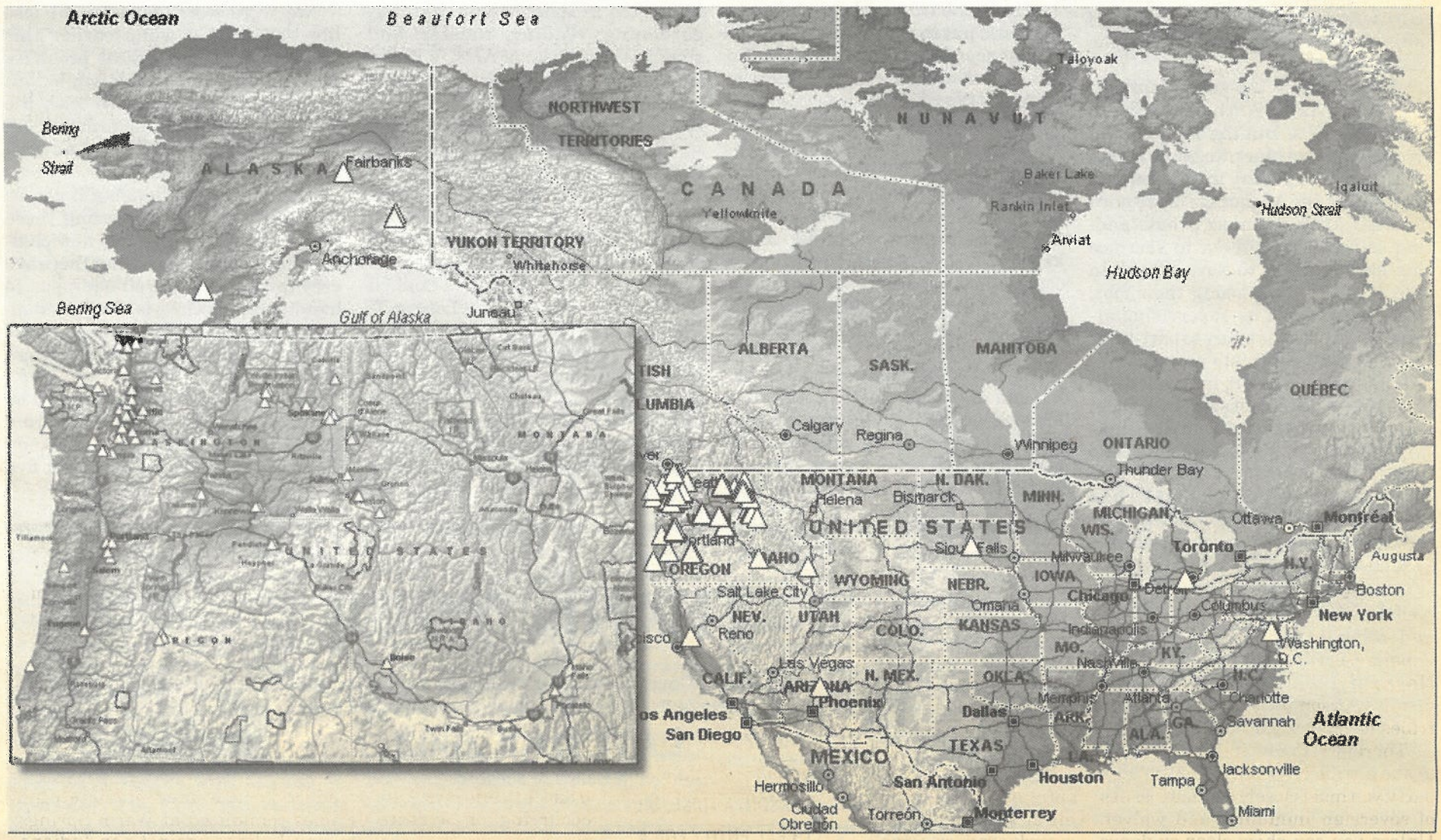
With special thanks to all judicial officers and staff of the ALASKA COURT SYSTEM who participated in Law Day activities statewide; to all local and district-wide Law Day Coordinators; and to all courts, schools & community centers that hosted the Law Day 2003 photo-text exhibits.

YOUR SUPPORT IS MUCH APPRECIATED!!

NOTE: If you participated in Law Day as a volunteer attorney or community member and we've failed to mention you, please accept our apologies and let us know about your Law Day activities by emailing us at bhood@courts.state.ak.us.

Northwest Indian Bar Association grows

(▲ Denotes NIBA Member)



Indian tribes become major players in many aspects of the economy

GABE GALANDA

Over the past decade, the 42 federally-recognized Indian tribes in Washington, Oregon and Idaho have become major players in the local, state and national economies. Northwest tribes are aggressively creating and operating new businesses in the areas of real estate development, banking and finance, media, telecommunications, wholesale and retail trade, tourism, and gaming. Consider these facts:

- Northwest tribes occupy more than 5.6 million acres of reservation lands in Washington, Oregon and Idaho.
- Washington tribes, for example, currently employ nearly 15,000 Indian and non-Indian employees. By comparison, Microsoft employs 20,000 Washingtonians.
- In 1997, Washington tribes contributed $1 billion to the State's overall economy.
- In 2001, tribal gaming generated $422.5 million dollars for the State of Oregon, in direct and indirect economic activity.

A corollary to the dramatic increase in tribal economic development is the increased interaction of tribes and non-Indian citizens who seek business, employment, or fun on Indian reservations. In turn, legal matters between Indian tribes and non-Indians continue to increase.

As Indian law issues now intersect both litigation and transactional practices, and virtually every niche of law, every attorney should be cognizant of the general Indian law principles at work and be prepared to answer common Indian law questions. For that reason, I thought it appropriate to share with readers of *The Bulletin* some legal principles that govern relations between Indian tribes and non-Indians in Oregon.

Question: "What is Tribal Sovereignty?"

Answer: Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. Although no longer "possessed of the full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations." In short, Indians possess "the right . . . to make their own laws and be ruled by them."

Much like the State government, tribal governments are elaborate entities, consisting of executive, legislative, and judicial branches. The office of the tribal chairman (like that of the State governor) and the tribal council (the State legislature) operate the tribe under a tribal constitution and code of laws.

Question: "Are Tribal Courts Different than State and Federal Courts?"

Answer: Yes. Although Oregon tribal courts are modeled after Anglo-American courts, Indian courts are significantly different. Tribal judges, who are often tribal members, are not necessarily lawyers.

Tribal courts operate under the tribes' written and *unwritten* code of laws. Most tribal codes contain civil rules of procedure specific to tribal court, as well as tribal statutes and regulations. Such laws outline the powers of the tribal court and may set forth limitations on tribal court jurisdiction.

A tribe's code also includes customary and traditional practices, which are based on oral history and may not be codified in tribal statutes and regulations. Tribal judges consider testimony regarding tribal custom and tradition from tribal elders and historians, who need not base their opinions on documentary evidence as may be required by state and federal evidentiary rules.

Tribal courts generally follow their own precedent and give significant deference to the decisions of other Indian courts. However, because there is no official tribal court reporter and because not all tribal courts keep previous decisions on file, finding such caselaw can be difficult. The opinions of federal and state courts are persuasive authority, but tribal judges are not bound by such precedents. Nevertheless, Oregon's state courts may extend full faith and credit to valid tribal court orders, and both state and federal courts in Oregon grant comity to tribal court rulings.

Before handling a matter in tribal court, an advocate must appreciate the character of tribal courts, pay careful attention to tribal laws and statutes, and understand the fundamental differences between tribal courts and state and federal courts.

Question: "Can We Sue the Tribe for Damages or Equitable Relief?"

Answer: Probably not. Like other sovereign governmental entities, tribes enjoy common law sovereign immunity and cannot be sued: An Indian tribe is subject to suit only where Congress has "unequivocally" authorized the suit or the tribe has "clearly" waived its immunity. There is a strong presumption against waiver of tribal sovereign immunity.

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Indian tribes

Continued from page 16

The doctrine of sovereign immunity shields tribes from suit for monetary damages and requests for declaratory or injunctive relief. However, tribal government officials who act beyond the scope of their authority are not immune from claims for damages.

Tribes are also immune from the enforcement of a subpoena, e.g., to compel production of documents. Further, a court cannot compel the Department of the Interior (DOI) or the Bureau of Indian Affairs (BIA) – fiduciary for the benefit of tribes – to comply with the Freedom of Information Act (FOIA) and release documents passed between tribes and the agencies unless the communications involve "tribal interests subject to state and federal proceedings." Arguably, if a tribe is immune from state or federal suit, documents exchanged between tribes and DOI or BIA regarding "tribal interests" or "matters internal to the tribe," are exempt from disclosure under FOIA.

Tribal immunity generally extends to agencies of the tribe such as tribal casinos and other business enterprises. As many Oregon citizens flock to tribal casinos, slip-and-falls and other tort claims arising on tribal reservations have increased. Nevertheless, courts routinely dismiss personal injury suits against tribes for lack of jurisdiction.

Therefore, in considering whether to sue a tribe on behalf of an injured party, you must closely evaluate issues of sovereign immunity and waiver. Unless you can show clear evidence of tribal waiver or unequivocal Congressional abrogation, do not waste your time, your client's money, or a court's resources by filing suit. A judge will simply dismiss the plaintiff's claims for damages for lack of subject matter jurisdiction.

Question: "Can We Sue the Tribe to Enforce a Contract?"

Answer: Probably not. Tribes retain immunity from suit when conducting business transactions both on and off the reservation. Generally, a tribe can only be sued in contract if the agreement explicitly waived tribal immunity; a waiver will not be implied. Nonetheless, the U.S. Supreme Court recently held in C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma, 532 U.S. 411 (2001), that a contractual agreement to arbitrate disputes constitutes a clear waiver of immunity.

Increasingly, tribes will agree to limited waivers of immunity. Some tribes set up subordinate entities whose assets, the tribes acknowledge, are not immune from suit, levy, or execution (although assets not held by the entity remain protected by immunity).

So, if you are asked to sue a tribe for breach of contract, you should first consider the entity with which your client contracted – i.e., a tribe, which is likely immune from suit; or a subordinate entity, for which the tribe may have waived its immunity. If you are asked to create a contract with a tribe, you must explain to your client that there may not be any remedy available in the event of a contractual breach. You should then negotiate with the tribe to reach a meeting of the minds with respect to the immunity issue. Again, some tribes will agree to a limited waiver.

Question: "Can I Sue the Tribe for Employment Discrimination?"

Answer: Probably not. Both Title VII, 42 U.S.C. & 2000e(b), and the Americans with Disabilities Act (ADA), 42 U.S.C. 12101-12213, expressly exclude Indian tribes. Similarly, the Ninth Circuit has held that tribes are immune from suit under the Age Discrimination in Employment Act (ADEA). Tribes are also immune from suit under 42 U.S.C. 1983. Likewise, state discrimination laws do not apply to tribal employers.

Tribally-owned entities are generally not subject to state and federal discrimination laws either. Tribal officials are also immune from suit arising from alleged discriminatory behavior, so long as they acted within the scope of their authority. In short, any employment suit against a tribe or its officials based upon federal or state discrimination law will likely be dismissed for lack of subject matter jurisdiction.

Oregon tribes have become one of the nation's largest employers. As a result, non-Indians' employment records and documents concerning tribal employment practices are increasingly becoming the focus of discovery, even in litigation against non-tribal entities. If the employee is a party, his or her employment records are discoverable if they are in the employee's custody or control. However, under the doctrine of sovereign immunity, a tribe cannot be forced to produce the employee's records. By the same token, a court cannot compel a tribe - or the Bureau of Indian Affairs - to provide documents about the tribe's employment practices, i.e., matters "internal" to the tribe.

TRIBAL COURTS HAVE JURISDICTION OVER A SUIT BY ANY PARTY -- INDIAN OR NON-INDIAN -- AGAINST AN INDIAN PERSON, A TRIBE, OR TRIBAL ENTITY FOR A CLAIM ARISING ON THE RESERVATION.

Question: "Can I Sue the for Violation of Labor and Employment Laws?"

Answer: Maybe. The circuits are split regarding the application of federal regulatory employment laws to tribal employers. The Ninth Circuit has applied the Occupational Safety and Health Act (OSHA) and the Employee Retirement Income Security Act (ERISA) to tribes, reasoning that such statutes of general applicability govern tribal employment activity because Indian tribes are not explicitly exempted from the laws. The Seventh and Second Circuits have adopted the Ninth Circuit's rationale and also applied OSHA and ERISA to tribes, and the Seventh Circuit leans toward application of Fair Labor Standards Act (FLSA) to tribal employers.

Conversely, the Tenth and Eight Circuits have refused to apply to tribes such laws as OSHA, ERISA, FLSA, and the National Labor Relations Act (NLRA), because doing so would encroach upon well-established principles of tribal sovereignty and tribal self-governance. While the Ninth Circuit's rulings that apply federal employment statutes of general applicability to tribes are binding in Oregon, and the decisions of the Seventh and Second Circuits serve as persuasive precedent, state labor laws and workers' compensation statutes remain inapplicable to tribal businesses.

Question: "Where Should We File a Claim that Arises on the Reservation?"

Answer: It depends. Subject matter jurisdiction of tribal, state or federal courts depends largely upon (1) whether the defendant is an Indian or non-Indian person or entity; and (2) whether the act occurred on Indian fee or allotted lands, non-Indian-owned reservation lands, or even a state right-of-way on the reservation. These two complex issues should be the first area of inquiry for any question regarding civil jurisdiction over a dispute arising on a reservation.

Tribal courts have jurisdiction over a suit by any party – Indian or non-Indian – against an Indian person, a tribe, or tribal entity for a claim arising on the reservation. Jurisdiction over lawsuits between non-Indians arising on the reservation lies in state court. So, assuming your client is prepared to show clear or unequivocal waiver of tribal immunity, you should file any tort claims arising on Indian lands or in tribal casinos, in tribal court.

Specifically, state courts have jurisdiction over any dispute arising from an auto accident occurring on a state right-of-way through the reservation, including a dispute between non-Indian citizens, and a suit by an Indian against a non-Indian. As such, common claims that arise on Oregon state highways running through reservations should be brought in state court.

Question: "Can We Be Sued in Tribal Court?"

Answer: It depends. Generally, a tribal court can only assert jurisdiction over a claim against a non-Indian person or entity when "necessary to protect tribal self-government or to control internal relations." Essentially, a tribal court only has jurisdiction over the reservation activities of non-Indian parties "who enter consensual relationships with the tribe . . . through commercial dealing, contract, leases, or other arrangements."

State courts may exercise jurisdiction over a non-Indian person or entity for a claim arising on the reservation. Federal courts may assert jurisdiction over a claim against a non-Indian party based upon reservation activities if there is federal question jurisdiction under 28 U.S.C. 1131, 1343, or diversity jurisdiction under 28 U.S.C. 1332. Thus, absent a contractual relationship with the tribe, non-Indian parties can only be sued in state or federal court.

Question: "Can We Challenge the Assertion of Tribal Court Jurisdiction?"

Answer: Yes. If sued in tribal court, non-Indian persons or entities can challenge the tribal court's assertion of civil jurisdiction in federal court. However, federal courts typically stay their proceedings to allow the tribal court to determine its own jurisdiction. Thus, before you challenge a tribal court's assertion of jurisdiction in federal court, you must first exhaust tribal remedies.

In any case, a tribal court first decides jurisdiction over non-Indian parties. If the tribal court rules that it has jurisdiction, it proceeds with the case. If the federal court later agrees that the tribal court had jurisdiction, it will not relitigate the case. Therefore, you should thoroughly present the merits of your client's case to the tribal judge, as you and your client may not have a subsequent opportunity to do so in federal court. In doing so, you should be ever mindful of the unique aspects of tribal courts described above.

Question: "Can I Be Prosecuted in Tribal Court?"

Answer: No. Tribal courts in Oregon cannot assert general criminal jurisdiction over Indian or non-Indian crimes occurring on the reservation. Under Public Law 280, 18 U.S.C.A. § 1162(a), Congress granted Oregon state courts the power to assert jurisdiction over on-reservation crimes. However, all of the tribal courts in Oregon still retain the power to exclude any unwanted person from their reservations.

Public Law 280 does explicitly except the 640,000-acre Warm Springs Reservation in north central Oregon – the State's largest reservation. Under other federal criminal statutes, crimes committed at Warm Springs by non-Indians against non-Indians are subject to state jurisdiction, while federal courts have jurisdiction over reservation crimes committed by non-Indians against Indians or Indian "interests" (e.g., property).

Unlike civil jurisdiction, the rules concerning tribal criminal jurisdiction are rather clear. Oregon tribes recognize the bright-line rule that a non-Indian cannot be prosecuted in tribal court for an on-reservation offense, so rarely, if ever, will an Oregon citizen face tribal court prosecution.

Conclusion

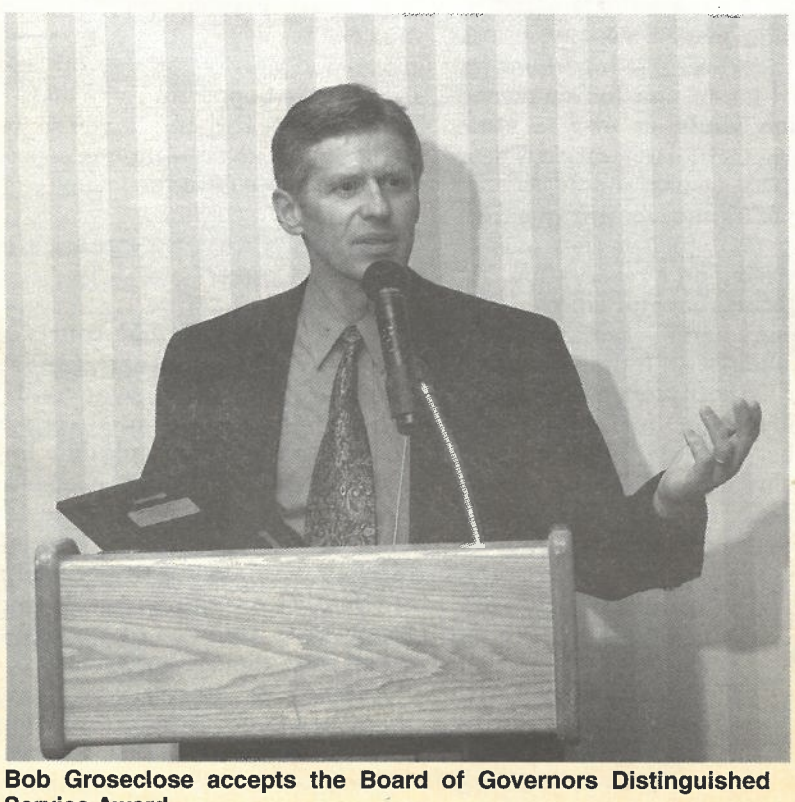
Oregon is witnessing first hand both the tremendous rise in tribal economic development, and an array of legal disputes between Indians and non-Indians. Indeed, Indian law principles impact litigation and transactional practices, and intersect general tort, contract, employment, and criminal law. Further, Indian law issues implicate tribal, state and federal court practice and challenge attorneys' common understandings of procedural and jurisdictional principles. For these reasons, it is vital that you recognize and understand the Indian law issues that you *will* inevitably encounter in your practice.

Mr. Galanda is an associate with the Seattle-Portland law firm Williams, Kastner & Gibbs, PLLC. He is an enrolled member of the Nomlaki Tribe of the Round Valley Indian Confederation in Northern California, and serves as President of the Northwest Indian Bar Association. *He thanks his friends and mentors, Professor Robert A. Williams, Jr., University of Arizona College of Law, and Randy J. Aliment, Esq., for their wisdom and support.* *Mr. Galanda can be reached at (206) 628-2780 or ggalanda@wkg.com.*

2003 Bar Convent

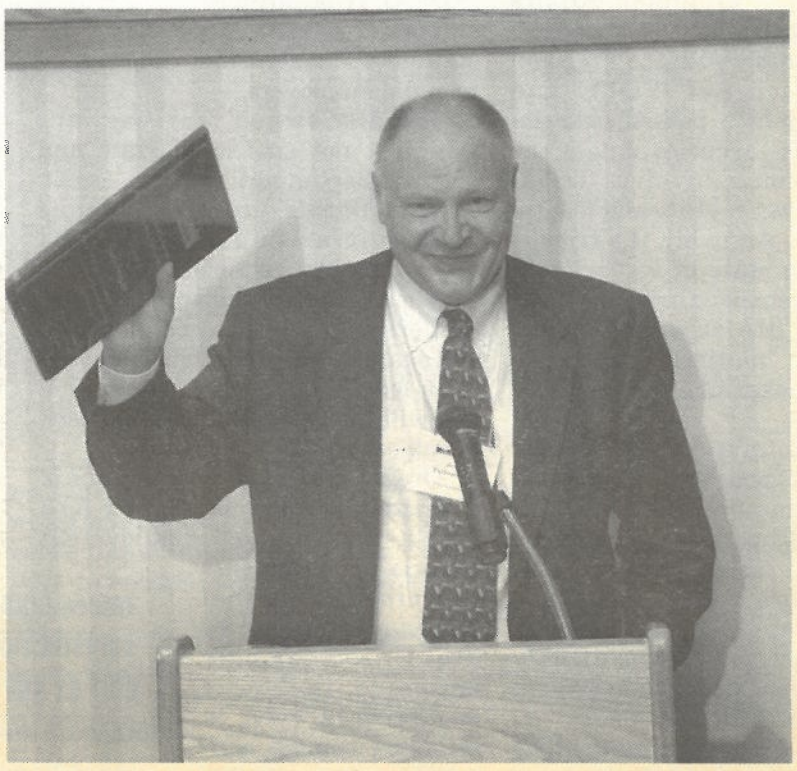
Fairbanks, Alaska · Wednesday, Thursday, and

Board of Governors Distinguished Service Award



Bob Groseclose accepts the Board of Governors Distinguished Service Award.

Board of Governors Layperson Service Award



Former public member on the Board of Governors Joe Faulhaber receives the Board of Governors' Layperson Service Award.

Lori Bodw
Award.

GATHERINGS AT THE CONVENTION

The Board of Governors presented Deborah O'Regan and Steve Van Goor with 20-year ABA recognition prints as the convention ended. Left ro right: Mauri Long, Pete Ellis, Larry Ostrovsky, Sheila Selkregg, Bill Granger, Lori Bodwell, Rob Johnson, Deborah O'Regan, Matt Claman, Steve Van Goor, Brian Hanson, Jon Katcher and Keith Levy. Photo by Barbara Armstrong

Left to right: Rachel Batres, Bar CLE Coordina
CLE Director, Lesa Robertson, AK Court System
Controller enjoy comaraderie at the banquet.

OTHER AWARDS RECIPIENTS HONORED AT CONVEN

Judge Niesje Steinkruger receives one of two Alaska Court System Community Outreach Awards from Chief Justice Dana Fabe.

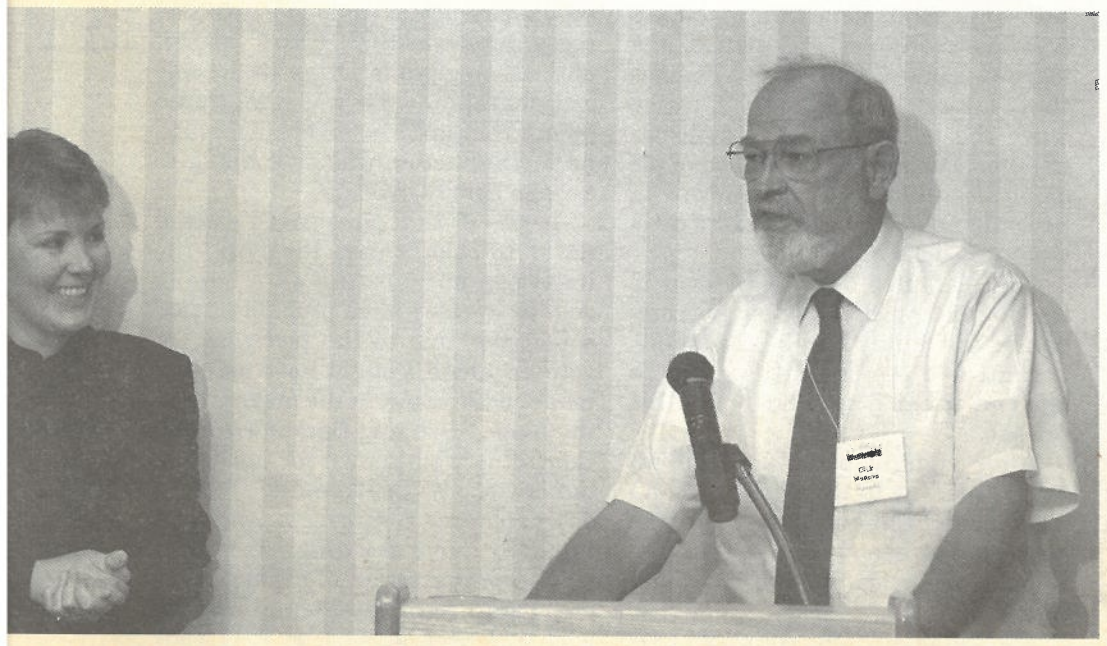
Judge David Mannheimer is presented with the Alaska Court System's Community Outreach Award by Chief Justice Dana Fabe.

ON HIGHLIGHTS

lay · May 7, 8 and 9, 2003

SINCE 1896
ALASKA BAR ASSOCIATION

Board of Governors Professionalism Award



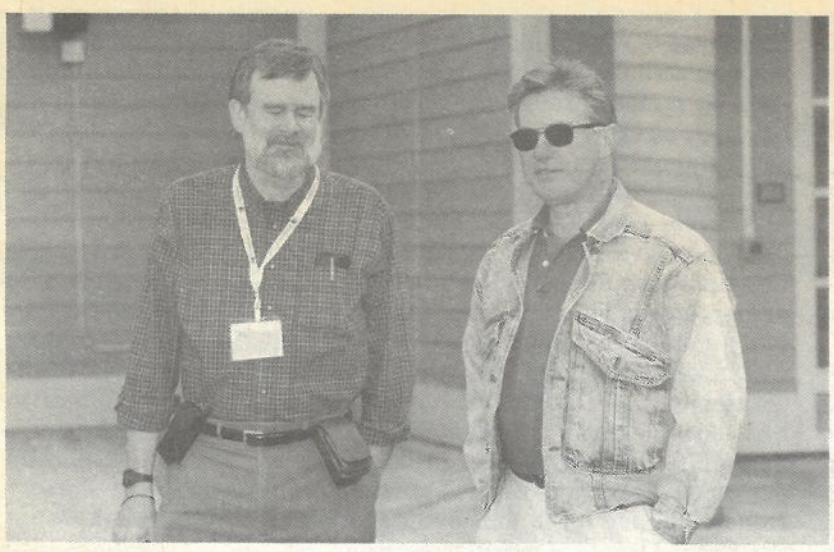
ns as Dick Madson responds to being presented with the Board of Governors' Professionalism

Board of Governors Robert Hickerson Public Service Award

Christine Pate is presented with the Board of Governors Robert K. Hickerson Public Service Award by President Lori Bodwell.

Photos By Kevin L. Bishop

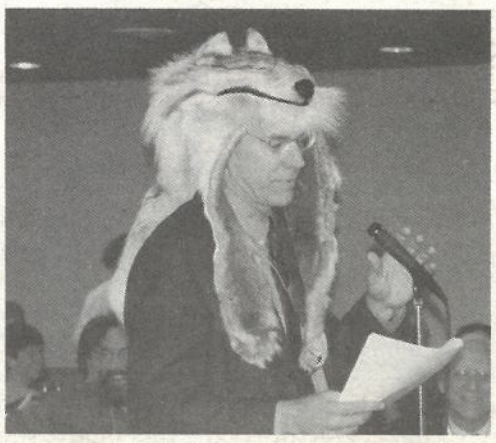
bara Armstrong, Bar
en Schmidlkofer, Bar



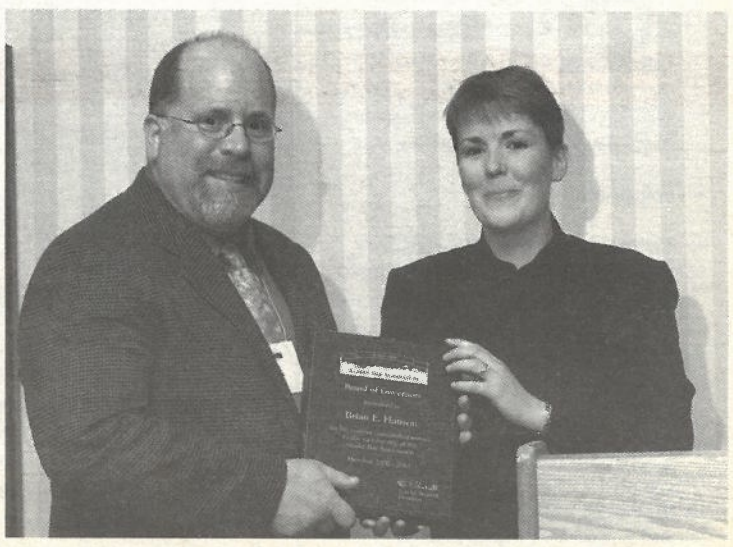
Photographer John Reese calls this photo of Steve Van Goor and Judge David Stewart "2 blind mice."

Outgoing President Lori Bodwell is presented with the original artwork from the convention brochure by incoming President-elect Larry Ostrovsky.

wyer Mark Regan receives the first Alaska Bar Founda-
labinowitz Public Service Award presented by Alaska
lation Trustee Barbara Schuhmann.



The Bristol Bay Bar Association's resolution to urge the Supreme Court "to adopt a rule making the wearing of a necktie a personal choice of the person who owns the neck" passed 64-38 (as amended to include headgear) at the ABA business meeting in Fairbanks. "Personal choice is great, but the resolution on ties should aim higher. They make you take your hat off in court, and that's just wrong!" testified Roger Brunner.



Outgoing Board member Brian Hanson is presented with a plaque by President Lori Bodwell.

Dog bite cases

☐ William Satterberg

People take certain things more personally than others. Trees, for example, have formed the basis of many a hard fought piece of litigation in Fairbanks. Evictions are another area of dissent. In fact, the only two times that I have ever been physically threatened in my professional career have followed successful evictions. In one of those incidents, there were indications that the individual who had come to visit with me had likely come armed with a gun. (True to form, I had already left the office, allowing my capable staff to deal with the crisis.) In another, recent case, one of my clients was told that he would be "kneecapped" if he didn't leave the property. The threat was effective.

Employment law issues are also dangerous and can be costly. Randy Ensminger once had an irate client throw his computer printer through the office's picture window when learning of an adverse decision. Randy's co-counsel, Ed Merdes, who was much more experienced in client relations, had wisely referred the client to Randy for an explanation of the loss. Randy apparently lacked Ed's persuasive abilities, as evidenced by the broken glass that littered the sidewalk outside the office.

Another area of intense personal belief pertains to animals. Pet owners take their animals quite seriously, and will go to extremes to litigate over the rights of a four-legged colleague, while leaving the family to eat Hamburger Helper.

My first animal case occurred when I was barely out of law school. I was still a member of the prestigious attorney general's office in Fairbanks, and assigned to the coveted condemnation section.

Due to high Alaska pipeline project rents, I lived in the basement of a small house in Fairbanks. The owner of the house had generously rented me an unfinished bedroom next to the laundry room. The rent was certainly not generous, but it was advertised as a family environment. And, it truly was a family environment. I was able to listen to people argue almost every evening. Still, it was all that I could afford on my meager state government wage. The only fixed asset that I had to my name was a dilapidated, 1965 green International Scout, worth at best, $500. The asset was certainly a fixed asset. In fact, I had to fix it weekly. In short, I was effectively a pauper.

As a *defacto* member of the family, I eventually became attached to two of the family dogs. The smaller of the two was Sidney, a poor excuse for a Dachshund. The ugly one was Bilbo, who looked something like a cross between a dwarf Rottweiler and a Pekinese with a chronic sinus problem. Bilbo had the size of the Pekinese, but the colorings and the personality of a Rottweiler. More than once, when I would fall asleep on the family floor, I would be awakened in the morning by both Bilbo and Sidney bounding across my belly to exit the house, or licking me affectionately in the ear. Fortunately, they seldom mistook me for a fire hydrant.

One day, Sidney fortunately disappeared. I immediately denied all knowledge of the event. Nobody thought anything about it in particular. Sidney still had all of his male equipment and was well known among the lady dogs in Fairbanks. However, when approximately 10 days had passed, the decision was made to check with the local pound to determine whether Sidney had found a new home. To our dismay, Sidney had not only found a home with the pound, but another, in Doggie Heaven. The family was dismayed that the pound had not attempted to call them. In response, the pound assured the family that attempts had been made to contact Sidney's owners, but that no one had responded in a timely manner. It was then that I remembered one of the earlier messages I had forgotten to pass on to the family: Sidney's untimely departure left Bilbo, the ugly one, with the suspected nasal polyps, as the only family pet.

To say that Bilbo had character would be an understatement. He snorted when he talked, had a perpetually runny nose, and liked to demonstrate his territoriality on virtually everything that didn't move. Bilbo also was quite poor at exercising social self-control. After Sidney's departure, Bilbo took a perverse liking to me for yet unexplained reasons. That is why I soon gave up sleeping on the floor. Bilbo just wasn't my type.

One day, Bilbo also disappeared. I again immediately denied all complicity. In short order, Bilbo was located at the dog pound. I voted to leave Bilbo there. The family disagreed. Still, as a compromise, the family figured that it would make Bilbo stay at the pound for three days to drive the point home that I was not his type of mate.

Bilbo would be on the seven day program due to the fact that he had a collar, rabies tag, and identification tag. Under what was considered the seven day program by the pound, Bilbo could not be executed until at least seven days of incarceration had passed. I figured it would be best for Bilbo if he spent some time in jail, got a tattoo like the other inmates, and learned some social skills. Besides that, I knew Bilbo would have to leave the pound sans his male attributes. Perhaps he would leave me alone after that. As an added benefit, he could have a couple of extra days to get his licks in.

On the fourth day, we all went to the pound to pick up Bilbo. I accompanied the family. Unlike the others, I wanted to see the little rascal in jail and taunt him a bit before his release.

After signing us all in, the attendant led us to the back room. As we walked the line of cages, there was nothing that even began to look like Bilbo in residence. Something wasn't right.

We explained to the pound that we knew that Bilbo had been arrested. We insisted that we had been assured that Bilbo would be able to be released in seven days or before, based upon the earlier conversation with the poundmaster.

The clerk, a relatively young woman, nervously asked if we would review a book of pictures to see if we could identify Bilbo. The book looked like a photographic collection of Alaska's favorite road kills, interspersed with an occasional recognizable species. We leafed through the book for approximately two minutes. After several pages, we all saw a Polaroid photograph of Bilbo. It was undeniably Bilbo, complete with his plaintive, deceptive little face, drooly nose, identifiers, a number, and a statement of disposition. The term "disposition" had an ominous implication.

I asked the pound girl what the "Statement of Disposition" meant. She became even more awkward and embarrassed. When pressed, she apologized and confessed that Bilbo had gone on to join Sidney in the Great Doggie Hereafter just the previous day. I tried to look sad as all eyes turned to me.

To say that I was upset would have been an understatement. I was being framed! It had to be more than mere coincidence. I needed to do something fast and lawyerly. I tried to make my indignation appear genuine, lest the family suspect me of nefarious deeds.

"Bilbo was to be taught a lesson, but certainly not a lesson of such a permanent nature!" I protested.

The lady confessed that a terrible mistake had been made. Someone obviously had mixed up Bilbo's records and had advanced the timetable. I secretly thought that, just maybe, Bilbo had made another of his rude overtures, only this time to the wrong person. Huffing and puffing, the family left the pound, intent upon bringing retribution to the negligent bureaucrats. I was immediately elected to champion the cause.

It was shortly after that attorney Tom Wickwire brought his famous dog case, which resulted in a ruling by the Alaska Supreme Court that the value of a dog, absent certain special circumstances, was nothing more than the fair market value of a similar pedigree on the open market.

Unfortunately, Bilbo had no pedigree. Admittedly, Bilbo was certainly unique. In fact, Bilbo was the careful result of several years of random Fairbanks crossbreeding. The likelihood of recreating the Bilbo strain was virtually impossible. Furthermore, Bilbo was substantially depreciated simply by the passage of time. The ultimate recognition was that Bilbo's value, if any, was negligible. Other than some rather graphic curse words muttered among the family members in private, no further action was ever taken to avenge Bilbo's bye-bye.

It was at that time that I elected never to take a case involving the improper euthanizing of a family dog. In a way, I have probably made a mistake, due to the fact that, on volume alone, I might have actually made some money in the process over the years. Fairbanks Borough Animal Control is well known for not being unnecessarily "pet friendly."

After I entered real private practice, I began to arrive at a different type of legal representation of animal owners. These were the animal owners who had been subject to both civil and criminal actions based upon allegations of animal neglect, nuisance, or the like.

Although dog cases are prevalent, the most contested areas of representation involving neglect that I've had have involved horses. Horse people are even more rabid than dog people. In contrast, cat people never seem to call. Perhaps they just choose to bury their heads in the sand.

My first horse case involved a lady who felt that my client did not deserve to keep a horse which she had sold to him. After the purchase, my client had returned the horse for winter boarding at the seller's stables. When he returned the following spring to retrieve the horse, the seller announced that he could not have the animal. Besides, it had been "stolen." When questioned, she admitted that she had never reported the theft to the authorities. She also let it slip that she knew that the stolen horse "was safe." It was then that I became aware that there was alive and active in Fairbanks what could best be termed a "horse underground."

The horse underground, in my opinion, is a group of misguided, but apparently self-believing well-intentioned individuals which has formed a loose, unofficial band which will sometimes "rescue" horses which the people apparently believe are in jeopardy. As with many causes, the members of this group are emotionally quite involved. Unfortunately, reason and emotion are concepts that often do not peacefully coexist, especially when lawyers and pets enter the fray.

In the case of my client, the family pet and horse was in good health according to a veterinarian's last visit. The horse was shaggy due to its winter coat, but this was normal. No emergency existed. Despite the lack of any emergency, the horse had not only disappeared from the boarding stable, but its absence was totally unexplained by anyone. Everyone who was contacted either refused to speak, or exercised plausible deniability. When a lawsuit was finally filed, the

Continued on page 21

Dog bite cases

Continued from page 20

woman who had allegedly absconded with the horse was placed under oath. Throughout her deposition, she was evasive, but would assure people that the horse was "okay" although she did not know anything with respect to its status or whereabouts. Needless to say, credibility was at issue. In my opinion, hers was not good.

Ultimately, following the investment of several thousands of dollars of litigation expenses, and a near trial, the animal miraculously returned home, along with some settlement stipulations which allowed an inspection with respect to the condition of the horse, should any questions ever arise. No such questions ever arose after that and the inspection rights were never exercised, nor were the rustlers ever hanged.

In another case, a client of mine had been criminally accused of neglecting several horses. The allegations of the Animal Control officer were that the horses that my client owned had been starved. As such, Animal Control had seized two of the animals purportedly for their welfare. My client disagreed, and did so even more strenuously when he found himself facing several Class A misdemeanor charges and a claim for total forfeiture of the animals.

Ultimately, the case came down to competing expert veterinary testimony regarding the care and treatment of the animals. In this case, the experts were two local veterinarians. Each had a different opinion about the condition of the horses. Coupled with that, the Animal Control Officers had their own opinions, as well. No one could be swayed. In my opinion, it was not a case of evidence, but again of diametrically opposed emotions.

Jury selection was equally as challenging. Many of the jurors were highly opinionated about horses, attorneys, and government involvement with borough tax dollars. I was somewhat surprised that my own visage did not become intermingled with the presentation.

Ultimately, the case came down to an in-depth analysis of the rear end of a horse. Unbeknownst to me at the time, one of the primary means by which horses are evaluated for physical condition is by comparing the relative plumpness of their behinds. Several graphic photographs were introduced of horse's rear ends. I was somewhat surprised that my own visage did not become intermingled with the presentation. Predictably, this gave rise to a number of jokes and puns as the case was fleshed out. Some of these puns were only thought, but everyone obviously understood.

Ultimately, neither side was able to make much hay with the jury. After several hours of intense deliberations, the jury came back with a hung verdict, and faded into the sunset. Later, Judge Wood accurately opined that he felt that no jury would ever reach a verdict in the case. The emotions were simply too high on all sides. The reason for this, he explained, was because half of the jurors loved horses, and the other half hated the borough. Emotions ran high on both sides, which had been apparent early on even during jury selection. In short, neither group could be corralled into taking a firm stand against the other.

It should be noted, in all fairness, that this was not the first case that centered on analysis of the rear end of an animal. Animal lawyer Tom Wickwire, as well, had another case several years previously involving the analysis of the rear end of a bear. In that case, the issue centered about the appearance of a bear's anal orifice, in a case in which nobody could seem to make hide nor hair of anything as well. Still, there are more jokes made about a horse's rear end than there are about a bear's.

The lesson to be learned is that animal cases are often hard fought and emotionally laden. Although I have yet to see people get too excited about cats and other lower forms of life, always beware of the canines and equines. There is simply not enough to win, and way too much to lose.

Bill Cummings, Bill Saupe, Carmen "Marilyn" Clark, and Don McClintock.

Mind Games crowns championship team

The Immigration and Refugee Services fundraising competition Mind Games, The Pursuit of Life, Liberty and Trivia, was held on Thursday March 13, 2003 at Snow City Café. The championship team, sponsored by the law firm of Ashburn & Mason, consisted of Bill Cummings, Bill Saupe, Carmen "Marilyn" Clark, and Don McClintock. Fourteen teams competed to win the inaugural trivia event. The winning team received gift certificates and the unique championship trophy of The Incredible Hulk cradling a brain in his left hand.

Immigration and Refugee Services is a program of Catholic Social Services that recognizes it's biblical responsibility to "Welcome the stranger" by empowering all refugees, immigrants, and displaced persons to share in the freedom, justice, and equality of our society.

The Immigration and Refugee Services was established in 1987 and is the only low cost/no cost program in Alaska that offers legal assistance to immigrants and refugees. The program offers resettlement support services and reunification with family members who are living in Alaska.

For information please contact Gene Faulk at 297-7719, or gene.faulk@css-ak.org.

DID YOU KNOW...

that your call to any member of THE LAWYER'S ASSISTANCE COMMITTEE will be held in complete confidence?

SINCE 1896
ALASKA BAR ASSOCIATION

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, or the person about whom the caller has concerns, to any other committee member or 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.

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Michelle Hall .....(Nome) 443-2281
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Vanessa H. White .....(Anchorage) 278-2354 (private line), 258-1744 (home)

File Holocaust-era insurance claims now

BY DR. JOE SONNEMAN, ESQ.

Abstract: *The [U.S.] National Association of Insurance Commissioners helped create an International Commission on Holocaust Era Insurance Claims, for those Holocaust victims--and their heirs--who bought insurance before and during World War II but who were never paid. The* ***deadline*** *for filing claims with the ICHEIC is now* ***September 30, 2003****; call* ***(800) 957-3203*** *for a claims packet. But insurance companies who sold the policies, and who now are supposed to publish purchasers' names so relatives can know whether to file claims, vary in their levels of cooperation. To check names of potential insureds, go to* ***www.icheic.org/*** *and search 'name lists' in any of many languages; you can also search by 'sound-alikes'. You can file a claim even if you do not find names and even if you do not have documents. There is no filing fee, no cost.* ***Do it now.***

"Holocaust" we now say to describe Nazi murders of Jews, Gypsies, Communists, homosexuals, the mentally impaired, and others. Nazis killed about six million (6,000,000) Jews. How many are six million? Visit the Holocaust Museum in Washington D.C. and see names of hundreds or thousands of villages, each village with hundreds or thousands of people, and you begin--but only begin--to get the idea of six million people, murdered. Genocide.

Some European Jews escaped--sometimes legally, with the aid of 'sponsors' [the U.S. still requires sponsors for immigrants who neither win immigration lotteries nor buy 'investor visas'], and sometimes not, with the aid of good people or their own resources, or through Divine Providence. Many more did not escape; Nazis and others killed them.

My father, Eric Sonneman, knew he had to leave Germany when Hitler barred all Jews --including Eric--from becoming pharmacists (as Eric hoped to be), and when Eric's schoolboy friend said "We will bury you Jews." But, how to get a sponsor? Eric, his brother Max, and his parents Kurt and Bertha 10 years earlier had a visit from a distant American relative, but who--a decade later--remembered her name and address? Imagine: on this memory your life depends!

After weeks of worry, a *dream* brought Bertha the name. The family wrote, the relative agreed, and Eric got an appointment at the U.S. Consulate for what turned out to be the day after Kristallnacht [Night of (Broken) Glass]. Providentially, neighbors hid the family that night. The next day, Eric made his way past S.S. guards to the Consulate and--after some delay--to freedom.

Eric landed in New York March 17, 1939. He thought America a wonderful place, because of parades welcoming immigrants. [Eric hadn't known of St. Patrick's Day then, but ever after our family celebrates it!]. Eric later brought over Max, Kurt, and Bertha, but, because of war in the Atlantic, they had to take a train for six weeks across Russia, then to Japan, Hawaii, and the U.S. the long way around.

So, some European Jews found sponsors. Many did not; most were annihilated.

Eric recently sent me a 1942 letter from the American Friends Service Committee to his father, Kurt, with the 'very tragic news'--that a relative had "DEPARTED UNKNOWN DESTINATION." This phrase was a euphemism for "death camp." So, Eric asked, could I find on the Web the unlisted address of an unnamed international insurance commission mentioned in an April 29, 2003, Chicago Tribune reprint of a New York Times News Service story?[1]

Eric is now 92 and is not computer literate. I went to Google the Omniscient for him.

In 1997, the U.S. National Association of Insurance Commissioners met to consider what to do about insurance--life, education, dowry, etc.--bought in Europe before and during WW II by Holocaust victims, when claims were never paid. NAIC's Special Issues Committee set up a Working Group, headed by Washington State's then insurance commissioner Deborah Senn, to look into establishing an international commission.

New York State, home to many American Jews, claims *it* really led the way. Former U.S. Senator D'Amato first proposed the independent international commission which New York's Governeor Pataki endorsed. The NAIC International Holocaust Commission Task Force included New York, North Dakota, California, Connecticut, Florida, Louisiana, Missouri, Pennsylvania, and Washington.[2]

New York and California insurance commissioners on April 8, 1998, signed a Memorandum of Intent to create an international commission to resolve Holocaust survivors' insurance claims. Also signing the MoI were four major European insurance companies: AXA, Allianz, Zurish, and Generali, and the World Jewish Restitution Organization, the World Jewish Congress, and the Claims Conference.[3]

The Washington State Office of the Insurance Commissioner--Commissioner Kreidler now--in February 2000 noted progress in publication of names of the insured, which publication was needed to let survivors and heirs know of potential claims.[4] Kreidler mentions 4 companies.

Italy's Generali in 1997 denied the existence of Holocaust-era files, then found 340,000 policyholders, did not publish those names, but created a computer disk with 90,000 names "unpaid", which disk Generali released to the ICHEIC, but ICHEIC then (2000) planned to release only 5,000 of the names.

Switzerland's Winterthur (parent of Unigard Insurance) said it found up to 45,000 files of policies sold in Europe. Winterthur "assumed" they were paid. Some policies were actually confiscated during WW II, but Winterthur denied responsibility. Winterthur called valid only 9 of 4,000 inquiries received since 1997.

Switzerland's Zurich (parent of Farmers' Insurance Co.) identified 22,000 policies sold in German-occupied territories, but Zurich said only 22 remain unpaid. Zurich said it didn't know how many of its policies were actually paid to the Nazi regime instead, but Zurich denied further responsibility. Zurich had not published names of unpaid policyholders.

French insurer AXA (parent of The Equitable) computerized files with 570,00 policyholder names, but, 18 months later, still had not released those names to ICHEIC. AXA claimed privacy laws prevented it from publishing names.[5].

Fortunately, after a 2002 agreement provided $275 million to settle claims, ICHEIC got access to 8 million Holocaust-era German policyholder names and "hundreds of thousands of names from other European companies."[6]

Actually, that is only $100 million to settle claims and $175 million to Jewish charities through ICHEIC, with the U.S. trying to make German insurers immune to possible later U.S. lawsuits. ICHEIC got the names by comparing lists of German Jews with German pre-WWII policy holders. "But having a relative's name on the list is no guarantee of being entitled to a claim because some policies have been settled and other forms of restitution may have been already made."[7]

ICHEIC published peoples' names--over 379,000, "almost all German Jews"--on its website on April 30, 2003. ICHEIC agreed to withhold the German insurance companies' identity, but Allianz and Victoria zu Berlin were among those contributing policyholder names.[8]

If you, or a relative or client, want to file a claim, you can get an ICHEIC Claims Packet from **ICHEIC, Box 1163, Wall Street Station, New York, NY 10268**, or at the ICHEIC website, **www.ICHEIC.org**, or call **(800) 957-3203.** Check the ICHEIC website to find names, listed in many languages, but you need not find a name to file. There is no charge to claimants, who may--but need not--use a lawyer or other person to assist them. Supply what documents you can supply, but documents are not required. But if you phone, it may take 4-6 weeks to get a claims packet; using their website should be quicker.

The deadline for filing was March 30, 2003, but ICHEIC Chair (and former U.S. Secretary of State) Lawrence Eagleburger extended the deadline to September 30, 2003 to give ICHEIC time to publish policyholders' names on the ICHEIC Website and to give the public enough time to review those lists.

Ideally, ICHEIC should resolve all claims within two years; ICHEIC will acknowledge claims in writing, and companies should issue a decision or status report within 90 days ... but claims volume (or insurer recalcitrance?) may cause delay. "Critics say the insurers want to avoid paying claims and to avoid documenting the magnitude of their unpaid claims." (Treaster).

That's the polite version. Others say ICHEIC also hopes "to shield the insurers from lawsuits" and "has been widely criticized as being ineffectual. In more than four years of operation, it has offered $38.2 million--or just short of the $40 million it had spent on expenses as of 18 months ago--to 3,006 claimants." [That averages $12,700 each.] Nor has ICHEIC blocked all lawsuits: about 20 exist, including 8 in April 2003 against Italy's Assicurazioni Generali. (Treaster).

Generali had had trouble in California. There, in December 1999, state insurance commissioenr Chuck Quakenbush told Christopher Carnicelli, U.S. boss of Generali, "It's obvious to me you have no intention of complying with" California's new Holocaust Registry Law to force insurers to provide the names of Holocaust-era policy holders so they--or their heirs--would know if they had claims. Unhappy with Carnicelli's vague answers, Quakenbush threatened to revoke Generali's license to operate in California.
Generali and other European insurance companies sold policies to Jews during the Nazis' rise to power before World War II, then refused to pay the heirs of Holocaust victims by requiring death certificates, policies, and other documents. That [demand] is now widely recognized as absurd, since insurance officials knew the Nazis never issued death certificates for most of the six million Jews they killed.[9]

Some insurers fought back, claiming that California was getting into foreign relations, which constitutionally belongs only to the Federal government. This case is now (April '03) at the U.S. Supreme Court after the 9th Circuit upheld California;s law and after the Atlanta Circuit struck down Florida's similar law.[10]

The Washington State Office of the Insurance Commissioner website links to Holocaust-era insurance companies that did business in Austria, Franch, Holland, Poland, and Northern Europe. The site also reports Washington State's unanimously passed 1999 Holocaust Victims Insurance Act, which, inter alia, created the Holocaust Survivor Assistance Office [also on the Web, or call (888) 606-9622], created a Holocaust Insurance Company Registry, and which, for Washingtonians, extended the statute of limitations on Holocaust survivors' and heirs' insurance policies to December 31, 2010.

. The Washington website explaines that ICHEIC on February 15, 2000, "began a global effort to locate Holocaust survivors and heirs who could file claims for unpaid insurance dating from the Holocaust Era (1933-1945)." Since the turmoil of WW II destroyed or lost many paper policies, ICHEIC tried to get major European insurers to publish policyholder names from their company records, to let Holocaust victims or heirs know of policies and of potential claims.

Washington State's Insurance Commissioner Deborah Senn's final report urged "ICHEIC to speed up its claims process and to publish policyholder records" from the era. The Washington State Office in June 2002 published a Status Report acknowledging progress but admitting the process must go further even to 'bring closure' and even "*symbolic* justice to Holocaust survivors and their families."[11]. (Emphasis added).

Just recently, ICHEIC did publish many names. Go to the website and look. But be sure to **file before September 30**, 2003--ICHEIC might not again extend the deadline. **Do it now.**

ENDNOTES:

1. "Insurers to reveal Holocaust victims" (Treaster, J.)
2. Gov. Pataki, Sen. D'Amato Announce International Holocaust Insurance Commission (NY Gov's Office, April 30, 1998), www.state.ny.us/governor/press/ april30_98.html.
3. Ibid., NY Governor's Press Office.
4. "Holocaust-Era Insurance Claims Update Feb. 2000: Why Publication of Names is Key" (Kreidler, M., Comm'r, Feb. 11, 2000) www.insurance.wa.gov/industry/holocaust/holofactsheet.asp
5. Kreidler, ibid..
6. Sherman, M., "Court Weighs Holocaust Era Insurance Case" (AP) (April 23, 2003)
7. "Holocaust victims to get insurance dues" (nzoom.com Reuters) (http://onebusiness.nzoom.com/onebusiness_detail/0,1245,186531-3-169,00.html
8. Ibid.
9. .. (California threatens Italy's Generali on upaid Holocaust claims) (sg.dailynews.yahoo.com/,Dec. 2 1999, AFP) www.ess.uwe.ac.uk/genocide/appropriation10.htm
10. Sherman, M., "Court Weighs Holocaust Era Insurance Case" (AP; re: American Insurance Assn. V. Garamendi, 02-722, and Gerling Global Reinsurance Corp. v. Garamendi, 02-733).
11. www.insurance.wa.gov/industry/holcoaust/holocaust.asp

Board of Governors invites comments

The Board of Governors invites member comments concerning a proposed amendment to Alaska Bar Rule 15.

Alaska Bar Rule 15: Bar counsel became aware of an allegation that a lawyer was acting improperly in employing a lawyer suspended for nonpayment of dues because the employing lawyer was not complying with the notice requirements in Bar Rule 15(c). Bar counsel responded by advising that Bar Rule 15(c) was designed only to apply to lawyers who had been disbarred or suspended from practice for disciplinary reasons.

However, in its present form, Bar Rule 15(c)(1)(A) could be interpreted to apply to lawyers suspended for administrative reasons as well. In adopting the definition of the practice of law for lawyers suspended solely for the nonpayment of fees and for inactive attorneys, the Court clearly intended that these individuals be able to perform some tasks without penalty. The Court wrote that "these persons may represent another to the extent that a lay person would be allowed to do so."

The attached amendment identifies five classes of lawyers who have practice restrictions under the Alaska Bar Rules and then specifically defines those limitations depending on the lawyer's classification.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to alaskabar@alaskabar.org by August 8, 2003.

(Additions are underlined; deletions have strikethroughs)

Rule 15. Grounds for Discipline.

(a) Grounds for Discipline. In addition to those standards of conduct prescribed by the Alaska Rules of Professional Conduct, Ethics Opinions adopted by the Board of Governors of the Bar, and the Code of Judicial Conduct, the following acts or omissions by a member of the Alaska Bar Association, or by any attorney who appears, participates, or otherwise engages in the practice of law in this State, individually or in concert with any other person or persons, will constitute misconduct and will be grounds for discipline whether or not the act or omission occurred in the course of an attorney-client relationship:

(1) conduct which results in conviction of a serious crime as defined in Rule 26(b);

(2) conduct which results in attorney or judicial discipline in any other jurisdiction, as provided in Rule 27;

(3) knowing misrepresentation of any facts or circumstances surrounding a grievance;

(4) failure to answer a grievance, failure to answer a formal petition for hearing, or failure to furnish information or respond to a request from the Board, Bar Counsel, an Area Division member, or a Hearing Committee in conformity with any of these Rules;

(5) contempt of the Board, of a Hearing Committee, or of any duly appointed substitute;

(6) engaging in the unauthorized practice of law as defined in subparagraph (b) ~~while on inactive status, or while disbarred or suspended from the practice of law for any reason~~;

(7) failure to perform or comply with any condition of discipline imposed pursuant to these Rules; or

(8) failure to inform the Bar of his or her current mailing address and telephone number as provided in Rule 9(e).

(b) Unauthorized Practice of Law.

(1) Attorney Status Definitions.

(A) "Disbarred or suspended attorney" means an attorney disbarred or suspended for disciplinary reasons in any jurisdiction.

(B) "Resigned attorney" means an attorney who has resigned from the practice of law in any jurisdiction while disciplinary charges are pending.

(C) "Attorney on disability inactive status" means an attorney who has been transferred to interim disability inactive status or disability inactive status under Rule 30 or a similar rule in any jurisdiction.

(D) "Administratively suspended attorney" means an attorney who has been suspended from the practice of law under Rule 61 or a similar rule in any jurisdiction.

(E) "Inactive attorney" means an attorney who pays inactive bar dues under the Bylaws of the Alaska Bar Association.

(2) Unauthorized Practice of Law Definition for Disbarred, Suspended or Resigned Attorneys or Attorneys on Disability Inactive Status.

For purposes of ~~the practice of law prohibition for disbarred and suspended attorneys in~~ subparagraph (a)(7) of this rule, ~~except for attorneys suspended solely for non-payment of bar fees,~~ "unauthorized practice of law" is defined for disbarred, suspended or resigned attorneys or attorneys on disability inactive status as:

(A) holding oneself out as an attorney or lawyer authorized to practice law;

(B) rendering legal consultation or advice to a client;

(C) appearing on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body which is operating in its adjudicative capacity, including the submission of pleadings;

(D) appearing as a representative of the client at a deposition or other discovery matter;

(E) negotiating or transacting any matter for or on behalf of a client with third parties; or

(F) receiving, disbursing, or otherwise handling a client's funds.

(23) Unauthorized Practice of Law Definition for Administratively Suspended or Inactive Attorneys.

For purposes of subparagraph (a)(7) of this rule, ~~the~~ "unauthorized practice of law" ~~prohibition~~ for administratively suspended attorneys or inactive attorneys ~~suspended solely for the non-payment of fees and for inactive attorneys, "practice of law"~~ is defined as it is in subparagraph (b)(~~1~~2) of this rule, except that these persons may represent another to the extent that a layperson would be allowed to do so.

(c) Employment of Disbarred, Suspended, or Resigned Attorney or Attorney on Disability Inactive Status.

(1) For purposes of this rule,:

~~(A) "disbarred or suspended attorney" means an attorney who has been disbarred or suspended from the practice of law in any jurisdiction;~~

~~(B)~~ "employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

~~(C) "involuntarily inactive attorney" means an attorney who has been transferred to interim disability inactive status or to disability inactive status under > Alaska Bar Rule 30 or under a comparable rule in another jurisdiction; and~~

~~(D) "resigned attorney" means an attorney who has resigned from the bar association of any jurisdiction while disciplinary charges are pending~~.

(2) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or ~~involuntarily inactive~~ an attorney on disability inactive status to perform the following on behalf of the member's client:

(A) render legal consultation or advice to the client;

(B) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(C) appear as a representative of the client at a deposition or other discovery matter;

(D) negotiate or transact any matter for or on behalf of the client with third parties;

(E) receive, disburse, or otherwise handle the client's funds; or

(F) engage in activities which constitute the practice of law.

(3) A member may employ, associate professionally with, or aid a disbarred, suspended, or resigned attorney, or ~~involuntarily inactive~~ an attorney on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(A) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(B) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(C) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(4) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, or resigned attorney, or ~~involuntarily inactive~~ an attorney on disability inactive status, the member shall serve upon the Alaska Bar Association written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, or resigned attorney, or ~~involuntarily inactive~~ attorney on disability inactive status will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(5) A member may, without client or Bar Association notification, employ a disbarred, suspended, or resigned attorney, or ~~involuntarily inactive~~ an attorney on disability inactive status whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

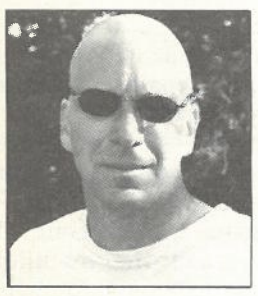
(6) Upon termination of the disbarred, suspended, or resigned attorney, or ~~involuntarily inactive~~ attorney on disability inactive status, the member shall promptly serve upon the Bar Association written notice of the termination.

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.

Sounds like Judge Link

☐ Rick Friedman



"Some days there are just no fish."

— Superior Court
Judge Jonathan Link

I never knew exactly what Judge Link meant by that, but he was very fond of repeating it when facing a trial problem with no satisfactory solution. I came to think of it as his version of the Serenity Prayer—"God grant me the serenity to accept the things I cannot change, courage to change the things I can, and wisdom to know the difference." Perhaps the wisest words ever written. But, "Some days there are just no fish," sounds more Alaskan and of course, more like Judge Link.

I didn't know him socially, but I tried two complex and emotionally charged cases in front of him. You can learn a lot about a person by staring up at them day after day as they confront one tough decision after another. Judge Link had that rare combination of intelligence, self-confidence and humility—three characteristics almost never seen traveling together. When they are, they make for an extraordinary person.

In the heat of a murder trial, I saw him call a timeout so he could keep two young native men from having to wait for their arraignment. I was anxious to get back in the fray. The judge calmly and patiently walked each man through his rights. I was fidgeting. He then talked with each man about what he was going to do to make sure he had a lawyer, how court appearances would affect his job, where his family was from, etc. What finally penetrated even my preoccupied and hyper-focused psyche was that I was witnessing compassion in the courtroom. That's not something you see every day.

I came away from each of my trials with Judge Link thinking "he is what I would like to be like when I grow up." He had the air of someone who had wrestled with his personal demons and come to terms with them. Terms he could be proud of. Hearing of his death, I felt a sense of personal loss out of proportion to the time I spent with him.

Judge Link's friends say he had a wonderful sense of humor, and I believe it. I wish I could have shared the following transcript with him. I think he would have enjoyed them, and I do so here in his memory.

The late Irving Younger was perhaps the most entertaining law professor. His 150 seat classroom was always filled—often standing room only—at 8:00 a.m. One of the most memorable classes was one in which he acted out the cross-examination transcribed below, complete with slurring speech and professorial pomposity.

The transcript was reprinted in an article by Jacob Stein that appeared in the Winter 1989 edition of *Litigation*. Under intense questioning, Younger repeatedly swore that the transcript was true, correct and authentic. Stein also maintains this position.

According to Stein, the case involved a patent infringement suit in the U.S. District Court in Minnesota, before Judge Paige Morris. The patent involved a beaver trap. According to Stein, "[a] minor contention of the defendant was that the plaintiff's trap was not designed to catch beavers, but much larger animals."

To rebut this contention, plaintiff called a retired professor of zoology who was elderly and garrulous. On direct examination, he refuted the contentions of the defendant. He went into elaborate detail concerning the habits of beavers, as well as many other animals, large and small, wild and tame.

Counsel for the defendant returned from the noon recess to begin cross-examination. While not obvious to those who did not know him, he was apparently drunk. This freed him from Irving Younger's "Ten Commandments of Cross-examination," as well as other rules and proscriptions that can stifle our cross-examination creativity. Here is how things progressed—or degenerated:

Q: Professor, you say you are a professor?

A: That's right. That is, a former professor. You see, I retired in 1915.

Q: That's all right, Professor. Professor of what, Professor?

A: Zoology.

Q: What's that?

A: Zoology.

Q: Yes, but what is zoology? Don't try to evade or quibble.

A: I am not quibbling.

Q: Oh yes you are, yes you are, just like all so-called experts and so-called experts.

The Court: Treat the witness fairly. He isn't trying to quibble. He just didn't understand you.

Counsel: I have practiced in this court for twenty-nine years and no court has ever accused me of mistreating any witnesses or any court or any client, directly and indirectly, and beyond that.....

The Court: Proceed.

Q: What do zoologists do, Professor?

A: They study and sometimes teach animal life. It is a bit difficult to define in a sentence. . . . It is the study of animals and animal life. I know of a professor of zoology at a school in Ohio who spent thirty-five years studying one animal. A snail, or rather the snail family.

Q: What was his name?

A: James H. Hertford.

Q: Where is he now?

The Court: What has that got to do with this matter? I am afraid you are wandering a little far afield.

Counsel: You honor forgets this is cross-examination.

The Court: I don't forget anything of the kind. Get along with your questions.

Q: Answer the question.

Counsel: Strike it. We will start all over again. I will try to put my questions in such a simple childlike way — so simple and easy, that even a professor, a dignified educated so-called professor who comes to Minnesota in the north woods after spending his life in a schoolroom looking at snails then telling, oh yes, telling us, as if we didn't know, what beavers would do.

Opposing Counsel: I certainly want to object to these remarks. These gratuitous....

The Court: Yes, that is very objectionable. Simply ask your questions. You know how. You aren't testifying. Get down to the meat of this thing. This is cross-examination, but you can't abuse any privilege...

Counsel: Very well, Your Honor. The attitude of this witness, the sneering, contemptuous, supercilious attitude of this witness toward me and toward the court has so outraged me that perhaps I have lost my temper. I shouldn't have done so. Read the question.

The Court: I haven't observed anything improper in the attitude of this witness.

Counsel: Read the question.

Opposing Counsel: There wasn't any question. You were starting to make a speech...

Counsel: I deny that. I absolutely...

The Court: There has been enough of this. If you have any questions, ask them or dismiss the witness.

Q: So you say you are a specialist, and expert, on beavers and beaver traps and snails?

A: I didn't say any such thing, sir. I said I know a great deal about beavers, just as I think I know, or many people say I know, a great deal about many animals. I have lived with them. I have observed them. I have handled them. I have fed them. I was almost going to say that I have conversed with them. They have a sort of language, you know. They are not inarticulate. And the cruelest thing we can call them is dumb animals; and also...

Q: You say that they can talk?

A: Well there is a sense in which all nature has a language which we who study it can understand.

Q: Answer my question.

A: What was your question?

Q: You said a beaver can talk.

A: Please don't try to make me ridiculous. What I said was this. All animals can speak, and by that I mean that they communicate with one another and understand their own language, even...

Q: Can you talk it?

A: I can answer it this way...

Q: Answer yes or no.

A: Yes.

Counsel: I want the reporter to get this. This is good. Mr. Reporter, be sure and get this.

The Court: He is getting it.

The Witness: I was about to say that if one wants to draw an analogy, even plant life has a kind of language.

Q: Do you talk that too?

A: As I said before...

Q: Don't quibble. Answer yes or no.

A: Subject to what I have said, I will answer yes.

Q: Did you ever talk to a buttercup?

Opposing Counsel: Now, Your Honor, this is too much and I...

Counsel: He is your witness, he is your witness. You brought him here and you are bound by his testimony. You brought this man here.... Did you ever talk to a buttercup, Professor?

A: Well, to those who are familiar with them and have learned to love them, some flowers have a certain language.

Q: What did the buttercup say to you and what did you say to the buttercup, fixing the time and place as well as you can?

The Court: You don't have to answer any such question.

Counsel: Exception to the remarks of the court. Objection likewise.

Q: Did you ever talk to a giraffe, yes or no?

A: I can't answer that yes or no. I have told you before that all animals have a kind of language which they speak which we who have training and sympathy and understanding can comprehend . . . .

Q: Then you have talked to a giraffe?

A: Yes, with that qualification.

Q: And the giraffe talked to you?

A: Yes.

Q: Did you ever talk to a lion?

A: Yes.

Q: And the lion talked to you?

A: Yes, with the qualifications I have stated.

Q: Did you ever talk to a skunk?

A: Yes.

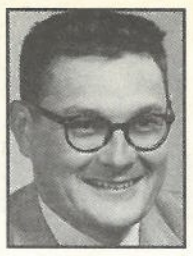
Q: And the skunk talked to you?

A: Yes.

Q: Well the next time you have a talk with one of those bastards, ask him for me what the God damned hell is the big idea.

50 Years
Alaska Bar Association

50 Years of Bar Membership


Judge Seaborn Buckalew


Judge James Fitzgerald


Al Maffei


A. David Talbot

Law Review: A love story remembered

By Lawrence Savell

As the gleaming jetliner drooped its nose earthward like a fading associate after a trifecta of consecutive all-nighters, Nick Ladrone thought back two decades, when he was smitten by her vixenish allure that first day of Property class.[1] "Her" was Cindy Uxor, Nick's classmate at the University of Michigan Law School, and his girlfriend, constant companion, and — dare he say it — original and enthusiastic love partner[2] from that first night[3] through graduation.

Nick remembered Cindy like it was yesterday, precisely recalling every detail of her appearance.[4] After that first class, Nick had followed her into her Document Production workshop seminar, and Cindy had been touched by Nick's tenderness in attending to her numerous paper cuts and extracting her flowing hair from one of the many industrial-capacity shredders being demonstrated.

As Nick reread the 20th-reunion invitation for the thousandth time, he nibbled instinctively at the corners of yet another Maalox tablet and thought of the experiences the couple had shared. Smiling, he recollected how their off-campus apartment had been in terrible shape, despite their many efforts to contact the landlord's on-site employee.[5] He recalled how Cindy loved to plant herself in her 1960s retro designer chair[6] and watch old movies on TV, particularly those starring the noted actor, Mr. Marshall.[7] He remembered that they had many common opinions, such as their belief in reincarnation,[8] acceptance of Freudian analysis,[9] support of often-unpopular political groups,[10] and sense that there had not been a truly great racehorse at any time during the 20th century.[11] And he thought wistfully of the sight of her outside their apartment, gleefully honking the horn on her dented but reliable old Honda.[12]

Of the two, Cindy had been the better student by far, making the law review on grades, then athletically[13] scaling the journal's rigorous scholarly heights to be appointed Punctuation Editor.[14] Nick was a marginal student at best, although he did sometimes use the rest of the page. Indeed, he nearly did not graduate; he was saved when the dean, a close friend of Nick's family, summarily commanded a reluctant Origami Law professor not to fail the boy.[15]

As it turned out, it was the Law that drove the loving couple apart. Cindy won a coveted circuit court of appeals clerkship in New England, which was capped by two tours of duty as a U.S. Supreme Court clerk. Nick, after a short stint as a legislative aide drafting provisions dealing with motor-coach transportation of starlets,[16] opted for the in-house route, joining one of the "Big Seven" fertilizer manufacturers down South, serving as the company's Assistant Associate Adjunct Auxiliary Additional Annexed Appended General Counsel in its Legal and Shipping Department.

The two tried to continue their relationship, but geography, schedule differences, and a childhood injury to Nick's salivary glands rendering him unable to adequately moisten and affix a postage stamp signaled their doom. One day, the calls stopped. Even after Nick replaced the cord he had tripped over, things were never the same.

TEMPUS FUGIT

"Please make sure your seat belts are buckled and your tray tables are stowed," the voice commanded from above.

Nick took a last swig of Kaopectate and replaced the flask in his attaché case. His hands were shaking, his palms were sweaty, and he suddenly had a desire to buy several Barry Manilow albums.

"Get a hold of yourself," he silently demanded.

A bumpy landing, 20 minutes of elbowing elderly fellow passengers from their prime luggage-carousel positions, and an hour's brakeless cab ride to Ann Arbor later, Nick found himself outside the venerable University of Michigan Law Library (which, a neon sign proclaimed, in exchange for sponsorship remuneration, was now to be referred to officially as the Hornblower & Kornblatt LLP, a Professional Corporation and Bowling Team,[17] Law Library).

Nick opened the door and immediately his eyes were drawn to her. She looked somehow even more youthful than she had back in law school.[18] She was standing at the center of an admiring and attentive group, whom he recognized from reading *People* magazine as two state supreme court judges, a U.S. senator, two Nobel laureates, and the guy who invented the double-fudge brownie.

Thankful that he had opted for the top-of-the-line Excelsior Plus suit separates from among the offerings at his local Wal-Mart, Nick confidently strode towards the laughing circle.

"Hi, Cindy," he said.

"Go away, creep," she responded automatically, the result of years of dating undependable men who amazingly had all shared the same annoying first name,[19] as well as the stubborn refusal to tame their staggering halitosis through the use of an offered breath mint.[20]

His look of shock and dyspepsia caused her to examine him more closely. She concluded, in fact, that he had remnants of egg salad in the corner of his mouth. Finally, a broad smile of recognition engulfed her face.

"Nick, is that *you*?" she asked breathlessly.

"*Res ipsa loquitur*," he responded, remembering that phrase as something one of his professors had once said in class.

The two of them sat down at a vacant reading table in the corner, pushing aside the stacks of *Gilberts*, *Nutshells*, and copies of *Law for Silly People* which had been taken down from the shelves.

"So what are you doing now?" he asked.

"I'm a full professor here at the law school," Cindy replied, choosing to omit the fact that, although the half-full professors whom she had eclipsed had accepted her with open arms, the half-empty professors had unfortunately taken a negative approach. "How about you?"

Nick explained how his company had recently gone under, buried in the current economic downturn after scared investors dumped its stock.

"I guess there's nowhere to go but up," he sighed.

Cindy laughed. Nick thought to himself how much he had missed that laugh.

They talked for hours. Cindy told Nick about her beloved home, Blackacre, and her two dearest friends, who were unfortunately also habitual litigants, P and D. But she admitted that something was missing from her life, beyond a deli within 500 miles where you could get an acceptable pastrami sandwich.[21] She openly discussed the fact that although she wanted to marry and have kids, the demands of her career had never allowed the opportunity, plus many of the men she had met had been intimidated by her achievements. Nick, who usually fantasized with lifelike realism about excelling at fatherhood,[22] volunteered that he likewise remained on his own in the romance field,[23] although essentially due to the fact that he was really no prize.

"You know, Nick, there's an opening at the law school for a Natural Resources Law Clinic instructor," Cindy advised. "That could be right up your alley. Plus, it would give us the opportunity to spend time together again."

Nick thought for a moment. Other than the other five pairs of pants to his suit and his collection of Cowsills eight-tracks, there was not much pulling him back to his poorly-decorated prefabricated dwelling.[24] And maybe, just maybe, he pondered excitedly,[25] he and Cindy could start over again as a couple, after 20 years of wondering why they had ever allowed themselves to drift apart.

"I hear the tomato soup in the Lawyers' Club cafeteria is pretty good," Nick said, taking the hand he had missed all those years as they walked out to the crisp open air of the Law Quad,[26] and watched the setting sun further deteriorate the retinas of anxious students preparing hopelessly for the final exams that would irreversibly determine their future.

This article first appeared in the February 2003 issue of *California Lawyer.*

(Footnotes)

*Counsel, Chadbourne & Parke LLP, New York City. Third baseman with limited, if not indiscernible lateral range, Central Park Lawyers' Softball League. I am indebted to those who have selflessly devoted themselves to facilitating my practicing law (i.e., my internist, ophthalmologist, dermatologist, and dry cleaner).

1. Pierson v. Post, 3 Cai. R. 175 (1805).
2. Emma Blissman, A Beginner's Guide to Easements (1969).
3. Act of September 4, 1979 (codified as Mich. Dating Code § 1 (1979-1982)). *Compare* Act of September 5, 1979, et seq.
4. Seymour Orless, *The Fallibility of Eyewitness Testimony*, 86 O.D./O.S.L.J. 2020 (1961).
5. *See supra.*
6. *Op. cit.*
7. *E.g.*
8. Hereinafter.
9. *Id.*
10. *Contra.*
11. Citation omitted.
12. *Accord.*
13. *See also* Buff. L. Rev.
14. *Cf.* U.S. Sentencing Guidelines Manual at 5-10 (1980).
15. *Passim.*
16. *See* Model Bus. Corp. Act (amended 1983).
17. To be distinguished from Horn & Hardart, a professional bakery. See N.Y. Digest § 3.14159265 35897932384626433.
18. Younger on Evidence (rev. ed. 2002).
19. *See* Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (West, 2002).
20. Cert. *denied.*
21. N.Y. Supp. (all volumes).
22. *See generally* 1 Pa. Super. 3d.
23. *See* ABA Handbook for Solo Practice (2002).
24. *Cf.* Charles Dickens, Bleak House (1853).
25. *In re Viagra Litigation*, 13 Prod. Safety & Liab. Rep. (BNA) 86 (2002).
26. 1 Blue Sky L. Rep. (CCH) ¶¶ 1-".

The Association of Legal Administrators elects officers

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

Name	ALA Office	Firm Name
Jennifer Palacio	President	Hughes Thorsness Powell Huddleston & Bauman
Patti Simmons	President-Elect	Perkins Coie
Sheila Mller	Vice-President	Jamin Ebell Schmitt & Mason
Lindsey Galin	Secretary	Holmes Weddle & Barcott
Karen Ponsness	Treasurer	Heller Ehrman White & McAuliffe
Sheri Lopez	Director-at-Large	Winner & Associates
Jennifer Grinnell	Director-at-Large	Jermain Dunnagan & Owens
Mary Ann Holappa	Past President	Atkinson Conway & Gagnon

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

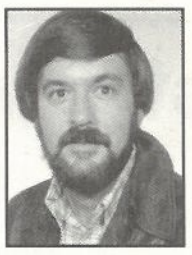
25 Years
ALASKA BAR ASSOCIATION

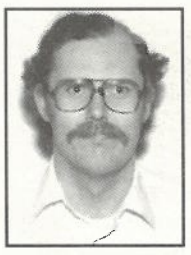
25 Years of Bar Membership


Daniel W. Allan


Patrick M. Anderson


Vaughn S. Armstrong


C. Richard Avery


Conrad N. Bagne


Ronald L. Baird


Madelon M. Blum

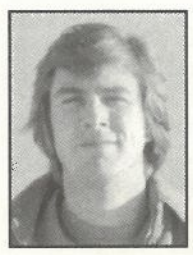

Brad J. Brinkman


Michele D. Brown


S. Wyanne Bunyan


Danny W. Burton

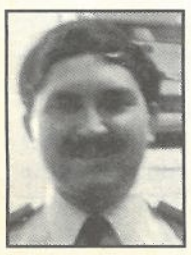

Paul J. Canarsky


William H. Cantrell

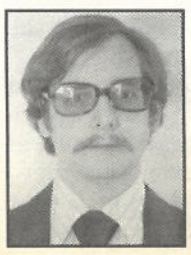

Linda M. Cerro


Allen R. Cheek

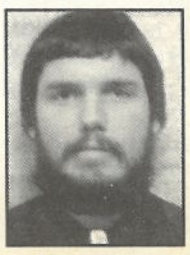

Cabot C. Christianson


Charles W. Coe


Patrick B. Cole

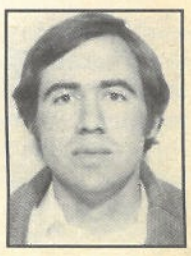

John W. Colver

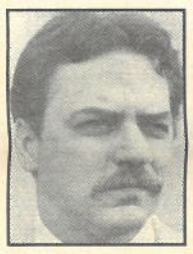

William F. Cummings


John G. Davies


Susan M. Delbert


Loren C. Domke


C. Walter Ebell


Mark L. Ells


Paul J. Erickson


Francis S. Floyd

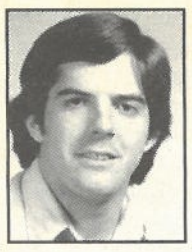

Gary G. Foster


David M. Freeman

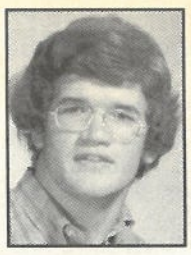

George T. Freeman


John B. Gaguine


Julie Garfield


Michael C. Geraghty


Lance E. Gidcumb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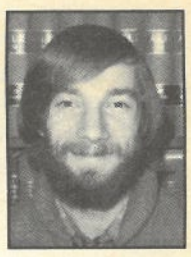
Neil M. Goff


Joe Goldberg


James B. Gottstein


Mary E. Guss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Bruce E. Heller

Andrew M. Hemenway

Alan Higbie, Jr.

K. Daniel Hinkle

Lee Holen

John M. Holmes

Gayle A. Horetski

Robert H. Hume, Jr.

Irene Frances Jackson

Chris A. Johansen

Joseph L. Kashi

Paul D. Kelly

Dennis D. Kelso

Mary D. Killorin

Frederick W. Ledbetter

Robert D. Lewis

Michael J. Lindeman

Edgar R. Locke

John R. Lohff

L. Merrill Lowden

David D. Mallet

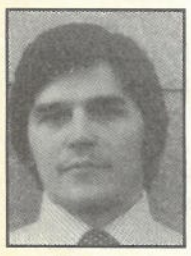
Michael P. McConahy

D. John McKay

Louis James Menendez

25 Years
ALASKA BAR ASSOCIATION

25 Years of Bar Membership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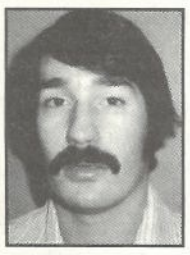
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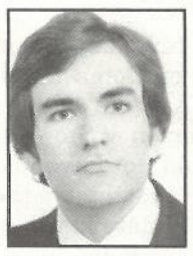
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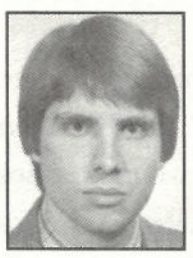
Rodney K. Nelson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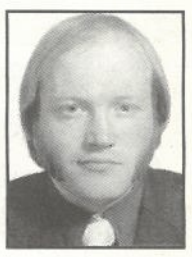
Deborah A. Paquette


Paul W. Paslay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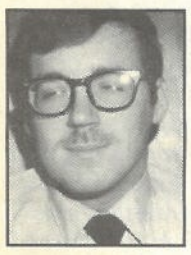

Michael J. Patterson


William J. Pauzauskie


James R. Peterson

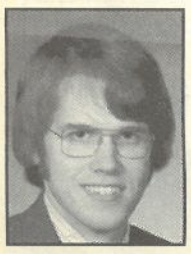

Ann E. Prezyna


Mark C. Rausch


Ann Waller Resch


Joyce M. Rivers


James G. Robinson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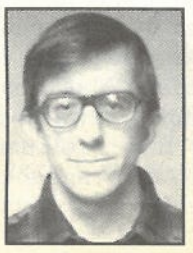
Elisabeth H. Ross


Joel A. Rothberg


Mark A. Roye


Karen L Russell


Christine S. Schleuss


Cherie L. Shelley


Robert I. Shoaf


John C. Siemers


George Wayne Skladal


Deborah M. Smith


Steven D. Smith


Spencer C. Sneed


Harold E. Snow, Jr.


Ann K. Stokes

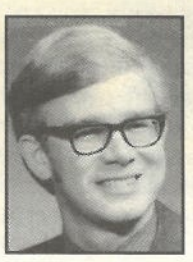

Antoinette M. Tadolini


Bonnie L. Thie


Julia S. Tucker


John R. Ulyatt


Susan A. Vaillancourt


Stephen J. Van Goor


Lawrence E. Volmert


Richard L. Waller


Stephen R. West

25 YEAR PIN RECIPIENTS RECEIVE AWARD AT CONVENTION

L-R: Steve Van Goor; George Skladal; Paul Carnarsky; Linda Wilson; John McKay; Lee Holen; David Freeman; Mary Guss; Julia Tucker; Deborah Williams; John Lohff. Not pictured: Gail Horetski was also present to receive the award

Stephen M. White

Linda K. Wilson

Russell L. Winner

Christopher E. Zimmerman

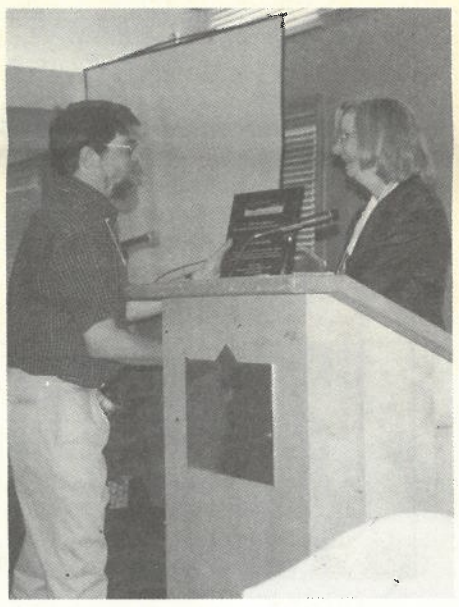
NOT PICTURED
W. Grant Callow, II
Gregory A. King
Ronald W. Miller
Martha C. Shaddy

Congratulations to pro bono volunteers

Katherine Alteneder

A highly distinguished and dedicated group of lawyers and firms were recognized at this year's Bar Convention for their outstanding contribution to pro bono service. They truly do honor to our profession. The Alaska Pro Bono Program, Alaska Network on Domestic Violence and Sexual Assault, the Pro Bono Asylum Project, and the Volunteer Attorney Support Services at Alaska Legal Services Corporation (ALSC) join together to honor and congratulate Jim Kentch, Clapp, Peterson & Stowers, Niewohner & Associates, Faulkner Banfield, P.C., and Michael Gershel for their service to low-income Alaskans and for the excellent example they set for the legal profession.

2003 Robert Hickerson Distinguished Individual Service Pro Bono Award is given to an individual who over the last year has demonstrated an outstanding conviction toward equal access to civil justice for low-income Alaskans. This year, that person is Jim Kentch of Anchorage.

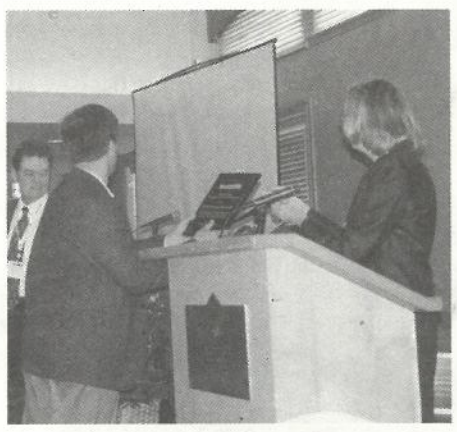


Jim Kentch accepts award.

Jim has been a lawyer since 1978, and has practiced in Alaska since 1980. His practice focuses on consumer protection and researching and writing for other lawyers; in his free time he dominates the slopes on his snow board. Jim has always been a generous financial contributor to pro bono efforts throughout the state, and in 1999 became one of the first volunteers for the Asylum Project. Fearlessly immersing himself in a new practice area, Jim has donated countless hours for clients fleeing persecution from El Salvador and Colombia. "Jim has distinguished himself by creating life-altering bridges for his clients to their new home in Alaska," said Robin Bronen of the Pro Bono Asylum Project. "He has completely embodied the mission of the project, which is to provide zealous pro bono representation to those fleeing torture in their countries of origin, as well as to create bridges across culture and language," she added. About his work, Jim says, "immigration pro bono work is a good way to show compassion and charity to very deserving people caught in a complex system where the stakes are high."

2003 Robert Hickerson Distinguished Firm Pro Bono Award is given to a firm who over the last year has demonstrated an outstanding conviction toward equal access to civil justice for low-income Alaskans. This year, this award is shared by two Fairbanks firms, Niewohner & Associates and Clapp, Peterson and Stowers, both of which have gone above and beyond the call of duty.

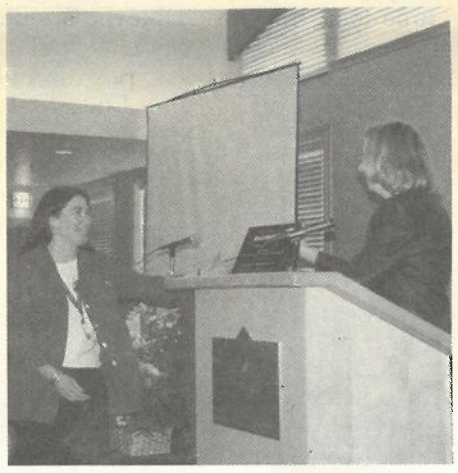
Niewohner & Associates was established in 1964, and since that time have developed a practice focusing on general civil litigation. For many years, Niewohner and Associates has been recognized for its pro bono efforts, in particularly on behalf of victims of domestic violence and people living in rural Alaska. "They are always willing to help out," said Erick Cordero of Volunteer Attorney Support Services at ALSC. During the last year, the firm has been a leading provider of pro bono services in the state, modestly donating many hundreds of hours for numerous cases. "Niewohner & Associates' unwaivering dedication is inspiring," added Cordero. Reflecting on his firm's commitment to pro bono, Ed Niewohner said simply, "It's a job that needs to be done and we try to do our fair share – so we do it."



Clapp, Peterson & Stowers accepts award.

Clapp, Peterson & Stowers began in June of 1994 with the opening of their Fairbanks office, and then expanded with an Anchorage office in April of 1995. The emphasis of the firm is on civil litigation in defense of professionals, product liability, personal injury and employment law. In the past year, the firm accepted a particularly difficult and complex domestic relations case that also included domestic violence. As the needs of the case grew, the firm contributed more and more resources, donating more than 300 hours of time a six month period. "They took on this terrifically difficult case and gave the client 200%," said Christine Pate of the Alaska Network on Domestic Violence and Sexual Assault, adding, "without Clapp, Peterson & Stowers' help, this client would not have had a chance in court." Reflecting on the firm's pro bono work, Marcus Clapp said, "Pro bono work is being asked of lawyers more and more as laws become more complicated, limiting lawyers' effectiveness and making it more difficult for people to get quality civil representation. Clapp, Peterson & Stowers pro bono efforts provide what we can within our fields of practice to bring some security to those in need of legal services."

The Pro Bono Lifetime Achievement Award is given to a firm, individual, or both, who has demonstrated a lifetime of leadership, outstanding volunteer services, and a commitment to making equal access to justice a reality for low-income Alaskans. This year the honor is awarded to the Juneau law firm Faulkner Banfield, P.C. and to Anchorage solo practitioner Michael Gershel. Both have distinguished themselves and brought honor to our profession with their years of pro bono service. They do more than simply represent clients on a pro bono basis; they have become role models for all of their colleagues.



Beth Ann Chapman accepts award on behalf of Faulkner Banfield.

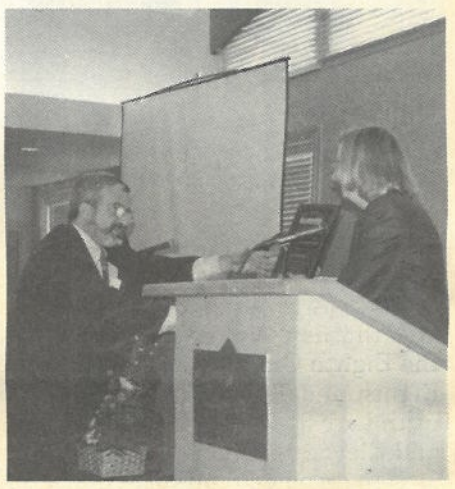
Faulkner Banfield, P.C. has made pro bono service a core aspect of what it means to work for their firm. The firm was founded in Juneau, Alaska, in 1914 by Herbert Faulkner. From historic roots in criminal law, the firm has grown to provide representation throughout Alaska in an array of fields as diverse as estate planning, complex commercial civil litigation, natural resources, personal injury litigation, products liability, professional malpractice and state and local taxation. Generously folded in to this expanse of practice areas has always been a commitment to pro bono work, often in the domestic relations area. Every year the firm donates hundreds of hours to pro bono clients, making immeasurable differences in people's lives.

WHAT IS PARTICULARLY NOTABLE ABOUT THE FIRM'S PRO BONO WORK IS THAT NEARLY EVERY ATTORNEY, AS WELL AS THE SUPPORT STAFF GETS INVOLVED IN ONE WAY OR ANOTHER.

Reflecting upon pro bono service, Leon Vance, the managing shareholder of the firm, said, "Pro bono representation is an important professional obligation, but it also is an important part of the social compact. We hope the contribution of our time helps to strengthen the community's respect for law and the justice system."

What is particularly notable about the firm's pro bono work is that nearly every attorney, as well as the support staff gets involved in one way or another. This ethos has made the firm, "a pro bono coordinator's dream come true," says Erick Cordero, of the Volunteer Attorney Support Services at ALSC. The firm is also renown for its financial support and its assistance in recruiting other attorneys.

Michael Gershel is a sole practitioner who specializes in domestic relations. His knowledge and enthusiasm are boundless, and in addition to helping innumerable clients, he has also mentored many young attorneys. "Michael's dedication is just incredible – he is a role model to all private practitioners of what is possible," says Erick Cordero, of the Volunteer Attorney Support Services at ALSC.



Michael Gershel accepts award.

For eighteen years, Michael served as a domestic relations attorney at ALSC. After opening a private practice in 1996, he continued to work at ALSC on a part-time basis. Since then he has distinguished himself as a leading volunteer for all of the pro bono programs, as well as finding many other avenues to help low-income Alaskans gain access to justice and to help his colleagues. Some of Michael's activities have included mentoring new attorneys, teaching legal clinics, training legal advocates who work with victims of domestic violence, teaching at the UAA Justice Center as an adjunct professor, serving on the Family Rules Committee, preparing case summaries of domestic relations decisions for the Family Law Section, and serving on the Advisory Committee for the Court System's Family Law Self-Help Center.

When reflecting on his pro bono service, Michael said, "A healthy society requires a consensus that it is responsive to each person's rights, and we have a collective obligation to ensure that society recognizes the rights of all, including those of limited financial means. As attorneys, we have a tremendous ability to bring justice to where it is otherwise absent and, in doing so, to touch people's lives."

20 questions for the Appellate Judge

Continued from page 1

with the Executive Branch that Alaska would get the next seat on the Ninth Circuit. After calling me, Senator Stevens put my name forward.

The confirmation process itself is extremely unpleasant. From the time the FBI and ABA investigations make it known that the President has tentatively decided to nominate a person, the prospective nominee dangles in the cold wind while the President's adversaries look for dirt. At least that's how it was when I experienced it. No doubt some good potential nominees decide to avoid the whole process, and the courts lose talent.

Q: In a letter that you submitted in May 1998, you endorsed a division of the Ninth Circuit that would place the States of Alaska, Idaho, Montana, Oregon, and Washington into a new Twelfth Circuit. Do you continue today to view that proposed split as the best possible division, if not what proposed split do you favor today, and please explain the reasons for your answer.

A: I continue to strongly favor a split of the Ninth Circuit. The most important reason why is purely administrative, that the circuit is just too big for effective appellate decision making.

As to the details of how the split is done, I don't think it matters all that much. Placing just about any combination of states in the Twelfth Circuit, and apart from California, would improve the quality of justice in both by making both the Ninth and the new circuit smaller. When the Eighth Circuit was split into the Eighth and Tenth Circuits, and the Fifth Circuit was split into the Fifth and Eleventh Circuits, the people in all of those new circuits benefited from a more coherent and predictable decision-making process.

I agree with the conclusion of the Commission headed by Justice Byron White (and two-thirds of the appellate and district judges that they surveyed) that the Ninth Circuit has far too many judges for an optimally functioning appellate court. Currently, we have 28 seats for active judges on this court, and 46 judges on the court counting those who have taken senior status (almost all senior judges still participate quite substantially).

Our court is much too big for us to read all of each other's decisions and it's too big for us to sit together to rehear a case *en banc*. There are well over 3,000 combinations of judges, not including senior and visiting judges, so a pair of active judges on the court can go 3 or 4 years without sitting with each other on a regular panel. Our "limited *en banc*" consists of 11 judges out of 28. If you have a majority of 6 judges in those cases (as we often do), then a "majority" that is less than one-fourth of the whole court purports to be acting for the full court in rehearing our most important and controversial cases.

Q: If the Ninth Circuit is indeed divided, what are the three things about the current Ninth Circuit that you expect you will miss the most, and what three things will you miss the least?

A: The three things I'll miss the most are: 1. My very capable colleagues and friends in whatever states are no longer in my circuit. 2. Working on the diverse and interesting problems that arise out of California. 3. The pleasure of the people and places I regularly get to visit when hearing cases in San Francisco and Pasadena.

The three things I'll miss the least are: 1. Too many cases, with the consequence that a judge just can't read all the slip sheet opinions from the court. As a result, the law becomes somewhat incoherent and unpredictable. I once tried to carry a year's worth of slip sheets up to a podium to give a speech about the Ninth Circuit, but there were so many that the carton broke and the slip sheets fell like snow all around my feet and up to my ankles in a huge pile. That proved my point better than anything I could have said.

2. The rarity with which I get to work on the important legal concerns of my own state, and other states with which Alaskans have more contact and similarity than California.

3. The "crapshoot" aspect of *en banc* panels drawn randomly from our much larger court.

Q: You are the first former trial court judge to participate in the 20 Questions feature. I have heard some federal appellate judges who formerly served as federal district judges remark that they enjoyed the job of federal district judge more than they enjoy the job of federal appellate judge. How do the two jobs compare in your opinion, and what things if any do you miss about being a district judge?

A: For me, anyway, it's not true that I enjoyed the district judgeship more than the appellate judgeship. They are both great privileges and I quite frequently think how fortunate I am to be doing this work. I like the Circuit Court better, because my own tastes run to reading briefs and records and researching the law, and I didn't get to do as much of that as a district judge. A district judge's work is kind of lonely, because he exercises most of his authority in the courtroom, and does it by himself.

As for how the two jobs compare, being an appellate judge is more like being back in law practice. Your daily work consists in significant part of trying to persuade judges to accept your view of the law. Although I am not writing memos supporting or opposing summary judgment anymore, writing suggestion memos, *en banc* memos, and to some extent the process of writing opinions is a lot like the part of law practice that isn't conducted on the telephone. Studying and writing about the law, and trying to come up with an analysis of the facts and the law that will satisfy the other two judges on the panel, is a lot like what I did when practicing in front of the Alaska courts.

As for what I miss most about being a trial judge, I liked supervising a case in pretrial, frequently on matters that I understood well and with lawyers on both sides that I knew. I enjoyed being able to adjust the conditions and limitations on discovery and trial in such a way that the case would be resolved fairly, on the merits, with attorney's fees and expenses that were reasonable in relationship to the stakes on both sides. The ability to bring about justice in an individual case, and to recognize how to do that, is often much greater as a trial judge than as an appellate judge. The discretionary decisions of trial judges shape most cases, and it's nice to be able now, as an appellate judge, to understand and appreciate those exercises of discretion.

Q: Some may believe that the Ninth Circuit is unfairly maligned in the popular press, especially when the press reports on the latest U.S. Supreme Court reversal or the latest Ninth Circuit ruling to provoke a public outcry of one sort or another. What are your views on the press coverage that the Ninth Circuit has been receiving, and would you characterize the coverage, generally speaking, as fair or unfair?

A: I have no criticisms of the press coverage of the Ninth Circuit, any more than I have criticisms of press coverage of any major institution. Of course, lay journalists often do not understand technical matters in the law. But I certainly see nothing wrong with critical reporting on a public institution, whether it's a court or not. When we are wrong about something, and we get reversed, there's no reason why it should be our little secret.

Q: While today you don't have to travel hundreds of miles by dogsled to hear cases as your predecessor judges based in Alaska once did, you probably now have the most grueling commute of any federal appellate judge to arrive at the locations where your court regularly hears oral arguments. When you weigh the substantial costs of oral argument against its benefits, do you find oral argument to be over-valued? And do you have (or if not would you favor) the option of participating in oral argument via videoconference, which even the rather geographically compact U.S. Court of Appeals for the Third Circuit uses when its judges can't justify a trip to Philadelphia?

A: Oral argument is worth the trouble.

We have occasionally had oral arguments by conference call, typically on a comeback case that we are not hearing during a regular argument week (it would not be practical for all three judges to travel just for one case). In my experience, it works reasonably well, though not quite as well as live argument. Videoconferencing would be a little better. I didn't know about the videoconference oral argument in the Third Circuit. Thanks for telling me.

Despite its inconvenience, I find oral argument extremely valuable and worth the very considerable effort it takes for me to get there. The effort is no joke: it's 8 ½ hours to San Francisco and 10 ½ to Pasadena when everything goes right, and as long as 22 hours when it doesn't (which is often).

The value of oral argument differs for different judges, because judges have different learning styles. Some prefer to learn things and develop their opinions as they read, others as they listen and talk. I'm in the "listen and talk" camp. On a case where some aspect is troubling or difficult (and that's many of the orally argued cases), I just don't make up my mind until I have to; and I don't have to, even tentatively, until we confer after oral argument. There is no point to making up my mind sooner, because I learn a lot from the dialogue with the lawyers. The value comes not just from answers to my own questions, but from the loosely structured back-and-forth when a three-judge panel conducts oral argument, and the dialogue that the other two judges have with the lawyers.

Even when I come in with a fairly well-set, tentative view, the lawyers often educate me on matters I did not fully understand from the briefs or the excerpts. Ordinarily, a lawyer knows more about his or her own case than the judges can possibly know, and they educate judges. Sometimes we don't really understand the case from the briefs, particularly if they are not that well written, and the issues become clear at the oral argument.

Q: After growing up in Brooklyn, New York and attending college and law school on the east coast, you traveled to Fairbanks, Alaska to take a judicial clerkship with Justice Jay A. Rabinowitz of the Supreme Court of Alaska. What strategy did you employ in seeking a judicial clerkship, how did you come to accept this one, and what were the reasons why you decided to make your home in Alaska following your clerkship's conclusion?

A: Although I was born in the Bronx (not Brooklyn), I mostly grew up in the Washington, D.C. suburbs. I had thoughts about a political career and Alaska looked like a good place for it, but I abandoned those thoughts after discovering that law was much more interesting for me than politics. I had no strategy for seeking a clerkship. I chose to apply to Jay Rabinowitz after reading a large number of Alaska Supreme Court decisions and deciding that of the three justices who were then on the court, he was the one with whom I was most impressed and with whom I resonated the most. I was most impressed with some dissents Justice Rabinowitz wrote in a case that went up and down to the U.S. Supreme Court, because of his lucid and effective defense of freedom of speech in the face of a majority that got the answer wrong.[1]

The only clerkship I applied for was with Justice Rabinowitz. While finishing it, I thought about going back to Boston where I had an offer lined up at a very fine firm I had clerked for after my second year, Rackemann, Sawyer & Brewster. Before I went back I decided to hang out my shingle in Fairbanks to see what it would be like. Back then, Fairbanks was just a small frontier town. What happened was that from the start I was making more money and having more fun then I expected to have in Boston, so I never went back. And the camaraderie of the bar in Fairbanks was delightful (and still is - I have lunch with the Tanana Valley Bar Association every Friday unless I'm out of town).

Q: What qualities do you look for in deciding whom to hire as a law clerk, and are there any sorts of candidates whom you wish were applying but haven't been. Also, are you adhering to the "Law Clerk Hiring Plan" that supposedly has the overwhelming support of federal appellate judges, and why or why not?

A: When looking at potential clerkship applicants, I look first for a very high level of intelligence. I prefer that the person have had a good undergraduate education, so that the law clerk will be well-rounded in history, economics, political science, and literature, with some general scientific and mathematical understanding. It is not at all unusual for us to have to think together about Reconstruction politics or statistical significance as well as legal doctrine.

I don't limit myself to hiring applicants from the top law schools. Some highly capable people don't go to the top law schools because they can avoid incurring a six figure debt by accepting a good financial package from a law school a little further down

Continued on page 30

20 questions for the Appellate Judge

Continued from page 29

on the U.S. News & World Report's list. And some people just have more talent at the law than they did at their undergraduate subjects and blossom in law school. I prefer to give a chance to a broader range of people, and it gives me the benefit of a broader market.

My clerks and I spend a lot of time together, and we have daily conferences where they have to present cases to me orally. We also have lunch together frequently. So I look for clerkship applicants who speak clearly and concisely about complex matters, and who I will enjoy talking with. I like law clerks who share my view that judges should perform an intellectually honest analysis of the law and apply it to the facts of the particular case, rather than imposing their policy preferences. Resume entries such as participation in the Federalist Society or with organizations like the Institute for Justice also pique my interest. And I look for nice people, so that through an entire year working closely together in a small office at a remote subarctic outpost we will continue to like each other and enjoy each other's company.

I don't follow the (federal) law clerk hiring plan, because it is impractical for Alaska. I hire before, during, and after the officially stated times. As a practical matter, I now expect to do much of my hiring during the summer following second year and during the fall of third year. Applicants applying in advance of the law clerk hiring plan shouldn't wait on recommendations from their professors before sending applications.

The reason I don't follow the plan is that it would be too great an imposition on an applicant to make them travel to Fairbanks, Alaska for an interview, so I squeeze in a very few interviews when I am Outside on calendars. Often the interview is a long dinner at a good restaurant. The timing of my calendar trips and the sparseness of interview slots requires that I spread them out more than the hiring plan allows for. Also, I make better judgments on whom to hire when I can spread out the decisions and hire the law clerks one at a time.

Q: In researching these 20 questions for you, I've enjoyed learning about Fairbanks, Alaska (which is now celebrating its centennial) via this online visitors' site and from the Web site of the local newspaper, The Fairbanks Daily News-Miner. Do the clerkship candidates who apply to work for you generally view the opportunity to live in Fairbanks, Alaska for a year as a positive or negative feature of the job, and what do you tell candidates from the Lower 48 States who are not sure whether Fairbanks is the place for them about what it's like to visit or live there?

A: Among those who apply, Fairbanks seems to be a positive draw. Few other clerkships of this caliber give the clerks a chance to go to the Chatanika Outhouse Races, or walk from chambers onto the frozen Chena River to see dogs finishing the 1,000-mile Yukon Quest dog sled race, and get rewarded with big slabs of raw steak. If applicants are not sure if Fairbanks is the place for them, I encourage them to read and think about it, and not to clerk for me if they would rather be somewhere else, because there are a lot of people who think it would be a real treat to be in Fairbanks, Alaska.

Q: The committee in charge of considering amendments to the Federal Rules of Appellate Procedure is giving serious consideration to a rule that would allow the citation of unpublished, non-precedential decisions in briefs filed in federal appellate courts. The Ninth Circuit appears to stand alone in actively opposing that rule change. Where do you personally stand on this issue, and do you think that the Ninth Circuit's opposition to the possible rule change stems from the large size of the court and its inability to ensure that its non-precedential decisions are adequately considered?

IN MY VIEW, LIBERTY AND DEMOCRACY ARE THE TWO MOST IMPORTANT ASPECTS OF OUR FORM OF GOVERNMENT, AND THE CONSTITUTION SETS UP WHAT THE BOUNDARIES ARE BETWEEN MAJORITARIAN CONTROL OVER INDIVIDUAL CHOICES AND INDIVIDUAL PROTECTION FROM MAJORITARIAN GOVERNANCE.

A: I stand in the very uncomfortable position of having a leg on each side of the fence on this issue. On the one hand, we owe it to people to treat like cases alike and, in that sense, all cases ought to be precedential. On the other hand, we simply cannot supervise our own court's output adequately for publication because of the size of the court. If we did publish all our decisions, it would not accomplish the purposes of achieving consistency, because we could not read them all. Universal publication would make the law less predictable, because there would be too many decisions going too many ways, and neither the judges nor the lawyers could keep up with them and develop a coherent body of law.

A very substantial percentage of our unpublished decisions are written by staff attorneys at our San Francisco headquarters. They are reviewed by the judges in "motions and screening panels," in which we decide an enormous number of cases in a few days, based on oral presentations by the staff attorneys and such examination of the briefs, record, and unpublished dispositions as we feel we can do in a very few minutes. Within chambers as well, our unpublished dispositions are a way for us to cope with excessive volume by avoiding the very time consuming process of writing an opinion in what appear to be easy cases. The care one takes with the language in a published opinion is extremely time consuming and requires many drafts. The unpublished dispositions are necessarily not as careful. It is not at all unusual for them to have sentences that, taken out of the context of the particular case, would give a mistaken view of the law.

My personal preference would be to change the name from "memorandum" and "unpublished disposition" to "summary disposition," and to make the dispositions so summary in form that publication and citation could do no harm. Summary form is in fact what our circuit's general orders call for, although some judges issue longer dispositions. There's really no such thing as an unpublished disposition, since they are all published electronically and in West's Federal Appendix. Calling them "summary" would encourage the writers to make them summary, with fewer articulated errors that spread to other cases.

Q: Is the salary paid to federal appellate judges too low, and if your answer is "yes," what should the salary be or, perhaps less controversially, how would one determine what the proper salary should be?

A: For me, salary doesn't matter. I saved enough money while in private practice to provide for my wife, to send my three children through college and, if they want, graduate or professional school, and to continue to live well despite the judicial salary. If I die broke, that's just a good estate tax avoidance scheme. This is easy for me to say because housing in Fairbanks is a lot cheaper than in Seattle, San Francisco, or Los Angeles.

I do think the salary should be raised. Prestige in our society tends to be linked with salary. As the salary of judges falls compared with lawyers, law professors, law school deans, university presidents, and others in conspicuous positions, it affects our ability to draw the most accomplished and capable lawyers into the federal judiciary. A lot of lawyers can't afford to be judges.

Also, in the long run, if judges are paid more like clerks than like highly successful lawyers, then people are more likely to treat their decisions as being more like those of clerks, than those of highly respected officials in our government. I think there is a tendency in this direction in the Continental system. Most of our compliance with the law is voluntary and based on respect for the law, so this would be an unhealthy development.

As for how high the salary should be, it seems appropriate to draw comparisons with the relevant market, such as law firm partners and law school deans. It's ridiculous that our law clerks make more than their judges within a couple of years.

Q: You were the author of a decision which held that a jury's award of $5 billion in punitive damages arising out of the Exxon Valdez oil spill against the oil company and the ship's pilot was constitutionally excessive. I imagine that like most federal appellate judges, you generally labor in anonymity. Did you receive more feedback than usual from other Alaska residents following your ruling in that case, and was it mostly positive, mostly negative, or evenly divided?

A: Anonymity is great. I knew when I was writing the decision in the Exxon Valdez case that it would be very unpopular in Alaska, and it was. There were some very intense feelings, though the most intense feelings were in South Central Alaska, not in the Interior where I live. Nevertheless, life tenure and anonymity are just great when you have to make a decision that you know people won't like.

Q: Of the many opinions that you have written since joining the Ninth Circuit in 1991, what single opinion — unanimous, majority, concurring, dissenting, or other — do you find to be the most memorable?

A: An especially important opinion for me was a short dissent I wrote in our court's "right to die" case, Compassion in Dying, which was later reversed by the Supreme Court. In my view, liberty and democracy are the two most important aspects of our form of government, and the Constitution sets up what the boundaries are between majoritarian control over individual choices and individual protection from majoritarian governance. There is an unfortunate tendency among people who don't think about it too deeply to think that if something is very important, then it must be a matter of constitutional law. That implies that if something is very important, power is transferred from the majoritarian institutions to the courts. "The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary." Compassion in Dying v. State of Washington, 79 F.3d 790, 858 (9th Cir. 1996).

I have also been particularly interested in working out the application to changing times of our unchanging constitutional protection of freedom of speech and freedom of religion, as in Finley v. National Endowment for the Arts, 100 F.3d 671 (9th Cir. 1996), K.D.M. v. Reedsport School District, 196 F.3d 1046 (9th Cir. 1999), Ex rel Lavine, 279 F.3d 719 (9th Cir. 2002), and others. Another case of considerable interest involved protecting families from unconstitutional searches and seizures by social workers as well as by police. Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999).

It's also hard to beat relatively trivial cases that gave me the opportunity to plant in the law procedural determinations that increase fairness and reduce arbitrariness. For example, I took a lot of satisfaction in the holding in Carmen v. San Francisco Unified School Dist., 237 F.3d 1026 (9th Cir. 2001), that in order to prevent a summary judgment, a respondent has to include the evidence or a reference to it in the opposition papers, instead of rescuing the case on appeal with some document buried hundreds of pages earlier in the file that neither the judge nor the movant were alerted to.

Q: Public outcry in reaction to judicial decisions is no longer a seldom-seen occurrence. Two examples are the annual protests that accompany the anniversary of the U.S. Supreme Court's ruling that recognized a constitutional right to abortion and the protests that followed the Ninth Circuit's recent Pledge of Allegiance ruling written by Senior Circuit Judge Alfred T. Goodwin, whose decision to take senior status opened up the Ninth Circuit seat that you now hold. What weight, if any, should an appellate court judge give to the general public's actual or expected reaction to a ruling under consideration or reconsideration?

A: The value of having life tenure is that we can reject the general public's expected reaction when the law requires rejection, instead of following public sentiment as we would usually have to do were we elected legislators rather than judges. But that doesn't mean that public reaction, both ac-

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20 questions for the Appellate Judge

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tual and expected, should be ignored. When the law leads me to a conclusion that I know would cause public concern or outcry (if the reporters picked it up, which they usually don't), then I check my work carefully. Of course, I check my work carefully anyway, but I would have to say I check it more carefully to see whether the law really compels the conclusion, if I know that most laypeople would think that the conclusion was idiotic. When most people think something, it's often right — but not always. If the law compels a result, that's the way it is, and being able to reach that result without being beholden to public opinion is what life tenure is good for. Nevertheless, I do not think judges ought to affect disdain for public opinion.

Q: How do you define the term "judicial activism," and is it ever proper for a federal appellate judge to consider his or her personal preference as to the outcome of a case (other than the preference to decide the case correctly in accordance with the law) in deciding how to rule?

A: I don't use the term "judicial activism" myself, because I am uncomfortable with the imprecision of its definition.

We are bound to determine whether the law compels a result, whether it is consistent with the judges' preferences or not, and when the law does compel a result, a judge is obligated to apply it. For example, if someone is in litigation against a union and you're reviewing a summary judgment, you don't decide the case based on being pro-union or anti-union. You decide whether the summary judgment papers establish that there were no genuine issues of material fact and that the appellee was entitled to judgment as a matter of law.

As judges, we are just as bound by the law as everybody else in society. The people are entitled, except where they are barred by constitutional limitations, to make the law through democratic processes, and they are entitled to have us follow it. As I wrote in Compassion in Dying, this is a democratic republic, and the people are entitled to have their elected legislators and executives, not us, make policy judgments. If we don't like the laws and regulations, we can vote for the other guy, just like other citizens. To my mind, the judge who simply decides upon the outcome he or she prefers rather than deciding upon an intellectually honest application of the law, is himself or herself an outlaw. "The courts must declare the sense of the law; and if they should be disposed to exercise Will instead of Judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78 (Alexander Hamilton). Also, there just isn't the satisfaction of a craft performed well, if we substitute our policy preferences for the law. Judging like that is just an exercise in despotism, rather than the intriguing, difficult and satisfying craft that an honest judge practices.

Q: I see that in your published opinions, you follow the method of legal writing that recommends putting all citations to authority in the footnotes rather than in the body of the text. What reasons can you offer to other federal appellate judges for why they should join you in that practice, and would you recommend that appellate advocates who file briefs in the Ninth Circuit follow your approach or use the more common approach, whereby citations to authority often appear in the text rather than exclusively in footnotes?

A: I've been putting my citations in footnotes because I was persuaded by Brian Garner's argument that this makes the opinions more readable and leads to clearer reasoning and writing. Footnote citations require judgment, though. Often it's important for the reader to know the name of the case you are talking about, or what court it came out of, or what date it came down, without having to look at the footnote, and it's important to put these things in the text when they're necessary to the reader. The idea of using footnotes is that no one has to read them unless they are writing something, a decision or a brief, and need to check the cites. Because my process can't be mechanical and involves a lot of writing judgments, it requires more work. It's possible that I will drop the practice because it has not spread.

TO MY MIND PLAIN LANGUAGE AND CLEAR WRITING ARE ESSENTIAL TO CLEAR THINKING AND ARE A PROTECTION AGAINST JUDICIAL ERROR AND GOVERNMENT ABUSE.

The real attraction of it to me is not just a matter of writing style. There is a deeper underlying philosophy. I require all my law clerks to read George Orwell's essay, Politics and the English Language.[2] Orwell describes bureaucratic and academic writing as "a mass of Latin words [that] falls upon the facts like soft snow, blurring the outlines and covering up all the details." To my mind plain language and clear writing are essential to clear thinking and are a protection against judicial error and government abuse. A layperson should be able to pick up one of my opinions and understand it. It's important that people be able to know the justifications for the decisions judges make in the exercise of their power. That's the real reason why I use Bryan Garner's footnote style, and why I write in such a plain-spoken way when I can take the time to reduce my less easily understood early drafts to plain English.

As for what the briefs do, I don't have a recommendation. You never want to stand out too much for your style or form in a brief, because you don't want to distract from the substance of what you are saying or risk annoying a judge who is reading it. Because of the volume of briefs, being clear and succinct is most important.

Q: In the early 1990s, while you were still serving as a federal district judge, you sat by designation of the Secretary of the Interior as an Acting Associate Justice on the High Court of American Samoa, Appellate Division (see here and here for two opinions noting your service on that court). How did that assignment happen to come your way, and what memories do you have of serving on that relatively obscure court?

A: The High Court of American Samoa gets its Acting Associate Justices for appeal by asking them to serve as volunteers and getting the Secretary of the Interior to appoint them. The judges try to pick out visitors who they think will do a good job and will appreciate the opportunity. I had a friend who was one of the regular resident justices on the court, and he called me. It was among the especially pleasurable experiences I've had as a judge.

The cases were exotic and required me to learn a lot of interesting law about how one gets to be a chief or a "talking chief" (like a lawyer) in Samoan society, and how the complexities of communal land tenure there distinguish it from the individual land tenure system we have in our common law system. I had the satisfaction of writing the decision in one land dispute that had gone on for the better part of a century, a Bleak House of the South Pacific.[3] And I like the other judges and lawyers in Samoa. It was fun sitting with judges who wear a necklace, lavalava (a kind of skirt worn by men in Tonga and in American and Western Samoa), and sandals on Fridays, the traditional dress days in court. I bought a lavalava myself and wore it to the luau that the Governor gave for the court.

Q: What do you do for enjoyment and/or relaxation in your spare time? And do any special obligations accompany the distinction of being the northernmost federal appellate judge in the United States?

A: If you drive north out of Fairbanks for a half hour, you are in some of the most beautiful wilderness on the planet. I enjoy that a lot, as well as puttering around, photography, and teaching myself new things like assembly language programming and Photoshop. I especially enjoy having lunch every Friday with our local bar association, as I have for the last 34 years. I enjoy sitting in my chair in my log house in the hills, reading, listening to music, and looking out my window at the woods, the valley, the Alaska Range and Mount McKinley a couple of hundred miles away. As for special obligations arising from being the northernmost federal appellate judge in the United States, I feel a special obligation to release my staff from work and encourage them to walk outside to see the North American Championship dog mushing race that starts right outside my chambers.

Howard J. Bashman chairs the Appellate Group at Buchanan Ingersoll, P.C., is co-chair of the Appellate Courts Committee of the Philadelphia Bar Association, and writes a monthly appellate column for The Legal Intelligencer. *His appellate Web log, "How Appealing," can be accessed at htt;: / / appellateblog.blogspot.com /* **Footnotes**

1. *Watts v. Seward School Board*, 454 P.2d 732 (Alaska 1969), cert. denied, 397 U.S. 1071 (1970); Watts v. Seward School Board, 421 P.2d 586 (Alaska 1966), reh'g denied, 423 P.2d 678 (Alaska 1967), vacated, 391 U.S. 592 (1968).

2. Available at http://www.resort.com/~prime8/Orwell/patee.html.

3. *Tavete v. Laisene*, 19 Am. Samoa 2d 40 (1991).

Chambers ranks U.S. lawyers

Continued from page 1

USA is not just a 'Yellow Pages' guide. No one can 'buy their way in'."

Alaska attorneys and their firms ranked in six practice areas include:

Corporate / M&A

Kathryn Black, Birch, Horton, Bittner, Cherot

Richard Rosston, Dorsey & Whitney

Barbara Kraft and *Jon Dawson*, Davis Wright Tremaine

Fred Odsen, Hughes Thorsness Powell Huddleston & Bauman

Doug Parker, Preston Gates & Ellis

Other Notable: *Brian Durrell* (solo)

Employment: Defendant

Tom Daniel & *Helena Hall*, Perkins Coie

Parry Grover, Davis Wright Tremaine

Doug Parker, Preston Gates & Ellis

Tom Owens, Owens & Turner

Other Notable: *Joan Rohlf*, Guess & Rudd

Employment: Plaintiff

Tom VanFlein, Clapp, Peterson & Stowers

Bill Jermain, Jermain, Dunnagan & Owens

David Shoup, Tindall Bennett & Shoup

William Schendel, Winfree Law Office

Other Notables: *Lee Holen* (solo) & *Tim Petumenos*, Birch, Horton, Bittner, Cherot

Environment

Susan Reeves, Foster Pepper Rubini & Reeves*Eric Fjelstad*, Perkins Coie*James Reeves*, Dorsey & Whitney*Lawrence Hartig*, Hartig Rhodes Hoge & Lekisch*George Lyle*, Guess & Rudd

Other Notables: *Robert Reges*, Ruddy, Bradley, Kolkhorst & Reges

Litigation

Jeff Feldman, Feldman & Orlansky

Rick Friedman, Friedman, Rubin & White

Mark Ashburn, Ashburn & Mason

Patrick Gilmore, Atkinson, Conway & Gagnon

Nelson Page, Burr, Pease & Kurtz

Other Notables: *William Bankston*, Bankston, Gronning, O'Hara, Sedor, Mills & Heaphey; *David Oesting*, Davis Wright Tremaine; and *Tim Petumenos* at Birch, Horton, Bittner & Cherot.

Real Estate

Donald McClintock, Ashburn & Mason

Bruce Gagnon, Atkinson, Conway & Gagnon

Joseph Reece, Davis Wright Tremaine

James Reeves, Dorsey & Whitney

Gordon Schadt and *Jim Stanley*, Stanley & Schadt

Other Notables: James McCollom

Chambers and Partners, based in London, began as general book publishers in 1969 and then launched a legal recruitment consultancy four years later. With the publication of Chambers Directory in 1990, the company began specializing in legal publishing. Other directories followed, and Chambers now produces the world-famous guides to the legal profession. Chambers also publishes the leading legal monthly magazine Commercial Lawyer.

SINCE 1896
ALASKA BAR ASSOCIATION

Mildred Robinson Hermann: Queen Mother of the Alaskan Statehood

Mildred R. Hermann of Juneau. In 1934 first woman admitted to practice law in Alaska. Shown in Fairbanks signing the new Alaska State Constitution, 1956. Photo courtesy of Anchorage Museum of History and Art B65.9.2

BY KRISTIN BORAAS

Mildred Hermann

Mildred Robinson Hermann was one of the great founders of the State of Alaska. She began her career as Juneau's first and only female lawyer, and ended it a well-known attorney, stateswoman, and public servant. Her vision and dedication helped Alaska achieve statehood, and her intelligence and focus helped create a workable and well-crafted state constitution. Mildred spent much of her career fighting for Alaska statehood. She was appointed to the Alaska Statehood Committee, and then elected by the territory's residents as a delegate at the Constitutional Convention. She was so confident of being chosen that she reserved her hotel room in Fairbanks' Nordale Hotel, the site of the Convention, before she even knew she had been elected.[1]

Mildred also shone on the national stage. She traveled to Washington D.C. five times to testify before Congress on behalf of Alaskan Statehood. In those days it could take twenty days to make such a trip. She presented the definitive economic analysis of the costs of statehood, and was so persuasive one senator said she was the best witness he had ever seen.

Apart from her political and professional accomplishments, Mildred stood out. She had great personal presence, in part because of her articulate and good-natured demeanor, and in part due to her imposing physical person. Mildred weighed over 300 pounds for most of her adult life, a victim of her love of pies and other foods. She would regularly cook for family and friends and was known as an excellent chef and baker.[2] Mildred was most comfortable with a rolling pin in her hands, to the point that she kept one on her desk when a delegate to the Alaska Constitutional Convention. During especially heated arguments, she would use the rolling pin to accentuate her point.

She wore elaborate hats and when she failed to wear a hat to the Constitutional Convention one day, Delegate Hilscher speculated on its significance.[3] Mildred was outspoken and pursued every point until she understood it well. It was a rare day during the constitutional convention when Mildred did not add several substantive comments on questions before the delegates.[4] Mildred was able to laugh at herself, however. When the question of whether the public should be allowed to attend the Convention's committee meetings on specific subjects, she argued against it, stating the rooms were small, "and when I get in one, they're a little crowded."[5]

Mildred Hermann envisioned a better life for Alaskans, and this she believed would come through statehood. She spent a significant portion of her career involved in pursuit of this goal, and she was ultimately successful. This paper will outline Mildred's achievements and person, but will focus on her work on the movement for Alaskan Statehood.

Mildred on the Move

For many years, Mildred didn't stop moving. After her birth in the Midwest she moved as far as she could, west and then north, eventually settling in Alaska. She must have found a sense of belonging in Alaska, because she stayed there for the rest of her life. Women traveling alone were unusual in the early 1900s, and a young woman who moved out to the Wild West by herself was even more an oddity. Not only did Mildred head west as a young single woman, she eventually turned right and headed up the coast to the Territory of Alaska, *The Last Frontier*. Alaska was accessible only by boat, foot or dogsled in the days that Mildred traveled to the northland, but not only did Mildred survive in the rough-edged Alaskan wilderness, she thrived.

Mildred Robinson was born in Brookfield, Indiana on February 28, 1891 to William M. and Lucretia R. Robinson. She graduated from high school in Indiana, and then studied at the University of Indiana in Chicago. She then started teaching school after a move West, to Yakima, Washington. Mildred taught school in Washington for nine years, from 1910 to 1919. At some point she attended classes at the University of Washington, although the topic of her studies is unclear. In 1919 she moved to Valdez, Alaska, and continued her teaching career. However, her" stay in Valdez was short-lived. During that year, she met Russell Royden Hermann, a pharmacist, whom she wed in Valdez on May 27, 1920.[6] The couple moved to Juneau that summer, where Russell's pharmacy, the Juneau Drug Store, was one of the few shops in town.[7]

Mildred and Russell had two children, Barbara Ann and Russell Royden Jr. Russell Jr. was born on May 18, 1924, and Barbara followed shortly afterward. Mildred was 33 when she gave birth to her first child.[8] Russell Jr., or "Chee," followed in his mother's illustrious footsteps, and became a lawyer himself, eventually achieving the post of Assistant Attorney General for the state of Alaska.[9] He moved to California, where he continued to work as an attorney in private practice, and now lives outside of San Diego. Mildred has several living grandchildren.

Although little recorded information exists on these early years in Mildred's life, at least one element of information may be inferred. Mildred was an adventurer. She was fearless in her migration through the United States, and then out of it, to a Territory where stories of cold and bears were even more fearsome and exaggerated than they are now. She was a risk-taker and a woman, and she must have wanted to see something, to *do* something. She did. She moved to Washington when she was 19, she moved to Alaska when she was 28, she married when she was 29, and she had children in her thirties. Even just this last would send the town to whispering in the early 1900s. She did all these things, but she didn't stop there. She was a successful professional and an influential public servant. Mildred was unrestrained by the expected social requirements; she was outspoken but good-natured, self-assured and able to laugh at herself. She was by all accounts, a good cook, a good mother, and a good lawyer. She inspired trust, and she is remembered with affection. The rest of us would do well to follow this example.

Mildred and the Law

LEARNING THE LAW

While Mildred's most prominent successes were outside a courtroom, Mildred was first a lawyer. A school teacher for several years, Mildred decided in her thirties that it was time for a change. Her husband's business likely paid the bills, so her decision to join law was probably more a calling than a necessity. While her legal career did not produce any cases which changed the face of the American legal system, Mildred achieved something just as noteworthy. She was an active female attorney, the only one in a thousand mile radius.

After the Mildred and Russell moved to Juneau in 1925, Mildred took a few years to bear and raise her children. However, she wasn't content to settle into motherhood as an exclusive occupation, for in the early 1930s Mildred began studying law in the offices of James Wickersham. Mr. Wickersham, who later became Judge Wickersham, was a vital mentor for Mildred. Mildred followed in his footsteps years later by mentoring other young Juneau lawyers, among them, Judge Thomas Stewart. Judge Stewart worked with Mildred early in his legal career.[10] He was also involved with the Constitutional Convention, and was an early administrator of the court system. He later sat as a judge on the Superior Court bench. In the 1950s Judge Stewart traveled around the United States speaking to political scientists and lawmakers on the legislative details of Alaskan Statehood. He was also a member of Alaska's Territorial House of Representatives and introduced the enabling bill for the Constitutional Convention.[11]

In the early 1930s Mildred began to pursue the study of law more formally by enrolling in correspondence courses in law through Le Salle University in Indiana.[12] It must have taken weeks for papers and assignments to cross the United States and then travel, most likely by boat, up to Juneau. Even today, Juneau, the Alaskan state capitol, is inaccessible by road. One can imagine Mildred eagerly anticipating each installment of her studies; waiting for the whistle announcing the incoming boat and moving with the surge of people to the docks to claim the mail and goods it carried. Of course, it is also quite possible that she waited for the packets in the mail with the dread of a first year law student receiving her first exam.

Whatever the emotions of this time, Mildred was successful, and after receiving her L.L.B. from Le Salle, Mildred applied for admittance to the Alaska Territorial Bar. In those days, applicants to the bar were reviewed by a panel of three local judges or lawyers. Mildred was rejected several before finally being admitted to the bar.[13] Conflicting evidence exists as to whether these early rejections were the result of the bar's resistance to accept a woman attorney, or Mildred's "inferior" correspondence course law degree. According to Judge Stewart, Mildred's femaleness was a stumbling block for the commissioners.[14] However, Norman Banfield, a contemporary of Mildred's cites the poor quality of her Le Salle correspondence course.[15] The later argument is a bit disingenuous, for a few reasons. First, most Juneau lawyers in this era were not formally educated. The few with any legal knowledge acquired it through clerking for a judge, not through any academic study.[16] Also, Mildred could not have attended a school in Alaska since the state did not, and does not, have a law school. Any Alaskan resident desirous of a law degree must move hundreds, if not thousands, of miles away from home to obtain one. Mildred, a wife and mother of two, and in love with Alaska, would have had to transplant the family to Seattle or leave them behind to get a "real" law degree. She proved she didn't need one. In 1934, Mildred Robinson Hermann was admitted to the Bar of the Territory of Alaska, and nothing slowed her stride after that.[17]

ALASKA'S WOMAN LAWYER

It is worth noting that Mildred, generally credited with being the first lady lawyer in Alaska, cannot truthfully lay claim to this honor.[18] Rather, a Fairbanks woman was admitted to the bar in 1920, beating Mildred out by a good 15 years. However, there is no record of this woman actually practicing law, so Mildred can perhaps get away with asserting her position as the first *practicing* woman lawyer in Alaska. She was clearly the first woman lawyer in Juneau, and for that matter, the entire Southern and Eastern region of Alaska. Further, at the time of Mildred's admittance in 1934, there was not a single woman lawyer practicing in the entire state of Alaska. By the time Mildred was testifying in front of the United States Senate on Statehood issues, there was only one other female lawyer in Alaska. Even disregarding her claim to being first, Mildred certainly did it best. She was involved in at least a dozen clubs, was recognized as a public figure throughout the state, and her opinion was respected and followed. She was appointed to influential posts, and she was never, ever afraid of speaking her mind.

MILDRED'S LEGAL PRACTICE

After Mildred's hard-won success at becoming a territorial lawyer for Alaska, she followed the mold of an early woman lawyer. Most pioneering female lawyers served groups that could not pay for their services, they were forced by situation and lack of influence to represent the poor and powerless.[19] However, trailblazing women lawyers often thrived in this role, since many felt responsible

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and honored to represent groups that couldn't afford to pay for an attorney. Mildred followed the model of women who had gone before, and represented the poor, women, and Native Americans, populations under-served by Alaska's legal profession at the time and, in the case of Native Americans, not served at all.[20] According to a contemporary, Mildred relied on criminal defense work and court appointments for her clients.[21] Early women attorneys frequently had difficulty getting cases. Few paying customers were willing to trust a woman with their case. It makes sense that Mildred spent her time defending others. Her cases ranged all over the map, from estate law to criminal defense to admiralty law.[22] Juneau was a small town, and small town lawyers, like small town doctors, need to be versatile.

Mildred was a defense attorney. During the Constitutional Convention, Mildred cited her "considerable volume of experience as a defense attorney" as support for an amendment on the floor requiring a grand jury to be available the entire year.[23] Her work defending people prompted her to demonstrate greater sympathy and understanding than many of her colleagues for those on the wrong end of a criminal charge. According to Judge Stewart, Mildred "represented those who needed a lawyer but couldn't afford it."[24] She believed in protection of the innocent charged with criminal behavior, and rehabilitation for the guilty. In the context of the same grand jury discussion at the Constitutional Convention she stated,

"I have no other experience except as a defense attorney, though not all of my cases have been as a general rule in the criminal courts. I also have seen the misplaced zeal of some of our district attorneys...and my 20 years experience as an attorney, in the courts of Alaska, exclusively, have given me no reason to have too much reverence for district attorneys even though I have one in the family, and think very highly of him. The fact of the matter is that I have seen a great many innocent people plead guilty rather than wait for the grand jury to meet. I have also seen innocent people convicted, not a lot of them, but I have seen it enough to know that it is done and that our system of justice as it now stands is far from perfect...It is true that most people who come to stand before the bar of justice come because they have committed some crime, but there is also a considerable volume of people that appear to be tried in court that are unjustly called there...I don't believe in protecting the guilty, but I do believe in considering them innocent until they are proven guilty."[25]

The previous day at the Convention Mildred joined a discussion about an amendment which would provide that criminal punishment in Alaska would include a goal of rehabilitation, and not just retribution. Mildred commented:

"I would like to believe that there is never any vindictiveness in the punishment of people who have violated the laws of this country, though I am compelled to admit that sometimes I have seen evidences of it...I think it is high time that some state constitution had in it some mention of the need of reformation of people who seem criminally inclined rather than the need of constantly stressing punishment for them. When we learn to have preventive instead of punitive measures on our statute books we are going to be a long way further towards really administering criminal justice."[26]

As demonstrated by her words, Mildred believed in justice; she believed in consequences for the guilty, but also in redemption for the flawed. As with most people, it is unclear if her values were shaped by her profession or if her choice of profession was shaped by her values, but it is clear that Mildred had faith in people, and was willing to give them a chance at atonement. Another possible reason for her protection of the accused was the fact that Juneau, like every other town in Alaska at this time, was small and isolated. Small, isolated communities do not have the luxury of relying on larger institutions to take care of their problems. Further, Alaska attracts individuals who are not particularly interested in government control of their daily lives. Mildred, and the other citizens of Juneau, most likely often dealt with the unruly and the trouble-makers of their community informally, using social control and well-timed intervention to prevent potential crimes or problems. Occasionally, the fish bowl of a village can do a better job of protecting its residents than all the officers or employees of a metropolis. I imagine Mildred, with all her fearless outspokenness, was quite good at ensuring the safety of her community.

Mildred and Minorities

WOMEN

Mildred was a "feminist of the old school."[27] She firmly believed in the equality of women, and their ability to be completely capable of everything men where. When during the Constitutional Convention the debate arose over whether discrimination on the basis of sex should be banned in the Alaskan constitution, Mildred argued against it, reasoning that Alaska had treated its women well up to that point, and there was no need for a specific protection.[28] Mildred's feminism demonstrated itself in her promotion of women's clubs and activities. She was a leading member, and president for many years, of the Alaskan Federation of Women's Clubs, and was also active in the National Federation of Women's Clubs. She was a member of the Toastmistress Club, the National Association of Women Lawyers, the National Association of Press Women, the Soroptimist Club (a volunteer service organization for women in business, management and the professions), Republican Women, the Alaska Arts and Crafts Society, the Juneau Women's Club, and probably several others.[29] Through these clubs Mildred promoted the advancement of women in professions and as active citizens generally. Further, as demonstrated by her membership in national clubs, Mildred actively attempted to bring Alaska and Alaskan women into the national consciousness.

Mildred's involvement eventually helped her in her battle for Alaska statehood. The National Federation of Women's Clubs provided strong support for Alaska's inclusion in the United States. This support stemmed from a speech Mildred gave at the 1958 annual convention of the Federation in St. Louis. There, the representatives adopted a measure supporting statehood for their sisters in Alaska, but they didn't stop there.[30] The ladies of the Women's Clubs actively lobbied their Senators to support their position. As Territorial Governor Gruening states, "In our efforts to convert the unconvinced, we were greatly aided by a number of dedicated groups – the Federation of Women's Clubs, whose representative, Mrs. Leslie Wright, was a tower of strength in mobilizing the club members in the home States of the recalcitrant Senators. These ladies buzzed around obdurate Senators and Congressmen like angry hornets."[31]

NATIVE AMERICANS

Mildred also was an activist for Native Americans. Alaska's Native population endured substantial discrimination during this era of Alaska's history, to the point where stores and restaurants posted signs stating, "No Natives Allowed." Judge Stewart remembers Mildred as a friend of the Native American ,community in Juneau.[32] She represented Alaskan Natives in criminal cases, and generally advocated for tolerance and inclusion of these first Alaskan residents. During a break in the Convention, Mildred traveled to Nome to address concerns about the forming Constitution. She noted on the Convention floor with pleasure that the presentations were well attended by Eskimo people. She commented, "We had many Eskimos, and they participated in the discussion quite as much as the whites did and showed as much interest in the Constitutional Convention.[33] Mildred wanted everyone to be invested in Alaska's governance, and worried about the inclusion of these marginalized groups in the discussion of how the future State of Alaska should be shaped.

OTHERS

Mildred was involved with many other communities and issues that are not always the most glamorous. For one, she was involved with organizations promoting the research and prevention of various illnesses. While not properly minority communities, those with serious illness in Alaska could be just as isolated and helpless. Mildred was the first Vice President of the Alaska Tuberculosis Association. Before statehood, Alaska's population suffered and died from tuberculosis at rates far greater than other Americans. She also helped organize and was the volunteer director of the American Cancer Society in Alaska and worked with the National Heart Association.[34] Further, Mildred apparently knew sign language, and traveled to Nome with Mr. McNees, who was hearing impaired, to speak about the constitutional convention. She translated for him while there, and signed for him on the Convention floor when reporting on their trip.[35]

— Continued next issue

Kristin J. Boraas is an associate in the Litigation Department of the Seattle office of Preston Gates & Ellis, LLP. She is a member of the Intellectual Property Litigation and Environmental Litigation Practice Groups. She graduated from Stanford Law School in 2001. This paper was drafted in conjunction with the "Women in the Law" class she took in her third year of law school. This paper and others written on early women lawyers around the country are available at the Women's Legal History Biography Project at: http://www.law.stanford.edu/library/wlhbp/. While currently living in the Lower 48, Ms. Boraas grew up in Soldotna, and frequently returns to Alaska. This summer she will be driving up the Alcan for her annual 4th of July attempt to obtain a new scar on Mount Marathon.

(Endnotes)

[1] GERALD E. BOWKETT, REACHING FOR A STAR 6 (1989).

[2] Telephone Interview with Judge Thomas Stewart (October 25,2000).

[3] "Mr. President, as a point of information, is there anything significant to the fact that Mrs. Hermann is not wearing a hat today? Does that mean she is going to stay until the Convention is finished? ' asked Mr. Herscher. Alaskan Constitutional Convention Proceedings, Fairbanks, Alaska, Day 18 (1955-1956).

[4] Alaska Constitutional Convention Proceedings, Fairbanks, Alaska (1955-1956).

[5] GERALD E. BOWKETT, REACHING FOR A STAR 26 (1989).

[6] Alaska Historical Society Biographical File - Obituary, Mildred Hermann (March 16, 1964); WHO'S WHO IN ALASKAN POLITICS 44 (1977).

[7] Telephone Interview with Judge Thomas Stewart (October 25, 2000).

[8] WHO'S WHO IN ALASKAN POLITICS 44 (1977).

[9] WHO'S WHO IN ALASKAN POLITICS 44 (1977).

[10] Telephone Interview with Judge Thomas Stewart (October 25, 2000).

[11] GERALD A. MCBEATH, THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE 7-8 (1997).

[12] WHO'S WHO IN ALASKAN POLITICS 44 (1977).

[13] Telephone Interview with Judge Thomas Stewart (October 25, 2000).

[14] Id.

[15] PAMELA CRAVEZ, SEIZING THE FRONTIER: ALASKA'S TERRITORIAL LAWYERS 61 (1994). Mr. Banfield demonstrates some animus towards Mildred in this oral history. He calls her practice, "spotty," and dependent on criminal clients and court appointments. While degrading Mildred's legal qualifications, Norman states that he "breezed" through the bar exam. However, earlier in the history it states that "although Banfield did not shine on the territorial bar exam the commissioners stretched the rules, figuring that it would be unlikely that Banfield would get into trouble practicing with their esteemed colleague, Bert Faulkner." Id., at 47. Norman and Mildred also had political differences. Although both Republicans, (another fact not remembered by Norman) Juneau's elite attorneys, of which Norman was a member, made their money off outside interests like fisheries and miners, industries that Statehood supporters like Mildred wanted to tax. Id., at 62.

[16] PAMELA CRAVEZ, SEIZING THE FRONTIER: ALASKA'S TERRITORIAL LAWYERS 46 (1994)

[17] Anchorage Times, Mrs. Hermann Dead at 73 (March 17, 1964).

[18] WENDY JONES, WOMEN WHO BRAVED THE NORTH 183 (1976).

[19] BARBARA BABCOCK, WESTERN WOMEN DEFENDERS 13 (2000).

[20] Telephone Interview with Judge Thomas Stewart (October 25, 2000).

[21] PAMELA CRAVEZ, SEIZING THE FRONTIER: ALASKA'S TERRITORIAL LAWYERS 62 (1994).

[22] see, Zamora v. United States, 112 F.2d 631 (9th Cir. 1940); Lucas v. Juneau, 168 F.Supp. 195 (AK Dist. 1958); Burgo v. Burgo, 149 F.Supp. 932 (AK Dist. 1957); Territory of Alaska v. Journal Printing Co., 135 F.Supp. 169 (AK Dist. 1955); Warner v. The Bear, 130 F.Supp. 549 (AK Dist. 1955).

[23] Alaskan Constitutional Convention Proceedings, Fairbanks, Alaska, Day 45 (1955-1956).

[24] Telephone Interview with Judge Thomas Stewart (October 25, 2000).

[25] Id.

[26] Alaskan Constitutional Convention Proceedings, Fairbanks, Alaska, Day 44 (1955-1956).

[27] Telephone Interview with Judge Thomas Stewart (October 25, 2000).

[28] VICTOR FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION 74 (1975). However, on August 22, 1973, Alaskans voted for a constitutional amendment adding the word "sex" to Article I, Section III, which states, "No person is to be denied the enjoyment of any civil or political fight because of sex, race, color, creed, or national origin. The legislature shall implement this section." AK CONST. art. I, § 3.

[29] WHO'S WHO IN ALASKAN POLITICS 44 (1977).

[30] General Federation of Women's Clubs, Convention, St. Louis (1958).

[31] ERNEST GRUENING, THE BATTLE FOR ALASKA STATEHOOD 102 (1967).

[32] Telephone Interview with Judge Thomas Stewart (October 25, 2000).

[33] Alaskan Constitutional Convention Proceedings, Fairbanks, Alaska, Day 43 (1955-1956).

[34] WHO'S WHO IN ALASKAN POLITICS 44 (1977).

[35] Convention Proceedings, Day 43.

Family mediation works for women and children

☐ Drew Peterson

Divorce and Family mediation has become fairly widespread in Alaska. Yet there remain some skeptics, particularly in the feminist and domestic violence advocacy movements. The fear is that mediation may be harmful to women and children. A 1999 scholarly study from Connecticut, however, confirms that family mediation is actually advantageous to women and children.

The study in question is summarized in *To Mediate or Not to Mediate: Financial Outcomes in Mediated Versus Adversarial Divorces*, by Marcy G. Marcus, Walter Marcus, Nancy A. Sitwell, and Neville Doherty, found in the *Mediation Quarterly*, vol. 7, no. 2, Winter, 1999, pages 143-152. The study compared 199 privately mediated cases with 201 adversarial divorce cases from the State of Connecticut, from the years 1996 through 1998. Adversarial cases were limited to those where both sides were represented by counsel. Cases were also matched by years of marriage, whether there were minor children, judicial district, and were limited to the same years as the mediated cases.

Variables compared in the two groups included the following:

1. Percentage of family income obtained by wife and husband.
2. Percentage of family assets obtained by wife and husband.
3. Percentage of family liability retained by wife and husband.
4. Amount of alimony awarded
5. Duration of alimony awarded
6. Amount of child support awarded
7. Relationship between length of marriage and percentage of family income assets and liabilities,
8. Length of time from initiation of divorce to judgment
9. Frequency of postjudgment actions.
10. Comparison of custody arrangements.
11. Relationship between custody arrangement and family income.
12. Provisions for college education for the children.

FINDINGS FROM THE STUDY

The results of the study confirmed that women and children were not harmed by mediation. Indeed in many areas, they obtained better outcomes through the mediation process. For Example:

There were no significant differences found between the percentage of family income nor the percentage of liabilities that women received in mediated versus adversarial cases. In contrast, however, the amount of family assets that women retained was significantly higher in mediated versus adversarial cases.

No significant differences were found in the amount of periodic alimony awarded. Such awards of alimony, however, were significantly longer in their duration in cases that were mediated.

In the area of child support, the Connecticut study replicated the findings of a number of previous studies: that child support awards were significantly higher in mediated versus adversarial cases. The overall mean child support awarded in mediated cases was $1,030 per month versus $784 in the adversarial cases.

Interestingly, in the area of custodial arrangements, there was no significant difference between the cases. This is in contrast to past studies, which have found that mediated cases were more likely to result in a joint custody type arrangement. It appears that joint custody has now become the norm in both mediated and adversarial cases.

• Another finding of the study was that parents in mediated cases were significantly more likely (26%) to provide for the college education of the children, versus adversarial cases (10%). This is also consistent with a number of earlier studies.

• The mean time in days from the service of the complaint to judgment was significantly longer in adversarial cases (325 days) versus mediated cases (245 days).

• Finally, the frequency of postjudgment modifications was significantly higher in adversarial cases (22%) versus mediated cases (9%).

The conclusion of the authors of the Connecticut study is that contrary to concerns of some of its critics, mediation is actually advantageous for women and also for couples in general because it leads to less postjudgment modifications. Because common sense and a number of previous studies indicate that an adversarial divorce is also much more expensive than mediation (cost was not studied here), as well as being significantly slower in coming to an end, the authors conclude that divorce mediation is an option worthy of serious consideration by most divorcing clients.

A PERSONAL PERSPECTIVE

I would note that almost all of the findings of the Connecticut study are borne out in my own experience of with divorce mediation. When divorcing parties are able to talk heart to heart about the needs of their children, and their own needs and fears, especially financial fears, their focus changes. They often put aside the child support schedules and legal preferences, and instead focus on what seems fair to both of them. What seems fair is based on their own experience of their family. This empowers the parties to work out arrangements they are both happy with. The outcomes often exceed normal court expectations, especially for women and children. Child support, alimony, and college education for the children are the three areas that benefit the most from mediation, in my experience.

One other area touched on by the Connecticut study is worth discussion. I doubt that participants in mediated divorces really have significantly less conflict after the divorce than do other divorcing couples. Most mediation agreements, however, provided for further mediation before taking new disputes to court (the future dispute clause). I believe this clause is the reason for the lower amount of postjudgment litigation noted in the study.

Mediation is still a relatively young field, and important research remains to be done. I find it gratifying, however, to find solid research studies that confirm my own experience that mediation actually leads to results that are better for women and children than the traditional adversarial model. While there are still valid concerns about proper training for mediators in cases involving power imbalances, it is my conclusion that those who say mediation is bad for women and children need to take a second look.

2003 Bar Convention Moments

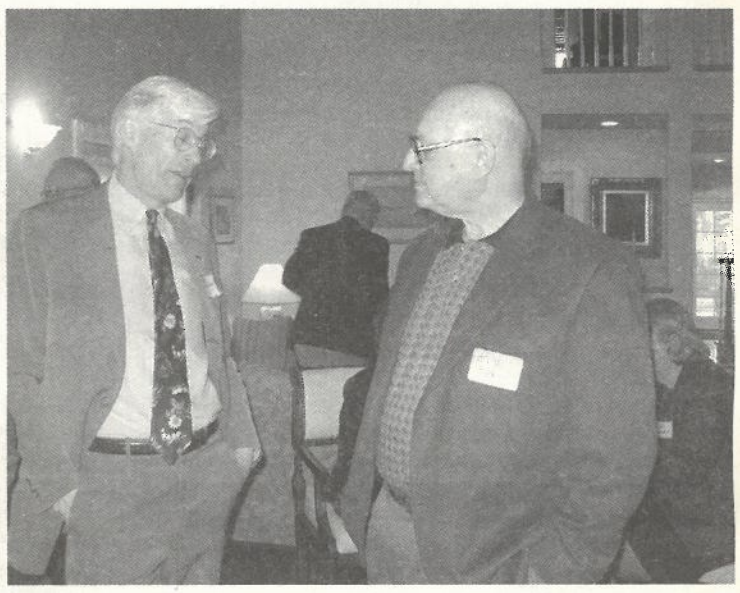
A group of Fairbanks lawyers took Justice Scalia for a canoe trip down the Chena River during the convention. L-R: Bob Groseclose, Julie Webb, Ken Covell, Lori Bodwell, Gene Gustafson, Justice Scalia

The CLE panelists pose following their Off the Record presentation to about 300 lawyers. L-R: U.S. District Court Judge Ralph Beistline; Alaska Court of Appeals Judge Robert Coats; U.S. Supreme Court Justice Antonin Scalia; Alaska Supreme Court Justice Robert Eastaugh; 9th Circuit Court of Appeals Judge Andrew Kleinfeld.

Race Director Bob Groseclose presents the awards following the 5K Fun Run at the convention: L-R Bob Groseclose; first place man: Mike Kramer; first place woman: Dayle Wallien; second place woman: Mauri Long; second place man: Kevin Doran.

Anchorage Inn of Court Update

Mike Moberly, Judge Brian Clark, Judge James Wanamaker, Chancy Croft, Gene DeVeaux, and Marla Greenstein listen to Justice Matthews' acceptance speech.



Justice Eastaugh and former Justice Robert Erwin contemplate the state of the judiciary.

The Anchorage Inn of Court awarded its 2003 Professionalism and Ethics Award to Justice Warren Matthews on April 3, 2003. The Award recognizes a person who has rendered exemplary service to the legal profession in the areas of legal excellence, professionalism, civility and ethics. The executive board unanimously selected Justice Warren Matthews to receive its inaugural award. Throughout his career, Justice Matthews has epitomized those qualities reflected in the mission of the Inns of the Court - excellence, civility, professionalism and ethics in the practice of law.

Retired Judge Victor Carlson and Marla Greenstein enjoy a glass of wine together.

A reception was held at the home of Yale Metzger and was well attended by Inn of Court members and friends and family of Justice Matthews.

Left to right, Justice Matthews receiving the Anchorage Inn of Court 2003 Professionalism Award, Thomas Van Flein, and Sheila Gallagher.

Rodney Kleedehn, Gene DeVeaux, and Chancy Croft enjoying the festivities.

Justice Eastaugh and Thomas Van Flein.

Randy Clapp, Judge Sigurd Murphy, and Mary Murphy relax and discuss Randy's search for a good plaintiff's lawyer.

News from the Bar

Board of Governors invites comments

The Board of Governors invites member comments concerning proposed housekeeping amendments to Article II, Section 4(a)(1) & Article III, Section 3(c) of the Bylaws of the Alaska Bar Association.

Bar Rule 2, Section 2 was extensively revised in the early 1990s to set out a clear test for an applicant's "character and fitness" to practice law as opposed to the more general "good moral character" standard.

Article II, Section 4(a)(1) and Article III, Section 3(c) of the Bylaws still refer to "good moral character" and should be amended to read "character and fitness" as provided in Bar Rule 2, Section 2.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to alaskabar@alaskabar.org by August 8, 2003.

Article II, Section 4(a)(1)
Article III, Section 3(c)
HOUSEKEEPING AMENDMENTS CONFORMING BYLAWS TO BAR RULE USAGE FOR CHARACTER AND FITNESS

(Additions are underscored; deletions have strikethroughs)

ARTICLE II. MEMBERSHIP

Section 4. Transfer from Inactive or Retired Membership to Active Status.

(A) Transfer if Inactive or Retired for One Year or More.

Upon written request to the Board, a member who has been inactive or retired for one year or more may be transferred to active status if

(1) the Board finds the requesting member possesses character and fitness to practice law as provided in Alaska Bar Rule 2, Section 2(d) ~~is of good moral character~~, pursuant to procedures set forth in the Board's Standing Policies; and

(2) full, annual active membership fees are paid for the current year, less any inactive fees previously remitted for that year.

ARTICLE III. MEMBERSHIP FEES AND PENALTIES

...

Section 3. Delinquent and Suspended Members.

...

(c) Reinstatement. Any suspended member whose suspension for nonpayment has been in effect for less than one year, upon payment of all accrued fees and late payment penalties, shall be reinstated as a member of the Alaska Bar upon certification by the Executive Director to the Alaska Supreme Court and the clerks of court that the fees and penalties have been paid. Any member who has been suspended for one year or more, upon a determination of character and fitness to practice law as provided in Alaska Bar Rule 2, Section 2(d) ~~good moral character~~ by the Board, in accordance with Board Policy, and upon payment of all accrued membership fees, in addition to a penalty of $160.00, shall be reinstated as a member of the Alaska Bar upon certification by the Executive Director to the Alaska Supreme Court and the clerks of court that the member ~~is of~~ has the character and fitness to practice law as provided in Alaska Bar Rule 2, Section 2(d) ~~good moral character~~ and that the requisite dues and penalties have been paid.

In Memoriam

James T. Robinson

Former Anchorage attorney and longtime school board member **James T. Robinson**, 55, died May 11, 2003, at Life Care Center of Aurora in Denver after a two-year battle with multiple myeloma.

A private memorial service will be today at his brother's house in Denver.

He was born May 9, 1948, in Brawley, Calif.

Mr. Robinson was an Alaska resident from 1973 until 1988 and again from 1997 until 2000.

His family wrote: "Jim was a prominent attorney, practicing for many years in Anchorage. He also worked in Barrow, Guam and Denver. He was also lauded for his work on the Anchorage School Board. He served on the board for 10 years, from 1979 until 1988, and serving as president for four.

"His interests included scuba diving, having attained a rating of Master Scuba Diver Trainer. He also loved to fly, and as a pilot attained ratings for commercial, multi-engine, sea plane and instrument flying."

He is survived by his sons and daughter, Brian and Kim Robinson of Denver and Scott Robinson of Boulder, Colo.; half-brother, Frank Robinson of Denver; and his constant companion, Lucy, the golden retriever.

Condolences may be sent to Scott Robinson, 3635 19th St., Boulder, CO 80304.

Richard D. Pennington

On May 14, 2003 Richard D. Pennington passed away at the Sacred Heart Hospital in Eugene Oregon where he had been hospitalized for about a week. Dick's wife Kristi and their daughter Helena were at his side. A small family service was held and Dick's ashes were scattered over the Oregon Coast close to their family home in Coos Bay, Oregon.

Even though Dick and Kristi continued their law practice in Alaska, they had been spending more of their time in Coos Bay since their daughter Helena started school.

After high school Dick had attended a year of college at Duquesne University in Pittsburgh. He worked for a year in a steel mill and knew he wanted something different. It was 1959 and Alaska had just been made a state when he and a friend decided it was time to "go North." At 19, Alaska was an adventure for Dick, one he loved and enjoyed. He worked as a surveyor, a fisherman out of Cordova, a suba diver when the nets fouled the prop of the fishing boat, and a fireman in the National Guard. He graduated from Alaska Methodist University, (nka Alaska Pacific University), and in 1970 was a member of the first day class at the new campus of Northwestern School of Law at Lewis & Clark college in Portland Oregon. Dick graduated in 1973 and was admitted to practice law in Alaska in February 1974. He has always maintained an active practice in Alaska, even though in later years he spent a lot of time at his home on the beach at Coos Bay.

Dick practiced as a partner with Edgar Paul Boyko from 1974 1979. He then entered into a partnership with Terry Aglietti and Ron Offret, which thereafter took on a variety of names. He always wanted a law firm known as Richard D. Pennington and Associates so he married Kristi Nelson and they have since practiced law together. He always said that Kristi was the brains of the law firm, but you have to give Dick some credit - he got her to marry him.

Dick had an engaging smile and ingratiating personality. He will be missed by his friends and the legal community.

Harry Brelsford

Former Alyeska Pipeline Service Co. general counsel Harry Gregg Brelsford died May 7 at Virginia Mason Hospital in Seattle. He was 78 and succumbed to congestive heard failure.

A memorial service will be held at 7:30 p.m. June 14 at St. Mary's Episcopal Church, Lake Otis and Tudor Roads in Anchorage.

Brelsford had been living in Washington since 1992 after he retired from the practice of law. Born in Houston, TX, he received his law degree from the University of Texas after service in World War II. He was called to duty and May 1943, received the Purple Heart after being wounded in action in St. Die, France. He also served at Pearl Harbor.

Following his graduation from law school, Brelsford became an associate at Vinson & Elkins in Houston and married Diane Bowyer in 1949. His law career moved his family from Houston to Billings, Denver, and ultimately Anchorage. He lived in Anchorage for 18 years and became Alyeska general counsel in 1980, remaining in that position until he retired in 1988.

Brelsford was a devout member of the Episcopal church since the 1950s, serving in the vestry and other capacities. His family has written that activities he enjoyed included golfing, fishing, designing model trains, traveling, avid reading, and crossword puzzles. He especially enjoyed his grandchildren, and "he was a natural comic, always good for a laugh to cheer one up. A plainspoken and compassionate man, he was known for his honesty, integrity and kindness.

He is survived by his wife, the Rev. Diane; five children, Gregg, Taylor, James, Virginia, and Harry; four daughters-in-law; a son-in-law; nine grandchildren; two step-grandchildren; sister Nancy Brelsford Thawley; and a niece, Virginia Thawley. In lieu of flowers, memorial contributions may be made to the charity of donor's choice.

Kenneth Lamb

Kenneth Robert Lamb died April 9 at Providence Alaska Medical Center, from injuries he sustained in a fall at his Sand Lake home during the Southcentral windstorm disaster March 9. He was 57.

A solo attorney in Anchorage, Lamb came to Alaska in 1972, after earning a bachelor's degree in anthropology from the University of Wisconsin and a juris doctorate that year. He was born in Patterson, NJ, grew up in Wisconsin, and earned his Eagle Scout award from the Boy Scouts at age 13.

Known as Kenn to his friends, Lamb was active in community service—in the West Side Community Patrol since 1997 and as a member of Anchorage's Community Emergency Response Team. He also was a member of the Sand Lake Community Council, advocating for sensible development and wildlife habitat preservation. He enjoyed bird-watching, camping, canoeing, fishing, gardening, and photography and had a keen interest in classical music and old Hollywood musicals.

He is survived by his wife of 26 years, Susan and daughter Stephanie, of Anchorage; his son, Jeffrey who is attending college in Portland, OR; father Daniel, of Brookfield, WI; sister Dorothy Horton of Denton, TX; and his father- and mother-in-law, Bill and Cecile Dubois, of Anchorage.

In lieu of flowers, Kenn Lamb's family suggests memorial contributions to the Boy Scouts of America, 3117 Patterson St., Anchorage 99504; or to the Anchorage Police Department Dollars for Dogs program, PO Box 202042, Anchorage 99520. As he requested, Lamb's ashes will be scattered over Lower Cook Inlet this summer.

Superior Court Judge Jonathan Link

Superior Court Judge Jonathan H. "Jon" Link, 59, died March 25, 2003, at Central Peninsula General Hospital in Soldotna after a short illness.

Judge Link was in Washington, D.C. After obtaining a bachelor's degree in 1965 from Whittier College Judge Link joined the U.S. Army and was posted to Fort Wainwright, where he was honorably discharged as a sergeant E-5 in 1969.

Judge Link returned to Alaska in 1972 after obtaining a law degree from Hastings School of Law in San Francisco and was employed by the law firm of Hughes, Thorsness, Lowe, Gantz and Clark in Anchorage for two years. He returned to Fairbanks as a partner in Johnson, Christensen, Shamberg and Link. From 1976-90, Link was a solo practitioner until he was appointed to the Superior Court bench in Kenai by then Gov. Steve Cowper, a position that he held until his death.

Judge Link was elected to the Board of Governors of the Alaska Bar Association in 1978, serving as vice president in 1981. In Fairbanks, Judge Link was elected as secretary, vice president, and then president of the Tanana Valley Bar Association.

In early 1991, Judge Link was appointed as administrative judge for the Kenai Peninsula, overseeing the smooth operation of courthouses in Kenai, Seward and Homer, a position he continued to fill until his death. In 1995, his peers elected him to membership on the Alaska Commission of Judicial Conduct, the body charged by law with oversight and discipline of members of the judiciary, a position he held until 1999.

His interests were eclectic, ranging from Northwest Coast Indian art to river boating, carpentry, and the construction of stained-glass pieces. He also served as director and treasurer of the Fairbanks Historical Preservation Foundation, the entity responsible for the restoration of the riverboat Nenana, a 1913-vintage carousel at Alaskaland. However, the first in his life was his family. "We met on the Chena River in 1979 at the Chena Pumphouse--he in a racing boat, me in a canoe," said his wife of nearly 19 years, Milli. "In the early days, it was almost like we were in a time capsule of Alaska old," The two bought the Palace Saloon at Alaskaland, where Milli burst in song nightly as a Gold Rush diva; with Jim Bell at the piano, and Jon Link in a starring role as Bigfoot. "We lived in the era of the Gold Rush for 5 years, and had a great run as one of Fairbanks' hottest spots," she said. "We finished the 1984 Salute to Statehood Show, were married a week later at Alaskaland, and handed over the keys to the new owner the next day. One might imagine that after such an exciting life in the fast lane, ordinary life would seem rather bland. It never was with Jon." They adopted a daughter in 1986, "and he was utterly devoted to both of us; he was the kindest, gentest man I've ever known," said Milli, remembering his sense of adventure and dedication to a wealth of interests...like the lighted, 20-foot fountain he built as a surprise for Milli and Lydia in Kenai. "I am so grateful for the time we had together."

Fueling "Channel Fever" on Yukon River" 1992.

Judge Link is survived by his wife Mildred; daughter, Lydia; sisters, Mary Means of Seattle and Barbara Durigan of Fort Brage Calif.; brother, Russell Link of Whidbey Island, Wash.; and stepmother, Thea Link of Walnut Creek. Ca.

In lieu of flowers, the family suggests that memorial donations be made in Judge Link's memory to either the Alaskan Bar Foundation, P.O. Box 100279, Anchorage 99510; SPCA of Kenai Peninsula, Inc. P.O. Box 4243, Soldotna 99669; or Fairbanks Historical Preservation Foundation, P.O. Box 70552, Fairbanks 99707.

Friends of Link joined Milli for a special memorial service April 5 at the Kenai courthouse. Several of his colleague reminisced on the contributions he made to his profession and Alaska.

Federal district court Judge Ralph Beistline, of Fairbanks, represented federal courts and the Tanana Valley Bar Association at the service, reading a message from 9th Circuit Court of Appeals Judge Andy Kleinfeld.

"We knew each other as lawyers in the rip-roaring, boom-town days of Fairbanks pipeline," write Kleinfeld. Jon came to town to organize the Teamster pre-paid work plan, and he was my idea of what a lawyer ought to be. Besides being capable, intelligent, aggressive, and highly successful on behalf of his clients, John was a consummate gentleman...you could take his word. He was not entirely happy with his life until he met Milli," his wife of nearly three decades.

"In my personal capacity, John Link was one of the good guys," added Beistline. I met him when he first came to Fairbanks in 1976. I was in the courthouse, just finished clerking, and in walked this big fella, with this warm smile. Jon was there to introduce himself to the judges, and let them know he had arrived in Fairbanks. He convinced us that this was a monumental event.

"I'd heard the legend about Jon Link," said Beistline of his soon-to-be colleague from Hughes Thorsness. "He'd made partner in 18 months. That had never been done before, and never been done since."

"I personally believe that life doesn't end here, and that Jon has simply moved on to a new chapter. And I suspect that Jon has already introduced himself to the judges, and let everyone in heaven know that he has arrived...and that it is a monumental event," said Beistline. "There is no question that Jon's passing leaves a void in our lives."

Judicial colleague Hal Brown recalled that Link "was a very good attorney, and an even better judge." Brown recounted his trip to the Kenai Peninsula, when Link has suggested that he apply for the judgeship vacated by Alan Cranston. "Link invited me down from Anchorage...to tour the courthouse, and it *was his* courthouse," said Brown. Said Link, "Look Hal, there is no better job in the world. Every day there is something new, a challenge that you've never had to deal with before. I love this job, and you will, too."

"I'm reminded of scene in the first Star Wars movie," said Brown. "Evil guys had just tested their weapon of mass destructin by blowing up a planet with the loss of millions of lives. Obi Wan Kenobi placed his hand on his heart and said, 'A great light has just gone out in the universe'."

Long-time friend and colleague Donna Willard recalled with emotion numerous family adventures on the Chena River.

"You have great intellect, honesty, and critical to your duties as a judge, great fairness," said Willard. "If I were to choose one word that best exemplifies your personality, it would be 'humility.' Each person you met was a friend, entitled to respect and courtesy. Another hallmark of humility is modesty, which you had in great measure. Never did you succumb to the 'black robe syndrome.' The office never changed or overtook you, though you filled it splendidly," said Willard.