The Alaska BAR RAG

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Burgess ascends to federal court

By Michael Schwaiger

If you had told UAF Nanook center Tim Burgess to take a seat on the bench in 1977, he would have been disappointed; today, he has happily taken a seat on the bench after being appointed to the U.S. District Court for the District of Alaska.

Burgess was sworn in on January 23 after being nominated by President George W. Bush on July 28, 2005 and confirmed by the U.S. Senate on December 21. The seat he has taken was previously occupied by James Singleton, who took senior status on January 27. Friends, family and colleagues attended Burgess' investiture ceremony on February 28 at the Anchorage Museum of History and Art.

Judge Burgess comes to the U.S. District Court from the U.S. Attorney's Office, where he served as the U.S. Attorney for Alaska since 2001 and Assistant U.S. Attorney for 12 years starting in 1989. Burgess started his legal career in Anchorage at the law firm of Gilmore & Feldman in 1987, the year he graduated from Northeastern University School of Law. He holds a BA and an MBA from the University of Alaska and worked as a legislative aide for U.S. Senator Frank Murkowski before attending law school. Judge Burgess is married to Chief Assistant Attorney General Joanne Grace. They have four children.

Since 2004 Burgess has led the Rural Justice and Law Enforcement Commission as the federal co-chair. The commission was created by Congress to investigate barriers to justice in rural Alaska and will issue a report

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ABA President coming to Alaska

Michael Greco

American Bar Association President Michael Greco will be the keynote speaker at the 1st Annual Law Day Luncheon on May 11, 2006 in Anchorage. The first ABA President to visit Alaska, President Greco will be speaking on the theme of Civic Education and the Separation of Powers. Mark your calendars and please call 272-7469 for more details about reservations and other events connected to President Greco's visit.

ALASKA BIRD FLU??? IT COULD HAPPEN! PG. 19

Conduct rules up for revision

By Steve Van Goor, Bar Counsel

Professional conduct rules have come a long way since the Alabama Bar Association adopted a Code of Ethics in 1887. The American Bar Association (ABA) issued its Canons of Professional Ethics in 1908, followed by the Model Code of Professional Responsibility in 1969, and then the Model Rules of Professional Conduct in 1983. Not content to stand still, the ABA formed an Ethics 2000 Commission to review the Rules of Professional Conduct. After extensive review and debate, the ABA House adopted revisions in 2002 and 2003.

And, of course, those revisions landed on the desks of the nine members of the Alaska bar's Rules of Professional Conduct Committee: Jerry Juday, Liz Hickerson, Doug Johnson, Judge David Mannheimer, Judge John Lohff, John Murtagh, Bob Bundy, Ruth Hesse, and Bob Mahoney. Little did

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PRESIDENT'S COLUMN

The American Bar Association, President Bush & bugging, and farewell

By Jonathon Katcher

American Bar Association President Michael Greco is coming to Anchorage in May. This is the first time that a sitting ABA president has visited Alaska. President Greco will be speaking at the Alaska Bar's First Annual Law Day Luncheon on May 11th at 11:30 at the Downtown Marriott. His topic will be Civic Education and the Separation of Powers. This is in keeping with the 2006 Law Day in the Schools theme regarding separation of powers. We hope you will attend the luncheon and also join us on our annual sojourn into the schools to discuss civics with middle and high school students. You can RSVP for the Greco luncheon and sign up for Law Day in the Schools and the corresponding training by contacting Pro Alaska Bar Bono Director Krista Scully.

The ABA may bring to mind large gatherings of conservative lawyers at junket conventions. Some of my earliest memories are family trips built around accompanying my father, no radical he, to ABA conventions in Boston, Philadelphia and Washington D.C. Past presidents of the ABA have included Supreme Court Justice Lewis Powell. The ABA has a well earned reputation for being a politically mainstream group of legal professionals.

It is therefore interesting to see the ABA weigh in squarely against President Bush on his use of domestic phone taps without judicial review. For those of you who have not been paying attention, it was recently revealed that since September 11th the Bush administration has been undertaking extensive electronic surveillance of domestic phone calls without the benefit of judicial warrants. Notwithstanding the far from burdensome procedures for judicial review under the Foreign Intelligence Surveillance Act, which include ex post facto approval of warrants, and a FISA court that almost never withholds approval of warrants, the Administration has taken the position that neither the Constitution nor FISA require the President to comply with this act of Congress.

Recently ABA President Michael Greco appointed a panel of nine distinguished lawyers and law professors to consider the issue. The ABA Task Force on Domestic Surveillance in the Fight Against Terrorism included: William Sessions who has served as FBI Director, U.S. Attorney for the Western District of Texas, and Chief U.S. District Court Judge for the Western District of Texas; and Dean Elizabeth Rindskopf of the Pacific George Law School, formerly General Counsel for the National Security Agency, and formerly General Counsel for the Central Intelligence Agency.

Based upon the report and recommendations of the Task Force the ABA House of Delegates overwhelmingly passed the resolution that can be found at page 22 of this edition of the *Bar Rag*. In summary the resolution: calls upon President Bush to abide by the limitations of our constitutional system of checks and balances; opposes future electronic surveillance that does not comply with FISA; urges Congress to affirm that the Authorization for Use of Military Force in Iraq did not create an exception to FISA; and urges Congress to thoroughly investigate the Administration's wiretap program.

The Task Force has written a detailed report which can be found at the ABA's website at http://www.abanet.org/op/domsurv/. The report begins

"I can say from the bottom of my heart that serving as Bar President has been one of the most satisfying and fulfilling experiences I have ever had as a lawyer."

with the following from Justice Brandeis: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." The report provides background about the history of FISA, and discusses in detail the Administration's arguments.

No one can question the necessity to discover and prevent terrorism. But the Administration must proceed within the bounds of all of the laws: against torture; affording due process; and requiring judicial warrants before wiretaps.

In the late 20th century the great constitutional struggle was over federalism; the transfer of power to the states. In the 21st century the issue is separation of powers; efforts to diminish the congressional and judicial oversight of the executive. Justice Jackson, concurring in the Court's rejection of President's Truman's attempt to nationalize the steel mills during the Korean War, wrote: "No penance would ever expatiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."

As lawyers we have a special responsibility to uphold the Constitution. We must do this not only in our day to day practices with the courts and our clients; we must speak out in the public square about any and all abuses of power. We owe it to our fellow citizens and the Constitution to make ourselves heard on important issues. One is at a loss to imagine an issue more important than the executive asserting itself to be above the rule of law.

Come join President Greco at the Law Day Luncheon for his discussion of this critical issue. But most important of all, sign up for Law Day in the Schools and join your fellow Bar members as they help educate students about the separation of powers. (See volunteer sign-up information on page 10.)

Finally, this is my last president's column. John Tiemessen of Fairbanks will take over and the Bar will be in good hands. Fortunately for all of us the Bar is run by an outstanding staff who carry on from year to year, board to board, and president to president.

I hope you have enjoyed my discourses, including those asserting my plenipotentiary presidential powers as the Chief Nomenklatura of the Marxists-Leninist Soviet Collective Brotherhood of Alaska Attorneys. But all kidding aside, I can say from the bottom of my heart that serving as Bar President has been one of the most satisfying and fulfilling experiences I have ever had as a lawyer. Thank you all for granting me this great honor and privilege.

EDITOR'S COLUMN

All in the family

By Thomas Van Flein

The Ringling Bros. have their circus. Lisa had Frank. Sly had his Family Stone. And Lamont joined Fred Sanford to form Sanford & Son. Some businesses work well between family members, so why not law? We took a look at several Anchorage area law firms that have family members working together to see how the normal pressures of practicing law interact with family members as partners.

Leonard Kelley, Michaela Kelley-Canterbury and Christopher Canterbury

Kelly & Canterbury—Family Ties

At the top of the list is Kelly & Canterbury. Leonard Kelly is the venerable stalwart of the plaintiff's bar and father to Michaela Kelly, by all accounts the firm's lead trial lawyer, with six civil trials in the last 8 months. Afraid to go to trial . . . not her.

Leonard Kelly started his legal career in Alaska in 1976 after working for the FAA and working as a commercial fisher. Michaela started to work for him long before law school, "doing everything" in the office until she graduated law school in 1993. She went to work for him after graduating and had her first trial (which she won) one week after she was sworn in.

Christopher Canterbury married Michaela in 1997, but apparently she had been working on him for awhile, including being a member of the cheerleading squad at Chugiak High School for the hockey team that Christopher played with. After several years with Preston, Gates and Ellis in Seattle and Anchorage, and a clerkship with Judge Singleton, Christopher joined the firm with his wife and father in-law and anchored its new Palmer office starting in 2000. Christopher and Michaela live in Eagle River and have two children, Connor and Grace. She commutes South to the Anchorage office and he heads North to the Palmer office.

"Some businesses work well between family members, so why not law?"

Both report that they do not bring their work home and talk business because they "have too much going on with the kids" and if anything they do not have enough time to review business issues notwithstanding their monthly partner's meeting.

Each family member appreciates what the others have to offer. They all agree that Leonard Kelly will see the best part of a case, Christopher will be the "most conservative" and most likely to "see if from the defense

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The Alaska BAR RAG

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April 24 & 25, 2006
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EDITOR'S COLUMN

All in the family

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side" and Michaela notes that she will most likely predict how the jury will ultimately see a case. They enjoy the flexibility of owning their own firm, particularly since it allows them to be involved with their children to a much greater degree than working for someone else, although they recognize that financially they "sink or swim together." Leonard Kelly commented that they "don't eat unless we kill it and butcher it." Occasionally they close the office, as they will this March, for a family vacation and a well-deserved break from one of the busiest plaintiff's firms in the state.

Foley & Foley—Lawyers in Love

When it comes to trusts and estates, asset planning and protection, estate and probate administration, and passing on from here to there, Richard Foley and Susan Behlke-Foley have teamed up to create one of the state's premier boutique firms.

Richard, a UAF graduate, says he and Susan "were introduced by mutual lawyer friends soon after we both arrived in Anchorage in 1981, but I didn't ask her out until we happened to run into one another at a wedding in 1983. Although she was with her parents at the wedding, I boldly approached her and asked her to dance." He asked her out (apparently with some success), and after surviving close scrutiny from Susan's father, they were married in 1985. They have two children, 17-year-old Matthew and Chad, age 13.

A family-centered practice mirrors their family centered relationship. By working together, they believe they have the flexibility to share daily their time with their children, including coaching little league and soccer, and as of recently, the whole family is taking tae kwon do classes together. Susan works from their home office frequently whereas Richard prefers to get most of his work done at their South Anchorage office.

Practice-mates Susan Behlke-Foley and Richard Foley.

The Foleys recognize the "financial risk of having all their eggs in one basket" but the trade-off of working together and having more time for their family functions is worth that risk. They take family vacations together but keep their offices open with an associate and support staff. Both truly enjoy the control over their professional and personal lives that owning their own firm provides.

Libbey Law Offices—We Are Family

The Libbey Law Offices consist of Robert Libbey, a senior member of the bar, and his son Daniel Libbey and daughter-in-law Colleen Libbey. Robert Libbey has been practicing law in Anchorage since 1963 when he joined with Wendell Kay and Lester Miller in the firm Kay & Miller. The firm changed to Kay, Miller & Libbey and had other partners rotate in and out until 1974, when Robert Libbey joined with Doug Serdahely to form a personal injury, product liability and criminal defense firm. Several years later the firm became Libbey, Suddock & Hart, and then from 1986 to 1997 it was Libbey & Suddock.

With several of his partners or associates on the bench (John Suddock, Doug Serdahely, Milt Souter, Bill Fuld, and more recently Alex Swiderski), Robert Libbey thought he would slow down practicing law and focus his energy on a horse ranch off the Denali Highway about 100 miles west of Paxson Lake.

However, his son, Daniel Libbey, joined the bar in 2000, and after clerking for Judge Sanders, and working at Oles, Morrison & Rinker, Daniel joined the practice with his father in 2003. Colleen Libbey, originally from Ketchikan and also a 2000 bar admitee, joined the firm at that time after clerking for Judge Gonzales and working at Holmes, Weddell & Barcott. Daniel met Colleen while he was working in Seattle and she was visiting friends. Apparently Daniel made her a Calzone dinner, and after a long distance courtship, they were engaged after six weeks of actual dating and then married in 1996.

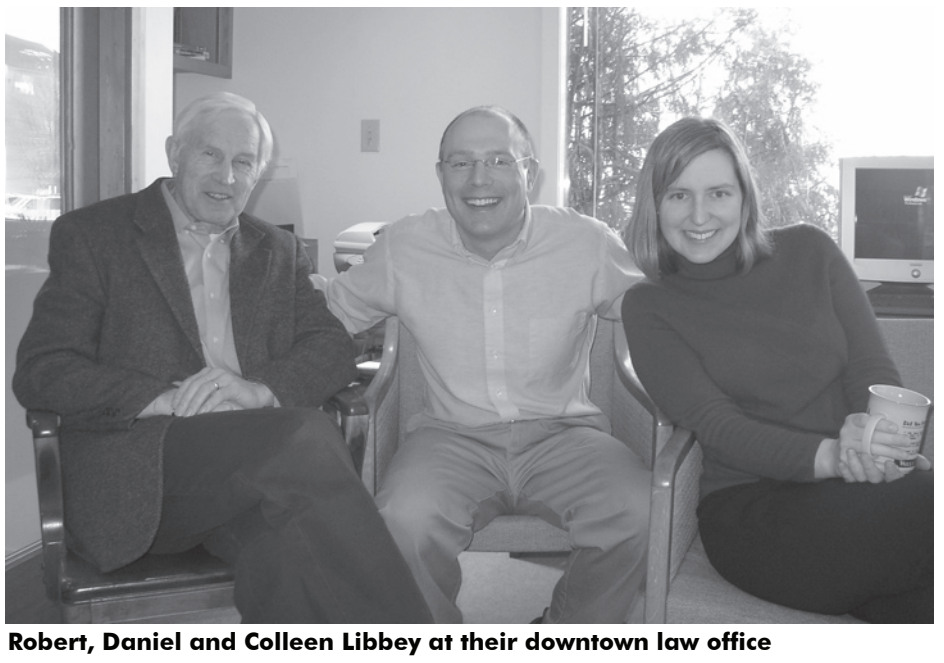
Robert says it is "a joy to work with" his son and daughter-in-law and he says he is at that "point in life" where he enjoys every day and appreciates the "younger lawyers who seem much better prepared to practice law" out of law school than his generation was. The practice also includes Robert's wife Karol as the office manager.

Jackson Brown thought that "the U.S.S.R. will be open soon as vacation land for lawyers in love." Nobody told that to the Libbeys, who instead went on a family ski vacation in Utah this March. They kept in touch with the office by phone—they say. Having seen the video of them skiing together, it is doubtful any work got done, as it should be.

Colleen says she likes working in the family firm and that it is "better than any other job" she has had because of the flexibility, and the willingness "to help each all the time." She sees the relationship with her law partners as "more than just financial."

Known for his professionalism and hard work, Robert Libbey notes that all of the firms he has been with were small firms "that felt like family," so the transition to actual family members was not difficult. Colleen and Daniel have found ways to complement each other's strength in the practice, with Daniel focusing on construction law, business litigation and criminal defense and Colleen enjoying appellate practice.

All of the lawyers I met with seemed very pleased to work with their family members. They are family, they are partners, and as Sister Sledge might say, "they got all their sisters (and spouses and in-laws) with me."



Robert, Daniel and Colleen Libbey at their downtown law office

The Libbey Horse Ranch on the Denali Highway

Letters to the Editor

There's more to the Arend story

Mr. Olsen's account of the Bar Association Supreme Court fight is incomplete without reference to In Re McNabb, 395 P.2d 847 (Alaska 1964), an omission which perhaps casts the Association and members of the 1964 bar in an unduly unfavorable light as a result.

Mr. Olsen commends Justice Arend for his refusal to campaign on his own behalf as undignified and unseemly. However, Justice Arend's participation in an unseemly effort may well have tipped Anchorage lawyers against his retention. It certainly tipped me.

As with other members of our young firm, Ely, Guess, Rudd and Havelock, I was of two minds about the retention issue. The Chief Justice's assertion of jurisdiction over the bar did look like a power grab. After all, the Bar Association was recognized as an independent institution in the Constitution.

But sometimes the bar–court fight looked to us juniors like a settling of old scores among the senior members of the bar. Though esteemed senior lawyers such as George Boney, Roger Cremo and Cliff Groh were involved in defense of the Bar's position, Stanley McCutcheon and Ed Boyko, as suited their temperaments, were conspicuous in leading the fight. Both of these gentlemen were said to be capable of devious motives. Ambiguities regarding both purpose and conse-

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Letters to the Editor

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quence of the proposed campaign to unseat Justice Arend raised points of hesitation.

Though Justice Arend lived in Fairbanks, the bar was smaller in those days, even chummy, so Justice Arend was in fact well known throughout the state as a decent and thoughtful man. Having been elevated to the Supreme Court as a "man of the bar" in reaction to the "Nome plot," Justice Nesbett became a major disappointment to many lawyers for his aloofness and remoteness, a characteristic not uncommon among judges, often for good reasons, but thought by many to be unbecoming to a frontier state in which anyone could rap on the door of the governor's house for the time of day.

I forget whether it was Nesbett or Dimond who first put it out that they should no longer be addressed by first name by their friends even outside of formal settings, but this did not sit well. A senior attorney in the Juneau Bar assigned a plane seat which turned out to be next to Justice Dimond was told to move his seat. Stories like this tended to be passed around the whole bar in days.

Justice Dimond, a tall, gaunt man, his persona possibly undernourished in the shade of his famous and ebullient father, was painfully shy, and so likewise remote if more understandably. Gossip around the new three-person court soon had it that Justice Dimond was under the wing of Nesbett and would go with him except on issues that touched on his strong Catholic faith. In comparison, Harry Arend was positively cuddly and was the only one who might dissent from the strong-willed Nesbett. So there was much fretting that Nesbett, who was thought to deserve a comeuppance, waited until after his reelection to launch his attack on the independence of the bar.

At that time, most of us knew virtually every member of the Alaska Bar personally, at some level of acquaintance. Though my acquaintance with Justice Arend was at the remote end, like others in Anchorage, I knew many Fairbanks practitioners well and knew that he was highly regarded. Judge Rabinowitz, in particular, spoke very highly of him and opposed the recall though he was eventually to replace him on the high bench.

In Re McNabb issued October 26, 1964, and was inevitably, and surely appropriately, interpreted to have been rushed into print for its force in the campaign track for the election the following month, against the Bar Association and inferentially for Justice Arend. In this opinion, the Bar Association was excoriated for its appalling disciplinary practices. To cite an example: "We disapprove of such laxity. The failure on the part of the integrated bar to process a grievance matter with reasonable dispatch serves to discredit the legal profession in the eyes of the public," but on and on. No doubt some of this was well deserved, but the timing was unethical.

This opinion, issued with obvious political intent on the eve of the election, turned many lawyers in Anchorage against Justice Arend who, though he did not write it, could have stopped the issue of the opinion or at least controlled the timing. The Nesbett Supreme Court appeared to be out of control, and as nice a man as he was, in defeat, Harry Arend would carry the message to the Supreme Court that the Bar would not stand for it. After reading and discussing the In Re McNabb advance sheets, Bob, Gene, Joe and I agreed that it justified our taking a position on the retention and, like many other lawyers, we immediately put out letters to clients and I think sent some money to a campaign headquarters.

The ultimate resolution of the Nesbett-Bar dispute did not come about because Justice Nesbett had an epiphany. Heavyweights of the bar and bench from outside Alaska came in to mediate the dispute, which had gathered national attention because of the seizure of the bar association accounts. Justice Nesbett was squeezed mightily, and as Mr. Olsen points out, he was staring at the possibility of facing a three-judge federal court with the possibly still disaffected Judge Hodge as the Alaska member.

Thus I agree only in part with my friend retired District Judge Connelly, quoted in the article as saying that what happened to Justice Arend was "unfair and outrageous." While it may have been--like life--"unfair;" it was not "outrageous."

—John Havelock

Even more Arend lore

I read with interest the article on the ouster of Justice Harry Arend in 1964. However, notably missing from the article was any mention of Neil McKay and the key role his disciplinary action played in the controversy.

Arend was assigned the task of writing the Supreme Court opinion disapproving of McKay's handling of the Mary Keno Hill estate, and contrary to the mild discipline which the Bar gave McKay, the Court decided disbarment was appropriate. 395 P.2d 835 Alaska 1964 (later withdrawn). McKay was a friend of many bar leaders in Anchorage, including George Boney, then in private practice. While many of us recall McKay because of the car bombing death of Muriel Pfiel during the custody dispute over Scotty, and the prosecution of McKay for the shooting of his brother-in-law Bob Pfiel (McKay was acquitted in the 2d trial), he was characterized by the Bar as an innocent victim of an over-zealous Supreme Court. McKay was the rallying cry of the Bar in the Arend assault.

When later appointed to the Supreme Court, George Boney proudly announced to the Anchorage Bar at our noon lunch meeting, that the first thing he intended to do on the Court, was to reinstate Neil McKay to full membership in the Bar. He did that by withdrawing the original Arend opinion, which has now nearly disappeared from our law books and from the memory of many.

—Jim Powell,
Law Clerk to Harry Arend and
Jay Rabinowitz 1964-1965

Living in Bethel

I read with interest the article by Ethan Windahl about the joys of living in Bethel. Ethan, as you may know, lives in Olympia Washington.

—Jon Larson

Reverse discrimination

In a recent *Alaska Bar Rag*, Ken Kirk (aka "Neanderthal Man") suggested that the primary reason that disproportionately few women sit as Alaska judges is that "Judges are usually chosen from more experienced attorneys." He said that women attorneys have less experience than men, as a group, and concluded that, therefore, one would expect that not as many would be judges. He suggested further that women appointed to the bench with fewer years of experience were appointed because of their gender.

Review of the Judicial Council's selection data did not support his claim of "reverse discrimination," both because his data were flawed and because rigorous analysis showed that, at least in the past that he discusses, gender did not play any statistically meaningful role in judicial nominations and appointments.

In 1999, the Judicial Council published Fostering Judicial Excellence: A Profile of Alaska's Judicial Applicants and Judges. The report showed that women applicants, as a group, had fewer years of experience and that years of experience did make a significant difference in the nomination and appointment of judges. But further analysis that weighed the effects of many potential variables showed unmistakably that gender did not have an independent significant effect on the nomination or appointment of judicial applicants. The data showed that women's other abilities were more important than their years of practice.

What factors were important in the nomination and appointment of judges? The Council's report showed that the most important criteria were an attorney's colleagues' evaluations of an applicant's abilities (Bar surveys), the applicant's writing abilities, the applicant's employment history, and other variables such as significant experience with jury trials. Years of practice, years of residence, the number of jobs held in the applicant's legal career, participation in Bar activities, and substantial criminal practice before appointment were other less important significant factors. Gender, age, marital status, and other such variables were not correlated at all with likelihood of nomination and appointment. Mr. Kirk's conclusion that women had an "easier time" getting onto the bench is belied by the data that showed that gender was unrelated to nomination and appointment during the years to which he referred.

Mr. Kirk also "cobbled together" bits of information to support his conclusions. He added that the "[f]igures are approximate."

The Judicial Council turned to its records to provide the most accurate data possible. Only one judge was appointed to the bench with two years' experience (which met the legal requirements at that time); a number of men were appointed to the bench during the 1980s (and more recently, in 2004) with noticeably less than 10 years' experience; three of the eight women judges in 1985 had more than 10 years' experience (not one, as he says); and seven of the 12 women on the bench in 1995 (not four of 13 as he says) had 10 or more years of experience.

Finally, Mr. Kirk said, "Today, five of the 13 judges had more than 10 years in the trenches." Today, however, Alaska's bench has 11 female judges, not thirteen. Eight of them had 10 or more years of experience before appointment to the bench. Eight of 11 is 73%, approximately three-quarters, and nearly double the 38% that Mr. Kirk showed with his figures.

While the Council may wish to be as entertaining as Mr. Kirk, it strives to report, "Just the facts, ma'am." Many will take Mr. Kirk's incorrect data and assumptions seriously. Neanderthal men may not have been familiar with statistical analysis, but to survive they had to get their facts straight.

The Council has continued to enter data about applicants since 1999, but has not had an opportunity to analyze the information. A new analysis of the data could show different findings about the significance of various factors such as gender, age, experience, and so forth. We appreciate the opportunity to provide accurate statistics.

—Teri Carns
Senior staff associate at the
Alaska Judicial Council

Length of Alaska Practice,
First Time Female Appointees to Judgeships

Judge	Year first appointed	Governor who appointed	Length of Alaska practice at time of first appointment
Nora Guinn	1968	Hickel	No information available
Mary Alice Miller	1968	Hickel	No information available
Dorothy Tyner	1968	Hickel	No information available
Beverly Cutler	1977	Hammond	2
Jane Kauvar	1981	Hammond	7
Elaine Andrews	1981	Hammond	4
Natalie Finn	1983	Sheffield	10
Karen Hunt	1983	Sheffield	10
Joan Katz Woodward	1984	Sheffield	12
Martha Beckwith	1984	Sheffield	7
Mary Greene	1984	Sheffield	7
Niesje Steinkruger	1988	Cowper	12
Dana Fabe	1988	Cowper	12
M. Francis Neville	1990	Cowper	14
Stephanie Rhoades	1992	Hickel	5
Stephanie Joannides	1994	Hickel	10
Patricia Collins	1995	Knowles	12
Suzanne Lombardi	1997	Knowles	6
Sharon Gleason	2001	Knowles	17
Nancy Nolan	2001	Knowles	16
Morgan Christen	2001	Knowles	15
Margaret Murphy	2005	Murkowski	10

Alaska Judicial Council February 7, 2006

Timothy Burgess

Burgess ascends to federal court

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to Congress and the Alaska Legislature in making recommendations to address organizational difficulties of rural Alaska law enforcement and court systems and the problems of alcohol abuse, domestic violence and child abuse.

As a U.S. Attorney, Burgess was selected in August 2001 by U.S. Attorney General John Ashcroft to serve on the U.S. Attorney General's Advisory Committee (AGAC). The committee advises the Attorney General and affords U.S. attorneys a chance to affect departmental policies. Burgess chaired the committee's Environmental Issues Subcommittee.

Several AGAC members played evening basketball games with Ashcroft during their trips to Washington, DC. Burgess impressed his colleagues with his talent and leadership on the court—Burgess still holds the UAF record for highest percentage of field goals in a season and continues to coach youth basketball in his spare time through the YMCA and the Boys & Girls Club. According to Anchorage Superior Court clerk and YMCA coach Vikram Patel, "If you ever need to rally a group of rowdy, pre-adolescent sixth graders around a common purpose, Coach Tim is definitely your guy. I envied the way his kids actually listened to him throughout entire timeouts."

As a judge, Burgess says he will strive to emulate the good judges he has seen working in Alaska, including especially Judge James Fitzgerald, whom Burgess holds in special regard for bringing to the bench such dignity, fairness and humor. Burgess encourages attorneys appearing before him to work hard, be fair, and to treat everyone with respect.

QUOTE OF THE MONTH

All great things are simple, and many can be expressed in single words: freedom, justice, honor, duty, mercy, hope.

Sir Winston Churchill
British politician
(1874 - 1965)

ALASKA BAR FOUNDATION

Grant applications for IOLTA funds due April 1

By Dani Crosby

The Alaska Bar Foundation is now accepting IOLTA grant applications for FY '07 (July 1, 2006 through June 30, 2007). Applications are available on-line at www.alaskabar.org or by stopping by the Alaska Bar Association, located at 550 West Seventh Avenue, Suite 1900. Last year, the Alaska Bar Foundation awarded grants from IOLTA funds totaling $72,000. The Foundation anticipates that $95,000 will be available for grants for FY '07.

Applications must be received at one of the following addresses no later than 5:00 p.m. on April 1, 2006: (1) Alaska Bar Foundation, P.O. Box 100279, Anchorage, AK 995510-0279; or (2) Alaska Bar Foundation, 550 West Seventh Avenue, Suite 1900, Anchorage, AK 99501.

In the 1980's, the Alaska Bar Foundation and the Alaska Bar Association worked successfully with members of the Bar and with the banking community to establish the Interest on Lawyers' Trust Accounts (IOLTA) program. Under the program, lawyers' trust funds that are small in amount or held for a short period of time are aggregated in interest-bearing accounts held by participating financial institutions throughout Alaska. The interest is then paid to the Alaska Bar Foundation.

Every year, the Alaska Bar Foundation awards grants using the IOLTA funds. Applicants must demonstrate that the funds would be used to supplement a legal services program for economically disadvantaged individuals or for the purpose of enhancing the administration of justice.

The Alaska Bar Foundation encourages all active bar members to participate in the IOLTA program by setting up IOLTA trust accounts for client funds. These funds are critical to the provision of legal services to economically disadvantaged Alaskans through non-profit entities such as Alaska Legal Services and the Alaska Pro Bono Program. Historically, the funds also have supported other efforts, such as Alaska Youth Courts and similar programs.

The following financial institutions participate in the IOLTA program and do not charge the lawyers or the Foundation any fees for maintenance of the IOLTA accounts: Alaska First Bank & Trust; Alaska Pacific Bank; Alaska USA Federal Credit Union; ALPS Federal Credit Union; Denali State Bank; First Bank; First National Bank Alaska; Key Bank; Mt. McKinley Bank; Northrim Bank; and Wells Fargo Bank.

For more information about setting up an IOLTA account, please call me at Ashburn & Mason, P.C., (907) 276-4331. I would be happy to talk with you about the program and work with you to establish an interest-bearing account that will benefit important programs for Alaskans.

ESTATE PLANNING CORNER

Aircraft and watercraft liability

By Steven T. O'Hara

Alaska has many interesting laws, especially in the area of asset protection. One of these laws is an Alaska Statute that can limit the liability of owners and operators of personal-use aircraft and watercraft.

The statute is entitled "Civil Liability For Aircraft and Watercraft Guest Passengers"(AS 09.65.112). This statute deals with at least four possible scenarios. Common to each are three requirements that must be satisfied before the statute may be considered as a possible source of liability protection, namely:

Requirement 1: *The act or omission by the owner or operator was not gross negligence, reckless misconduct, or intentional misconduct.* The statute provides no protection from liability exposure for gross negligence or reckless or intentional misconduct.

Requirement 2: *The aircraft or watercraft was not being operated as a common carrier or used for commercial purposes.* The statute provides no protection from liability exposure for an act or omission arising from a craft being operated as a common carrier or used for commercial purposes.

Requirement 3: *The aircraft or watercraft was not being demonstrated to a prospective buyer.* The statute provides no protection from liability exposure for an act or omission arising from a craft being demonstrated to a prospective buyer.

Each scenario is further based on whether or not the owner or operator has insurance. For purposes of this Article, "insurance" means insurance that would compensate a passenger for civil damages awarded against the owner or operator (AS 09.65.112(b)(2)).

By identifying both the owner and the operator, the statute recognizes that an aircraft or watercraft may be operated by someone other than the owner and that both have liability exposure.

"Alaska has many interesting laws, especially in the area of asset protection."

Scenario 1: *Both the Owner and the Operator Have Insurance.* Under this scenario, with the above requirements satisfied, the statute would limit liability exposure to the amount of the insurance. In the words of the statute, the "owner or operator who is insured. . . is not liable for civil damages. . . that exceed the applicable insurance. . ." (AS 09.65.112(b)(2)(A)).

Scenario 2: *The Owner Has Insurance But the Operator Does Not.* Under this scenario, with the above requirements satisfied, the statute would limit the Owner's liability exposure to the amount of the insurance (*Id.*).

On the other hand, the statute would provide no protection to the uninsured Operator unless the passenger was informed by the Operator before the passenger entered the craft that the Operator was uninsured. If the passenger was given this notice, and the above requirements are satisfied, the statute provides that the Operator would have no liability exposure (AS 09.65.112(b)(2)(B)).

Scenario 3: *The Operator Has Insurance But the Owner Does Not.* Here the statute would limit the Operator's liability exposure to the amount of the insurance as long as the above requirements are satisfied (AS 09.65.112(b)(2)(A)). By the same token, the statute would provide no protection to the uninsured Owner unless the passenger was informed by the Owner before the passenger entered the craft that the Owner was uninsured. If the passenger was given this notice, and the above requirements are satisfied, the statute provides that the Owner would have no liability exposure (AS 09.65.112(b)(2)(B)).

Scenario 4: *Neither The Owner Nor the Operator Has Insurance.* Here both the Owner and the Operator would be exposed to unlimited liability unless, according to the statute, the passenger was informed before he or she entered the craft that the Owner and the Operator were uninsured (*Id.*). If the passenger was given notice by the Owner and the Operator that they were uninsured, and the above requirements are satisfied, the statute provides that both the Owner and the Operator would have no liability exposure (*Id.*).

Thus the statute encourages the purchase of insurance, no matter the amount, because it limits liability to the amount of insurance without any requirement of notice to passengers. If an owner or operator does not purchase insurance, the statute requires notice of the lack of insurance before the passengers board; otherwise, the statute provides no protection.

The statute does not mention any requirement of written notice. Nevertheless, this writer recommends that owners and operators of personal-use aircraft and watercraft ask their passengers to sign a statement evidencing the receipt of notice and that the statement be kept in a safe place outside the craft. This step may eliminate any after-the-fact denial by the passenger or his or her heirs about the notice given. An instrument like the "No Insurance Notice to Passengers" below might be a starting point, but this writer assumes no responsibility in connection with any use of any such instrument.

The statute requires notice only where no insurance exists. Where the owner or operator has insurance he or she may still want to have passengers sign a notice. Here an instrument like the "Insufficient Insurance Notice to Passengers" below might be a starting point, but again this writer assumes no responsibility in connection with any use of any such instrument.

•

NO INSURANCE
NOTICE TO PASSENGERS
(Alaska Statute 09.65.112)

- Neither the owner nor the operator of the aircraft in which I am about to fly has insurance to compensate a passenger for injuries the passenger may suffer or for civil damages awarded against the owner or operator.
- I am not flying as a prospective buyer of the aircraft.
- In this flight the aircraft will not be operated as a common carrier or used for commercial purposes.
- I sign this Notice before I enter the aircraft.

_____ _____
Date Passenger Name [print]

_____
Signature of Passenger

****

INSUFFICIENT INSURANCE
(UNDERINSURED)
NOTICE TO PASSENGERS
(Alaska Statute 09.65.112)

- Neither the owner nor the operator of the aircraft in which I am about to fly has sufficient insurance to compensate a passenger for injuries the passenger may suffer or for civil damages awarded against the owner or operator.
- I am not flying as a prospective buyer of the aircraft.
- In this flight the aircraft will not be operated as a common carrier or used for commercial purposes.
- I sign this Notice before I enter the aircraft.

_____ _____
Date Passenger Name [print]

_____
Signature of Passenger

THE KIRK FILES

Deep Throating the First Amendment

By Kenneth Kirk

I had just finished delivering the manuscript for my latest *Bar Rag* submission. The editors' instructions were a bit odd, but eventually I found the boarded-up window in the back alley, slipped the brown paper envelope under the loose corner, and headed back out to the street.

I noticed him almost immediately. He appeared to be strolling nonchalantly, but he was unmistakably headed in my direction. When he was close, I could see, despite the turned-up trenchcoat and dark glasses, that it was my primary *Bar Rag* contact. To protect his identity, we'll call him "Tim Von Fly".

"I saw the signal," he said, "the flower pot was moved to the other side of the window. You needed to see me?"

"I'm sorry, man, my wife did some cleaning. No, I didn't need to see you. The 'stuff' is delivered. We're good."

He breathed a sigh of relief and walked alongside me. Well not exactly alongside, sort of one pace off and about two paces back, so it wouldn't look like we were together. "Well, we're always glad to have your submission. I know you work hard on it. Of course if you needed to take an issue or two off, we'd totally understand...."

"Wouldn't think of it," I cut him off, and then said "I enjoy doing it". I was trying to affect an air of subtle sarcasm but wasn't sure if it was coming through. I decided to go ahead and confront him. "It's not like I don't know you guys are uncomfortable with some of my more..." I searched for the word... "provocative articles. I'm sure you wouldn't mind distancing yourselves."

"Nonsense" he protested. "The *Bar Rag* is proud to stand beside you on this. You bring a unique and controversial perspective which allows us to provide a greater diversity of opinion to our readers, who are certainly capable of deciding for themselves whether to reject your views." I would have been touched, if I hadn't seen all the internal e-mails deciding how to phrase the official position, forwarded to me by a disgruntled *Bar Rag* staffer.

I decided to push it a bit further. "So why is it that the famed 'Public Defender Diaries' article, which brought in all those letters to the editor, isn't included in the website as a 'featured article' for that issue?"

He sniffed. "We can't include all of the articles from the print version, on the website. We've included some of your past articles from other issues."

"And why was your editorial defending that column, titled 'Defending the Indefensible'"?

"It was intended broadly. We didn't mean that that article in particular was indefensible. We just meant that we would defend it, even if it was." He was starting to sound nervous now.

"And why did all the *Bar Rag* staffers get separate counsel after my 'Gumshoeing the Bench' article?"

"You made that up!" he protested.

"All right, I made that one up," I chuckled. "I was just fishing a little".

"Only the main editorial staff each got separate counsel," he clarified. "The rest had to share one lawyer. And one for the janitorial staff, since they're contractors...."

At that point he cut off what he was saying, as a group of lawyers passed us going the other way. He gazed into a store window; I pretended to look at my watch. Eventually the conversation resumed, a bit less heated now.

"I guess it can't be easy, being the controversial one," he offered. "It must make you feel a bit paranoid. But honestly, we do believe in freedom of speech, and we don't mind publishing your articles. Heck, we even get kind of a kick out of it. It makes us feel a little bit like First Amendment heroes."

"Most lawyers and judges – and everyone else – supports freedom of speech as long as the speech in question doesn't really offend them in the first place."

I thought about that for a moment. "Hardly anybody really believes in freedom of speech, you know. You guys get a cheap thrill out of vicariously tweaking other peoples' noses, maybe, but very few people will really defend freedom of speech on principle."

"I disagree," he said, not quite with me. "Lots of people support freedom of speech. Including most lawyers and judges".

"No," I continued, "most lawyers and judges – and everyone else – supports freedom of speech as long as the speech in question doesn't really offend them in the first place. Lawyers will back a T-shirt saying 'F*** the Draft' , because the F-word doesn't bother them all that much. But use the N-word, and see how many of them will still back you up."

"But that's because it's racially offensive," he replied, "so there's a valid justification for that objection."

"Racially offensive, sexually explicit, politically or socially dangerous, personally slanderous, factually misleading" I rejoined, "there's always a justification when you object to someone else's expression. By the time you get done, very few people are still around who back unfettered free speech. And that's my point."

He took a moment to ponder this. He had plenty of time to do it, as he had to slip into a doorway and pretend to fumble for a cigarette, while another group of lawyers walked by on the sidewalk. When he came back he asked, "So how would you know whether someone was really a First Amendment believer? I mean, everyone is offended by something."

Get a T-shirt that says "F*** the N*****s," I said, "and see if anyone is left standing."

He winced. "That's about as offensive as you can get."

"Exactly," I said, "and that's something to consider. If somebody used the N-word around me, I'd be grossly offended. I'm not even sure I'd stand up for your right to say it."

"Not that I would want to" he interjected.

"Which leads me to wonder whether I am really in favor of total, unfettered freedom of expression," I went on, "so maybe I'm not a complete First Amendment champion."

"Which leads me to wonder whether I myself am really in favor of total, unfettered freedom of expression," I went on, "so maybe I'm not a complete First Amendment champion myself."

"Maybe," he said thoughtfully, "but you may end up a First Amendment martyr."

"Not a First Amendment martyr," I said, "because the most I might suffer is social opprobrium, and that's everyone else's right, if they don't like what I have to say. The First Amendment is only implicated when it's a government restriction. I could talk about that offensive T-shirt in the *Bar Rag,* and see if your quasi-governmental publication will print it. That would implicate the First Amendment, since the Bar Association is quasi-governmental and you've created a public forum."

He looked very upset now. "Please tell me that won't be your next article. The F-word is bad enough; if you use the N-word we'll never hear the end of it."

I decided to go easy on him. "No, I'm not into racial epithets anyway. My next article will be about the practical difficulty of getting attorney fees under the Longshore and Harbor Workers' Compensation Act". What the heck, he'll know the truth soon enough.

He relaxed a little. "Attorneys fees are important," he said.

"Told by a drunk guy to his bartender," I added.

"Drunks are funny," he said.

"Yes," I went on, continuing the lie, "at most it might mildly annoy a few insurance defense lawyers, but they don't write letters to the editor." He liked that too, I could tell.

Yes, drunks are funny, I thought. So are misogynistic gumshoes, and disenchanted young PD's. But they can also get a point across that I couldn't get across if I just came out and said it. People will read satire all the way through, laugh about it, and maybe something important slips through into their consciousness. They won't read a diatribe unless they already agree with it. Like the court jesters of old, I could get something through to the king that he maybe needed to hear, even if he didn't want to.

I decided to tell him the truth. "Tim," I said, turning, "my next article...."

But he was already gone. The tracks in the snow behind me showed he had ducked into a bar we had just passed. No use following, I realized, because he would already be out the back door and on his way back to his office by now. His "drop" would have the manuscript back there by now.

I shrugged and headed back to my own office. He'd know soon enough, I guess. I thought about the article, and the potential reaction. I thought about what I'd just said about people's unwillingness to defend speech that really offended them.

I turned up my collar against the cold wind. And hoped I was wrong.

(Editor's Note: Contact Deborah O'Regan for your t-shirt.)

We Need Your Help!

The Alaska Judicial Council is surveying Alaskan attorneys about the performance of 31 judges who will be on the ballot in 2006. The Council uses survey results and comments when considering whether to recommend judges for retention.

Attorneys observe judges firsthand and have the training to evaluate judges' legal abilities. Responding to the survey gives the Council and the public the best information available about judicial performance. The survey also provides valuable feedback on how judges may improve their own performance. When attorneys fail to respond, their actions may weaken the high standard of justice that Alaskans expect and may reflect indifference on the part of the legal profession.

If you have not already done so, we urge you to respond to the Council's paper or electronic retention survey. The response deadline has been extended to March 22, 2006. If you require another survey, please contact the Judicial Council (279-2526; lcohn@ajc.state.ak.us.) Thank you very much for your cooperation.

FAMILY LAW

Custody issues involving teenagers

By Steven Pradell

Family law lawyers are routinely asked to assist parents in addressing custody matters involving teenagers. Clients often ask their lawyers, "At what age in Alaska can a child tell their parents where they want to live?" The Alaska legislature has chosen not to set a specific age at which a child's desire to live with one parent is considered by the court. Instead, AS 25.24.150(c) states that the court can consider "the child's preference if the child is of sufficient age and capacity to form a preference."

This test allows a court substantial discretion in determining, on a case by case basis, whether a particular child is old enough and articulate enough to have a meaningful preference. While it is clear that the preference of most children over the age of 15 will be strongly considered, and that most children under the age of 7 will not have the capacity to form a meaningful preference, what falls in between is a gray area which can vary greatly from judge to judge in its implementation.

Even when a child's desire is considered, it is only one of many factors set forth in AS 25.24.150(c) that the court must consider in determining custody and visitation, in the absence of a finding that a parent has a "history of perpetrating domestic violence" under AS 25.24.150(h)-(j). The domestic violence presumption trumps the other best interest factors, and issues involving that section of the statute are presently before the Alaska Supreme Court and are beyond the scope of this article.

In addition to the preference of the child, the other best interests factors include:

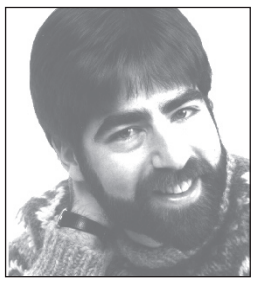
(1) the physical, emotional, mental, religious, and social needs of the child;

(2) the capability and desire of each parent to meet these needs;

. . .

(4) the love and affection existing between the child and each parent;

(5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;



"The Alaska legislature has chosen not to set a specific age at which a child's desire to live with one parent is considered by the court."

(6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;

(8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;

(9) other factors that the court considers pertinent.

The Alaska Supreme Court has rarely addressed the preference of the child issue, and has not defined a certain age at which a child's preference must be controlling. However, in Valentino v. Cote, 3 P. 3rd 337 (Alaska 2000) the Court upheld a decision concerning E.C., a fourteen year old child, noting that:

Judge Tan . . .stated that the primary basis for his decision was the preference of E.C., whom he found to be "mature" and "of sufficient capacity" to make a reasoned decision.

The Valentino decision has been subsequently cited in Kelly v. Joseph, 46 P.3d 1014, n. 14 (Alaska 2002).

What all of this means is that there is no clear answer as to how much weight, if any, a judge in a divorce or custody case is going to give to the child's preference. For a child about to become an adult, it is likely that the court is going to focus on the preference of such a child. Controlling older teens is difficult for adults, and Superior Court judges, like parents, have little power policing the day to day activities of older children about to emancipate.

Although courts are reluctant to allow parents to bring children directly into custody proceedings, a child's preference can come to court through a Custody Investigator, counselor, or, in some cases, by an in-camera discussion by a judge with the child.

At the conclusion of a recent contested custody hearing, Judge Cutler suggested that both parties read some literature to learn more about their teenagers. She provided the names of the following books on the issue, which practitioners may want to pass on to their own clients:

1. Youth and Revolt, by C.D Payne

2. Get Out of My Life But First Could You Drive Me And Cheryl To the Mall: A Parent's Guide to the New Teenager, by Anthony E. Wolf

3. Parents, Teens and Boundaries: How to Draw the Line, by Jane Bluestein

4. Joint Custody with a Jerk : Raising a Child with an Uncooperative Ex, A hands on, practical guide to coping with custody issues that arise with an uncooperative ex-spouse, by Julie A. Ross and Judy Corcoran

5. Adult Children of Alcoholics, by Janet Geringer Wolfitz

6. The Strong Willed Child, by Dr. James Dobson

7. How to Talk So Kids Will Listen & Listen So Kids Will Talk, by Adele Faber and Elaine Mazlish

8. Trust Me Mom Everyone Else Is Going, by Rohi Cohen Sandler

9. You Don't Really Know Me: Why Mothers and Daughters Fight and How Both Can Win, by Terri E. Apter

10. Reviving Ophelia: Saving the Lives of Adolescent Girls, by Mary Pipher

All of the above books are available for purchase at Amazon.com.

 Steve's book, The Alaska Family Law Handbook, (1998) is available for family law attorneys to assist their clients in understanding domestic law issues. Steve's website is located at www.alaskanlawyers.com.

ATTORNEY DISCIPLINE

Lawyer admonished for commingling funds

Attorney X represented Plaintiff in a personal injury claim arising from a car accident. The case settled and the court issued a written order specifying the distribution of settlement proceeds. Most of the money went into a structured settlement designed to pay out over Plaintiff's lifetime. The balance was delivered to Attorney X for the payment of attorney fees and the claims of Plaintiff's creditors. Attorney X deposited all of this money in the law firm's general operating account. The attorney withdrew fees and made the creditor payments within a month.

Under Alaska Rule of Professional Conduct 1.15(a) the money delivered to Attorney X should have been placed in a client trust account. The attorney believed that using the office account was acceptable if the money was promptly distributed under the court order. Ethics authorities agree on the risk of this practice, which can expose client funds even temporarily to levy by the lawyer's creditors, inadvertent use by staff to pay law firm expenses, or even embezzlement. In this case all funds were properly accounted for and nobody lost any money. The lawyer had an otherwise unblemished ethical record. An area discipline division member reviewed Bar Counsel's investigation file and approved a written private admonition, which Attorney X accepted.

Attorney admonished for circulating embarrassing poems

Bar counsel issued a written private admonition to Attorney X for violating Alaska Rule of Professional Conduct 4.4 that requires an attorney to respect the rights of third parties.

During a contested estate probate proceeding, Attorney X served many Estate creditors with copies of intimate, erotic poetry that a respected, married member of the community had written over the course of many years to the decedent, a prominent business member of the community.

The court ordered the poems to be sealed in the court file and ordered the parties not to copy or distribute the poems and to destroy any copies in their possession.

The dissemination of the poems to interested parties in the probate proceedings served no substantial purpose other than to embarrass the locally prominent, married author of the poems. Rule 4.4 cautions that a lawyer, while representing a client, cannot take steps that have no substantial purpose other than to embarrass or burden a third party.

An area division member approved the issuance of a written private admonition which Attorney X accepted.

Anchorage lawyer Bill Ford suspended for violating court order

The Alaska Supreme Court on January 27, 2006 issued an order suspending William T. Ford of Anchorage for 90 days. The suspension took effect thirty days later, on February 27.

Ford represented a husband who owed his former wife money under a property division decree. The wife wanted to foreclose her security interest in the husband's property. The husband borrowed $20,000 from a relative, intending to use the money to negotiate a stay of foreclosure while he appealed. The relative sent a check for $20,000 payable to Ford, which Ford held. After learning of the loan, the court in writing ordered Ford to deposit the $20,000 into his trust account, then issue checks for money owed to the wife, with the balance to be transferred to the wife's lawyer. Instead of following the order, Ford returned the $20,000 check to the lender, stating afterward that he had a duty to his client to do so.

A disciplinary hearing committee, the Disciplinary Board, and the Supreme Court found that Ford violated Alaska Rule of Professional Conduct 3.4(c) by knowingly violating a court order. Ford did not exercise his right of "open refusal" of an invalid order, and he did not employ other options to preserve the status quo and honor his duty to the court, such as by depositing the money with the court or holding it himself while he sought appellate review.

The court considered mitigating and aggravating factors, including a prior disciplinary admonition for advising a client to disobey a court order, and rejected the hearing committee's recommendation for a 30-day suspension. Instead the court adopted the Disciplinary Board's recommendation for a 90-day suspension.

The Supreme Court's opinion is In re Ford, No. 5979 (Alaska Jan. 27, 2006). The public file can be reviewed at the Bar Association office in Anchorage.

The team from Chugiak High School won the 2006 Alaska High School Mock Trial Championships, which were held at the Boney Courthouse in Anchorage February 17-18, 2006. Members of the team include: L-R, Benny Martinson, Eric Pinard-Janisch, Ellen Hackenmueller (front), Matt Smith (back), Stephen Calkin, and Paul Eldred. Team coaches were Chugiak teachers Henry Vancil and John Conroy and Anchorage attorney Jonathan Hegna. Chugiak High School has won the championships in eight of the past ten years. Team member Ellen Hackenmueller has won three outstanding attorney awards during her three years of state competition. The team is now fundraising for a trip to the national mock trial finals in May, and welcomes support from the legal community. If you are interested in purchasing raffle tickets or making a contribution, please contact the team c/o Henry Vancil, Chugiak High School, Vancil_Henry@asdk12.org. Photo courtesy of Henry Vancil.

Students gather for Alaska Mock Trial Championships

By Ryan Fortson

Ninety-four high school students on 13 teams from around the state participated in the 17th Annual Alaska High School Mock Trial Championship on February 17-18. Teams came to Anchorage from as far away as Bethel, Sitka, and Kodiak to compete in simulated trials before volunteer judges from the local legal community.

On trial was Parker MacLaine *aka* The Protector (a superhero with full use of the powers of the Northern Lights) for assault and arson charges arising from an epic battle with Re-Flec-Tor, leader of the Blips, a criminal gang in the fictional city of Alaskopolis. There were four potential witnesses on each side, from which teams could choose only three to call to the stand.

Teams of six to nine students played the roles of both attorneys and witnesses in head-to-head match-ups. Students practiced their speaking and analytical skills through presenting opening and closing arguments, examining witnesses, and making and responding to objections. The trials took place in the courtrooms of the Boney Courthouse.

The competition organizers hope that the Mock Trial competition is an opportunity to promote legal and civic education among high school students through a positive exposure to the legal system. Every year, volunteer judges comment that they are impressed with the depth of understanding that the students display of complicated legal concepts.

After four preliminary rounds, the top two teams based on the judge's scoresheets emerge to face each other in a final competition in the Alaska Supreme Court Courtroom. The final round participants this year were Valdez and Chugiak High Schools, who competed before a five-person panel consisting of Chief Justice Bryner, Justice Fabe, Court of Appeals Judge Mannheimer, Presiding Judge Christen, and Judge Morse.

In a close and well-fought battle, Chugiak High School emerged as the winner on all five scoresheets. All five judges on the panel were effusive in their praise of the students' performance, with Judge Morse commenting that Chugiak and Valdez were "two of the finest teams" he had seen in his many years of judging mock trial competitions. Chugiak High School will now represent Alaska in the National High School Mock Trial Championship in Oklahoma City on May 11-14.

The Alaska High School Mock Trial Championship is organized and sponsored by the Young Lawyers Section of the Anchorage Bar Association. The Mock Trial Committee would like to thank the Alaska Humanities Forum for awarding a grant toward covering the expenses of the competition.

ALL MY TRAILS

Reflections on entering a burning building

By Rick Friedman

I think I have identified a major source of plaintiff lawyer and criminal defense lawyer unhappiness. Since I have done virtually no prosecution or civil defense, I will not presume to think these observations apply to lawyers who do that work. But we lawyers who represent people have a way of driving ourselves crazy.

Why does this job, which can be so challenging, exciting and rewarding, also cause us so much unhappiness? I think I have identified a major source of our unhappiness and a partial solution.

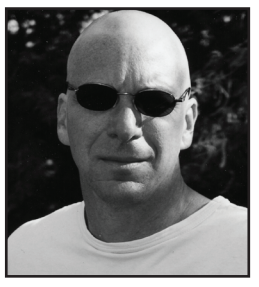
The usual suspects—workload stress, financial stress, lack of civility, an adversary system that rewards only winning—all play a part in our unhappiness. But I believe there is a more basic and far-reaching root-cause of unhappiness among people's lawyers. It can be found within each of us; it is our idealism. Or stated more accurately, it is our naïve idealism.

From the time we entered grade school, until the time we were sworn in as lawyers, we were taught that we have the best legal system in the world; our system presumes that the accused is not guilty; the courtroom is a level playing field; the goal of the courts and judges is justice; judges are fair and impartial; we have a system of laws, not of men; all participants should follow the rules, and if they don't they will be caught and punished. The list goes on and on.

While we all began our legal careers with mixed motives and goals, there can be no doubt that most of us possessed an almost religious faith in the judicial system. We knew it wasn't perfect, but with our help, it would get there.

Even those of us just in it for the money (you know who you are) assumed they had found a corner of the free-market system where a certain order and fairness would prevail. The rules would be rational and applied evenhandedly—the ultimate meritocracy.

Think of any aspect of the system, from the Grand Jury to the Civil Rule 26 disclosure statement. The gap between how it is supposed to work, and how it actually works is often vast. Why is this so? Many reasons could be advanced, I suppose, but the one that is cited most often by people's lawyers is [stupid] [lazy] [dishonest] [biased] — [judges] [opposing counsel] [witnesses] [jurors] [clients].



"Why does this job, which can be so challenging, exciting and rewarding, also cause us so much unhappiness?"

How we react—internally and externally—to the gap between the myth of the judicial system, and the reality, is at the heart of much of our unhappiness. Let's look at some of the more common coping strategies. All of us have engaged in each of them to one degree or another. Usually, we engage in more than one at a time.

Keeping score of system shortcomings

We don't just note when the system fails, we lovingly keep score. "This is the third time the judge has overruled my valid objections." "Your honor, this is the fifth time defense counsel has failed to respond to valid discovery requests." We keep raising our grievances to anyone who will listen: judges, co-counsel, opposing counsel, law partners, spouses and friends. We return from court triumphant: "Guess what the judge did today?" We have our "victory" with each shortcoming exposed. Surely, now that opposing counsel has been exposed and embarrassed, he will cease this outrageous conduct. Surely now the judge will act.

Maybe we tell ourselves we are trying to "expose" these problems and fix the system. Maybe what we are really doing is trying to calm our own anxiety over the gap between how the system should work, and how it is actually working. Either way, we are in danger of losing track of our prime objective—winning the case.

Becoming a victim

It's so unfair, isn't it? The judges are against us, our opponents don't follow the rules, the jurors are stupid. Everything just goes to prove that I am unfairly suffering. And I want everyone to know that. I will keep looking for evidence that me and my clients are being mistreated and cheated. As my search continues, I may actually lose sight of the fact that there is a way to win this thing. Of course, if I am the victim of mistreatment, no one can blame me for losing, can they?

Becoming a Zealot

It is unfair, goddamn it, and I'm not going to stand for it! There are the evildoers, and there is me. And they are going to get what's coming to them. Anything I do is justified, because this is a battle between good and evil. I will fight them, I will expose them, I will make them pay at all costs—including the cost of losing the case.

Becoming Cynical and Bitter

The whole process is corrupt. It's just a game. I can play it too. I'm through getting excited about it. I'll just look out for Number One. That's what everyone else does. Since the whole thing is a game, it doesn't really matter if I win or lose.

Paradoxically, the very idealism that brought us to our vocation can corrode our ability to pursue it effectively. And, it can make us very unhappy. The thoughts and feelings described above lead to unhappiness. In fact, they cause us to revel in our unhappiness.

I would like to propose a new way of thinking about the gap between our ideal system, and the one we work in. Consider this: If the system were fair, we'd hardly be needed. With fair, impartial judges, scrupulously honest opponents and intelligent, perceptive jurors, how much would a client need us? We are hired to enter an unfair system and extract some justice from it. For us to complain about unfairness is like a firefighter complaining there is too much smoke to allow him to put out the fire.

Let's take federal court for example. In many parts of the country, the federal court system has a well-deserved reputation as a place where plaintiff cases and criminal defendants go to die. Imagine a client coming to your office and having the following conversation:

YOU: We can file in state court, but there is a chance the case will be removed to federal court.

CLIENT: What does that mean?

YOU: All the judges do everything they can to help corporate and government defendants. Your chances of getting fair treatment are very slim. I'm afraid if the case is removed to federal court, I will not be able to represent you. I don't like going over there, it is just so unfair.

CLIENT: Can you tell me where to find a real lawyer?

Let me say it again: we are hired to enter an unfair system and extract some justice from it.

If that is our job, nobody wants to hear you complain about it—not your partners, not your spouse, and especially not your client.

I am not saying we shouldn't try to improve the system, any way we can.

I am not saying we can't tell war stories about unfair treatment at the hands of idiotic judges.

I am not saying we shouldn't tell our clients what they are up against.

But there is a difference between complaining and problem solving, between reveling in your unfair treatment and letting off steam with war stories. We all know the difference when we watch and listen to other lawyers. In the end, it is a question of self-discipline.

Let me give you an example. We have all been in front of what I call the 100-to-1 judge. This is the judge who believes it is better for 100 plaintiffs to be under-compensated, than for even one to be overcompensated. Chances are, this is a sincerely held (probably unconscious) belief. It will color every ruling.

The criminal equivalent would be the judge who believes his job is to see that defendants are convicted in an expeditious and orderly way. Again, this is likely a sincerely held (probably unconscious) belief. It will color every ruling.

Our job is not to change this judge's core values; it probably can't be done. Our job is not to expose his stupidity; he is probably not stupid. Our job is not to expose his unfairness; he is probably a very fair person—given the emotional and intellectual framework in which he resides. Our job is to get him to see that what we are asking for is just and right—given his view of the world. Or maybe to show him that he has no choice—given the law—than to do what we ask. Either way, we must enter the burning building. This takes technical skill, courage and self-discipline, but it can be done. We will not always be successful, but we will have more success than we will employing any of the coping strategies outlined above.

Sometimes, the smoke is thick and the flames are so hot you can feel them miles away. The building is falling down before your eyes. Can you go in and get out with some justice for your client? Often, the answer is no. But there haven't been many lawyers elbowing me aside to rush into that burning building ahead of me. There probably aren't many trying to elbow you aside, either.

If we think of ourselves as firefighters, entering the burning building, we might discover several things. First, we might discover that the smoke is not so bad (the system not so unfair) as we believed. Self-pity, cynicism, and zealotry have a way of distorting perceptions. With the detachment of the firefighter, we may see more clearly.

Second, we can reclaim our idealism—a more mature idealism. It is our sweat, our tears, and whatever comes dripping out of our souls when they are squeezed, that lubricates this system. It is our job to enter the burning building. And that is something of which to be very proud.

ALSC President's Column

An upbeat start to 2006

By Vance Sanders

On behalf of ALSC's clients, as well as its staff and board members, this is to extend my heartfelt thanks to the law firm of Guess & Rudd P.C. for initiating the December 2005 fundraising challenge to members of Alaska's legal community. Law firms and members of the legal community throughout our great state responded to Guess & Rudd's pledge to donate $10,000 to the Robert Hickerson Partners in Justice Campaign if eight other Alaska law firms or members of the legal community would make matching $10,000 contributions. The challenge was met -- indeed, exceeded -- and resulted in a boost of over $110,000 for our 2005-06 campaign. I want also to thank the campaign chairs (Ann Gifford and Janell Hafner in the 1st Judicial District, Charlie Cole in the combined 2nd and 4th Districts, and Walter Featherly and Jim Torgerson in the 3rd District), as well as ALSC's Andy Harrington and Erick Cordero, for their invaluable work on the campaign and in helping to meet the challenge.

We are grateful to the following donors who contributed to the law firm challenge:

- Guess & Rudd
- David and Pamela Marquez
- Members of Dillon & Findley
- Friedman, Rubin & White with Christine Schleuss
- Staff of Alaska Legal Services Corporation
- Heller Ehrman with Jim Torgerson and Morgan Christen
- Feldman & Orlansky
- Michael J. Schneider
- Jamin Ebell Schmitt & Mason
- Choquette & Farleigh
- Holmes Weddle & Barcott
- Patton Boggs
- Hughes Bauman Pfiffner
- Members of Jermain, Dunnagan & Owens
- Perkins Coie
- Members of Dorsey & Whitney
- Members of Ashburn & Mason
- Bliss Wilkens & Clayton, LLC
- Members of Preston Gates & Ellis
- Members of the Tanana Valley Bar Association
- Members of the Juneau Bar Association

It is interesting to note that the Tanana Valley and Juneau Bar Association members both made it up and over the $10,000 hump virtually simultaneously. It will be interesting to see which group ends up with the greatest total by the end of the campaign, wrapping up at the Bar Convention.

Buoyed by the success of the law firm challenge, ALSC is attempting to increase the number of donors to 500 before the end of the campaign on 30 June 2006. We can do this! If you haven't made your contribution, you can do so online at www.partnersinjustice.org. You can request a donation envelope by e-mail (bheuer@alsc-law.org). Or you can call ALSC's Erick Cordero in Anchorage at (907) 222-4521.

ALSC's endowment reaches milestone

ALSC's endowment fund, which began with $30,000 in start-up funds several years ago from the Anchorage Bar Association, has now reached the $250,000 level. The goal is to raise $1 million before using the endowment's revenue to support ongoing operational expenses. Donors have the option of directing all, part, or none of their contributions to the endowment fund. Unless the donor specifies otherwise, 10% of each Partners in Justice contribution is placed in the endowment.

Legacy Gifts – For Yourself, Your Family, and the Future of Our System of Justice

A planned gift to ALSC can be a good decision and a good investment. ALSC's board of directors has established planned giving mechanisms that make it easy for donors to leave legacy gifts to ALSC. Bequests through wills, memorial and honorary gifts, gifts of appreciated stocks, bonds, or other securities, charitable remainder trusts, gifts of life insurance, and gifts of employee benefits such as IRAs or 401(k)'s are options that you might wish to consider. Information about ALSC's planned giving opportunities is available on ALSC's fundraising website (www.partnersinjustice.org). You may also request a detailed planned giving brochure by e-mail (bheuer@alsc-law.org).

Civil Legal Services bill moves in Legislature

House Bill 175, creating a special account to fund ALSC from the state's share of punitive damage awards in civil lawsuits in Alaska, passed the House 33-2 on February 6. The bill, sponsored by Rep. Lesil McGuire, R-Anchorage, with an impressive list of bipartisan co-sponsors (Reps Gara, Gardner, Gruenberg, Guttenberg, Hawker, and Kerttula), has a companion bill in the Senate (SB 19) sponsored by Sen. Ralph Seekins, R-Fairbanks. SB 19 passed favorably out of Senate Judiciary last year, and spent the rest of the session awaiting a hearing in Senate Finance. Indications now are that HB 175 will be the bill that Senate Finance will consider.

Enacting this legislation is a top priority for ALSC. The state's appropriation to ALSC, which had been as high as $1.2 million in 1984, gradually declined over the intervening years to zero as of FY 2005 and FY 2006. State legislators set about to create a mechanism by which ALSC could receive financial support from the state for the provision of civil legal assistance to low-income Alaskans. Dedicated funds are of course constitutionally forbidden, but a "designated program receipt" as long as it is subject to legislative appropriation year-to-year is permissible. The amount of punitive damage judgments paid to the state varies; $175,000 was paid in 2004 and $476,000 was paid in 2005. If the bill passes, it will be a challenge for ALSC's board to figure out how to even out the financial roller coaster ride our program has experienced in the past several years. But even at the low figure, this funding would provide ALSC critically-needed operating funds that can be used throughout the state, particularly in under-served and under-funded rural areas such as Nome -- where ALSC's office remains unstaffed -- and Bethel and Juneau - where solo attorneys are holding down the fort until additional operating revenue can be obtained.

ALSC needs your support, and your phone call/e-mail/fax contacts with your local Senator, to make the Civil Legal Services fund a reality. Thank you so very much for your meaningful assistance to our program financially and otherwise. On behalf of our indigent clients across our great state, it is very much appreciated.

Bar People

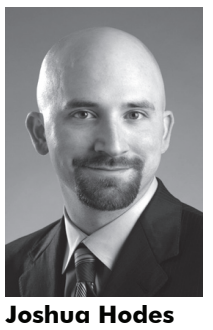
The law firm of Holmes Weddle & Barcott is pleased to announce that **Jeffrey D. Holloway** has become a shareholder of the firm, effective March 1, 2006. Mr. Holloway is a graduate of Cumberland College in Williamsburg, Kentucky and earned his J.D. with Distinction from the University of Nebraska, Lincoln. He joined Holmes Weddle & Barcott in 2003, and practices in the firm's Anchorage office with an emphasis on workers' compensation insurance defense. He also handles a variety of civil litigation and educational law matters.

Heidi Drygas, formerly with Guess & Rudd, is now counsel to the Alaska District Council of Laborers.....**Thomas P. Owens, Jr.** has left Turner & Mede, P.C. and is now in solo practice.

Hodes joins Landye Bennett

Landye Bennett Blumstein LLP is pleased to announce that Joshua D. Hodes recently joined the law firm as an associate. He is focusing his practice on corporate, business and commercial transactions; real estate; Alaska Native law; and debtor-creditor law.

Hodes received his B.A. from Wesleyan University in Connecticut in 2000 and graduated cum laude from Lewis & Clark Law School in Portland, Oregon, in 2005. While in law school, he clerked for the Bonneville Power Administration in Portland and Margaret Madison Phelan, an elder law attorney, in Vancouver, WA.


Joshua Hodes

Founded in 1955, Landye Bennett Blumstein LLP provides legal services for individuals and businesses in Alaska, Oregon and Washington. The firm emphasizes real estate, Alaska Native law, environmental law, mergers and acquisitions, corporate business and tax law, high technology, intellectual property, municipal law, litigation, administrative law, and tax and estate planning.

NEWS FROM THE BAR

Who can you talk to in the corporate world?

ALASKA BAR ASSOCIATION ETHICS OPINION 2006-1

Propriety of a Lawyer, Acting on the Lawyer's Own Behalf Regarding A Matter Not in Litigation, Communicating Directly with Management of a Corporation or Other Institution that the Lawyer Knows or Should Know is Regularly Represented by Counsel

Introduction

The Committee was asked about the propriety of a lawyer, acting on his own behalf regarding a matter not in litigation, communicating directly with management of a corporation or other institution that the lawyer knows or should know is regularly represented by counsel.

Conclusion

For the reasons discussed below, the Committee concludes that such contact is not improper, so long as the attorney has not been advised that he or she should deal only with corporate counsel on that matter.

Analysis

Lawyers frequently act on their own behalf as consumers and citizens, and they interact with private and public institutions that have counsel on staff or that frequently retain counsel. Each of these situations requires the lawyer to decide whether he or she may contact employees or managers directly to address his concern, or whether the lawyer must contact only the institution's counsel. For example:

• A lawyer has a complaint as a consumer about a product or service received from a local company that the lawyer knows is regularly represented by in-house or retained counsel. May the lawyer address his complaint directly to management of the company, or must the lawyer communicate only with corporate counsel?

• A lawyer, as a newspaper reader, disagrees with the editorial policy of the local newspaper. She knows that the newspaper regularly retains counsel. May she contact the editors to discuss the policy, or must she contact corporate counsel instead?

• A lawyer, as homeowner, has a concern about the municipal government's failure to issue a building permit for which he applied. He knows that the municipality has a legal department. May the lawyer directly deal with the supervisor of the permitting office, or must the lawyer communicate only with the municipality's attorneys?

Alaska Professional Conduct Rule 4.2 prohibits a lawyer, who is representing a client, from communicating about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless specifically authorized by law or by the other lawyer. In applying this rule when a lawyer wants to speak with representatives of a corporation or agency on his or her own behalf, and not on behalf of a client, the lawyer must answer three questions:

(1) Does Rule 4.2 apply in a situation where the attorney's "client" is herself?

The short answer to this question is "yes." In Ethics Opinion 95-7, this Committee concluded that Rule 4.2 applies to a lawyer who is a pro se litigant. In other words, when representing herself, for purposes of Rule 4.2, the lawyer may not act as if she is a "party" who is not bound by the ethical rules that govern lawyers' contact with represented individuals. Rather, even when representing herself, a lawyer is subject to the dictates of Rule 4.2.

(2) What does it mean to "know" that the institution is represented by counsel on a particular matter?

Alaska Professional Conduct Rule 9.1(f) explains that "knowing," for purposes of these rules, "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Knowing that a company or agency has a legal department or ordinarily retains counsel when litigation is likely does not establish that the lawyer knows that company or agency is represented on a particular matter when the lawyer makes his or her first contact on a new issue.

A lawyer knows that the company or agency is represented on a particular matter if the lawyer is told by a representative of the company or agency that the matter has been assigned to a lawyer or referred to the legal department. Once a suit is filed, receipt of an entry of appearance from opposing counsel also clearly indicates that the party is now represented on that matter. In other situations, the lawyer must be guided by the circumstances, and, when in doubt, may ask for clarification. Ethics Opinion No. 98-1 contains further discussion of when a lawyer knows that an insurance company is represented by counsel.

(3) Does the communication concern a "matter" that is "the subject of the representation"?

Knowing that a company or agency is represented by a lawyer on one particular matter does not mean the lawyer knows, or must assume, that the company or agency is represented on a wholly different matter. Thus, the lawyer may continue to speak directly to employees and managers on topics unrelated to the matter on which the institution is known to be represented. The commentary to Rule 4.2 explains: "This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating directly with nonlawyer representatives of the other regarding a separate matter." The same principle applies to a lawyer representing himself in dealing with a government agency or private organization.

In the three examples set forth above, the key question posed in each instance is whether there is a "matter" that is "the subject of the representation." An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers, representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a "matter" that is "the subject of representation." The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance.

Conclusion

The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a "matter that is the subject of representation" depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular new matter, the lawyer is not prohibited from dealing directly with representatives of the party.

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

Adopted by the Board of Governors on January 27, 2006.

NEWS FROM THE BAR

Board of Governors Action Items January 26 & 27, 2006

• Adopted a resolution that the Board seeks reauthorization of the Board following the recommendation of the Legislative Audit for an eight year extension.

• Heard reports from the Board subcommittees on MCLE; voted to table the discussion of MCLE until the next Board meeting in April; and to set up an informal meeting with the Supreme Court to discuss MCLE.

• Staff to do an estimation of the cost of MCLE. Staff to get info on malpractice insurance discounts if MCLE is passed.

• Voted to approve eight reciprocity applicants for admission.

• Voted to adopt the recommendation of the Law Examiners subcommittee to allow the special accommodations requested by an applicant for the February 2006 bar exam.

• Voted to deny an appeal from the July 2005 bar exam because the appeal was untimely and the applicant did not make specific allegations of either procedural improprieties or substantial deficiencies in the administration or grading of the bar exam.

• Directed staff to follow up on the inquiry from the Oregon State Bar on possible reciprocity with Oregon.

• Authorized staff to move forward on the database proposal with the Bar Alliance and LegalSpan; the Board will meet to vote on the contracts.

• Approved the stipulation for discipline by consent with Eugene Cyrus for a public censure and a six month suspension.

• Appointed a subcommittee to recommend awards to be presented at the annual convention: Katcher, Tiemessen, Granger and Mendel.

• Approved the 70% reduction in bar dues for Ruth Bauer Bohms, who provided over 400 hours of Pro Bono service in 2005.

• Voted to publish a proposed Bar rule 43.2, which would allow Inactive and Retired Bar members to do Pro Bono service under the supervision of a qualified legal services provider.

• Appointed James Cannon to the vacancy on the Alaska Judicial Council.

• Approved the minutes of the October Board of Governors meeting.

• Adopted the ethics opinion entitled: "Propriety of a Lawyer, Acting on the Lawyer's Own Behalf Regarding a Matter Not in Litigation, Communicating Directly with Management of a Corporation or Other Institution that the Lawyer Knows or Should Know is Regularly Represented by Counsel."

• Adopted a resolution that the Law Related Education expenditure does not fall within Keller and doesn't raise a Keller issue (i.e., that this is an allowable expenditure by the Board.)

• Voted to adopt the recommendation of the Lawyers' Fund for Client Protection Committee to make payment in the LFCP case.

• Voted to accept the stipulation for a private reprimand.

• Voted to publish the Ethics 2000 Amendments to the Alaska Rules of Professional Conduct as proposed by the ARPC Committee.

• Voted to publish an amendment to Bar Rule 61(d) correcting the name of the Child Support Services Division.

• Voted to amend the Standing Policies of the Board of Governors to have the Nominating Committee of the Board of Governors make the appointment of the New Lawyer Liaison for a two year term.

• Voted to amend the Standing Policies of the Board of Governors to state that an individual may work for a total of 10 months for either the DOL, PD or Office of Public Advocacy and that an individual may exclude from the 10 month period time away from the employment for medical or family leave, for the bar exam or for unpaid leave.

• Voted to amend Bar Rule 5, section 1(b) to add the filing of the Bar Rule 64 affidavit to the requirements to file Bar membership acceptance forms.

2006 Bar Convention in Anchorage

Circle these dates!
April 26, 27, and 28, 2006
Hotel Captain Cook and the Egan Convention Center

Social Events
Wed., April 26
Thurs., april 27
Fri., April 28

CLEs — Get all 12 CLE recommended crdits at the convention!

Wednesday, April 26

- Trust Accounts Update, Part 1 – *Steve Van Goor, Bar Counsel and Robert Reis, former Risk Manager, President & COO of ALPS*
- US Supreme Court Opinions Update – *Professors Erwin Chemerinsky and Laurie Levenson*
- State of the Judiciaries Address
- Alaska Constitutional Law Update — Professor Erwin Chemerinsky
- Intro to Evidence: Getting the Edge on Evidence Cranium - *Larry Cohen, Cohen Law Firm, Phoenix*
- Opening Reception at the 4th Avenue Theatre – Alaska Premier of "12 Days in Dayton: The Scopes Monkey Trial"

Thursday, April 27

- Trust Accounts Update, Part 2 – *Steve Van Goor, Bar Counsel and Robert Reis, former Risk Manager, President & COO of ALPS*
- Pro Bono Makes Cents: The Business Case for Pro Bono – *Roy Ginsburg, J.D., Minnesota*
- Satisfying Your Clients Ethically & Professionally – *Roy Ginsburg*
- Cybersleuthing: A Guide to the Essentials of Computer Discovery – *Joan Feldman, Navigant Consulting Discovery Services, Seattle*
- 25 and 50 Year Pin Presentation and Lunch
- Picking Your Battles: Client Management Tips and Strategies – *John Reese, former Superior Court Judge, Reese Mediation Services, Moderator*
- Update on Alaska Native Law Issues for All Practitioners – *Robert Anderson, Director, Native American Law Center, University of Washington School of Law; co-author/co-editor, Felix Cohen's Handbook of Federal Indian Law, 2005 edition; Natalie Landreth, Alaska Native Law Section Chair*
- How to Do It Right in Federal Court: The Jungle's a Friend to Those Who Know It – *Presented in cooperation with the US District Court and the Federal Bar Association*
- Bush Alaska Needs You! Pro Bono Rural Legal Services – Ways You Can Help –*Presented in cooperation with the Gender Equality Section*
- Awards Reception and Banquet – *Keynote: Michael Carey, Journalist and Author – "Alfred Kinsey, Sex, and Alaska Territorial Law"*

Friday, April 28

- Evidence Cranium Revisited! *3rd Judicial District Superior Court Presiding Judge Morgan Christen and Deputy Presiding Judge Philip Volland, Planning Chairs*
- Alaska Bar Association Annual Meeting and Lunch
- Science, Belief, and the Law: Two Scientists Discuss Intelligent Evolution –- *Dr. Jerry Coyne, Professor of Ecology & Evolution, University of Chicago and Dr. Hugh Ross, past post-doctoral fellow, California Institute of Technology; President, Reasons to Believe*
- Two Lawyers Debate the Separation of Church and State in the Public Schools -- *Dr. Jeremy Gunn, Director, Program on Freedom of Religion and Belief, ACLU and Kelly Shackelford, Chief Counsel, Liberty Legal Institute*
- Closing Event: Salmon and Halibut Bake at Kincaid Park

SPONSORS
Alaska Association of Legal Administrators
Alaska Association of Paralegals
Alaska Court System
ALPS – Attorneys Liability Protection Society
Anchorage Bar Association
AVIS Rent-a-Car
Federal Bar Association
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Alaska Legal Services Corporation
Alaska Network on Domestic Violence & Sexual Assault
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LexisNexis
LoisLaw, An Aspen Publishers Company
MARSH USA, Inc.
Professional Legal Copy, LLC
Thomas, Head & Greisen, APC
Wells Fargo Private Client Services
West, a Thomson Company

Make your hotel reservations by March 23.
The Hotel Captain Cook is the convention hotel for the 2006 convention. Located at 939 W. 5th Avenue in Anchorage, the phone is 907-276-6000/fax 907-343-2298.
A block of rooms has been reserved for the Alaska Bar. Rates are $105 plus 12% tax single or double.

Please make your reservations by March 23. Book your reservations now!
To make a reservation, please call the hotel at 907-276-6000 or toll free in Alaska at 800-478-3100 or toll free nationwide at 800-843-1950. Be sure to state that you are with the Alaska Bar Association.
Or make a reservation online: go to www.captaincook.com, click on "Make a reservation," click on "Group Reservations" at bottom of page, type in password akbar06.

Don't forget —
2 for 1 Special

Bring a Bar member admitted in the last 5 years and pay only one convention CLE fee.

Check the Bar website www.alaskabar.org for a registration form or call us at 907-272-7469

Pro Bono Corner

Guess & Rudd law firm challenge met

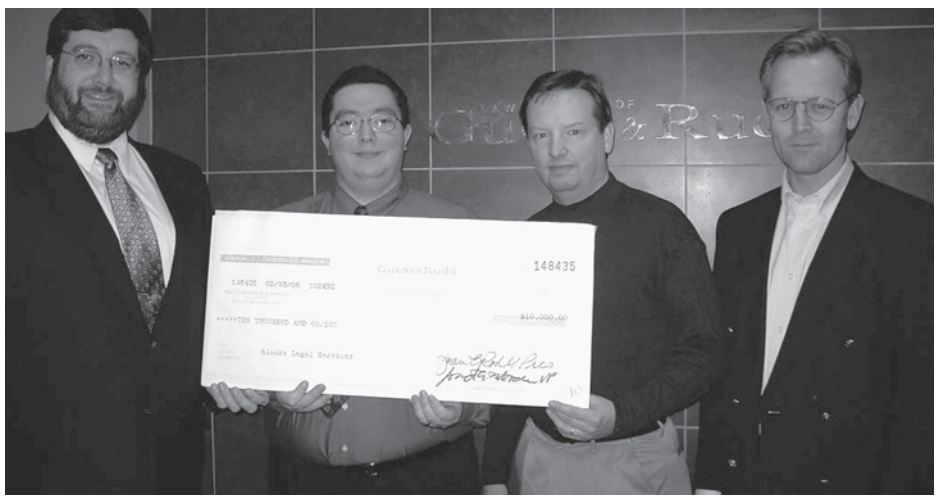
Fundraising challenge gives $110,000 boost to Alaska Legal Services Corporation

The fundraising challenge issued by the Anchorage and Fairbanks law firm of Guess & Rudd P.C. to members of Alaska's legal community came to a successful conclusion on January 31, 2006. Guess & Rudd P.C. had pledged to donate $10,000 to Alaska Legal Services Corporation's Robert Hickerson Partners in Justice campaign if eight other Alaska law firms or members of the legal community made a matching $10,000 donation.

Ten challenge matches were donated or pledged, resulting in a total of over $110,000 earmarked for ALSC's annual fundraising campaign. ALSC Executive Director Andy Harrington stated "The Guess & Rudd challenge re-energized our annual fundraising campaign through friendly competition among members of the legal community – and overwhelming generosity on the part of the donors – at a time when we most needed a financial boost. We are grateful beyond words to Guess & Rudd, and to all of the donors, for their commitment to the provision of legal assistance to Alaskans in need."

Donors at the $10,000 level include: David and Pamela Marquez; members of Dillon & Findley; members of the Tanana Valley Bar; the law firm of Friedman, Rubin & White with Christine Schleuss; members of the Juneau Bar Association; the law firm of Heller Ehrman with Jim Torgerson and Morgan Christen; and staff of Alaska Legal Services Corporation. Donors at the $5,000 to $10,000 level include the law firms of Feldman & Orlansky, Patton Boggs, and members of Dorsey & Whitney. Contributions from an additional ten major donors helped to meet and exceed the challenge goal.

ALSC's annual fundraising campaign provides operating revenue for services on behalf of low-income Alaskans who seek civil legal assistance. Donors who wish to contribute to the campaign, which ends June 30, can make an online donation at www.partnersinjustice.org or request a donation form from Director of Volunteer Services and Community Support, Erick Cordero at 907-222-4521.



(L to R) Jonathan Woods (Shareholder, Guess & Rudd), Erick Cordero (Alaska Legal Services), William Evans (Managing Partner, Dorsey & Whitney), James Torgerson (Managing Partner, Heller Ehrman and Co-Chair of the Partners in Justice Campaign for the 3rd Judicial District) pose with a big check.

Jonathan Woods and Erick Cordero meet the challenge.

Law Library News

New database for Alaska case law

All published Alaska Supreme Court and Court of Appeals opinions now accessible via the internet: http://government.westlaw.com/akcases. Access the database directly or via the Alaska Court System website.

This database presents the official version of opinions of the Alaska Supreme Court and Court of Appeals as published in the Pacific Reporter, as well as selected unpublished opinions.

• Search the database using keywords, case name, citation, judge, opinion type (lead/concurring/dissenting and published/unpublished), counsel, court, file number, and/or date.

• With a keyword search, enter multiple search terms using the connectors AND, OR, and BUT NOT.

• Use quotation marks to search for a phrase, e.g. "adverse possession."

• The database does not include West headnotes or KeyCite indicators. For full access to Westlaw – including all state and all federal primary law, full-text law review articles, the Am.Jur. library, and more – use the computers in all 17 of the Alaska State Court System law libraries, free of charge.

Library acquisitions

Several attorneys requested new, up-to-date treatises in last summer's bar survey. The following publications are now available for loan to Alaska bar members from the Alaska Court System Law Library:

• Rabkin & Johnson, *Current Legal Forms with Tax Analysis*

• Spero, *Fraudulent Transfers: Applications and Implications*

• Handler & Dunn, *Drafting the Estate Plan: Law and Forms*

• Diaconis & Hammond, *Reinsurance Law*

• Madoff, Tenney, and Hall, *Practical Guide to Estate Planning*

• Cohen, *Indian Law* (2005 ed.) (Anchorage, Kenai, and Fairbanks)

• Nichols on *Eminent Domain* (current in Fairbanks and Anchorage)

• BNA Tax Portfolios: Income Tax and Estate & Gift Tax

• In print and electronically

For information on borrowing these or other materials, contact the Anchorage Reference Desk at (907) 264-0585, or at library@courts.state.ak.us.

New BNA databases in the library

On a trial basis, BNA databases are available on library computers in Anchorage, Fairbanks, Ketchikan, and Juneau, including:

• Criminal Law Reporter
• Environmental Law Reporter
• Family Law Reporter
• U.S. Law Week
• And more!!

Ask your librarian in Anchorage, Fairbanks, Juneau, and Ketchikan for the password and try out the new BNA databases. Let us know if they are useful to you. If you have any questions, please contact the Anchorage reference desk at (907) 264-0585.

Stats tally superior court 'success rate'

Fairbanks attorney Ed Husted captures Alaska Supreme Court actions for a rough tally of how the various opinions of the superior courts survive the high court's scrutiny. As Ed notes, many appeals involve more than a simple affirmance or reversal, and in a case where the judge has issued multiple rulings that are on appeal, there will often be a combination of affirmances and reversals. So, Ed has applied his judgement on these cases, resulting in the table on the right. What the table does not show is how many cases the appellate reversed a lower court, but only after modifying the underlying law upon which the superior court had ruled upon.

The table below summarizes the number of published cases issued by the Alaska Supreme Court between 1990 and 2005. This table does not reflect either memoranda of opinions (MO&J), which typically are unpublished orders, or most dispositions on petitions for review.

Ed Husted provided the following comments to subscribers of his summaries at year-end:

Since the supreme court issued no slip opinions on the last Friday of the year (Dec. 30, 2005), I have taken the opportunity to revive a feature of the weekly summaries which I provided to subscribers for several years, but have not done so since 1999. I am providing with this final edition for 2005 a tabulation of how the superior court judges' opinions survived on appeal.

My scoring system is not perfect. It has two obvious drawbacks:

1. I have counted a decision that is affirmed in part and reversed in part as 50% affirmed and 50% reversed. In some instances several issues are presented on appeal and it is quite possible the majority of the trial judge's work was affirmed with perhaps only a single issue being remanded. However, attempting to divide each opinion, issue by issue, and proportion divided opinions in a more sophisticated, yet accurate, fashion was more of a task than I wished to undertake.

2. Another drawback of my scoring system is that I do not take into account the court's unpublished opinions which tend to affirm more often than published opinions. Thus, a superior court judge's actual record will likely be higher than indicated by my box score.

In reviewing my earlier box scores from the 1990's, I notice that the court averaged about 130 opinions per year. This year's total output of 115 is below that average. In fact, this is the first year since the mid 1990's that my weekly index did not expand to three pages by the end of the year.

However, in contrast to those earlier years, the court seems to be deferring more to the superior court's rulings. While the reversal rate reached as high as 54% in 1999, this year only about 35% of the appeals from the superior court resulted in a reversal.

Summary of Supreme Court Slip Opinions
1990 - 2005

Year	Opinion Numbers	Total Published
1990	3541 - 3656	**116**
1991	3657 - 3792	**136**
1992	3793 - 3914	**122**
1993	3915 - 4040	**126**
1994	4041 - 4159	**119**
1995	4160 - 4305	**146**
1996	4306 - 4456	**151**
1997	4457 - 4927	**164**[1]
1998	4926 - 5060	**134**
1999	5061 - 5228	**168**
2000	5229 - 5353	**125**
2001	5354 - 5521	**168**
2002	5522 - 5654	**133**
2003	5655 - 5765	**111**
2004	5766 - 5857	**92**
2005	5858 - 5972	**115**
Annual Average of Published Slip Opinions, 1990 - 2005		***132.8***

Footnotes:

[1] In March 1997, the court inadvertently changed its numbering system, jumping from Op. No. 4489 at the end of February to Op. No. 4787 at the beginning of March. I have taken this into consideration in computing the number of published opinions for 1997. -- E.H.

[2] Contact Ed Husted at lss@gci.net or 907-4528157.

Alaska Superior Court Judges Box Score
2005 Published Opinions

	Appealed	Affirmed	Reversed	Part Affirmed / Part Reversed	Percent Correct
First Judicial District					
Stephens	1 case	1			100%
Collins	4 cases	2	2		50%
Weeks	3 cases	1	1	1	50%
Thompson	2 cases		1	1	33%
Zervos	3 cases	1	2		33%
Recap	***13 cases***	***5***	***6***	***2***	***47%***
SECOND JUDICIAL DISTRICT					
Erlich	1 case	1			100%
Esch	1 case	1			100%
Recap	***2 cases***	***2***	***0***	***0***	***100%***
THIRD JUDICIAL DISTRICT					
Huguelet	2 cases	2			100%
Bolger	1 case	1			100%
Cutler	1 case	1			100%
Hopwood	1 case	1			100%
Suddock	6 cases	5		1	86%
Gleason	5 cases	4		1	83%
Morse	6 cases	4		2	75%
Rindner	7 cases	4		3	70%
Michalski	9 cases	5	2	2	67%
Tan	4 cases	2	1	1	60%
Christen	7 cases	4	3		57%
Brown	4 cases	2	2		50%
Reese	2 cases	1	1		50%
Link	1 case			1	50%
Sanders	2 cases	1	1		50%
Smith	2 cases	1	1		50%
Volland	2 cases	1	1		50%
Neville	2 cases		1	1	33%
Joannides	3 cases		2	1	25%
Card	1 case		1		0%
Cranston	1 case		1		0%
Gonzalez	1 case		1		0%
Hensley	1 case		1		0%
Recap	***74 cases***	***41***	***20***	***13***	***59%***
FOURTH JUDICIAL DISTRICT					
Wood	3 cases	3			100%
Greene	2 cases	2			100%
Burbank	1 case	1			100%
Delaney	1 case	1			100%
Funk	1 case	1			100%
Savell	5 cases	4	1		80%
Curda	2 cases	1	1		67%
Pengilly	3 cases	1	1	1	50%
Steinkruger	3 cases	1	1	1	50%
Olson	1 case	1			0%
Recap	***22 cases***	***15***	***4***	***3***	***72%***

Recapitulation Key: 2005 Supreme Court Case Opinions

For cases surveyed, judges are listed in alphabetical order. After each name appears: **1)** an abbreviated case name; **2)** (**A**) = case affirmed, (**R**) = case reversed, (**A/R**) = case affirmed in part, reversed in part; and **3)** the month and date the opinion was issued.

Bolger: *Cowgill* (A)6-24
Brown: *Deaver* (R)2-25; *Rick P* (A)4-1; *Veselsky* (A)6-3; *Bartlett* (R)12-16
Burbank: *Conkey* (A)6-10
Card: *Johnson* (R)7-29
Christen: *Caldwell* (R)1-21; *Miller* (A)1-28; *Metcalfe* (R)4-15; *Jeff A.C.* (A) 4-27; *Jeff AC* (A)7-15; *Wise* (R)10-14; *Gilbert* (A)12-9
Collins: *Brown* (A) 1-21; *Dawson* (R)2-25; *Grunert* (R)3-17; *Ondrusek* (A)9-26
Cranston: *Fuller* (R)6-3
Curda: *Sara J* (A)11-10; *Scammon Bay* (R)12-23
Cutler: *Nevers* (A)10-28
Delaney: *Ebertz* (A)6-3
Erlich: *Wendell CH* (A)7-29
Esch: *Akpik* (A)6-24
Funk: *Lindhag* (A)10-7
Gleason: *Silvan* (A)1-14; *Alaska Inter-Tribal* (A)4-15; Bartley (AR)4-15; *Crumpler* (A)7-22; Jones(A)12-16
Gonzalez: *Lana C.* (R)3-11
Greene: L*owell* (A)7-22; *Ellison* (A)8-19
Hensley: *Hammond* (R)2-25
Hopwood*: Conoco* (A)1-28
Huguelet: *Vroman* (A)4-29; *Saltz* (A)12-23
Joannides: *Hansen* (AR)9-2; *ACLU* (R)10-28; *Killary* (R)11-10
Link: *Reust* (AR)10-28
Michalski: *Alden H* (A)3-4; *Phillips* (R)3-11; *Trapp* (A)5-13; *Larson* (A)5-27; *Schaub* (A)6-24; *Laidlaw* (A)8-12; *Morris* (AR)9-30; *Guerrero* (AR)11-4; *Polar Supply* (R)12-23
Morse: *McComas* (A)1-28; *Chase* (A)4-1; *Halloran* (AR)6-24; *Marron* (A)11-10; *Devon* (A)12-2; *Hanson* (AR)12-9
Neville: *Schmidt* (AR)6-24; *Dupier* (R)8-12
Olson: *Interior Trails* (R)6-24
Pengilly: *Bailey* (AR)4-22; *Hall* (A)6-10; *Maldonado* (R)7-22
Reese: *Harris* (R)2-11; *Ranney* (A)10-14
Rindner: *McGrew* (AR)2-4; *Dugan* (A)6-3; *Carlson* (AR)6-3; *Tanghe* (AR)6-24; *Green Party* (A)8-12; *Abood* (A)9-2; *Morton* (A)11-4
Sanders: *GEICO* (R)2-18; *Snyder* (A)9-2
Savell:*Rockstad* (A)6-10; *Cook* (A)7-8; *Chesser-Witmer* (A)7-15; *Hymes* (R)8-26; *Sengupta* (A)12-9
Smith: *Andrea* S (R)7-8; *Alyssa B* (A)8-5
Steinkruger: *Martin* (AR)3-4; *Kaiser* (A)3-11; *Dowdy* (R)
Stephens: *Webb* (A)9-9
Suddock: *DeNardo* (A)1-14; *Tufco* (A)6-3; *Ray* (A)7-1; *Valley Hospital* (A)7-1;*Elton H* (AR)8-26; *Owen M* (A)9-9
Tan: *Clement* (A)4-8; *Monzingo* (A)5-6; *Enders* (AR)10-14; *Cikan* (R)12-16
Thompson: *Martinez* (AR)6-10; *Wallace* (R)9-2
Volland: *DeNardo* (R)4-22; *Casciola* (A)9-23
Weeks: *North Pacific* (AR)4-15; *Cummins* (A)6-24; *Jack* (R)12-12
Wolverton: *Rockney* (R)5-27; *Easley* (A)7-22; *Munson* (A)11-18
Wood: *Morgan* (A)2-11; *OK Lumber* (A)11-25; *John* (A)12-16
Zervos: *Catalina* (R)1-14; *Lawson* (A)3-11; *Hixson* (R)11-18

NEWS FROM THE BAR

2 resolutions submitted for annual convention meeting

ALASKA BAR ASSOCIATION
Resolution No. __-2006

Proposed before the Alaska Bar Association Convention

(concerning the United States Court of Appeals for the Ninth Circuit)

WHEREAS, proposals are currently pending in Congress that would split the United States Court of Appeals for the Ninth Circuit into two parts, with the new Ninth Circuit limited to California and Hawaii, and a new Twelfth Circuit created for Alaska, Washington, Oregon, Idaho, Montana, Nevada and Arizona; and

WHEREAS, in the year ending March 31, 2005 the 28-member Ninth Circuit resolved 12,253 cases and is by any measure the most productive federal appellate court in the Nation; and

WHEREAS, the Federal Bar Association, the American Bar Association, the Ninth Circuit Lawyers' Representatives Coordinating Committee (appointed by the 9 State Bar Associations), and several individual State Bar Associations all oppose splitting the Circuit; and

WHEREAS, only a very small minority of Ninth Circuit judges supports the split; and

WHEREAS, despite the Ninth Circuit's caseload having increased over the past two years by 12.5% and 20.8%, respectively (due largely to a massive increase in immigration cases), the median life of a case from initial local filing at the trial level to final disposition by the Ninth Circuit in 2004 was 30.5 months, less than 5 months off the national median of 25.9 months; and

WHEREAS, the Sixth Circuit is slower than the Ninth Circuit in handling appeals, while the Ninth Circuit is the second fastest in the Nation in handling appeals from federal agencies; and

WHEREAS, there is no meaningful geo-political split on the Court defined by California judges, considering that a slight majority of the 13 Ninth Circuit California judges are Republican appointees, and a slight majority of the Ninth Circuit judges who would be in the new 12th Circuit are Democratic appointees; and

WHEREAS, so long as Alaska remains within a larger Ninth Circuit, with 3 existing vacancies and another 7 positions slated to be added, there exists a fair chance that a second active Alaska judge could be appointed to the Ninth Circuit (while such an outcome is a virtual impossibility within a much reduced Twelfth Circuit);and

WHEREAS, the estimated start-up costs for a new Twelfth Circuit (depending on whether it is headquartered in Seattle or Phoenix) could be as high as $95 million, with an additional annual administrative cost for two Circuit systems up to $10 million; and

WHEREAS, in comparison to the Supreme Court's general reversal rate of 74%, the Ninth Circuit's reversal rate in recent years has been 75%; and

WHEREAS, during the portion of the Supreme Court's 2005 Term from October 2005 through February 2006, six other Circuits had 100% unanimous reversal rates while the Ninth Circuit's 75% reversal rate included 8 of 9 unanimous reversals (constituting a 66% overall unanimous reversal rate); and

WHEREAS, the current session of Congress is expected to revisit the issue of splitting the Ninth Circuit,

NOW THEREFORE BE IT RESOLVED, that the Alaska Bar Association in Convention assembled hereby supports retaining intact the United States Court of Appeals for the Ninth Circuit, and opposes any initiative to split the Circuit.

Submitted by 10 members of the Bar

●

Resolution No. 2006-1

A RESOLUTION SEEKING REPEAL OF CIVIL CASE REPORTING REQUIREMENTS

WHEREAS, AS 09.68.130, Alaska Civil Rule 41 (a) (3) and Appellate Rule 511(e) presently require the submission of information about the resolution of Civil Cases to the Alaska Judicial Council upon the completion of many civil cases on a form prepared by the Alaska Judicial Council,

WHEREAS, the preparation and filing of these forms is a burden on many attorneys and a financial burden on their clients without any corresponding public benefit,

WHEREAS, there is no apparent effective sanction imposed for non-compliance,

WHEREAS, the Alaska Judicial Council dos not have adequate funding and resources to do anything meaningful with this information, and nothing is presently being done with it,

WHEREAS, whatever purpose the collection of this information was originally supposed to fulfill has been fulfilled by the published report of the Alaska Judicial Council dated February 2000, for data collected from September 1997 to May 1999,

WHEREAS, repeal of AS 09.68.130, Alaska Civil Rule 41(a)(3) and Appellate Rule 511(e) will allow the State, the members of the Alaska Bar Association, and their clients to save substantial amounts of time and money which are now spent to prepare these reports,

WHEREAS, the Alaska Bar Association may engage in legislative efforts relating to the practice of law, and

WHEREAS, resolutions substantially similar to this one were adopted by both the Anchorage Bar Association and by the members of the Alaska Bar Association at its 2003 convention, and nothing has been done to implement these prior resolutions.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF THE ANCHORAGE BAR ASSOCIATION AND THE MEMBERS OF THE ALASKA BAR ASSOCIATION, that:

The Alaska Bar Association shall actively work with the Alaska Judicial Council and the Alaska Legislature to secure the repeal of AS 09.68.130, Alaska Civil Rule 41(a)(3), and Appellate Rule 511(e), and its members are encouraged to actively assist in this effort.

Submitted by the Anchorage Bar Association

Bethel District Court Judge installed

New Bethel District Court Judge Dennis Cummings was installed on January 6, 2006, during a ceremony at the Bethel Courthouse. Joining him to celebrate his installation were fellow judicial officers who spoke at the event, L-R: Bethel Magistrate Craig McMahon; 4th District Presiding Judge Niesje Steinkruger; Bethel Superior Court Judge Dale Curda; Bethel Judge Pro Tem Ethan Windahl; Judge Cummings; Bethel Superior Court Judge Leonard Devaney; and Chief Justice Alexander Bryner, Alaska Supreme Court.

Before welcoming Judge Cummings to the bench, his new Bethel colleagues presented him with a cart filled with several hundred case files and an inch-thick daily calendar for the following court day.

Former District Court Judge Natalie Finn, who served on the Anchorage bench for over 19 years, offers her advice to Judge Cummings during his installation ceremony.

ALSC President's Column

2006 private attorney involvement plan

By Vance Sanders

Alaska Legal Services Corporation (ALSC) is seeking comments from members of the Alaska Bar Association on its 2006 Private Attorney Involvement (PAI) Plan. The plan and comments will be considered by the ALSC board at its May meeting. Comments must be received by Wednesday, April 19. Please submit to:

Erick Cordero
Volunteer Attorney Support
1016 West 6th Avenue, # 200
Anchorage, AK 99501

The Volunteer Attorney Support (VAS), a program of Alaska Legal Services Corporation (ALSC), will be a statewide direct service pro bono program. VAS will involve private and public attorneys in the delivery of free legal services to low-income Alaskans. No other LSC program will be involved in this project. No subgrant arrangements will be used.

Originally established in 1983 and known at that point as the "Alaska Pro Bono Program," the VAS has been a recipient of the Legal Services Corporation's first annual PAI/Pro Bono Award as Best Rural Private Attorney Involvement Program of the Year for 1992, as well as a special citation from the Alaska State Legislature in 1995 and recipient of the 2005 Golden Heart Volunteer Program Award presented by the British Petroleum and the Anchorage Association for Volunteer Administration.

In 2006, the VAS will be staffed by a full-time program director with assistance from ALSC staff statewide. The program director will be under the immediate supervision of the Executive Director of ALSC. The program director will also receive guidance from an Advisory Committee that will meet twice a year, in the fall and summer, and be composed of the Executive Director of ALSC, the Executive Director of the Alaska Bar Association, the chairs or their designees of the Juneau, Anchorage and Tanana Valley local bar associations, a long-term pro bono panel member nominated by the program director and ratified by the ALSC Executive Director, and the chair or designee of the Young Lawyers Section. (Members outside of Anchorage may participate telephonically.)

Clients with civil law problems will approach ALSC for free legal assistance. Screening of these individuals by ALSC personnel will determine if the client meets federal poverty guidelines and ALSC case acceptance priorities. Qualifying cases will then be forwarded to VAS for referral to an attorney who has volunteered to take at least one case per year in his/her area of expertise.

Attorneys who volunteer to become members of VAS will be available to take cases or provide one-time consultations in at least one of the following areas of law: consumer finance or bankruptcy; public benefits, education, health, or employment issues; domestic relations; housing; Alaska Native issues; representing pro se parties in U. S. District Court; wills and/or probate. When a client from a particular region of the state requires legal assistance, an attorney from that region who has volunteered in that specific area of law will be contacted. If no attorneys are available in that region, the program director will attempt to make the next best referral that would be most convenient to both client and volunteer attorney. ALSC's conflict cases will not be referred to the VAS panel.

If an attorney is available and accepts the case, the client will be referred to him/her for representation. Two weeks after a case is placed, the director will follow up with the client and the attorney over the telephone to get an update. The attorney will then be contacted every four to six months to ensure that the case is progressing satisfactorily.

The Alaska Bar Association will inform the program director each month about any changes in the Bar Association's membership roster. This will enable VAS to monitor when participating attorneys leave the state or fail to maintain good standing. If necessary, the program director will request that the volunteer return the file to ALSC.

When a case is completed, the attorney will be asked to provide VAS with a form summarizing the action taken on the case and the outcome of the case and, if available, documentation showing the level of services rendered. The client will be sent a survey to determine his/her satisfaction with the services provided. The volunteer attorney will be asked to itemize the time spent on the case, as well as expenses incurred. If the volunteering attorney requests reimbursement, expenses will be reimbursed by VAS. The VAS does not operate a revolving litigation fund, nor does it advance costs or fees. The VAS does not pay attorneys fees to the volunteer attorneys, nor for clients against whom an attorneys fees judgment may be entered.

The VAS will have a panel of 850 volunteer attorneys and other professionals throughout Alaska who are available to participate in the VAS, and expects to have an open case load of 180 - 200 cases at any one time. The VAS will also have almost 150 other professionals (doctors, court reporters, certified public accountants, translators, private investigators, paralegals, etc.) who will be assisting the program's volunteer attorneys. Recruitment will be ongoing and will include: mail solicitation with assistance from the Alaska Bar Association, presentations at law firms, local bar associations and other events. The program director will coordinate recruitment efforts in a way not to duplicate work with the Alaska Bar Association.

The VAS will arrange for free training seminars for its volunteer attorneys as well as malpractice coverage and cost reimbursement. In addition, the VAS will utilize the non-attorney volunteers by arranging for free depositions, free medical testimony in disability and family law cases, free process service, free translators, free expert witnesses, and free computerized research services.

Additional services for the client community will include: free monthly classes to provide assistance to clients who wish to obtain uncontested divorces pro se (without representation by an attorney); pro se custody classes for uncontested custody and support orders for unmarried parents; pro se Chapter 7 Bankruptcy class; a pro se Landlord/Tenant Law clinic; clinics on wills; and clinics in Spanish on general civil matters. There will be a portion dedicated to cover mediations in Family Law clinics. These advice-only and pro se clinics will be held on a regularly scheduled basis in numerous cities throughout Alaska. The VAS works with the U.S. District Court to find volunteer counsel for pro se parties in U. S. District Court.

In 2006, the VAS will be a direct service pro bono model only and will have no other compensated component. Alaska Legal Services Corporation must meet a requirement, imposed by the Legal Services Corporation, to spend an amount equal to 12.5% of its 2005 basic field grant on private attorney involvement activities. In 2006, ALSC will meet and exceed that requirement by budgeting approximately $87,000 to administer the VAS for administrative costs, office expenses, program travel, library, equipment, contract services, and litigation support. All financial control of private attorney involvement funds will be managed by the controller of ALSC. In past years, ALSC has met the 12.5% expenditure requirement for the operation of its private attorney involvement program.

NATIONAL LEGAL FICTION WRITING COMPETITION FOR LAWYERS

SEAK, Inc is sponsoring the nation's 5th Annual National Legal Fiction Writing Competition for Lawyers.

The purpose of the competition is to encourage lawyers to become more interested in and adept at writing legal fiction.

FORMAT: A short story or novel excerpt in the legal fiction genre should be submitted. The submission should be typed and not exceed 2,500 words. (This will be strictly enforced).

DEADLINE: June 30, 2006

JUDGING: The submissions will be judged on originality, quality of writing, and the potential of the author.

Submissions should be submitted to:
SEAK, Inc.—Legal Fiction Competition
ATTN: Steven Babitsky, Esq., President
P.O. Box 729
Falmouth, MA 02541

GUIDELINES

1. The competition is open to any licensed attorney in the United States and its territories.
2. The attorney's name, address, phone number, and e-mail address should be contained in the submission.
3. Only entries received by SEAK, Inc. on or before June 30, 2006 will be considered.
4. Only one entry should be submitted by each attorney.

ENTRY FEE: There is no fee to enter the competition.

PRIZES

FIRST PRIZE: $ 1,000 cash plus lunch with Lisa Scottoline, Esq and Stephen Horn Esq. on October 21,2006, at the Sea Crest Resort, Falmouth, Cape Cod Massachusetts. Notice of your win will be sent to over 100 New York Literary Agents and to the Associated Press.

SECOND PRIZE: $1,000 SEAK Gift Certificate.

THIRD PRIZE: $500 SEAK Gift Certificate and autographed copies of Lisa Scottoline's and Stephen Horn's latest books.

PRIZE Winners will be notified by email or phone.

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For additional information please contact Kevin J. Driscoll, Esq. at (508) 548-4542, kevin.driscoll@verizon.net.

Interested in submitting an article to the Alaska Bar Rag?

The Bar Rag welcomes articles from attorneys and associated professionals in the legal community. Priority is given to articles and newsworthy items submitted by Alaska-based individuals; items from other regions are used on a space-available basis.

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

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

Letters from Afghanistan

It's a different concept of justice over there

Editor's note: Anchorage attorney Brant McGee spent several months in Afghanistan in 2005, as a legal advisor in a public defender office based in Kabul. The following are letters he sent to friends back home, recounting his experiences and journeys.

November 18, 2005
Dear friends,

Kabul is a fascinating place—but dusty. Sometimes it feels medieval, both in attitudes and structures. The city is dominated by two hills—one is covered with modern communications towers and the other is topped by an enormous mud-colored fort, called the Bala Hissar, that has been held by a series of occupiers over the centuries.

It's not like the Taliban times that ended in late 2001 with the Western invasion, but half of the few women on the streets are still covered by burkas, the ironically beautiful blue head-to-toe traditional garb. Men are no longer beaten for having a beard shorter than a fist, but even long-time "internationals" have never met the wives or families of their daily co-workers.

Many schools have re-opened but I met two young men today, ages 12 and 23, who have excellent English and are clearly very bright but whose fathers have refused to allow them to attend school classes regularly because they are "needed" in the shops. One of them is the son (Iraj Muhammad Rais) of the "Bookseller of Kabul," an angry and tragic piece of journalism by a Norwegian woman who lived with the family for four months. The book exposes the startling ways in which women in a "liberal" educated family are still completely subjugated to the will of the master of the house.

I love my work and already plan to return for another two-month tour next year. I am a legal advisor in a public defender office established over two years ago by the International Legal Foundation, a small NGO run out of New York City on an even smaller budget. We have an office of nine lawyers in Kabul and two more in Kunduz, a small city up north near the border with Tajikistan. ILF provides the only effective counsel for the defense in the whole country. With the help of the Canadians, we will soon open an office in Kandahar, an important city to the south near which there is still active combat. The U.S. Army, of all institutions, is promising to fund offices in Herat and Jalalabad as part of a Rule of Law project.

I was very pleased to observe in the course of case reviews that the Afghan lawyers here are quite skilled and sophisticated in their analysis; energetic in their continued applications to the most ignorant and indifferent judges; and strongly focused on defense investigation as the principle road to success—just as it is in the US. My primary formal interaction with them is a review of all their cases about once a week. The need for interpretation is sometimes quite frustrating but just as often the source of very funny mistakes. Many cases, including adultery and "escape from home" matters are new to me and the stories are always intriguing and often hysterical. The work is exhausting but really quite fun—except, of course, for the death penalty cases.

I've had many times more completely innocent clients in two weeks here than I had in a long career in Alaska.

We all have lunch together every day where there is the usual public defender banter that makes me feel right at home. We hear the latest court stories from their morning's work and laugh a lot. We have many more successes than PD's in the US, and Sharia law, always in the background of the criminal statutes, is quite strict about proof in criminal cases.

Actually, another German NGO represents women defendants here in Kabul but their status is quite confused at this time. Then there is the Legal Aid office in the administrative apparatus of the Supreme Court that is reportedly filled with lay-about political appointees who have consistently demonstrated their ignorance of very basic principles of criminal defense—like the presumption of innocence—at several of our trainings.

So we're it. And we only represent about 10 to 15 percent of the jail population. The police are absolutely incompetent and corrupt. They frequently arrest the innocent. (I've had many times more completely innocent clients in two weeks here than I had in a long career in Alaska.) Some judges are very unhappy to see us in court because we insist on due process protections that take more court time and, worse yet, we don't pay or facilitate bribes. When I suggested that the definition of "client" was a guy who couldn't pay the bribe, the veteran American public defender here readily agreed. Unfortunately, Ken goes home tomorrow so I will be the only international here in the office until I leave just before Christmas.

Social contacts that are taken for granted at home are carefully maintained here. I'm already signed up for Salsa lessons even though I haven't danced since the Twist was popular. At Ken's going-away dinner party the other night there were 12 people from 10 different countries. It was great because I felt like I was back at Columbia. I play poker with a bunch of humorously cynical Americans on Thursday evenings and last night we had dinner with a Nicaraguan engineer who was trained in the Soviet Union and a Turkish woman engineer working for a Canadian company.

It is quite safe here in Kabul but there have been several recent suicide attacks against ISAF (a conglomeration of Western military forces) vehicles that killed a number of them and a greater number of Afghans. Everybody official gets immediately locked down as a result but most can't go to restaurants or other public places, anyway.

In our walking jaunts around the city Ken and I encounter nothing but friendliness and rarely see other internationals on the streets. This is because the logic of security is that there can never be enough of it. But the result of excessive paranoia is inevitably a loss of effectiveness. One can't learn much about Afghanistan or its people while locked in a razor-wired oasis of fellow internationals. And what must they think of us when we constantly demonstrate our fear of them?

The Afghans are a strikingly handsome people and their faces show character even early in adulthood. I think Sartre said that people over 40 were responsible for their own face. People here look as if they have had hard times and their stories, quietly told, reveal tragedy, exile, loss, and the sheer terror of the helpless in war. One out of every 13 families has lost members to landmines alone, to say nothing of the constant rocketing and shelling in Kabul during the endless battles between the factions of the Mujahedin from 1992-1996. But they are very quick to laugh, so I am quite comfortable here even though I find the language mystifying.

The staff here is very curious about we internationals and enjoy commenting on our conduct. I met an Iranian-American last night (Sunday) who understands Dari because it is closely related to Farsi. I quickly invited her to lunch on the condition that she not reveal that understanding. Now that will be interesting!

You can reach me at the above e-mail address or, if you have recently inherited great wealth or won a lottery, you can call at 011 93 70 28 54 91. We are 9.5 hours ahead of New York time.

I hope this finds you all well and cheerful and fighting the good fight.

Your lucky friend,
Brant

PS. I just received one of several security notices that we get daily from a variety of intelligence sources. This one warns of a plan to kidnap a Canadian woman. No rationale for this curious choice of target was offered. These are usually just rumors but I will be forced to cancel my plans to disguise myself as a Canadian woman when I am out and about.

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November 29, 2005

I have learned that the truth is elusive here in Kabul so today searched at the courthouse.

It is one of several nondescript buildings in a guarded compound where many groups of men congregate to wait, sometimes for weeks, for their case to be called. The courtroom itself is two flights up a narrow staircase crowded with hapless litigants. Just outside the door is a small landing full of uncuffed prisoners and two soldiers. Personal space is a foreign concept here.

The courtroom is only 12 by 20 feet with the chief judge sitting in front of two large windows behind an enormous desk. An assistant judge, who proves to be barely literate, sits against one wall while the lawyers and clients are crowded onto a sofa or the single chair on the other.

We are welcome here but many judges are quite unhappy to see defense lawyers and throw up technical barriers to their representation. First, we insist on due process protections that take up valuable court time, especially since the judges only work mornings. Second, we don't pay or facilitate bribes—the major source of income for judges who officially earn but $40 U.S. per month. When I recently concluded that "client" is best defined as a guy who couldn't pay the bribe (to the police, prosecutor, or judge) my predecessor, a veteran American public defender, readily agreed. There is no question of the indigency of our clients.

The proceedings are interrupted by frequent phone calls to the judge and two social visitors who sit at his side and drink tea after the ritual kissing of cheeks. It seems chaotic but the judge, a handsome man in his late 30s with a trimmed beard and an Elvis Presley haircut, is actually quite dignified and respectful of the defendants.

The two lawyers present are among the 11 public defenders in all of Afghanistan who are supported by a New York City NGO called the International Legal Foundation-Afghanistan (ILF-A). They are not opposed by the trial saranwals in court but this proves no advantage because the judge harbors an insurmountable presumption of guilt.

Trial saranwals are not present for 95 percent of their cases. The result is that the assistant judge reads the indictment and the chief judge has the saranwal file before him and acts as the prosecutor. The defense lawyer must then argue with, rather that to, the judge -- an idea that works about as well in Afghanistan as it would in the states.

Our first client is one of three co-defendants arrested six weeks ago for the crime of teasing girls. This violation cannot be found in the quite comprehensive Penal Code so they are charged under Article 130 of the Afghan Constitution which authorizes

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ECLECTIC BLUES

Billing hours during an influenza pandemic

By Dan Branch

Each spring, migratory birds fly thousands of miles from their wintering grounds to Alaska's rich tundra. Every day, jets full of passengers land at the Ted Stevens Airport. This year one of these flyers may bring us Avian Flu.

America has weathered, at great costs, earlier pandemics. The 1918 flu epidemic killed 700,000 Americans including 84% of people in Teller, Alaska. In 1900 an epidemic of measles and influenza hit Alaska killing 25% of the Yupik people.

Today the state's public health and emergency management experts are preparing to deal with the Avian Flu challenge if it comes. We can make their jobs easier by preparing our homes, families and businesses so we can shelter at home. With some planning, law firms should be able to reduce the negative impact that will come in a pandemic.

One obvious way to avoid catching influenza is to avoid people. During a pandemic outbreak, schools might close. Law office employees with kids will have to stay home from work. Other employees, fearing infection, will also stay home. Ten or 15 years ago firms would have had to shut down until the pandemic ran its course--- 30 days or more. That was before laptops and the Internet.

Today, when lawyers in the lower 48 telecommute to avoid rush hour traffic, we have the tools to get out the work at home. It doesn't take much to prepare contracts or wills in your den--just a computer, a printer, and a way to access files.

Unless the firm images all its documents, lawyers may have to sneak down to the office in the wee hours of night to collect the files they need to bill hours. That may not be possible if the Governor or mayor blocks access to the area where the firm's office is located.

With a secure Internet connection, lawyers should be able to e-mail a rough draft document to their secretary at home who can then prepare it for client consideration. The document could then be converted to a non-editable PDF document and then e-mailed to the client or opposing counsel for consideration.

"Today the state's public health and emergency management experts are preparing to deal with the Avian Flu challenge if it comes."

If a firm wants to keep going during a pandemic, now is the time to prepare. The first step is to take an inventory of your attorneys' computer skills and the computer hardware and software they have at home. It would make sense to hand out thumb drives to lawyers and staff now so they can use them to upload forms, treatises, and briefs from their office computers for transfer to their home computers.

The value of Internet-accessible legal research services like Westlaw and Lexis will increase during a pandemic. No one will want to go the law library, even if it is open, to shepardize cases if it means catching Avian Flu.

A firms' accounting staff may want to consider creative ways to get bills to clients and paychecks to the staff without relying on the mail or personal interaction. Employees might be encouraged to set up direct deposits of their pay checks and arrange for online payment of their credit card and utility bills.

Whether law firm employees intend to work at home or not, they should develop their own contingency plan to make sure they can feed their families without going to the store. The State Division of Public Health has made an 8-page pamphlet available online that contains a lot of information to help families prepare for disasters such as an Avian Flu outbreak. Here is the webpage address: http://www.hss.state.ak.us/dph/DPHPP/pdffiles/BTinsert.pdf

Some suggestions for pandemic preparation:

- The state's experts recommend that every Alaskan family have enough supplies on hand to sustain themselves for at least five to seven days. These may be needed if the stores close and city water is cut off because of an earthquake or a severe pandemic.
- A disaster supply kit should contain at least one gallon of water per person per day. Change out stored water every six months.
- You should stockpile non-perishable foods that require no refrigeration, preparation or cooking and little or no water. Canned foods, peanut butter and granola bars will fill the bill.
- Make sure you have a basic first aid kit and have an adequate supply of prescription and non-prescription medicine, vitamins and contact lens maintenance fluids. Stockpile paper plates, cups and utensils; battery operated radio; flashlight; extra batteries; wrenches; duct tape; whistle; utility knife; sanitation items such as toilet paper, soap, feminine supplies, garbage bags, and bleach.
- Families should make sure that they have a t least one change of clothing and footwear for each person, hats, gloves, rain gear, blankets or sleeping bags, and thermal underwear.
- Make arrangements to protect important family documents like wills, insurance policies, deeds, stocks, bonds, passports, birth certificates, social security cards, immunization records, bank and credit card account numbers.
- Make sure you have some things to help pass the time if the power is cut off, like books, board games, and playing cards.
- Finally make sure you have enough food and water to keep the family pet happy.

It's a different concept

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the resolution of issues not directly addressed in the laws in accordance with Shari'a law. There is no wording that suggests that it is intended to give carte blanche to prosecutors to make up a crime. But the judges here accept such charges as a matter of routine even though no provision of the religious law is ever cited.

But such legal fine points are irrelevant in this case because Rafi, an especially able defense lawyer, arranged a show-up with the prosecutor and brought two of the complainants to his office where they stated they had never seen two of the co-defendants before. Even when the two young women signed formal statements with their fingerprints the prosecutor would not dismiss the case, but he did order their discharge from prison.

Dismissals and plea bargains are very rare and nearly all cases are resolved by trial. Hearsay is fully admissible and confrontation, though mandated by the Interim Criminal Code, is equally rare so things move quite efficiently. After all, due process and fair trials would really slow down the railroad.

The judge hears from the defendants in a free-flowing exchange after the reading of the indictment. Rafi, referring to the formal Defense Statement he has filed, argues that the only evidence in the case is that which confirms the innocence of two of the co-defendants. We are smelling victory as we leave to allow the judges to deliberate. After five minutes we shuffle back to our cramped places only to hear the judge sentence the two innocent boys to four months in prison and the guilty one to five months.

Rafi is bitter afterwards but he believes he will have a better chance in the secondary court, where the process starts all over again even though it is called an appeal. The two innocents, who have been ordered arrested by the judge, slip out while I examine the well-used AK-47 carried by one of the soldiers, who prove to be as friendly as they are negligent.

In the next case our client is represented by Sediqullah, a zealous convert from his former role as a saranwal, and is charged with threatening his brother with a handgun in a dispute over money. The client, still incarcerated for trial like nearly all defendants, denies the presence of a gun and says it was just an argument. A Russian Makarov pistol with no trigger that belonged to yet another brother was found in another part of the house. A single witness has signed a statement that he saw, but did not hear, the defendant threaten his brother. The judge acquits our client of the gun charge and says that the only reason he will convict the defendant is the document signed by the witness, who is not present for cross-examination. The judge thus disbelieves the testimony of the victim that the defendant had a gun and finds the hearsay statement regarding mere gestures sufficient to convict and pronounce a sentence of four months.

These cases, fortunately, are not representative of the success of our lawyers. While total acquittals are rare, clients are often sentenced to time served, which is counted as a significant victory. Theft and drug cases, as well as the fascinating Shari'a violations, dominate the caseload. Violent crimes are, of course, uncommon because alcohol is outlawed.

This morning before court I heard a tragic love story that ended with a lie. One afternoon last July a man returned to his house and found our client, Ajmal, standing in the main room. He had never seen Ajmal before and was immediately concerned because his 17-year-old daughter was alone in the house. When the man asked Ajmal what he was doing in his house, the young man replied that he was there to steal.

When the police arrived, Ajmal told them the same story and later, when the prosecutor questioned him at the jail, he again maintained that he was in the house to steal.

But when Abdul, a lawyer here at the office, spoke with Ajmal he told a different story. He said he was in love with the girl and she with him. Contact between boys and girls over about 13 is forbidden by religious law and tradition, but unsurprisingly some find a way to secretly see each other. It is a disaster if a girl is caught alone with a boy as it will ruin her reputation and chances for marriage to a promising man and her family will be permanently shamed.

So when the father came home unexpectedly that afternoon, Ajmal faced a momentous choice. He could tell the truth and destroy the life and reputation of his loved one or he could protect her honor by telling a lie. Ajmal chose the latter course and courageously but falsely proclaimed himself a thief.

Ajmal held fast to the lie and never told anyone but Abdul the real truth of why he was in the house that afternoon. He formally confessed to attempted theft in a residence and he is now serving one and one half years in prison.

He can never marry the girl he loves because her family would refuse to allow their daughter to wed a convicted thief.

That story put the injustices of my later court visit in perspective, when I found that truth is not a stranger to the courthouse, but that it is often ignored with bizarre and blatantly unfair results.

I've always thought of public defenders as people who willingly run full speed into brick walls, pick themselves up with help from their colleagues, and return to the starting line to do the same thing again and again with only an occasional breakthrough. The ILF lawyers here are made of the same stuff and if anyone ever brings real justice to Afghan courts, it will be those who fight for it every day.

Cheerfully fighting the good fight in Kabul,

Brant

(Editor's Note: Client names were changed to preserve confidentiality.)

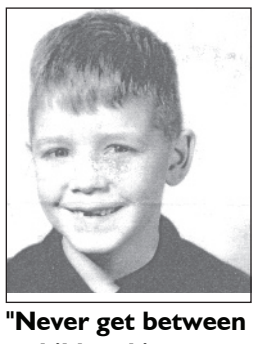
TALES FROM THE INTERIOR

A mother's imperative prevails over all things

By William Satterberg

I grew up as a child in Anchorage, Alaska. During my youth, my sister, Julie, and I would daily walk a wooded path to the local elementary school. Although the walk was short, Mom was always careful to warn us that, should we ever see a cow moose and a calf, we were to definitely not get between the animals. As Mom explained it, "Never get between a child and its mother, Billy, because the mother will do anything to save the child."

Over the years, I have seen the scenario play itself out many times. Eric Fromm, in his book, "The Art of Loving", once compared a father's love to a mother's love. According to Fromm, a father's love is conditional. It depends upon the child meeting the father's expectations. In contrast, a mother's love is unconditional. No matter how evil the child might be, the mother still remembers the child as an innocent babe. True, a mother's love can be a tough love, indeed. But, a mother's love is also an accepting love. A mother's love is the type of love that, in a crowded shopping mall a mother can still immediately recognize the panicked cry of her lost child. Hearing such a cry of terror, a normal mother will respond without hesitation to the rescue, without any consideration to her personal risk. A father, on the other hand, will wait for a commercial on the storefront video display, rather than miss a critical fourth down football snap.



"Never get between a child and its mother, Billy, because the mother will do anything to save the child."

According to Fromm, a father's love is conditional. It depends upon the child meeting the father's expectations. In contrast, a mother's love is unconditional. No matter how evil the child might be, the mother still remembers the child as an innocent babe.

North Pole, Alaska, is the self-proclaimed home of Santa Claus. The city proudly boasts a large, 60 foot tall plaster reproduction of a jolly St. Nicholas which regularly gets shot by snipers in passing cars. Unfortunately, North Pole is not just famous for St. Nick. The incorporated city is also the home of the much-feared North Pole Police Department. The North Pole Police, resplendent in their elf-green uniforms, have a reputation among those who live in the area as a "small town" police department. It is an earned reputation. After all, North Pole is a community which is the home of several fundamentalist churches, and only two bars. The North Pole Police is feared among even its locals for its speed traps and the staking out by its bored constabulary of the two local bars. In short, North Pole is an area often best to be avoided by errant drivers. Perhaps, this is why the new Parks Highway was built from Anchorage to Fairbanks several years ago, bypassing the hamlet entirely. Not that the detour was that effective, either. For several years, the small Parks Highway town of Nenana was a close second to North Pole. This was because, like North Pole, Nenana proudly had its own, smaller police department. Eventually, after losing too many police cars to bad driving, the Nenana City Council got wise and shut down its police department. Nenana now relies on the Alaska State Troopers for protection. Not so, however, with North Pole, which depends upon various outside funding sources for its economic lifeblood and likely finds the contributions of its police department as a significant source of revenue to the small community through abundant fines and governmental grants. As expected, there is a strong imperative on the part of the police department to justify its existence in the eyes of those responsible for acquiring and dispensing funding.

Still, even in the eyes of its own community, the North Pole Police Department is a creature unto itself. I still recall one closing argument several years ago when, before a typically skeptical Fairbanks jury, I commenced by slowly shaking my head, looking at the floor and contemptuously muttering "North Pole police…" Several of the jurors quickly joined with me in open agreement. The uncharacteristically quick defense verdict, as well, also signified unanimous agreement.

Times have not changed.

Mid-April of 2005 found the Alaska Interior once again anticipating spring. Water was running in the streets, and the pussywillows were in bloom. The classic, spring fever symptoms that plague all young schoolchildren had arrived. Surprisingly, despite its fundamentalism, North Pole was no exception. Even in North Pole, gaity filled the air. The feeling was contagious.

One weekend evening, my client was lounging in her house, drinking some beer, and watching television. Her long work day was over. As evidence of her intention to remain home, she was clad only in her flannel pajamas. She was barefooted and relaxed. The evening was pleasant and her two young boys had been given parental permission to ride their four wheeler recreation vehicles, or "quads", around the local neighborhood. Mom was clear that they could play on their own as long as they wore their helmets and drove safely. Apparently, the children did not follow Mom's directives entirely. After all, it was Mom.

At some point, the boys allegedly came dangerously close to hitting a young child who was playing alongside a dirt pathway. The child's father, justifiably concerned, called the North Pole police to report the incident. The police, perhaps with nothing better to do because the attack took place before the two local bars became active, responded in full force to the scene. In short order, given good police work, the two young boys were captured without the need for weapons to be drawn or shots fired. After all, the life expectancy of reckless four wheeler drivers in North Pole is below the national average when it comes to police encounters.

Both boys immediately admitted their complicity in the event, tearfully insisting that they were not criminals. The officer would not accept such a lame excuse. Instead, the officer declared that the boys had committed the heinous crime of reckless driving. Clearly, the two boys would likely be going to jail for their sins, absent some sort of divine intervention. Whether to impress the young boys with the seriousness of the crime by scaring them or because the officer truly believed his threats to the children is a fact which probably will never be known. What is known from listening to scene tapes is that the officer made it quite clear to the two young boys that they were facing serious criminal charges, and that immediate incarceration in the juvenile facility could be the result. After all, it is a proven fact that ten year olds are certainly a dangerous lot that can easily grow up into hardened criminals, if not stopped early.

It was clear that the boys were suitably scared. Either that or they were both good con artists. Probably the latter of the two. Exercising correct officer safety procedures, the officer secured one of the uncontrollably crying children into the back of his patrol car. He next ordered the other child to remain seated on his four wheeler. The officer then attempted to locate a parent to respond to the scene.

The drama was far from complete. The officer decided to question the youth. To their credit, the boys were cooperative in answering all of the officer's questions. Personally, I was disappointed with the boys' lack of understanding of their Miranda rights. I expected more. Then again, I also expected that the rights should have been given to the captives. In very short order, given intensive questioning, the children disclosed who their parents were, tearfully telling the officer that their daddy was "back on the east coast" preparing to be deployed to Iraq for combat. Only Mom was at home. Begging for leniency, the boys also told the officer that Mom was going to be "very mad" at them because they had broken her rules. Certainly, the children had a good appreciation of their mother and her feelings.

The interrogation completed, the next step was for the officer to contact the mother. He was able to accomplish the task after some initial futile attempts to call wrong numbers given by the clearly traumatized children. Eventually, Mom answered the phone. Mom was officiously told by the no-nonsense officer that her two children had nearly killed a "three year old" while they were racing their four wheelers down a dirt pathway. Mom was told that she needed to get to the scene right away in order to pick up her children. Needless to say, Mom complied. In retrospect, the call lasted

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TALES FROM THE INTERIOR

A mother's imperative

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only several seconds. But, those seconds were long enough to convey the urgency of the situation.

Like mothers the world over, without any regard for her own personal safety or appearance, Mom answered the long-standing call of nature to go to the aid of her young. Dressed in only her thin pajamas, and obviously barefooted, Mom started the family pickup truck and drove the 1500 feet to the location of the crime. The trip was a relatively slow trip, driven at approximately 15 miles per hour, due to the dirt roads, short distance and relatively narrow streets. No traffic was encountered while en route.

When Mom arrived, the scene which immediately presented itself were two North Pole police cars, with emergency beacons flashing. The two young criminals were clearly in custody. One child was locked in the back of a patrol car. The other was stationed obediently upon his four wheeler. Both exhibited obvious signs of extreme remorse. Clearly, the boys would have been safer in jail. Understandably, Mom was not happy with their transgressions.

As expected, Mom made motherly contact with the police officers. The arresting officer explained to Mom that her children were quite lucky that they had not killed somebody with their driving. Mom agreed. Mom furthermore assured the officers that she would personally lecture the young reprobates with respect to their four wheeler privileges. Mom would also confiscate those privileges as part of the punishment. Confiscation of four-wheeler rights still was not enough. The officer explained to Mom that the children would likely be charged with Reckless Driving, a Class A misdemeanor, for their activities. The boys would have to respond in a criminal courtroom. In a moment of compassion, the officer also indicated that he was willing to release the children to Mom's care rather than haul them immediately to the Youth Correctional Center.

So what if Mom had been driving? As the perceptive young man responded, "But, you told her to get down here! She would not have driven if you hadn't told her to!"

Under ordinary circumstances, the event would have been concluded with Mom having dispensed traditional and expected parental discipline. Criminal charges against the juveniles certainly were not necessary, nor should traffic tickets arguably even been issued to the two boys. Instead, common sense would have dictated that the officer should have relied upon Mom to pursue the appropriate remedies, including forfeiture of driving privileges on the four wheeler, other restrictions, and home confinement. But, this was North Pole. As such, it did not stop that point. Rather, the officer was on a mission and would not be kept from his sworn duty.

After the discussions with respect to the children were completed, the officer asked Mom whether or not she had been drinking. It was a justifiable question, since Mom apparently had alcohol on her breath. Mom had been drinking a beer when the officer called. Mom answered honestly in the affirmative. Surprisingly, Mom furthermore indicated that she had actually consumed four to five beers. This revelation was contrary to the community standard "two beers" response. The officer then asked Mom to perform some field sobriety tests, which, pajama clad and barefoot on rocky soil, Mom predictably failed. Doing his duty, as "honor and duty" dicated, the officer then told Mom that she was being arrested for DUI. Mom objected, but in a clearly non-violent, non-confrontational manner.

Despite Mom's protestations, and claims that she was simply following the officer's orders in responding to take care of her children, the officer would have none of it. As the officer stated, "Ma'am, you should have thought about that before you decided to drive after drinking." Mom replied that she did not even think about the matter in her panic to save her children. Again, the officer would have nothing of it. The officer stated that Mom could have told him that she was drinking and that she could not respond to the scene.

Since logic would not work on the officer, Mom next tried the sympathy angle. Mom pointed out that her "significant other" and husband-to-be was currently in training to be deployed to Iraq for combat. Again, the officer would have nothing of it. Mom had been drinking, had failed field sobriety tests, had broken the law in the officer's estimation, and was going to jail. No exceptions. Clearly, the law had no mercy for Mom's parental concerns.

Mom was getting nowhere with the officer. At that point, Mom expressed her anger to the children, indicating to them that they had essentially put her into this position through their actions. Although Mom's frustration in this regard certainly was not justified, it became evident that scene control for the officer was rapidly beginning to unravel. Not only were two children currently under arrest, with one crying uncontrollably in the officer's police car and the other weeping while seated on his four wheeler, but Mom, pajama clad and barefoot, had now been arrested, and was now facing her own serious criminal charges. Clearly, the entire family had the making of the infamous Ma Barker Gang. Unless they were stopped early in their developing crime spree, the entire nation was in jeopardy.

After placing Mom into the remaining patrol car, the officer returned and announced to the children that their mother was being arrested because she had been drinking and driving. To justify his decision, the officer explained that drinking and driving was not good. The explanation had little effect. In response, one of the children immediately yelled, "You arrested my mother! You arrested my mother! Why did you arrest my mother?" The officer again tried to explain that drinking and driving was bad. Again, the explanation was futile. So what if Mom had been driving? As the perceptive young man responded, "But, you told her to get down here! She would not have driven if you hadn't told her to!"

The officer argued with the young boy that Mom still did not have to drive the car. Instead, Mom could have told him that she had been drinking. Once again, the gutsy, protective young ten-year old told the officer that he was out of line. After all, as far as the ten year old was concerned, it was the o-ficer who had started the entire process.

For the next several minutes, a field debate ensued between the officer and the ten-year old. Objectively viewed, the term "debate" is a misnomer. This is because true debates are supposed to be give and take affairs, and the exchange between the officer and child was not reciprocal at all. At best, it was a one-sided discourse, more accurately termed a lecture. Clearly, the plucky ten-year old was getting the better of the officer, both with intellectual reasoning and superior eloquence. The boy's increasing success in filibustering finally prompted the officer to try to change his tactic. Clearly hoping to take the moral high ground, the officer began to expound upon esoteric concepts of "Duty and Honor". To bolster his decision, the officer explained to the young child that the officer had to do his duty, even though it deeply hurt him to do so. Honor dictated such. Once again, the young child reminded the officer that the officer was the one who had started the problem. As far as the boy was concerned, the officer should have been more compassionate.

To bolster his decision, the officer explained to the young child that the officer had to do his duty, even though it deeply hurt him to do so. Honor dictated such.

Obviously, trying to talk logic, intellectual, common sense and reasoning with the officer was proving to be a waste of time. It was clear that the officer had made up his mind and would not be swayed.

Meanwhile, back at the station, Mom, who was definitely stressed, experienced a serious asthma attack. The attack required the paramedics to respond. Much to Mom's credit, she was not feigning the attack, even though she did vomit. Everyone agreed it was a legitimate event. The paramedics checked Mom out. They even offered to take Mom to the hospital. Mom, not wanting to be far away from her children, refused and indicated that she still needed to take the Datamaster test, which she did. As expected, Mom's Datamaster reading was in excess of the legal limit for intoxication. To his credit, the officer who transported Mom to the police station and who later decided to leave the North Pole Police Department to become a City of Fairbanks police officer, followed all the rules, and was sympathetic to Mom's asthma attack as a legitimate and potentially dangerous medical emergency. Mom was clearly experiencing both the best and the worst of law enforcement.

Back at the scene, the philosophical discourse on duty and honor had resumed. The young ten-year old and the officer were still at a stalemate over esoteric concepts of law and morality. Neither combatant would budge, finally prompting the officer to concede quietly to himself that "I am obviously getting nowhere here." All of this was captured verbatim on the digital video recording devices utilized by the officer at the scene, thus providing objective factual proof to what took place by way of discussions, exchange, and counter-exchange.

Recognizing that Mom had been arrested for DUI and would shortly be transported to the Fairbanks Correctional Center, the officer asked the young children who takes care of them if Mom is not available. Just as the officer was attempting to locate their father, the boys reminded the officer that their father was on the east coast in military training. It was clear that the father was not going to be a first responder. The officer next asked the boys who takes care of them when their father is not there. The boys told the officer that their babysitter had the job.

The officer was obviously relieved. Things were progressing slowly, but nevertheless in a positive direction. Establishing the babysitter's identity, the officer then mobilized the babysitter from Fairbanks. It was to be a 30 minute drive to the location for the babysitter to respond and pick up the two young boys. Still, matters were drawing to a close.

All was going well until, about halfway through the babysitter's response, one of the boys spontaneously declared that he did not like the babysitter. Trying to make conversation, the officer politely asked the boy why he did not like the babysitter. The child responded "Because she beats me!" Sensing yet another crime taking place in the North Pole vicinity, the officer began to question the young man about the abuse which he allegedly suffered at the hands of his vicious babysitter. The officer clearly was in denial over such issues. After all, good babysitters did not do such things, even in North Pole. Despite the officer's attempts to explain that such things could not be happening, the boy was adamant that he was a regular victim of violence from his babysitter. The officer was now in a quandary. The babysitter was already responding to the scene, and Mom was under arrest. Still, the officer obviously could not turn the young children over to an abusive babysitter, only to be victimized further. Although the prospects of a temporary foster home became more and more apparent, the officer tried to avoid this unpleasant situation. After all, the children were already having enough trauma in their life, having been detained, themselves, for reckless driving, and having also witnessed Mom being arrested. They were now facing the prospects of being turned over to their evil babysitter. Most likely, the babysitter would be some portly vagabond in a printed dress and shawl who did not speak English and had a beard. But, it was suspected that the officer's real fear related to having to do reams of paperwork to accomplish this latest task.

Recognizing that the children probably did not have the authority to decide who they were to be released to, the officer decided to contact Mom. By then, Mom had recovered from her asthma attack. Mom was contacted at the station, via radio. Upon inquiry, Mom confirmed that the babysitter was not an ogre and was acceptable. The latest crisis was averted at the last minute.

(To be continued in Issue #2.)

—— West High team is on to the nationals ——

West HIgh students and their teacher celebrate their statewide "We the People" victory. Back row, left to right: Colin Zimmerman, Alex Beck, Amy Eisses, Max Rosefigura, and Russell Haering. Front row left to right: Roberta Gordaoff, Katie Bringold, Isaac Park, Maia Anderson, Teacher Mrs. Pamela Orme, Yinshi Lerman-Tan, Roz Worcester, Katelyn Tullius, and Alex Richert.

The team from West High School in Anchorage won this year's We the People...The Citizen and the Constitution competition, held March 3, 2006, on the UAA campus.

The competition is a civic learning program for high schools sponsored by the national Center for Civic Education, with funding from the U.S. Department of Education. Student teams make presentations on different articles in the U.S. Constitution and answer a wide range of questions posed by a panel of judges. The competition tests their knowledge of the constitution, their analytical abilities, and their advocacy skills.

This is the fourth straight year that West High has taken top honors in Alaska, and members of the team plan to travel to the national We the People championships in Washington, D.C., in May.

Many members of the legal community volunteered to assist with the We the People competition, and the closing ceremonies featured a keynote address by former Anchorage Superior Court Judge Larry Card.

If you are interested in learning more about We the People programs, or in assisting with the program's events, please contact the Alaska Bar Association's LRE Committee (Krista Scully, 272-7469).

Alaska's We the People program is a member of the Alaska Teaching Justice Network, a joint project of the Alaska Court System and the Alaska Bar Association that works to advance law-related education across the state. For more information about the network, visit its website at www.alaskabar.org/teachingjustice <http://www.alaskabar.org/teachingjustice> or contact bhood@courts.state.ak.us <mailto:bhood@courts.state.ak.us> .

Sancho Panza on the Appellate Bench

By Peter Aschenbrenner

Trial judges appear frequently in literature and philosophy, and Solomon is the poster-boy for the tough-case, clever-judge formula: two motherly litigants and a baby, not-ready-for-vivisection, if the point may be put so crudely.

Appellate judges' appearances in writ, holy or otherwise, are more rare. The problem would seem to be that the author (or Author) must mobilize parties in the trial court, and then bring forward their issues in appellate refinement; of course, there must be a result for the parties and a result for the non-parties who are the constituencies waiting for rules that society-ruled-by-law so eagerly yearns for. We pass by the beguiling myth at the end of Plato's Gorgias, in which Minos appears as the world's first appellate judge, dividing the quick from the dead, as a "court of appeal".

But the grand thing about the appellate judge, when she is deployed in literature, is that she's caught between the trial bench and whatever games the author feels like playing. Here we invite the reader's attention to Sancho Panza, he who rides a donkey, Don Quixote serving, in hopes of achieving his ambition of ruling an isle. He gets a fake island, and there's probably a good plot for a reality TeeVee show in there.

Sancho is the victim of an elaborate practical joke, which requires the alert reader to plow through twenty eight chapters of Part 2 of Don Quixote in which a Duke and Duchess play practical gags on the Don and Sancho Panza, such as putting them blindfolded on a horse and blowing air in their faces; they've traveled thousands of miles. What a thigh-slapper. Or Don Quixote's face is attacked by cats. Hilarious. I'm not making this up; there are people who profess to have read all of Part 2 and think it's the greatest work of art known to man.

Sancho is served trumped-up cases, because (Cervantes' conceit) Sancho's good-hearted, man-on-the-dusty-street common sense responses to these faked suits amuse the (aforesaid but unnamed) Duke and Duchess.

The trial bench is stymied by the following situation: If a man approaches them and tells the truth they let him pass, and if a traveler approaches and testifies falsely they hang him. In the case that's on appeal to Sancho, a traveler has approached, and says to the trial judges, "You're going to hang me." Now the reader (c. 1615 or thereabouts) is obliged to accept that there can there can be true or false testimony about future events, or even the intentionality of a witness. Okay, accept that.

Panza, J. handles the issue by asking, "Why don't you instruct the judges to hang the part of the man who's telling the truth?" which then leads to the riposte (we're at oral argument, always a dicey venue), "Well, we'd have to cut him in half and that's just an order to kill our traveling litigant."

Panza's problem is that he can't have it all different ways. He can't insist that he's previously instructed the trial judge how to handle every eventuality, because something new is always going to come up (even on remand). So the appellate bench is always making up (at least) one additional rule to decide the case, or to order the trial judges to decide the case.

Panza's power to decide cases is, in this view, the power to notice that all the rules, substantive and procedural, haven't been written down. And this applies with some force to the situation of the paradox proponent, the appellate barrister. If you write your appellate brief and then urge, "Those are all the rules that you need," even as the worthy Sancho Panza, J. embraces your argument, you and he will only discover that there are many practicing and academic lawyers happy to fence with you about everything, including the necessity or desirability of the existing rules and, more to the point, whether there is one or some additional rules that must of necessity be created. Or to put it a third way, each side on appeal urges that it supplies – exclusively – all the reasoning the court needs, and each side is always wrong to seek to trap the appellate bench.

To get back to the case that Sancho Panza judged, as the Governor-Supreme Court of the Isles: here the trial judges insisted that they had previously cobbled up a complete list of instructions as to how to judge their cases. Panza's critique wasn't that cute or insightful, but maybe that is the literary gag at work. The trial judges were fooling themselves with the "complete list of instructions" paradox. The alert reader may recall that this was addressed in a Bar Rag article published Nov/Dec 2003 featuring Lewis Carroll's take on the subject. Achilles played the befuddled, but earnest judge or advocate who wants to write down all the rules.

There are fundamental – and merely logical – problems with being a listmaker, which is perhaps why rulemaking is assigned by the constitution to the Supreme Court. One crowd insists it's all written down (perhaps even in ancient writ) and the other crowd is obliged to suggest one additional rule that no one thought of. For the likes of Panza, J., it was all the same, for he was obliged to be marginally original in reasoning, even if he came off as a bit of a dimwit. In any event Panza resigned his governorship shortly thereafter and forfeited his pension. It is often the trial judge's or appellate advocate's brief to suggest that all known rules will solve all known problems, when the creative instincts of the appellate judge must fend off the Panza paradox thrust at them. And it is a hoot that Cervantes adds appellate logic to literature just as Holmes is credited with having subtracted it from the law.

AmBA opposes surveillance

ADOPTED BY THE HOUSE OF DELEGATES
February 13, 2006

RESOLVED, that the American Bar Association calls upon the President to abide by the limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees;

FURTHER RESOLVED, that the American Bar Association opposes any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with the provisions of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA), and urges the President, if he believes that FISA is inadequate to safeguard national security, to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization;

FURTHER RESOLVED, that the American Bar Association urges the Congress to affirm that the Authorization for Use of Military Force of September 18, 2001, Pub.L. No. 107-40, 115 Stat. 224 § 2(a) (2001) (AUMF), did not provide a statutory exception to the FISA requirements, and that any such exception can be authorized only through affirmative and explicit congressional action;

FURTHER RESOLVED, that the American Bar Association urges the Congress to conduct a thorough, comprehensive investigation to determine: (a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; (b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance; (c) whether the Congress was properly informed of and consulted as to the surveillance; (d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies; and (e) whether this information was used in legal proceedings against any U.S. citizen.

FURTHER RESOLVED, that the American Bar Association urges the Congress to ensure that such proceedings are open to the public and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information; and

FURTHER RESOLVED, that the American Bar Association urges the Congress to thoroughly review and make recommendations concerning the intelligence oversight process, and urges the President to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

In Memoriam

Bill Bryson

Criminal defense attorney Bill Bryson, of Anchorage, died Jan. 10 in his home. He was 58. He was found by friends at his West 15th Avenue home, a victim of a gunshot wound that was pronounced as suicide.

At the time of his death, he was on the Anchorage Parks and Recreation Commission and was passionately committed to building a track-and-field facility for kids in Mountain View, said attorney and longtime friend Nancy Shaw.

A law graduate of the University of California Berkeley, Bryson came to Alaska in 1972 to work in Juneau for Alaska Supreme Court Justice Robert Boochever.

During his career, Bryson tried a number of high-profile criminal cases, including the defense of Neil Mackay (acquitted of killing Alaska Airlines pilot Robert Pfeil); Andrew Nelson (convicted of killing former girlfriend Sandra Pogany); and Scott Walker (convicted of kidnapping pioneer Mildred Walatka but acquitted of killing her.)

Bryson served on the board of the National Association of Criminal Defense Lawyers. His colleagues in the bar said he was frequently willing to offer advice "whenever we had a situation one of us hadn't faced before," attorney Rex Butler told the Anchorage Daily News. "He had faced them all."

Bryson was known as witty, entertaining, and flawlessly dressed for his profession. He was a sports fan and regularly flew to Stanford University, his undergraduate alma mater, for football games and other college sporting events, said former Anchorage deputy police chief Del Smith, who often went with him.

"This is a hell of a business," said Butler, a busy local defense attorney. "It has a long history of destroying people. You can't just leave it at the office."

"What Bill did best was stand-up lawyering," said former Superior Court Judge Doug Serdahely, who organized a memorial get-together of Bryson's friends Jan. 27. "He was very good in trial, with juries, witnesses. That was where his passions were. ... But like a lot of talented people, he was not good at the mundane stuff, running a law firm, running your own life." At the time of his death, Bryson faced IRS liens.

"He was liked and appreciated by all those he touched, from the man in the cell to the judge on the bench," said colleague Phil Weidner. "He cared about people. He tried to help. Inside he understood because he lived it."

Friends gathered at Josephine's restaurant for the Jan. 27 memorial with a sumptuous buffet, open bar, band, and an open microphone to celebrate Bryson's vigor in life.

FOOT-SOLDIERS OF THE LAW
(Thinking About Bill Bryson)

We build no bridges; we raise no towers;
We construct no engines; we paint no pictures;
But we smooth out difficulties, we relieve stress;
We correct mistakes, we take up other men's burdens;
and by our efforts we make possible
the peaceful life of men in a peaceful state.
John W. Davis, President,
American Bar Association, 1923

The practice of law cannibalizes its participants.
O.J. prosecutor Chris Darden

•

Youthful hopes and dreams used up;
Lives sucked into its insatiable maw;
Recognition, accolades – not for us.
We are the foot-soldiers of the law.

Taking hits from every direction;
Grind the psyche until it's raw;
We form the front-line echelon;
The ranks of the foot-soldiers of the law.

We don't expect appreciation;
Get the money up front or there'll be none at all;
Just confidential greetings from the Bar Association –
For the foot-soldiers of the law.

We didn't expect this mental distress,
Grinding toil, disproportionate abuse of alcohol,
For each dime we pay the price in loneliness,
We foot-soldiers of the law.

No photos on the courthouse wall.
No banners proclaiming, "Thank you, attorneys!"
Not for the foot-soldiers of the law.

But negative emotions dissipate,
When we can save the ones who fall.
While absorbing pain, anger, and hate –
I'm proud to be a foot-soldier of the law.

John C. Pharr, Attorney at Law

Ben Walters — Jan. 24, 2006

(Editor's note: The following is Linda Durr's reminiscence of her friendship with Ben Walters, in correspondence with the Anchorage Bar Association Board of Directors in January.)

As many of the Board know, Ben had a history of heart issues and had a new pacer-defibrillator inserted about 6 weeks ago at UCLA Medical Center. This was a replacement for a lower-tech version he had implanted about 5 years ago that had been working well until recently. He told me after a Finance Committee meeting that even though he had been cleared by his doctors to resume his regular routine, he was anxious about how this new device that was regulating his heart and he was trying to get used to it.

I have known Ben and Netta (Annette) Walters for almost 30 years. I first met Ben when he joined the law practice of Charles Cranston and a couple of others in about 1977, known at the time as Gallagher, Cranston & Snow, and then Cranston, Walters & Dahl. I was Chuck Cranston's secretary at the time. Later, Chuck Cranston was appointed to the Superior Court bench in Kenai, and the partnership eventually dissolved.

Ben and Chuck Cranston were friends long before they were law partners. But they were total opposites in personalities, and they got great pleasure in poking fun at each other. Chuck was in the office at 7 a.m. and had got through a day's work by noon, was the all-consuming health fitness nut, running 15 miles a day and putting wheat germ on everything, and Ben arrived at 11:00 a.m., and at that time ate the donuts, and we had to bug him at the end of the month to bill anyone for his legal work. Ben always took pity on his "poor", downtrodden client (and a lot of them were) and couldn't bring himself to bill a cent.

For those fairly new to the Anchorage Bar Association Board who may not have had the opportunity to get to know Ben well, he had such a big, generous heart and would help anyone who asked him.

He was on the Anchorage Bar Board before I came along as the admin director in 1990-91. He was our Santa Claus at the Christmas parties in the early 1990s, and he was on the Finance, St. Pat's Party and the summer picnic committees every year. He always volunteered if there was a need on the Board. And we all know that Ben prolonged many a meeting with his reminisces and stories of "how things used to be" on the Board! He was just as active in the general community as he was on our Board. I don't profess to know all his activities, and I'm sure they will be detailed more accurately in his obituary; however, when he left the Finance Committee meeting last Tuesday, despite the unease with his new bionics, he was on his way to the adult learning center where he was to tutor students for the GED, as he did on a regular basis. That was so typical of Ben.

DID YOU KNOW...

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

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

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

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

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

SINCE 1896
ALASKA BAR ASSOCIATION

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Changing Teams: Moving from one firm to another

By Mark J. Fucile

The Alaska Bar issued an ethics opinion in September outlining the ethical obligations lawyers face when changing firms. After 20 years at the same professional home, I started a new firm in October with my long-time trial partner. Launching a start-up gave me first hand experience with the issues involved in moving from one firm to another. In this article we'll look at three. First, when can you ask your clients to come with you? Second, how are file transfers handled? Third, what are the conflict rules involved?

The new Alaska opinion—2005-2—is available on the Bar's web site at www.alaskabar.org. It, in turn, adopts in abbreviated form an American Bar Association opinion on the same subject: ABA Formal Ethics Opinion 99-414 (1999). The ABA opinion is available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

When can you ask your clients to come with you?

In leaving a firm, a lawyer's first duty is to his or her clients. At the same time, a lawyer also owes fiduciary duties to the soon-to-be-old firm. Therefore, the scope of notice to clients varies depending on the lawyer's exit strategy.

If the lawyer announces an intention to leave but will remain at the firm for a transition period, the lawyer's continuing fiduciary duties to the firm constrain the content of the client notification. In this scenario, the notice can come from the departing lawyer, the old firm or jointly. Its content is generally limited to:

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

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

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

(4) The departing lawyer must avoid statements involving dishonesty, fraud, deceit or misrepresentation in describing or characterizing the former firm. 2005-2 at 2.

If the client requests additional information about the departing lawyer's new firm, the lawyer can then provide further information such as the new firm's rates and resources.

By contrast, if the lawyer tenders his or her resignation effective immediately the lawyer is no longer constrained by fiduciary duties to the old firm. In this scenario, the lawyer is free to communicate unilaterally with the client because RPC 7.3(a) allows a lawyer with a prior professional relationship with a client to solicit the client directly for business. And, as long as the lawyer's statements to the client are truthful, the lawyer is equally free to immediately describe the new firm's rates and resources and let the client know of the new firm's interest in continuing the client's work.

Under either scenario, however, the decision to leave the work at the old firm, move it to the new firm or seek entirely new counsel remains the client's alone. Again under either scenario, both the old firm and the new one must manage the transition so that the client's interests are at all times protected fully.

How are file transfers handled?

If a client decides to have the departing lawyer continue handling the client's work, the old firm (assuming that there is no lien for unpaid fees) must relinquish the client's file and other property to the departing lawyer on the client's direction. 2005-2 at 4. The Alaska Bar has three principal ethics opinions dealing with file transition issues: 95-6, which addresses a lawyer's possessory lien rights over a client's file; 2003-3, which governs file transition generally; and 2004-1, which applies the other two in the context of expert and investigators' reports.

95-6 notes that a client's need for a file "trumps" a lawyer's lien rights under AS 34.35.430. Therefore, if the client needs the file, 95-6 counsels that the old firm must turn it over notwithstanding the old firm's otherwise valid possessory lien rights.

2003-3, in turn, outlines what must be transferred and takes the position that the client should generally be entitled to the entire file subject to narrow exceptions. The primary exceptions are for a third party's materials that a lawyer placed in the file for the lawyer's convenience and items that go to the business relationship between the lawyer and the client rather than to the representation itself. A legal research memo prepared for another client dealing with the same issue is an example of the former, and a conflict check or collection note that the lawyer did for the lawyer's own purposes are examples of the latter.

2004-1 reiterates the general position that the client is entitled to the entire file and applies that to expert and investigative reports. It echoes 95-6 by noting that the client's need for these materials takes priority over the old firm's possessory lien rights.

All three of these opinions are available on the Alaska Bar's web site at www.alaksabar.org and were outlined in more detail in an article I did for the January-March 2004 issue of the Bar Rag called "Parting Company: Who Gets What When Lawyers and Clients Split?."

What are the conflict rules involved?

When a lawyer leaves a firm and takes all of the client's work, that client then becomes a former client of the old firm. RPC 1.10(b). At that point, the lawyer's old firm may represent clients adverse to the former client unless, under RPC 1.9, the proposed new matter is substantially related to a matter that the old firm handled for the former client or would involve the use of the former client's confidential information adversely to the former client. As with all former client conflicts, however, this prohibition can be waived. RPC 1.9, 1.10(c). Moreover, under RPC 1.10(b), if all of the lawyers who worked on the former client's matter have left the old firm and the firm no longer has the former client's file, then the old firm no longer has a former client conflict. If the lawyer joining a new firm wants to bring a client with the lawyer that would create a conflict with a client of the new firm, then those clients must both consent under RPCs 1.7 and 1.10(a).

Summing-Up

Changing firms presents challenges and occasional tensions for both the "old" firm and the "new" one. Alaska Ethics Opinion 2005-2 and ABA Formal Ethics Opinion 99-414 stress that for both the "old" and the "new," protecting the client's interests during any transition should be the paramount objective.

Mark J. Fucile is a partner at Fucile & Reising LLP, where he focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He can be reached at 503.224.4895 and Mark@frllp.com.

Conduct rules up for revision

Continued from page 1

they know that a project that started in November 2003 would last until the spring of 2005 and give them the chance to more than 30 times to squint at a Powerpoint screen in Bob Mahoney's office (or, in Ruth's case, listen on the phone from Juneau) and debate the reasons, or maybe the lack of reasons, for the changes the ABA proposed.

The result is the nifty little booklet you'll find in this issue. Ordinarily, changes to the Alaska rules of court would start with the Alaska text and show the amendments. But the Committee consulted with the Supreme Court and the Court requested that the ABA version be considered the principal text with the Committee's recommendations for Alaska practice or other changes reflected as amendments.

Throughout this review, the Committee tried to make the rules less cumbersome and easier to apply. You'll also find that the Committee essentially continued the Alaska variations found in the current rules. But there are significant changes: Rule 1.4 introduces the term "informed consent"; Rule 1.7 introduces the term "concurrent conflict of interest"; Rule 1.13 outlines an organizational lawyer's duties in light of Sarbanes Oxley; Rule 1.18 would permit "screening" to prevent disqualification regarding prospective clients; Rule 2.4 introduces the term "third party neutrals"; Rule 3.6 greatly simplifies the restrictions on trial publicity; Rule 3.7 refines the lawyer-as-a-witness rule; Rule 4.1 requires a lawyer to correct a false statement of material fact or law made by the lawyer to a third person unless disclosure is prohibited by Rule 1.6; Rule 4.4 requires notice of the receipt of an inadvertently sent document; Rule 5.3 provides guidance on the movement on nonlawyer personnel between offices; Rule 5.5 outlines permissible multijurisdictional practice; Rule 5.7 discusses law related services; Rule 6.5 provides guidance for nonprofit or court annexed legal services programs; Rule 7.5 adds websites and electronic references to the rule on firm names and letterhead; and Rule 8.3 would excuse a duty to report another lawyer's misconduct if the lawyer believes that the misconduct has been or will otherwise be reported.

OK, so it's not exactly a book, er, booklet, you'll take to the beach. But please take a few moments and study the proposed changes and let us know what you think. Please feel free to write, fax or e-mail your comments and suggestions to the Bar office by April 12, 2006. Thanks.

Judge Niesje Steinkruger receives 2005 Community Service Award from the Arctic Alliance for People

Fairbanks Superior Court Judge Neisje Steinkruger, Presiding Judge for the Fourth Judicial District, was presented with the 2005 Community Service Award by the Arctic Alliance for People (AAP) at the annual AAP membership meeting in December. The AAP is a coalition of non-profit organizations and social service agencies that has focused on the needs of the Interior region for over two decades. Judge Steinkruger was recognized for her tireless efforts to bring diverse groups of people together to learn from one another and address the region's problems. She is the first court official to receive the prestigious award. Presenting the award to Judge Steinkruger, L, is Jackie Debevec, Presiding Officer of the AAP.