The Alaska
BAR RAG

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Dignitas, semper dignitas

John W. Sedwick assumes senior status in March

By Ashley McDow

U.S. District Judge John W. Sedwick assumes senior status in March following 19 years of service in the federal courts.

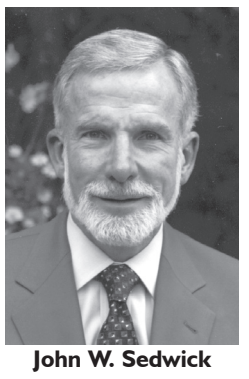
Judge Sedwick was born in Pennsylvania in 1946. In 1951, his father, who was a surgeon, moved his family to Anchorage after accepting a job offer there.

Returning to the east coast, Judge Sedwick attended Dartmouth college and received his Bachelor of Arts in 1968. He then received his Juris Doctorate from Harvard Law School in 1972.

The lure of Alaska was too great, however, and he returned to practice law. He was in private practice from 1972 to 1992, save for one year between 1981 and 1982 when he served as the State Director of Land and Water Management in the State Department of Natural Resources.

Outside observers would probably identify *Enserch v. State*, 787 P.2d 624 (Alaska 1989) as being the most noteworthy case that he handled in private practice. This was an important case striking down certain provisions of Alaska's local hire law for public construction contracts on state equal protection grounds.

Judge Sedwick had always possessed an interest in becoming a judge and his wish was granted when he was appointed to the United States District Court in 1992. On July 2, 1992, President George H.W. Bush nominated Judge Sedwick to take Judge Kleinfeld's bench (Judge Kleinfeld was elevated to a seat on the Ninth Circuit). The Senate confirmed the appointment on October 8, 1992. Judge Sedwick received his commission on October 9, 1992. In 2002, Judge Sedwick became the Chief Judge of the District of Alaska, a position he held for seven years until 2009.


John W. Sedwick

Despite his impressive list of accolades, Judge Sedwick still has a lighter side. In interviewing him for this article, he shared with me a humorus story from his high school days. While changing a flat tire on the Seward Highway on a Good Friday, the ground began to shake and the road began to crack. Although he was convinced that the Russians had dropped an atomic bomb, he later learned that it was only what would become known as the great Alaskan Earthquake.

When we turned our conversation to a case that had left a lasting impression upon him, Judge Sedwick recounted for me one of the more tragic cases to make its way into his courtroom. *Kluver vs. Rocky Mountain Helicopters,* was a wrongful death action brought by the survivors of the crash of a logging helicopter. The alleged cause of the accident was an unweighted thirty foot cable that was left dangling from the helicopter's belly and ultimately got caught in the tail rotor, causing the helicopter to go down. Three weeks into the jury trial, the case settled for fourteen million dollars. However, for those three weeks, Judge Sedwick and the courtroom were captivated by the gripping testimony.

Judge Sedwick informed me that he rarely, if ever, second guesses his rulings, stating that "that is what we have a court of appeals for." This ability to look forward is something genuinely admired by his colleagues. During his nearly twenty years on the federal bench, Judge Sedwick was frequently asked to sit as a visiting judge by the Ninth Circuit. He has also presided over cases from the

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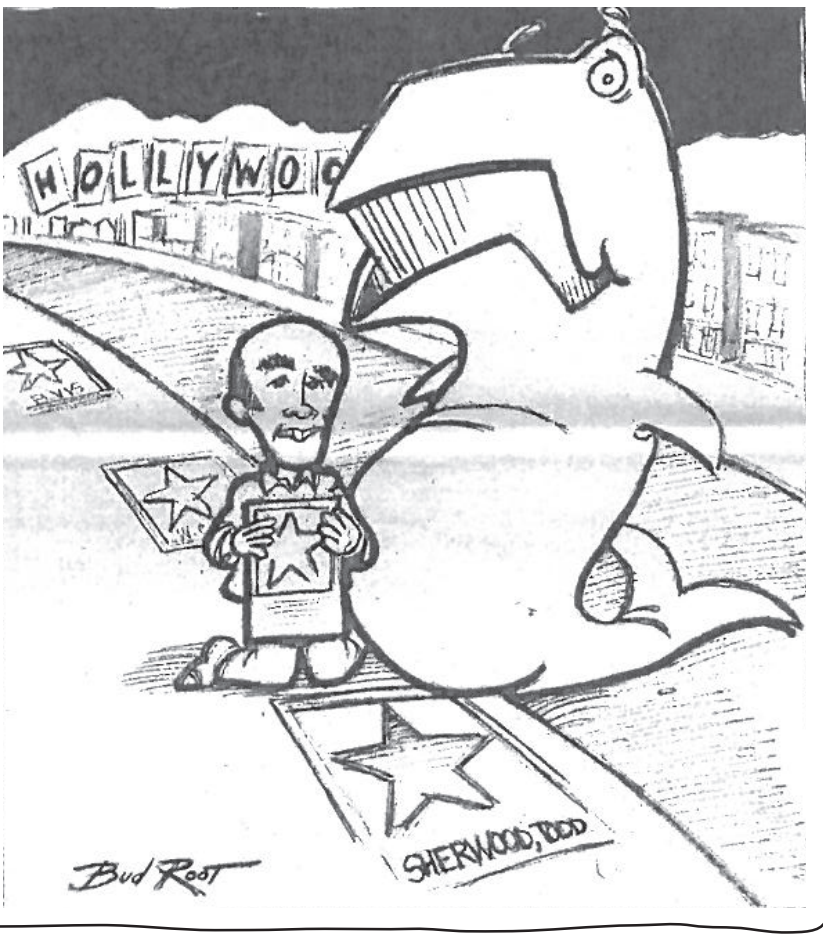
My Life as a Movie Star! (See below)



Or, the absolutely true story of a local attorney as an extra on the set of "Everybody Loves Whales"

By Todd Sherwood

It was a dark and stormy night as I was reading the daily paper by the light of the bare bulb hanging over the rough-hewn table upon which I took my meals. My oatmeal had grown cold and I was engrossed in the daily serial of a story of a medieval warrior entitled "A Dark and Stormy Knigh,t" when a blast of lightning cut the electricity and my small room was plunged into darkness.

As I struggled to light the kerosene lantern I knocked the paper to the floor. The lantern lit, I retrieved the paper. As I did so my eye fell on the title of a small article on the back page: "Whale Movie To Be Filmed in Anchorage – Local Actors Wanted." In a moment I was transformed. I heard the clarion call of my siren and her name was Holly Wood. I was helpless to resist her call.

I quickly updated my actor's resume and attached a black and white actor's "headshot" photo. It wasn't too difficult to update my anemic resume as I had only been in a few local plays. Still, I had hopes and dreams. Perhaps I would be "recognized" for the brilliant thespian I knew myself to be. Perhaps it would be only a short time before I would be leaving the droll life of lawyering behind and would daily be squinting under the bright lights of movie sets across the globe!


The Sherwood mug shot that might have launched him to stardom.

I had to get noticed. Having read that thousands would be auditioning I entitled my email: "Seasoned Actor for Whale Movie Auditions" and sent it off to Alaska Film Services, the local casting agency. I noted in the email that not only had I appeared in five local plays, I had lived in Barrow for five years (working as the North Slope Borough attorney) and knew people who were part of the whale rescue.

And then I waited. And waited. And waited. But I was patient, forcing myself with steel discipline to check

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By the way....

In the give credit where credit is due department, the Bar Rag in December inadvertantly dropped the byline for the excellent article on the *Storied Career of Territorial Lawyer George Grigsby*.

The historical piece was painstakingly researched and written by Margaret Russell. She is a member of the Bar Historians Committee.

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PRESIDENT'S COLUMN

Working together as one association

By Jason Weiner

While I am not sure whether this is universally true, I have personally observed that all things have a beginning and an end. Thus, 11 years ago I began my service to the Alaska Bar Association as the Young Lawyer Liaison. And now, after eight years on the Board in one form or another, both my term as president and time as Board of Governors member comes to an end (at least for the immediate future). I would like to thank you for letting me represent you, and for being the great lawyers that you are.

When I first came to Alaska, I was about to try and become something other than a lawyer. I had come from New York City, and knew that being an East Coast lawyer was not for me. I assumed that was how the world of a lawyer was – competitive and unforgiving, and assumed that Alaska would be no different.

I was very, very wrong.

I also thought at my first Tanana Valley Bar Association meeting 14 years ago that these are truly some amazing people, and I would never be welcomed as an Alaska lawyer. I like to think I was wrong about that as well.

We have so much to be proud of. We have a great group of lawyers with a sense of community that other Bar Associations can only dream about. We have a stable legal market, with work for those who want it (thanks in large part to not having a law school). We have strong programs for low-income individuals, and a judiciary that strives to serve all that come before it – rich and poor, young and old. We have a sound infrastructure, with a number of newer courthouses that add to the beauty of our communities. Finally, we live in one of the few states in the nation that can boast a surplus instead of a deficit, and actually returns money to its citizens. We really are fortunate.

"No matter how diverse we may be, we are one state, and we need to depend on each other, even if a more obvious choice is to vote for ourselves and our own community."

The more you have, the more you have to lose. We almost did not have a Bar president from Fairbanks this year, even though the convention was to be in Fairbanks. My personality was partly to blame. Fairbanks was able to maintain the tradition of having a president once every five years by one vote on the Board. It has been something I have thought about ever since for more reasons than one.

Our major population center by far is Anchorage. We cannot drive to our capital. The next largest city, Fairbanks, is a six hour drive away (assuming you go the speed limit!). As you look at these communities, you can easily forget that Juneau is in the same state as Fairbanks. However, no matter how diverse we may be, we are one state, and we need to depend on each other, even if a more obvious choice is to vote for ourselves and our own community.

Alaska cannot thrive if we focus solely on majority rule. Juneau will suffer terribly if our capital moves to Anchorage. Anchorage will suffer terribly if Fairbanks collapses economically, because Anchorage is a major supplier of Fairbanks goods and services. All of us will suffer if our bush communities do not survive, both for the economic support they allow us to provide them, and for the cultural diversity they contribute to our great state.

As lawyers, we help set the tone for our state. We need to work together to make sure each part of our state thrives. We need to encourage lawmakers to keep the capital in Juneau, even if lawyers in Anchorage might benefit economically from a move. We need to encourage businesses that already exist in Fairbanks and Kenai to remain there instead of moving everything to Anchorage. Finally, we need to reach out to all of the cities in our state, especially those that lack attorneys. We need to think as one state, not several mini-states, and remember that we got to where we are as a state by working together and building new industries and opportunities throughout our state, not by constantly competing for the same business in our neighboring communities.

A first step is to come to Fairbanks for the convention. Go to Southeast when the convention is in Juneau. And go to Anchorage when the convention returns there every other year. This year we have tried to design programs that will appeal to public lawyers, young lawyers, and private lawyers. We want everyone to get together from across the state to celebrate being an Alaska lawyer. We have brought up a controversial speaker as our keynote, and have brought up Steve Wax to debate him. We hope to educate the far left, the far right, and everyone in between. It is not about money, and it is not about pride – it is about continuing to work together as one association of lawyers to learn from each other so we can do the best we can for the state we love. I want to be able to look out at the convention attendees and see representation from lawyers from all walks of life. Alaska has never let me down before. I do not expect it to do so this time. See you at the convention!

EDITOR'S COLUMN

A new editor arrives

By Gregory S. Fisher

After serving 10 or 11 years as Editor of the *Alaska Bar Rag*, Tom Van Flein has moved on to better things. Somehow it doesn't seem right that he's not here. Most of us are creatures of habit. There's too much chaos in our lives. Familiarity is comforting. It gets us through each day. One just expects to pick up the *Alaska Bar Rag*, snap open to the second page, and find Tom weighing in with his quarterly observations. We might or might not have agreed with Tom's views or even cared, but the routine was reassuring. Change means something different. Different is –well, it's different. Different can be good. Different can also be that shortcut to Vera Lake that leaves you half way to Talkeetna at two in the morning with a quarter tank of gas, a flat tire, and clutch of hungry sled dogs wondering just how you managed to screw this up. I can't replace Tom. So I won't try. But it probably will be different.

Anytime a long-tenured position is replaced, the "newcomer" balances risk and opportunity. On the one hand, I don't want to damage a cherished institution. The *Alaska Bar Rag* may not be "The Gray Lady," but it is ours. Tom, Peter Maassen, Judge Ralph Beistline, Judge Harry Branson, and the other former editors built and maintained a solid newsletter under Sally Suddock's stewardship. On the other hand, as the apprentice stealing the master's brushes, I can probably experiment a little, and the failures will hopefully be charitably excused.

I do not have an editorial voice or vision—at least, not really. However, I have some general ideas that may find definition in a few months or years, or perhaps never depending on how long they let me remain on the masthead. Here is how I see it. The *Alaska Bar Rag* is our newsletter, "our" meaning the lawyers who are the Alaska Bar Association. It has a rich tradition of providing an irreverent but informative record of events. I think that captures what we should be about—irreverent but informative. As a journal it drives itself—it follows certain time–honored conventions. Those should not be disturbed. All are welcome. Free speech is free speech. Within the bounds of decency and taste, no views are turned away. The *Alaska Bar Rag* has never censored anyone's comments (to my knowledge at least), and has generally made room for everything from serious, robust dialogue to light, engaging fare. That's a tradition that is worth preserving.

"Here is how I see it. The *Alaska Bar Rag* is our newsletter, "our" meaning the lawyers who are the Alaska Bar Association."

However, we shouldn't be afraid to pop the hood and rattle a few wires. I would like to see more, but shorter, articles from a wider variety of correspondents. We don't seem to publish many practice guides (checklists or bullet point outlines). I would like to encourage brief reports from different parts of the State along the lines of the Tanana Valley Bar Association minutes that used to be required reading. I think many would find verdict or settlement summaries useful, and if there is a way we could figure out how to do it, I think most practitioners would like to see judges, mediators, and arbitrators confidentially rated in a way that made practical sense. We also need diversion, submissions that are maybe not law-related but that reflect what it means to live and work in Alaska. I think my job is to recruit good correspondents and then get out of their way. In the weeks and months ahead I am hoping to contact many of you to see if you'd be willing to submit an essay, article, or note for publication. If I do not contact you personally, please feel free to contact me. Please especially send us your articles, essays, notes, cartoons, poems, photos, or anything else you would like to share with your colleagues.

Turning to the trenches, my first issue opens with controversy. It seems Professor John Yoo has been invited to speak at the upcoming convention in Fairbanks (May 4-6, 2011). Professor Yoo will be the keynote speaker at the annual awards banquet on Thursday May 5, 2011. His topic will be "Crisis and Command: Presidential Power from Washington to Bush." The following morning, Professor Yoo

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The Alaska BAR RAG

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(Annual Convention – Fairbanks)

Letters to the Editor

A letter home

It has been almost 18 years since I left Fairbanks back in the days of the old court house, cold ice foggy and snow laden winters, and the tallest building being the Northward building.

I had started out in those days with Alaska Legal Services, Dave Wolf , and after a couple of years transferred to the Public Defender Agency, as I remember, being headed then, by Herb Soll in Anchorage. Brian Shortell was my boss then, but later I became head of the Fairbanks office back in the days when it was in the Artic bowl building.

I enjoyed being a Public Defender, back in the days of Mark Ashburn, and several who have since ascended to the bench (and by now, maybe, even retired!)

There was a stint of two years in Ketchikan with the Public Defender Agency, where two wonderful judges, Schultz and Keen presided in the Superior and District courts.

I returned to Fairbanks, set up private practice in the First National Bank building on 1st and Cushman. Those were also very good memory makers, and the days in which I practiced law across the hall from Cory Brogeson and John Burns.

I then was appointed by Jay Hammond to a District Court judgeship back in Fairbanks, and served there for 6 years. That was back in the days of Hugh Connelly, District Court, and Gerald Van Hoomissen and Jay Hodges in the Superior Courts. Mary Alice Miller, possibly smarter in the law than any of us, also presided in the District court

As you can see, my times there were nearly 20 years or more ago, and I have purposely done some name dropping here so that others who still take the Bar Rag, as I do, can reminisce back to those days as I do when I get the Bar Rag, see the pictures, and struggle through the weekly Satterberg tome.

I still owe Bill Satterberg a lot for his help with the first big (and only big) PI case I had (Don't ask how it came out!)

There are many memories of Fairbanks that still run through my mind on an almost daily basis. Luckily I have the world's best wife who helps me remember much when I cannot recall as much because in 2007 I had a heart attack, here in Grand Junction and have short term memory loss

When I read the Bar Rag I still recognize so many of you - see you ascending to the Supreme Court, the Superior Court and even some new District benches. You all seem to have aged a bit over the last 20 years, but I am always relieved to see that each day, when I look in the mirror, I have not aged a bit since I looked the day before!

Please take time to drop me a line on email when you read this, if you have time, as I would cherish as gold, any word from the past, from those of you who still remember me, and do not find the memory too painful!

— Stephen R Cline
SteveRCline@gmail.com

Writers discuss Yoo convention appearance

Editor's Note: *The decision to invite Professor John Yoo as the Bar Convention's keynote speaker has sparked considerable controversy. Published below are four opinions addressing different perspectives. The Editor's opening comments also discuss the subject. Elsewhere in this issue are related resolutions that have been proposed. However one views the issues, we are all Alaskans working together in an honored profession, learning from each other, and sharing traditions of community, courtesy, and collegiality. We encourage our readers to weigh and evaluate these opinions, conduct their own research into the underlying facts, and attend the Bar Convention in Fairbanks.*

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Convention speaker's appearance is 'an insult'

By Brant McGee

Many of us were appalled to learn that our bar president has invited John Yoo, a former Justice Department lawyer and author of the infamous torture memos, to be the keynote speaker at the awards dinner at the annual convention in Fairbanks this May. Yoo's professional history makes his invited presence among us an outrageous insult. Yoo committed "intentional professional misconduct" when he failed to provide "thorough, objective, and candid legal advice" regarding interrogation techniques, according to a lengthy investigation by Justice's Office of Professional Responsibility (OPR).*

Far more important, the evidence outlined below proves that Yoo was a chief architect of the former U.S. policy of legally sanctioned torture.

Yoo's First Amendment rights are not at issue here—he is a tenured professor at Boalt Hall, Berkeley's law school, his decidedly minority views of executive power are fashionable in some circles, and he regularly expounds on them in many fora. However, his active role in the propagation of torture in the last decade, which many believe constituted war crimes, should have made him anathema to those who selected him to speak to a captive audience at a dinner where we honor the best among us for professionalism and outstanding pro bono efforts.

Yoo will be discussing presidential powers at the Bar Convention, so perhaps it is appropriate to begin with a colloquy he had with an OPR investigator when he was asked if the torture statute would interfere with the President's war-making abilities:

Q: I guess the question I'm raising is, does this particular law [torture statute] really affect the President's war making abilities?

A: Yes, certainly.

Q: What is your authority for that?

A: Because this is an option the President might use in war.

Q: What about ordering a village of resistants to be massacred? ... Is that a power that the President could legally-

A: Yeah. Although, let me say this. So, certainly that would fall within the Commander-in-Chief's power over tactical decisions.

Q: To order a village of civilians to be [exterminated]?

A: Sure.

Read it again. According to Yoo, the president has the power to ignore U.S. and international laws and order that people be tortured and villages of civilians destroyed. In his world, the legislative power to make laws, the Geneva Conventions, and the Nuremburg precedents are legally irrelevant. This is the quality of legal acumen and, frankly, psychopathic lawyering that Yoo has been invited to Fairbanks to share with us.

So let's examine the evidence that supports the widespread condemnation of Yoo's conduct. Yoo was a deputy assistant attorney general in Justice's Office of Legal Counsel, that office which issues authoritative and binding legal opinions to government, when he was the principle author of two memoranda interpreting the federal torture statute in 2002. One contains his analysis of the torture statute, his redefinition of torture, and his proposed defenses to any future criminal charges that might be brought against US torturers. The other examines a list of interrogation techniques and dismisses any notion that they might constitute unlawful torture. [The complex political context of these and other memos, the waterboarding issue, and the full consequences of the misconduct of Yoo and other lawyers will not be examined here.]

Torture, under the federal statute modeled on the Convention Against Torture (CAT) signed by the first President Bush, is "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering."

Yoo chose to borrow definitions of severe pain from federal health care laws—rather than from national and international torture cases—and defined "severe pain and suffering" as that which would be associated with an injury so "serious that it would result in death, organ failure, or serious impairment of body functions." This definition was later found to be "misleading and unhelpful" by DOJ officials. It also defies common sense. Both death and organ failure can be painless and horrifying maltreatment can be inflicted without any danger of Yoo's listed results.

Further, Yoo had changed even those inapposite definitions. In his memo, "serious jeopardy" became "death," "serious dysfunction of any bodily organ" became "organ failure," and "serious impairment of bodily functions" became "permanent damage." The OPR found that the reason he "paraphrased" the language of the statutes was to "add further support to their 'aggressive' interpretation of the torture statute."

In Yoo's discussion of pain inflicted by torture he asserted that "severe pain" under the Convention is "not in substance different from" pain that is "excruciating and agonizing" even though the latter language had been discussed and stricken from the US version because it established "too high a threshold of pain for an act to constitute torture" and out of concern that our nation be seen as requiring "a higher, more difficult evidentiary standard" than the Convention required. In sum, Yoo simply lied about both the definitions in the federal medical statutes and the important language employed in the US ratification process.

In his discussion of US cases brought under the Torture Victim Protection Act, Yoo disparages the analysis by different courts of severe pain and suffering and concludes that the cases do not "approach [the lowest] boundary [of what constitutes torture]." Again, the OPR found that statement "inaccurate" and that Yoo had deliberately ignored two cases that contradicted his assertions.

Yoo also chose to discuss two international cases and managed to misconstrue their holdings, ignore important subsequent cases, and, in the words of the OPR investigation, again make assertions that were "misleading."

These first sections of the memo interpreted both statutory provisions and court decisions in a way that set a very high bar for violations of the torture law. The final sections argued that there were circumstances where even acts of outrageous torture could not be prosecuted. These arguments—and they can only be characterized as such in a memo that was supposed to be a careful and methodical analysis of the law and to constitute authoritative legal advice—were designed to provide blanket authority for actual torture and "defenses" to torture charges which anyone familiar with the criminal law would find ludicrous.

In keeping with his determination to discuss means of circumventing the law rather than ways to comply with it, Yoo adapted the perverted reasoning he brings to questions of presidential powers to provide an insurmountable barrier to the prosecution of torturers. Under Yoo's pet theories of executive power, any prosecution for violations of the torture statute would "represent an unconstitutional infringement of the President's authority to conduct war." Yoo further concluded that "any effort by Congress to regulate the interrogation of battlefield detainees" would violate the constitutional authority of the President as Commander-in-Chief. Yoo's position was later described by a Justice official: "This extreme conclusion has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."

Jack Goldsmith, another Justice official, later described the memos:

> *"In their redundant and one-sided effort to eliminate any hurdles posed by the torture law, and in their analysis of defenses and other ways to avoid prosecution for executive branch violation of federal laws, the opinions could be interpreted as if they were designed to confer immunity for bad acts. Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws mean and thus effectively to immunize officials from*

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prosecutions for wrongdoing."

Before turning to Yoo's attempted analysis of common law defenses to torture, one aspect of the political context of the preparation of the memos should be noted. The CIA had requested an advance declination of prosecution for violations of the torture statute and been refused by the criminal division of Justice. Immediately afterward, Yoo supplied the Commander-in Chief and defenses section of the memo.

Yoo, with no experience in criminal law, found that the specific intent element of the statute would protect an interrogator who knew that severe pain would result from his actions if causing "such harm is not his objective." But the infliction of severe pain would never be a single objective in the interrogation context, but rather a means to obtain information. Under Yoo's interpretation, which would astound prosecutors and defense counsel alike, a defendant would be innocent if he acted "with an honest belief that his conduct would not produce what the law prohibits" and further, that good faith belief need not be reasonable. In other words, Yoo advised that a defendant would have to act with a purpose to violate the statute in order to incur criminal liability—a nonsensical interpretation.

Yoo's study of the necessity defense to torture ignored its essential—and difficult to prove—elements and provided a creative but baseless interpretation of the leading Supreme Court case on the subject. Yoo then proposed that self-defense and defense of others are valid and acceptable defenses to torture even though the extension of these defenses would be novel and had no supporting precedent. Yoo had cited Article 2(2) of the CAT for other purposes, but he apparently forgot the provision's explicit statement that no exceptional circumstances can be invoked to justify torture.

In 2006, Dan Levin took over as head of OLC and was responsible for drafting replacements for the two Yoo memos. When he first read the memos, he remembered "having the same reaction I think everybody who reads it has—"this is insane, who wrote this?" Other Justice officials characterized the memos as "riddled with error," "plainly wrong," "a slovenly mistake," and "a one-sided effort to eliminate any hurdles posed by the torture law." Harold Koh, the dean of Yale Law School, called the memos "perhaps the most clearly legally erroneous opinions I have ever read."

There is a clear link between the Yoo memos of August 1, 2002 and one issued by James Haynes, chief counsel to Secretary of Defense Rumsfeld, that later outlined allowable and specific interrogation techniques to be employed against an Al Queda suspect. The "approved' torture techniques included beatings, severe sleep deprivation combined with 20 hour interrogations for months at a time, threats against suspects and their families, body cavity searches, sexual humiliation, attacks by dogs, acute stress positions for hours, exposure to cold and loud music for long periods, and more.

There is strong evidence that the techniques migrated from Guantanamo to Iraq and Afghanistan. Four months after he was briefed on the Haynes memo, Major General Miller, the commander at Guantanamo, travelled to Iraq in with a group of interrogators, known as the Tiger Team, and made recommendations to Lt. General Sanchez, who then authorized a series of new interrogation techniques. The detainee abuses that later made Abu Ghraib infamous throughout the world began one month later. The later exposure of the Abu Ghraib photos did catastrophic damage to our nation's claims to represent justice under law.

Three separate official investigations have confirmed that the migration theory, denied by Yoo as "an exercise in hyperbole and partisan smear," was unequivocally true. The investigation led by former Secretary of Defense James Schlesinger concluded that "augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded."

An earlier January, 2002 memo co-authored by Yoo had concluded that the Geneva Conventions didn't apply to al-Quaeda and Taliban detainees. However, in 2006 the Supreme Court invoked the legal precedents ignored by Yoo and held in *Hamden V. Rumsfeld* that the legal protections under the Geneva Conventions's Common Article 3 extended to Guantanamo detainees. In an opinion that exposed the blatant illegality of the interrogation techniques approved and sanctioned by John Yoo, Justice Kennedy pointedly observed that violations of Common Article 3 are considered "war crimes."

Is John Yoo a war criminal? Michael Ratner, the president of the Center for Constitutional Rights, has written that Yoo's memos were not mere academic exercises:

> *"They were written by high-level attorneys in a context where the opinions represented the governing law and were to be employed by the President in setting detainee policy. This was more than bad lawyering; this was aiding and abetting their clients' violation of the law by justifying the commission of a crime using false legal rhetoric."*

It is Yoo's history of unethical conduct, his likely criminal complicity in torture through providing its legal rationale and authorization, and his role in policies that led directly to crimes that blackened America's reputation, especially in the eyes of the Muslim world, that makes his selection as our keynote speaker so offensive.

In late 2006 President Bush signed the Military Commissions Act which contained a provision granting immunity to all US interrogators, and, presumably, to those who authorized torture, for acts committed between 9/11 and December, 2005. But, of course, that immunity is good only within the United States so Yoo and his former colleagues should carefully consider any overseas travel for several reasons.

First, there is precedent in the successful US effort to establish the principle that lawyers and judges bore a particular responsibility for Nazi crimes through the prosecution of 16 German lawyers in 1947 in *US v. Altstotter*. The prosecutors charged that leading members of the German legal system had "consciously and deliberately suppressed the law" and contributed to crimes, including torture, that were "committed in the guise of legal process." [Any comparison between the Nazi government and the Bush administration is, of course, absurd.]

Second, Article 4 of the Torture Convention makes criminal any conduct that amounts to "complicity" or "participation" in torture and the same principle governs violations of Common Article 3. The 2006 statutory immunization of American torturers will help foreign prosecutors demonstrate that their home country (US) will not hold them accountable—a key step toward prosecution for universally condemned war crimes in other nations, especially those who supported the legal procedures employed to ensure accountability in the cases of General Augusto Pinochet, the Chilean dictator who employed torture, and others. Human Rights Watch has reported that more than 100 people have died in US detention and 11 died as a direct result of torture so the fundamental facts regarding the crimes are not in serious dispute—only the legal theory of lawyers' culpability, supported by Nuremburg precedents, remains to be tested.

It is Yoo's history of unethical conduct, his likely criminal complicity in torture through providing its legal rationale and authorization, and his role in policies that led directly to crimes that blackened America's reputation, especially in the eyes of the Muslim world, that makes his selection as our keynote speaker so offensive.

** Endnote: A later review by a single Justice lawyer overturned some of the OPR findings and recommendations on several grounds, including the argument that post-9/11 hysteria explained the lawyers' misconduct even though the memos were written almost a year after the attacks. The review was oblivious to the principle that, especially in difficult times, lawyers must stand up for the law.*

It would be good if somewhere along the way someone could say something about Steve Wax.

He's dedicated himself to defending people against government abuses, has taken on the toughest of battles, and has secured some extraordinary victories.

He is, for my money, as much of a hero as lawyers get to be and makaes Atticus Finch look like Matlock. It would be a tragedy if he flew up here, and people stayed away because of their feelings about Yoo. Wax is as much a part of Friday's program as Yoo is. And his experiences, freeing people from Guantanamo, are beyond extraordinary.

This program has gotten a great deal of work, and it promises to be a riveting event.

Inviting Yoo is 'unforgiveable'

By Douglas Pope

The decision by our Bar Association leadership to invite John Yoo to speak at the Bar Convention is unforgiveable. I can't imagine the thinking that went in to inviting someone who has so clearly disgraced our profession to be the keynote speaker.

Other writers to this journal will no doubt detail the lengths to which John Yoo went in his attempts to weave a cloak of legitimacy to immunize his government clients' continued use of torture. The legal "reasoning" he employed to generate his now infamous secret 2002 memo was riddled with one-sided arguments, cherry-picked quotations, inexplicable omissions, inapposite cites, and tendentious misreading of leading authority.

The Justice Department subsequently concluded that in one instance he even falsified what a law review article actually said. Most non-partisan legal scholars agree that John Yoo violated the most basic duty a lawyer owes to a client, *to wit*: to exercise independent professional judgment and render candid advice. I know he was not disciplined by the Washington D.C. Bar Association, but that had more to do with Justice Department politics than anything else. The Office of Professional Responsibility determined that Yoo had violated his professional responsibilities and referred him to the Bar Association, but that determination was overturned by a single bureaucrat. Here is what the Justice Department official who overturned that referral had to say to justify his decision:

> *"While I have declined to adopt O.P.R's findings of misconduct, I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligations to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, view of executive power while speaking for an institutional client."*

So, John Yoo skated in the District of Columbia not because he did exercise professional judgment to justify his torture memos, but because his advice to his client "reflected his own extreme" views rather than a sound determination of what the law actually required.

In my 35 years as a lawyer in Alaska, I have represented institutional clients, politicians, lawyers, judges, and corporate presidents. I have always proceeded by telling them what the law was rather than what I wished it were. I can't imagine not being disciplined for giving advice to any of those clients based upon my own extreme views rather than what the law required. Yet, by inviting Yoo to be a keynote speaker at our annual convention, the Bar Association leadership endorses someone who skated on that defense. It is a dishonor to the Bar Association and to previous esteemed guests such as Chief Justice Roberts, Justices O'Connor, Scalia, Alito, Breyer and Ginsberg.

Writers discuss Yoo convention appearance

The committee's view on Yoo's selection as speaker

By Jason Weiner

I have been provided with two letters of protest regarding the selection of Professor John Yoo as our keynote speaker. I respect the individuals who sent the letters, and have given their opinions serious thought and believe their letters merit a response. However, I also believe these letters merit a few points of clarification.

First, Professor John Yoo was selected out of a full slate (I believe there were 50) of candidates to be our keynote speaker. There was a committee of eight individuals who came together to evaluate the candidates, with input from numerous others. While there were numerous considerations, including availability and cost, I feel more strongly than ever that the committee made the right choice by selecting Professor Yoo.

There has been talk of protests. There has been talk of people "boycotting" the convention. I have been disappointed to hear that members of our Bar Association would feel that boycotting the convention is the right approach to dealing with their disagreements regarding the choice of Professor Yoo as our keynote speaker.

Professor Yoo has agreed to come to Alaska knowing full well the controversial nature of his role in history. He is ready to defend his position.

Professor Yoo has agreed to come to Alaska knowing full well the controversial nature of his role in history. He is ready to defend his position. He is ready to talk to all of us about an issue that, from the letters and comments I have received, several members of the Bar Association feel very strongly about. Unlike some of our speakers of the past, Professor Yoo has few restrictions on his ability to address our concerns. I would think those who feel so strongly about Professor Yoo's role in history would relish this opportunity to learn more about his opinions, both legal and personal. I know I look forward to hearing him.

This will not be the first time we have invited individuals to our convention that have opinions many of our members disagree with. I can even remember complaints about some of the Supreme Court Justices and the fact that some of our members did not particularly appreciate their points of view. Like Professor Yoo, they have been criticized by many. They have made decisions that some feel fatal to their very ability to survive. However, like Professor Yoo, they have also made decisions that needed to be made, and provided opinions that they felt were well reasoned and were legally correct. A big difference between them and Professor Yoo is that in most cases, the Justices could not speak about their decisions.

I must admit that I have more to learn about Professor Yoo's opinions. What I do know is that his opinions led the President of the United States at the time to adopt policies that governed the actions of our armed forces and intelligence personnel. His importance in history cannot be questioned. His decisions can be questioned. Discussion and education on what has transpired and what it means for the future of this nation is more productive than boycotts and protests. The Bar Convention has always been a great opportunity for educational and professional growth. We should continue to support that theme and discuss our opinions with Professor Yoo. This is a unique opportunity - one I do not think we have had in recent years. We should take advantage of it.

I wish to end this discussion (as I believe it will be my last opportunity to address everyone in writing through the *Bar Rag* prior to the convention) by simply pointing to another famous individual who immediately came to mind as I read the recent letters who made a decision that continues to be questioned to this day - President Harry Truman. President Truman, a war time president much like Presidents George Bush and Barack Obama, was faced with a decision that, to my understanding, was controversial. The war was continuing. Lives were being lost on both sides. The future of the world hung in the balance. A weapon, the atomic bomb, was made available to him that might end the war, or might make it worse. The tool was so powerful there were some who thought it could destroy the entire world if it was used. If it worked as planned, tens of thousands of innocent civilians would die. It could also save hundreds of thousands of lives if it ended the war. President Truman made the decision. Drop the bomb. The rest is history. The war ended soon after, and the world we live looks like it does today at least in part because of that decision.

There are plenty of differences between President Truman and Professor Yoo, and I ask that those who revere President Truman but disagree with Professor Yoo understand that I recognize these differences. However, the greatest difference between the two is that it is has been over 65 years since America dropped the atomic bomb on Hiroshima and Nagasaki. We have a pretty good idea what role that has played in history, even though this event continues to influence our world. What we don't know is what the opinions Professor Yoo expressed in his memos, and what the decisions President Bush made in reliance on those memos, have done to help or hurt our nation and the world.

Did the interrogation practices authorized by President Bush prevent another 9/11? Did they prevent something even worse? We may not know the answer to these questions for years, if ever. However, we continue to make difficult decisions like these, and one way (and in some people's opinions, the best way) to make these decisions is to look at the decisions of the past.

Professor Yoo is going to give us the opportunity to hear arguably the source of one of these decisions and the merits, and hazards, of his approach. I think we should all take this opportunity to hear an unprecedented review of recent history and see what we can learn.

For those who oppose Professor Yoo's legal opinions, you can learn more about how to make sure his opinions do not control decisions in the future. For those that support Professor Yoo and his opinions, you can learn how to promote those opinions within our current governmental framework. And for those who are simply interested in hearing an entertaining debate about a controversial topic from an individual who has been the focus of much of the review of the Bush Presidency in recent months, I do not believe you will be disappointed.

I hope to see you all at the convention.

Proposed Convention Resolutions for Yoo

RESOLUTION #1

Whereas, the legal advice that John Yoo gave to the United States Government erroneously defined torture in such a way that United States officials could subject detainees to Draconian physical abuse, including waterboarding, which is torture under the ordinary understanding of that term and under international treaties to which the United States is a signatory;

Whereas, the legal advice that John Yoo gave to the United States Government brought discredit on the legal profession and on the United States of America; and

Whereas, the decision by the President of the Bar Association to invite Professor John Yoo to the 2011 Bar Convention as keynote speaker brings discredit on the Alaska legal profession and the Alaska Bar Association;

Now, therefore, be it resolved that the Alaska Bar Association regrets that the President of the Bar Association chose to invite Professor John Yoo to be the keynote speaker at this year's Convention.

Submitted by Mark Regan and Paul Grant and signed by 25 members of the Alaka Bar Association.

Feb. 28, 2011

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RESOLUTION #2

RESOLUTION CONDEMNING TORTURE AND TYRANNY ANNUAL MEETING OF THE ALASKA BAR ASSOCIATION MAY 6, 2011

WHEREAS torture is prohibited by 18 U.S.C. ' 2340A, and 18 U.S.C. ' 2340 defines torture as Aan act committed by a person under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanction) upon another person within his custody or physical control,@ and

WHEREAS torture is prohibited by common article 3 of the Geneva Convention, and the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, to which the U.S. is a signatory, and

WHEREAS torture is an assault prohibited by Alaska Statutes 11.41.200 - 230, and

WHEREAS if any citizen of the U.S. or Alaska were to commit torture, that citizen would be correctly subject to criminal prosecution, and

WHEREAS it would be the essence of tyranny for the President of the United States to be, or to consider himself to be, above and not subject to any law, including any and all laws and conventions prohibiting torture,

NOW BE IT RESOLVED THAT the Alaska Bar Association hereby condemns torture in all of its forms by any and all perpetrators, and

AND BE IT FURTHER RESOLVED THAT the Alaska Bar Association hereby condemns any attempt to declare the President to be above and not subject to any law, including any and all laws and conventions prohibiting torture.

Sponsored by Jon Katcher, Doug Pope & Brant McGee and signed by more than 50 active members of the Alaska Bar Association. (As of March 4.)

Writers discuss Yoo convention appearance

Yoo's perspective is important for lawyers to hear

By Paul Eaglin

Ed. Note: The following letter to the editor was written in support of John Yoo's appearance at the Bar convention, in response to John Havelock's commentary in the Anchorage Daily News in November, which declined to print Mr. Eaglin's response.

"I was on the committee and supported, and continue to support now, his selection. The panel discussion of Yoo/Wax will be terrific as he and Steven Wax have important things to say about our present context," said Eaglin in submitting his comments to the Bar Rag.

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I disagree with former Attorney General John Havelock's "Comment" piece in reaction to the selection of Professor John Yoo as keynote speaker at the May 2011 Alaska Bar Association convention. Yoo will also be the featured presenter regarding his perspective about the legal history of presidential powers. The focus will be his recently published book, *Crisis and Command*. I look forward to an important presentation that is not likely to be boring or uninteresting. He has important things to say about our legal history and the relations of the three branches.

My disagreement is based on my participation as a member of the committee that helped to advise the state bar president in his search for a keynote speaker. I present only my views here, and I have not presented this for prior approval to anyone, including specifically the state bar association or the president.

I should mention that there was awareness of the notoriety of his selection. I realize some find him to be objectionable based on the so-called torture memos. Each of us can imagine ourselves in his shoes during that time period and under those pressures, and we can imagine ourselves coming up with a different recommendation—the "right" recommendation. No doubt, each of us comes out the heroine or hero.

I should mention that there was awareness of the notoriety of his selection. I realize some find him to be objectionable based on the so-called torture memos. Each of us can imagine ourselves in his shoes during that time period and under those pressures, and we can imagine ourselves coming up with a different recommendation—the "right" recommendation. No doubt, each of us comes out the heroine or hero.

As for me, it was far more important that he would offer something important to hear. Yoo is likely to offer an intellectually challenging perspective on presidential powers in the relationship of the three branches. Surely his so-called torture memos are the product of his perspective on presidential powers. His recently published book is regarded as a strong presentation of that perspective, even among fair minded critics of the Bush Administration's decisions. Our nation continues to wrestle with issues of the interrelationship of the three branches, particularly with regard to allegations of overreaching abuses by any one of the three.

You mention that Mr. Havelock teaches public policy at UAA. As an academic, he ought to encourage students and citizens to seek out challenging, provocative, and well-considered perspectives on important issues. With respect to Yoo's historical perspective as presented in *Crisis and Command*, I believe that his viewpoint is taken seriously as part of contemporary legal historical scholarship.

During our committee process, when I indicated my strong support for inviting him, I was aware of the notoriety of his selection. But I was also aware that his views have been taken seriously despite the notoriety of the torture memos. Mr. Havelock refers to Yoo's circumstances now and the likely difficulty that he would encounter in international travel, especially in Europe, due to indictments. But we would do well to remember that the Obama Administration's review of Yoo's work at the Justice Department resulted in its decision to NOT take action against him, leaving it to state bar authorities to consider taking action, if necessary, based on state disciplinary or ethics provisions that might bear upon his work.

Mr. Havelock seemed to suggest that there was some sort of guilty knowledge at work among the committee by asserting that we "scurried around to find a person to debate with Professor Yoo" in what Mr. Havelock suggests was a reaction to "uproar" as word of his selection spread. That is not true at all. Once Professor Yoo was selected as keynote speaker for the annual dinner, bar officials worked cooperatively with him to construct the following morning's session at which he would be the featured presenter. I was not in those direct discussions with him but it is my understanding that he made the excellent suggestion of a debate format, as he has successfully done this style of presentation with one of his critics. So there was no scurrying about, no guilty knowledge, no underhandedness, and nothing conspiratorial in reaction to "uproar." At the time the decision was made, there was no reaction at all since the decision had not been made known. I regret that he chose to mischaracterize that decision making in such an uncomplimentary manner, but it is wholly inaccurate and misinformed.

Finally, and most importantly, since the principal purpose of inviting Professor Yoo is to offer significant perspectives, please plan to attend his keynote speech at the annual dinner on May 5, 2011 and to attend his session the next day. Admission is by ticket purchase and is not limited only to bar members and the judiciary. As a matter of being well informed on important issues of the day and significant historical legal issues, I am hopeful that the event will not disappoint you.

A new editor arrives

Continued from page 2

will sit on a panel with Steve Wax (the Federal Public Defender from Oregon) addressing "The Balance between Security and Civil Liberties in Wartime."[1] Jeff Feldman will moderate.

Brant McGee has authored a vigorous dissent protesting Professor Yoo's appearance as keynote speaker. Doug Pope has joined Mr. McGee with his own objection. The committee that invited Professor Yoo has replied by a letter from our President Jason Weiner. Paul Eaglin has also written to support the decision to invite Professor Yoo. All of these are strong and respected voices that merit our attention. The dispute centers on Professor Yoo's involvement in drafting certain legal opinions in 2002 which we now know as the "torture memo" [sic].

The "torture memo" is really (depending on one's interpretation) two or three documents that were issued in August 2002. Most segments have now been declassified. The papers addressed presidential wartime powers. Jay Bybee (later appointed to the 9th Circuit Court of Appeals), John Yoo, and other government lawyers were charged with the responsibility of providing clarifying guidance as to the limits of presidential powers. One of the underlying issues concerned what did or did not constitute torture. They did what we as lawyers do—they outlined and addressed the issues based on the known or assumed facts. The memo does not advocate torture. The so-called "torture memo" was an effort to trap previously undefined concepts so that unconscionable acts would be better framed, studied, and avoided. Perhaps they succeeded. Perhaps they failed. I don't know. I do know they tried. I also know how difficult it can be to translate policy imperatives into field operations where you have kids with a seventh grade education struggling to do the right thing. In a different era, I served eight years in the Field Artillery, six of those years overseas. Currently deployed service members could be forgiven if they viewed the "torture memo" controversy as being an academic argument between comfortable, well-fed people with warm feet and dry socks. The field has no political cover.

That is not to marginalize the debate. We can and should register dissent with our political leaders when we disagree with their policy decisions. The Alaska Bar Association scored a tremendous coup by coordinating this session to address presidential wartime powers. I was a lawyer representative to the Ninth Circuit Judicial Conference at the Sun Valley conference in 2008 when the issue of wartime presidential powers was debated. It was an excellent session. Professor Yoo was scheduled to speak but a last minute scheduling conflict prevented him from attending. Judge Bybee was there although not on the panel. Mr. Wax was not on the panel, but he asked a range of questions during question time that some applauded and some deplored. The basic thrust of his question(s) (and I hope I am not inaccurately paraphrasing them) was "why don't we indict and try all of these people for war crimes?" So with both Professor Yoo and Mr. Wax on the same panel, it should be an entertaining Friday morning no matter how you view the torture memo debate. Maybe not "Saturday night fight in the Teamsters' parking lot" exciting, but there will probably be some good jabs. Mr. Feldman should have his work cut out for him.

All of which brings us to the debate itself. Professor Yoo and his colleagues engaged in a legal exercise. Law recognizes few bright lines. The measured pace of time and precedent may reveal certain conclusions to be deficient in some respect or another. But we can rarely dismiss a legal opinion in categorical fashion. Most commentators have now, with the benefit of hindsight, questioned Professor Yoo's analysis. However, most ascribe no blame, acknowledging instead that people were acting in good faith at a time of intense pressure in the aftermath of 9/11 (including Jack Goldsmith, who replaced Judge Bybee and rescinded the torture memos).

Some, I know, have stated or implied that Professor Yoo is a war criminal. That makes me extremely uncomfortable. It is a needlessly pejorative label. War is by nature a criminal enterprise. It just is. The idea is to kill and destroy. In my opinion, it is dangerous to attach the label "war criminal" to civilians acting at a policy level who are not making decisions. It smacks of Robespierre. Soldiers accept mission responsibility. Things happen. In fact, actually, some really bad things happen at bad times. But if we as a society are prepared to conduct a parade of shame for legal opinions expressed by civilians, we will never attract the people, spirit, and minds we need to lead the nation. And, neither Judge Bybee nor John Yoo made any decisions. They tendered legal opinions. If they are culpable, we had better be prepared for the consequences. They exhumed Cromwell.

I recognize that the Office of Professional Responsibility concluded that Judge Bybee and Professor Yoo engaged in professional misconduct. However, OPR's opinion was not a decision, but a finding subject to review. David Margolis, Associate Deputy Attorney General, issued a sixty-nine page detailed Memorandum Decision on January 5, 2010. He concluded that Professor Yoo's analysis contained "significant flaws," but that no professional misconduct was committed. I suppose that, as with any other legal work product, one could disagree with his conclusions. However, I'm not sure we can dismiss his analysis as being an errant decision from a "single bureaucrat."

At the end of the day, the fundamental point is that if one is going to schedule a session addressing presidential wartime powers, Professor Yoo would be a featured speaker on anyone's short list. That is not an endorsement or indictment of his opinions. It is simply a recognition of a political reality. The decision to invite him as a keynote speaker is consistent with established criteria. The topic is timely and important. The speaker is knowledgeable. An invitation to speak does not and should not imply agreement with the speaker. If it did our keynote speakers would likely be uninteresting and uninformative.

On balance then my thinking is this—read the torture memos, OPR's report, and Mr. Margolis' decision (all of which are available on-line). Go to the Bar Convention. Go. See. Listen. Ask your own questions. But when everything is said and done, let's be Alaskans about this. We should welcome debate without rancor.

[1]Mr. Wax played a prominent role in representing Guantanamo detainees and has been described as a latter day Atticus Finch. This past December, the Federal Bar Association awarded Mr. Wax its prestigious Sarah T. Hughes Civil Rights Award. Writing in support of his nomination, Judge Anna Brown noted: "Steve has fiercely and unfailingly represented those who would not expect to have one of the best lawyers in Oregon to speak on their behalf and to fight for their rights. [He] could easily have been a rich man, but instead he chose to be a man with a rich life and to enrich the lives of others."

In the wake of Boumediene
The International Rule of Law remains in jeopardy

By Robert H. Wagstaff

The landmark U.S. Supreme Court decision of *Boumediene v. Bush*, 553 U.S. 723 (2008), holding that Guantanamo detainees were entitled to habeas corpus was seen as a watershed victory for the rule of law. Boumediene focused on the due process and fair trial requirements of the rule of law and was based on the habeas corpus clause of the United States Constitution of 1789, which traces its origins to the 1215 Magna Carta of England. In an earlier parallel decision, *A& Others v. Secretary of State for the Home Department,*[1] the highest United Kingdom court ruled that it was illegal and disproportionate to detain in Belmarsh Prison nondeportable aliens suspected of having terrorist ties with a suspicious organization. *A& Others* was based on the Human Rights Act 1998 and the enforceable European Convention on Human Rights. Despite the rulings in *Boumediene* and the preceding U.S. Supreme Court Guantanamo detainee cases,[2] many ongoing U.S. lower court decisions are in conflict with the rule of law and with human rights and humanitarian principles embodied in customary international law. There is no certainty that any of these post-*Boumediene* decisions will ultimately be reviewed by the U.S. Supreme Court, and some have already been denied review.

In the United States, political and ideological influences unfortunately affect judicial review of executive and legislative actions. The U.S. Supreme Court is sharply divided—one vote made the difference in *Boumediene*. Many lifetime legacy appointees in the lower federal courts support the concept of unbridled unitary executive power, and the Supreme Court is parsimonious in granting review. Many of the George W. Bush administration policies and positions have been retained by the current administration, and the residual consequences are grave. Many detainees who were abused and tortured remain in U.S. custody. The Obama administration has thus far not sought to hold anyone responsible for indefinite detention without charge or for torture and abuse; it has not even held an investigation to determine what occurred. The overall prospects for imposing meaningful and effective judicial limits on counterterrorism operations remain somewhat limited.

The United Kingdom and United States have taken somewhat dissimilar approaches in countering terrorism. The Bush war on terror, conjured in the wake of the attacks of September 11, 2001, served as a useful rhetorical and political tool, but it has no standing in law or fact. Nonetheless, the U.S. counterterrorism strategy is being carried out within a war paradigm. In the United Kingdom, on the other hand, strong lessons were learned during the Troubles in Northern Ireland, when the use of the military proved to be counterproductive and served principally to enhance the Irish Republican Army. Thus the United Kingdom determined to use principally the criminal law, involving long-term police operations, surveillance, arrest, and trial. The U.K. courts directly consider the issues presented for review within the context of the Human Rights Act 1998 and international human rights law, particularly the European Convention on Human Rights. The U.S. courts consider customary international law less directly, as it is not as embedded in domestic law.[3]

The United States' war paradigm was strongly condemned in a 2009 Report by the International Commission of Jurists:[4]

> The U.S.'s war paradigm has created fundamental problems. Among the most serious is that the U.S. has applied war rules to persons not involved in situations of armed conflict, and in genuine situations of warfare, it has distorted, selectively applied and ignored otherwise binding rules, including fundamental guarantees of human rights laws. This has not only had draconian consequences for the persons concerned, but also has utterly distorted humanitarian law's customary and treaty-based field of application.[5]

Nonetheless, the Obama administration continues to use the war paradigm. In May 2009, President Obama announced that:

> Al-Qaeda terrorists and their affiliates are at war with the United States, and those that we capture—like other prisoners of war — must be prevented from attacking us again. ... [T]here remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. ... [W]e are not going to release anyone if it would not endanger our national security, nor will we release detainees within the United States who endanger the American people.[6]

For President Obama, prevention includes targeted killings, use of remotely controlled Predator drones, and the inevitable resultant collateral damage.

In several recent decisions discussed below, the U.S. lower courts continue to operate within a war paradigm, affirming the assertion of the state secrets doctrine and denying *Bivens* claims[7] to those who seek redress for harm suffered.

El-Masri v. Tenet

El-Masri, a German citizen, was detained in Macedonia, rendered to the Central Intelligence Agency, and taken to a detention centre near Kabul, Afghanistan, where he was held incommunicado for months, beaten, and otherwise mistreated and abused. Five months after his detention, the CIA determined it was a case of mistaken identity and El-Masri was transferred to a deserted road in Albania and released. He made his way back to Germany on his own. He sued the CIA and the United States, claiming damages for kidnapping and abuse. The federal district court dismissed his claim, holding it could not be tried without revealing "state secrets" relating to the CIA. The U.S. Circuit Court of Appeals for the Fourth Circuit affirmed and the U.S. Supreme Court declined to hear the case:[8]

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In the wake of Boumediene

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> Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds,* 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953).[9]

"Reasonable danger" is broad enough for a coach and four. The courts' decisions translate to a no-go abdication, inconsistent with the rule of law's requirements for legal responsibility and accountability. The U.S. government is thus effectively put above the law.

Arar v. Ashcroft

Maher Arar was born in Syria and had been a citizen of Canada for seventeen years when, in 2002, he was questioned by U.S. authorities at John F. Kennedy International Airport in New York while returning to Canada. He was detained based on information given by the Canadian police, denied counsel and consul, and deported to Syria, where he was imprisoned in a grave-like cell and tortured. After a year of this unproductive abuse, the Syrians released him and he returned to Canada. The Canadian government conducted a judicial inquiry and concluded that Arar was actually innocent of any wrongdoing and was a victim of combined misfeasance by U.S., Syrian, and Canadian officials. The commissioner of the Canadian police resigned, and compensation was paid to Arar in the amount of ten million Canadian dollars. Arar brought a parallel action against the U.S. government in the U.S. courts, yet once again the state secrets doctrine was asserted and upheld by the courts.[10] In a sua sponte en banc 7-4 decision, the U.S. Court of Appeals for the Second Circuit dismissed Arar's claim. Dissenting judge and legal scholar Guido Calabresi wrote:

> [B]ecause I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay, I add a few words of my own, "... more in sorrow than in anger." Hamlet, act 1, sc. 2. … In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the [Torture Victim Protection Act] and of § 1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray. It does so, moreover, with the result that a person—whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under colour of federal law—is effectively left without a U.S. remedy.[11]

A *New York Times* editorial decried the subsequent denial of certiorari by the Supreme Court as "a bitterly disappointing abdication of duty."[12] The Obama administration opposed certiorari.

Rasul v. Myers

After prevailing in his 2004 Supreme Court Guantanamo habeas corpus case against President Bush,[13] Shafiq Rasul and others brought an action for damages against various government defendants.[14] They claimed that they had been tortured in violation of the Torture Victim Protection Act, the Geneva Conventions, and the Religious Freedom Restoration Act; that they had been denied due process of law guaranteed all "persons" by the Fifth Amendment; and that they were subjected to cruel and unusual punishment prohibited by the Eighth Amendment, thus giving rise to justiciable *Bivens* tort claims. But the U.S. Court of Appeals for the District of Columbia determined the officials were entitled to qualified immunity and the detainees were not protected persons under the Religious Freedom Restoration Act. The Supreme Court granted certiorari, vacated, and remanded for consideration in light of its opinion in *Boumediene*. On rehearing, the Court of Appeals held per curiam that *Boumediene* did not change the original result and the court reinstated its judgment.[15] Certiorari was then denied.[16] Once again the Obama administration opposed certiorari.

On the remand, the Court of Appeals determined that prior to *Boumediene* it could not have been readily apparent to any of the defendants that the detainees in Guantanamo had any clearly established enforceable rights whatsoever. In other words, defendants had good cause to believe that Guantanamo was in fact a legal black hole:

> No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights. At the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights—under the Fifth Amendment, the Eighth Amendment, or otherwise.[17]

It stretches credulity to suggest that officials, who were legally required to know that torture was a U.S. war crime,18 had no inkling that a federal court would have jurisdiction to adjudicate a resulting tort occurring on a U.S. Navy base, and they were thus free to torture and abuse at will, leaving no remedy for Rasul. *Boumediene* only applied to the question of habeas jurisdiction—not the legality of torture and the efficacy of the Geneva Conventions.

Al-Bihani v. Obama

Boumediene specifically left it up to lower courts to fashion procedures for habeas corpus. While in theory this is a useful procedure from an administrative standpoint, it means that there will be additional litigation and, for those affected, there will not be a readily foreseeable end. *Al-Bihani v. Obama* is a court of appeals decision addressing post-*Boumediene* procedures to be applied in habeas corpus actions.[19] Al-Bihani is a Yemeni citizen held at Guantanamo since 2002. The court found that he was lawfully detained and that continuing detention was lawful, notwithstanding the use of a preponderance of evidence standard, a presumption the government's evidence was accurate, and hearsay evidence deemed admissible if it appeared more likely than not that an accuser who was not present and not cross-examinable was speaking accurately.

The court held that the war powers granted by the post-9/11 Authorization for the Use of Military Force (AUMF) are not limited by the international laws of war because the authorization contained no actual statement that "Congress intended international laws of war to act as extratextual limiting principles for the President's war powers under the AUMF"20 and the laws of war as a whole have not been implemented domestically by Congress:

> [W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, *see Hamdi*, 542 U.S. at 520, 124 S.Ct. 2633, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers. Therefore, putting aside that we find Al-Bihani's reading of international law to be unpersuasive, *we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles.* The sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw.[21]

The court of appeals is saying in part that while the scope of the AUMF may be limited, the president's powers cannot be limited by anything or anyone. Treaty provisions are cast as "vague" and customary international law as "amorphous." Speaking for the court, Judge Janice R. Brown professes dislike of "amorphous customary principles" and "vague treaty provisions"—the binding fundamental human and humanitarian rights contained in the 1949 Geneva Conventions, the 1966 United Nations International Covenant on Civil and Political Rights, the 1948 UN Universal Declaration of Human Rights, the 1984 UN Convention Against Torture, and customary international law. As of the date of this writing, a petition for certiorari has not been filed.

Al Maqaleh v. Gates

On 21 May 2010, the U.S. Court of Appeals for the District of Columbia determined that three persons who had been detained by the U.S. military without trial at Bagram Air Base in Afghanistan had no habeas corpus recourse to the U.S. courts.[22] A three-judge panel ruled unanimously that, inasmuch as Bagram was the sovereign territory of another government and there were "pragmatic obstacles" to giving hearings to detainees in an active war, *Boumediene* did not apply. According to the panel, Bagram is different from Guantanamo. This was the result argued for by both the Bush and Obama administrations. But the detainees at issue had been captured outside of Afghanistan and brought to Bagram for incarceration. If this opinion stands, the U.S. will have a free hand to kidnap persons from other parts of the world and lock them away indefinitely at Bagram.

President Bush's claim of extravagant executive power—effectively creating a law-free zone in Bagram—has been embraced by the Obama administration. The district court's decision was in fact quite narrow and applied to a relatively small number of persons imported to Bagram who had been held without charge. U.S. District Judge John D. Bates had recognized that Bagram was an active theatre of war, but felt that objection to review could not properly apply to a detainee who was intentionally imported into the war zone. As of this writing, a petition for certiorari has not been filed.

The Case of Binyam Mohamed: An Unflattering Comparison

In the U.K. case of Binyam Mohamed the state secrets doctrine did not prevail.[23] Mohamed is an Ethiopian national and a legal resident of the United Kingdom. In April 2002 while attempting to return to the United Kingdom using a false passport he was arrested at the Karachi airport, and was turned over to U.S. authorities. Subsequently, he was subjected to U.S. extraordinary rendition and incarcerated in prisons in Pakistan, Morocco, and Afghanistan. He alleges that while in Morocco interrogators tortured him using scalpels and razor blades, repeatedly cutting his penis and chest. He was next transferred to Guantanamo and allegedly subjected to continued abuse and humiliation.

On August 7, 2007, Mohamed was one of five Guantanamo detainees that British Foreign Secretary David Miliband requested be freed. On June 28, 2008, the *New York Times* reported that the U.K. government had sent a letter to Mohamed's U.K. attorney confirming they had information about Mohamed's allegations of abuse.[24] This spawned a lawsuit in the U.K. courts requesting that the Foreign Office be compelled to turn over their evidence.[25] On August 21, 2008, the U.K. trial court found in Mohamed's favor, ruling that the exculpatory material should be disclosed as it was essential for his defense in the United States.[26] The documents were in fact disclosed but they were not released to the public. In October 2008, it was announced that the U.S. charges against Mohamed and four other captives at Guantanamo were being dropped.

On February 23, 2009, almost seven years after his arrest, Mohamed was returned to the United Kingdom where he was released after questioning.27 Shortly thereafter, Mohamed publicly claimed that British intelligence had colluded with his U.S. interrogators in the torture and abuse that led him to make false confessions. Mohamed sought public release of the discovery materials to support his claim. The Obama administration requested that the discovery material not be released publicly because it would prejudice the special relationship between the two countries. The foreign secretary concurred. After intense American pressure, including warnings from U.S. Secretary of State Hillary Rodham Clinton, the Foreign Office argued that summary publication could cause irrevocable damage to intelligence sharing between the United States and Britain. Rejecting the government's protestations, the

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three-judge appeals panel ruled that seven paragraphs that give details of "the cruel, inhuman and degrading treatment" administered to Mohamed by American officials were to be made public inasmuch as the public had a right to know. State secrets were not recognized. The foreign secretary decided not to appeal. This was the first time that a British court had been so blunt about its disapproval of interrogation techniques utilized by the Bush administration. The court observed that had these techniques been carried out under the authority of British officials, they would be breaching international treaties:

> Although it is not necessary for us to categorise the treatment reported, it could easily be contended to be at the very least cruel, inhuman and degrading treatment of [Mohamed] by the United States authorities.[28]

A fair reading of the documents now produced supports the contention that, at best, the United Kingdom acquiesced to the U.S. programs of rendition and torture or, at worst, were eager participants.[29] More documents are to be released in the future, and that litigation continues. Meanwhile, British Prime Minister David W.D. Cameron has agreed to a judge-led inquiry into all of the pending claims that Britain's security forces were complicit with the United States in the torture and abuse of terrorism suspects.[30]

On November 16, 2010, the U.K. government announced it had agreed to pay Binyam Mohamed and fifteen other British citizens and residents several million pounds in settlement of their claims for the United Kingdom's complicity in torture and abuse they suffered at Guantanamo and rendered U.S. secret sites. The U.K. government will continue with plans for a formal judicial inquiry led by a retired appellate jurist.[31] Under these circumstances it will be difficult for the United States to continue to evade its responsibility for torture and abuse.

Mohamed v. Jeppesen Dataplan Inc.

On September 8, 2010, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit ruled 6-5 in *Mohamed v. Jeppesen Dataplan Inc.*[32] that the same Binyam Mohamed and four other detainees could not proceed with a parallel private civil suit against Jeppesen Dataplan, a subsidiary of the Boeing Company, because of the state secrets doctrine enunciated in *U.S. v. Reynolds*.[33] Mohamed and others had initiated their lawsuit in 2007 under the Alien Tort Statute. Jeppesen Dataplan arranged the rendition flights that flew Mohamed and the others to Morocco, Egypt, and Afghanistan, where they were tortured. The U.S. government intervened in the litigation, asserting the state secrets doctrine. A three-judge appeals panel had held in August 2009 that the suits could proceed.[34] Invoking the state secrets doctrine, the U.S. Department of Justice sought rehearing en banc urging that the claims be dismissed.

The five-judge en banc dissent pointed out that the plaintiffs never had a chance to present nonsecret evidence. It was publicly disclosed that, according to the sworn nonsecret declaration of Robert W. Overby, the former director of Jeppesen International Trip Planning Services:

> "We do all the extraordinary rendition flights," which he also referred to as "the torture flights" or "spook flights." Belcher stated that "there were some employees who were not comfortable with that aspect of Jeppesen's business" because they knew "some of these flights end up" with the passengers being tortured. He noted that Overby had explained, "that's just the way it is, we're doing them" because "the rendition flights paid very well." [35]

The case was dismissed before Jeppesen had filed an answer to the plaintiff 's complaint. The dissenters note:

> Plaintiffs have alleged facts, which must be taken as true for purposes of a motion to dismiss, that any reasonable person would agree to be gross violations of the norms of international law, remediable under the Alien Tort Statute. They have alleged in detail Jeppesen's complicity or recklessness in participating in these violations. The government intervened, and asserted that the suit would endanger state secrets. The majority opinion here accepts that threshold objection by the government, so Plaintiffs' attempt to prove their case in court is simply cut off. They are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.[36]

The seemingly apologetic majority peculiarly awarded the losing plaintiffs all costs on appeal and suggested the alternate remedy of asking Congress for reparations as were awarded to the plaintiffs in *Korematsu*,[37] a remedy that occurred some fifty years after the fact. As of this writing no petition for certiorari has been filed.

Al-Kidd v. Ashcroft

In the September 4, 2009, decision in the case of Abdullah al-Kidd, an African American U.S. citizen born in Kansas and a successful college football athlete who converted to Islam, the Ninth U.S. Circuit Court of Appeals allowed a lawsuit to proceed against former attorney general John D. Ashcroft, alleging abuse of process through the material witness statute.[38] The statute permits the court to place restrictions on travel and residence of witnesses when there is a risk they will not be available for trial.[39] It does not permit detention for investigation. Nonetheless, al-Kidd was detained in jail for investigation under the pretext that he was a material witness in a criminal case. He has never been called as a witness or charged with a crime.

The record showed that Ashcroft had previously announced publicly that he would employ the material witness statute to prevent "new attacks." Federal Bureau of Investigation director Robert S. Mueller III publicly identified al-Kidd as a "major success" in "identifying and dismantling terrorist networks." Al-Kidd was detained in a maximum security facility, shackled, repeatedly strip-searched, and released from his twenty-four-hour illuminated cell for only one to two hours per day. Subsequently he was effectively placed under house arrest, separated from his wife and two children, and lost his job. His detention was based on an FBI affidavit that said he had a one-way $5,000 first-class ticket to Saudi Arabia and that he was believed to have information critical to a prosecution. That information has never been identified. In fact, al-Kidd was going to Saudi Arabia to study Islam and had a $1,700 round-trip coach ticket. The affidavit failed to disclose that he was married and had two children, that all were U.S. citizens, and that he had fully cooperated with the FBI in the past.

Al-Kidd's subsequent civil action seeks to hold Ashcroft personally liable in tort for abuse of process. Ashcroft claimed absolute prosecutorial immunity. In a 2–1 decision in al-Kidd's favor, the Ninth Circuit disagreed. Certiorari was granted on October 18, 2010.[40] U.S. Supreme Court Justice Elena Kagan recused herself. Justice Anthony M. Kennedy appears to be the swing justice. A 4–4 split would result in affirmance.

Unlike in the United Kingdom, the U.S. administration, Congress, and many courts have steadfastly declined to make any investigation or inquiry into U.S.-sanctioned torture and abuse, notwithstanding that it is only through such a review and allocation of responsibilities that steps can be taken to insure their nonrepetition. The public has extracted no political price for torture and there appears to be no interest in assessing the consequences. Enhanced interrogation primarily affects foreign nonwhite Muslims. Most of the public appears ignorant of the issues and satisfied with the refrains of the apologists that torture works and the detainees are the worst of the worst, despite evidence to the contrary and notwithstanding that Article 12 of the Convention Against Torture, a treaty ratified by the U.S. Senate, requires the United States to "proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

A fair reading of the documents now produced supports the contention that, at best, the United Kingdom acquiesced to the U.S. programs of rendition and torture or, at worst, were eager participants.

President Obama has recently authorized the targeted killing of an American citizen, Anwar Al-Aulaqi, in Yemen.[41] The American Civil Liberties Union and the Center for Constitutional Rights have brought suit to enjoin the government from extrajudicially executing a citizen by such an ex parte executive fiat.[42] The Department of Justice has moved for dismissal, claiming, among other things, that the decision to target and kill an American citizen is a "political question" and that information "properly protected by the military and state secrets doctrine" would be revealed.[43] There are no public guidelines for targeted killings, there is no limitation to targets of last resort, and there is no judicial or independent oversight. [44]

Although the United Kingdom is not doing everything perfectly,[45] as David Cole suggests in the title of his book, "The Brits Do It Better."[46] Perhaps Edward Coke's "gladsome light of jurisprudence"[47] may in the end shine on the United States from across the pond, exposing the extent of the torture and abuse officially sanctioned at the highest levels of government under the Bush administration.

Robert H. Wagstaff has practiced law in the western United States since 1967, emphasizing litigation and constitutional appellate practice. He has successfully argued two cases before the U.S. Supreme Court. He is former president of the Alaska Bar Association and a bar-elected member of the Alaska Judicial Council. He currently is a doctoral student at the University of Oxford, where he has been awarded two postgraduate law degrees.

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Alaska Bar Association 2011 CLE Calendar
MARK YOUR CALENDAR!

March 15, 2011	8:30 a.m. - 12:30 p.m.	Current Topics in Environmental Law	Hotel Captain Cook
March 22, 2011	8:30 a.m. - 4:30 p.m.	Elder Law: VA Benefits and Special Needs Trusts	Hotel Captain Cook
March 30, 2011	8:30 - 11:45 a.m.	Contempt of Court: A Lynching that Changed the American Justice System	Hotel Captain Cook
April 15, 2011	8:30 - 10:30 a.m.	From the Bar to the Bench: Promoting Diversity at the Judiciary Bench	Snowden Training Center
April 20, 2011	8:30 a.m. - 4:30 p.m.	Great! Adverse Depositions: Principles & Principal Techniques	Hotel Captain Cook
May 24, 2011	8:30 a.m. - 12:00 p.m.	Practicing Law in the 21st Century	Dena'ina Convention Center

All programs subject to change without notice.
Go to www.alaskabar.org for more CLE info.

Bar People

Baxter Bruce & Sullivan adds associate

The Law Office of Baxter Bruce & Sullivan announced that Todd J. Araujo has joined the firm as an associate attorney.

Born and raised on Martha's Vineyard, MA, Araujo attended the College of the Holy Cross in Worcester, MA and received his J.D. degree and Indian Law certificate from the University of New Mexico School of Law in 1997.

Prior to entering private practice, he was the deputy director for the Office of Tribal Justice in the U.S. Dept. of Justice, focusing on tribal self government, sovereignty and law enforcement. Araujo also was a staff attorney for the National Indian Gaming Commission and was the first court prosecutor for the Pueblo of Laguna in New Mexico. He is a member of the Wampanoag Tribe of Gay Head and served on the tribe's judicial task force.

A former board member of the D.C. Native American Bar Association, he currently is vice chair of the American Bar Assn. Section of Environment, Energy and Resources, Native American Resources Committee.

Nora G. Barlow has become a member of the law firm of DeLisio Moran Geraghty & Zobel, P.C. Ms. Barlow's practice consists of litigation before both state and federal courts and administrative agencies with an emphasis on representation of institutional clients in areas of employment, personal injury and commercial litigation.

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Virginia Lawyers magazine, Vol. 59, December, 2010.

Endnotes:

1 [2004] UKHL 56, [2005] 2 AC 68.

2 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

3 But *see Hamdan* (n 2).

4 Nongovermental organization based in Geneva, devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. Mary Robinson, president of the International Commission of Jurists, is the former president of Ireland and the former United Nations high commissioner for human rights. She was awarded the Presidential Medal of Freedom by President Obama in July 2009.

5 *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights,* (Executive Summary, Geneva, 2009), at 9.

6 Remarks by the president on national security, May 21, 2009 http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/

7 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

8 *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (ED Va 2006), Order affirmed by 479 F.3d 296 (4th Cir 2007), cert. denied 552 U.S. 947 (2007).

9 *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir 2007), 302.

10 *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir 2009), cert. denied 130 S.Ct. 3409.

11 Ibid 630.

12 "No price to pay for torture," *New York Times,* 15 June 2010.

13 *Rasul v. Bush,* 542 U.S. 466, 124 S.Ct. 2686 (2004).

14 *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008).

15 *Rasul v. Myers*, 563 F.3d 527 (CA DC 2009).

16 *Rasul v. Myers*, 130 S.Ct. 1013 (2009).

17 *Rasul v. Myers* (n 15) 530 (2009) (footnotes omitted).

18 18 USC § 2441.

19 *Al-Bihani v. Obama*, 590 F.3d 866, 870 (DC Cir 2010), rehearing en banc denied by —- F.3d —- (D.C. Cir. August 31, 2010).

20 Ibid.

21 Ibid 871-2 (DC Cir 2010) (emphasis added).

22 *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

23 *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65.

24 http://www.nytimes.com/2008/06/21/world/europe/

21 gitmo.html?_r=1&ref=raymond_bonner

25 http://jurist.law.pitt.edu/paperchase/2008/07/uk-guantanamo-detainee-asks-court-to.php

26 *Mohamed, R v. Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2048 (Admin); *Mohamed, R v. Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2100 (Admin).

27 http://www.guardian.co.uk/uk/2009/feb/23/binyam-mohamed-guantanamo-plane-lands

28 *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65, Appendix (x).

29 http://www.guardian.co.uk/law/interactive/2010/jul/14/toture-files-key-passages

30 Cite Guardian 29/6/10 "David Cameron agrees terms of British torture inquiry." http://www. guardian.co.uk/uk/2010/jun/29/ david-cameron-uk-torture-inquiry

31 "Government to compensate ex-Guantánamo Detainees," BBC (16 November 2010).

32 614 F.3d 1070 (9th Cir. 2010).

33 345 U.S. 1 (1953).

34 *Mohamed v. Jeppesen Dataplan Inc.,* 579 F.3d 943.

35 Mohamed (n 31) 1096 FN 5.

36 Ibid 1094.

37 323 U.S. 214 (1944).

38 *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009).

39 18 USC § 3144.

40 *Ashcroft v. al-Kidd*, 79 USLW 3062.

41 S. Shane, "U.S. Decision to Approve Killing of Cleric Causes Unease" New York Times 13 May 2010 http://www.nytimes.com/2010/05/14/world/14awlaki.html

42 *Al-Aulaqi (al-Awlaki) v. Obama,* 10cv1469, U.S. District Court, District of Columbia (Washington) Complaint for Declaratory and Injunctive Relief <http://216.86.138.142/complaint.pdf>.

43 *Al-Aulaqi (al-Awlaki) v. Obama,* 10cv1469, U.S. District Court, District of Columbia (Washington), Opposition to Plaintiff 's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss http://216.86.138.142/dojmtd.pdf

44 "Lethal Force Under the Law," *New York Times* (October 9, 2010).

45 Many of the U.K. legal processes are infected with the virus of secrecy. Control orders, preventive detention, special advocates, and the Special Immigration Appeals Commission are still operative. Secret evidence is being used with increasing frequency in deportation hearings, control order proceedings, parole board cases, asset freezing applications, precharge detention hearings in terrorism cases, employment tribunals, and even before planning tribunals. In some criminal cases secret evidence is never made public and anonymous testimony is presented.

46 D. Cole, *The Brits Do It Better, New York Review of Books*, 12 June 2008.

47 Edward Coke, *First Institute,* Epilogue.

Stoel Rives Anchorage office welcomes three attorneys

Melanie Baca Osborne

Meghan Kelly

Benjamin W. Spiess

Stoel Rives LLP, a full-service U.S. law firm, is pleased to announce that Melanie Baca Osborne, Meghan M. Kelly and Benjamin W. Spiess have joined its Anchorage office.

Osborne is of counsel in the labor and employment group and has experience with a broad range of issues, including policy development and enforcement, recruitment, dispute resolution, training, compliance, compensation systems and employee counseling. She has represented ANCSA corporations, tribal governments and tribal health organizations regarding employment law, litigation, federal contracting and corporate matters in state and federal courts and before administrative proceedings. Osborne is a graduate of the University of Washington School of Law (J.D., 1999) and the University of Alaska (B.A., 1996). She is admitted to the state bar of Alaska, the U.S. Court of Appeals for the Tenth Circuit, the Federal Circuit Court of Appeals, the Alaska Federal District Court, the U.S. Federal Claims Court and the U.S. Supreme Court.

Kelly is an associate in the Litigation group. Before joining Stoel Rives, she was a law clerk for the Honorable Joel Bolger at the Alaska Court of Appeals (2009-2010) and the Honorable Steve Cole at Kodiak Superior Court (2008-2009). Kelly is a graduate of the University of Denver Sturm College of Law (J.D., 2008) and the University of Wisconsin, Madison (B.A., History and Psychology, 2003, with distinction). She is currently admitted only to the state bar of Colorado.

Spiess is an associate in the Corporate and Real Estate groups. He has represented clients in a variety of real estate matters, including the purchase and sale of commercial real estate and timberlands, commercial leasing, conservation easement transactions, land use and zoning matters, mortgage financings, foreclosure and bankruptcy, and carbon sequestration projects. Spiess has also represented buyers and sellers in a variety of corporate matters, including mergers, equity and asset transactions, liquidating corporations and limited liability companies, and drafting organization documents and managing governance matters for corporations, limited liability companies, statutory trusts and partnerships. He is a graduate of Boston College Law School (J.D., 2006) and Middlebury College (B.A., 1994), and is currently admitted only to the state bar of Massachusetts.

Historical Bar

With Delaney's passing, a chapter of Anchorage history closes

By Kelly Taylor

The passing of Jim Delaney on December 28 closed a chapter in the nearly century-long history of the Delaney family in Anchorage. Jim's father, J.J. Delaney, who would become mayor, first moved here to work on the railroad — and it was the railroad that led to the establishment of Anchorage in 1914. Jim, who would begin practicing law when Alaska was yet a territory, grew up at 303 K Street — the familiar address now home to the Boney Courthouse.

On Monday, February 15, 1932, the following birth announcement appeared in the *Anchorage Daily Times,* under the headline, "New City Official Is Sunday Arrival":

> *While the council has not yet formally authorized any increase in the number of municipal office-holders, there arrived in the city yesterday a young man who will serve the municipality as an aide to his honor, Mayor J.J. Delaney, with the possibility that he soon will become supreme dictator of the Delaney household. The young man in question is a son, and a fine one, too, who arrived at the Anchorage Hospital yesterday afternoon.*
>
> *The report today is that Mrs. Delaney and the baby are getting on famously.*

That young man was James Joseph Delaney, Jr. ("Jim"), born to James Joseph Delaney, Sr. ("J.J."), then mayor of Anchorage, and Nancy Dillon Delaney.

J.J. and Nancy had separately emigrated from Ireland during the Irish Civil War in the 1910s. J.J. immigrated to Boston and, as his son told the story, had two job offers: work on a ranch in the State of Texas or work on a railroad in the Territory of Alaska. J.J. flipped a coin and, lucky for Alaska, that flip brought him here.

J.J. left Alaska when he enlisted to fight for the United States during World War I. After finishing his term of service, J.J. met Nancy. The two had grown up in adjoining counties in Ireland but met in New York City and, despite having no money, married in 1927 at the landmark Saint Patrick's Cathedral.

J.J., who had become enamored with Alaska, came back with his wife to build a life. He returned to work with the railroad, became assistant general manager, and eventually ran for mayor. There was a rumor — not confirmed by J.J. himself — that members of the Ku Klux Klan burned a cross in front of his home on the night of the mayoral election. But whatever the resistance to his candidacy, J.J. was elected and served as mayor of Anchorage from 1929-32. It is for him the Delaney Park Strip is named.

Although Jim would become the attorney of the family, J.J. tried, for a time, to pursue that same career. While working for the railroad, J.J. apprenticed for attorney Warren Cuddy. He planned, as permitted under the law at that time, to become an attorney by apprenticeship. But when a small boat owner sought Cuddy's representation in a lawsuit against the railroad, J.J. had to choose between remaining with Cuddy as an apprentice or remaining with the railroad. Thinking of his family's welfare, J.J. chose the railroad, and the apprenticeship option was eliminated soon after.

When asked whether his father's interest in the law influenced his decision to become an attorney, Jim Delaney declined to respond: "I keep some things for myself," he said.

Growing up in the Territory of Alaska, Jim went fishing with his father and sisters, Nancy and Loretta, and hunted rabbits on the family's property in Indian. He also experienced the ultimate teenage rite of passage by obtaining his driver's license. But times were different then: after Jim passed the test, a territorial official wrote out on a sheet of notebook paper, in long hand, "You are entitled to drive," and stamped the page with the territorial seal.

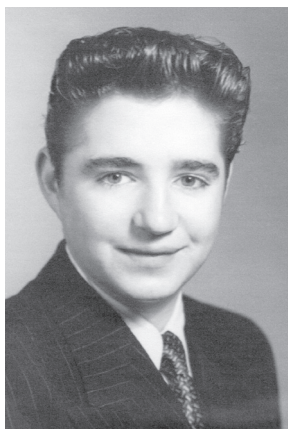
Jim graduated from Anchorage High School, and he attended Gonzaga University, the University of Colorado, Saint Louis University, and Saint Louis University Law School. He took one year off from his studies to fight rheumatic fever on the family property in Indian, and he graduated from Saint Louis University Law School in 1956 — the same year he was admitted to the Alaska Bar. His father introduced him to a few local attorneys, and those attorneys introduced him to others. As Jim put it, he offered to work cheaply enough that Ray Plumber hired him. Plumber was working in a partnership with another lawyer at the time, and Jim described him as "one of the finest trial lawyers I've ever seen." Jim won a few cases and eventually became Plumber's partner. After Plumber died, Jim took over, eventually establishing Delaney Wiles, Inc.

Howard Lazar, current president of Delaney Wiles, Inc., related one particularly colorful moment from Jim's career in our state's early years: According to legend, Jim, who was inclined to make lengthy and sometimes indecipherable objections, was involved in a deposition and was making his usual objections. At some point, one of the other lawyers threatened physical violence against Jim if he didn't stop objecting. Undeterred, Jim objected to the next question "in his usual, lengthy way." But "he didn't finish the objection because, depending upon which version of the story you believe, Jim either got socked in the jaw or the attorneys were rolling around on the ground, fighting it out together."

Lazar, who once worked closely with Jim, described Jim as a brilliant man who had the unique ability to see the different sides of an issue and was well-respected by lawyers on all sides of a case. As John Havelock explained, Jim was "a guy who kept his word, and he was honest in every respect." Jim handled a wide variety of different kinds of cases but specialized in the defense of healthcare providers, including physicians and hospitals.

Jim also represented his father when the state condemned the Delaney property at the corner of K Street and Third Avenue, along with four adjacent lots, to build the Boney Courthouse. Around 1971, the state cleared the Delaney property of the Delaney house, log cabin, and several apple trees that J.J., a gardener, had carefully tended for their fruit. The trees had stood in a row running south from Third Avenue, produced apples of different sizes, and flowered in the springtime. They were lovely enough that John Beaton, a neighbor, asked for a cutting in the late 1930s and grew a crab apple tree in his yard. At the suggestion of Justice James Fitzgerald, the state did not clear the Beaton tree, which still stands in the courthouse parking lot.

With Suzanne, his wife from 1963 to 1983, Jim had three sons: John, Daniel, and Tim, who passed away in 1999. While holding dear many childhood memories of his father, John speculated that his father's greatest gift was "imparting to us his passion for learning." John described his father spending hours with them at the downtown Book Cache and taking them to foreign films at Capri Cinema and called his father's "immense curiosity about everything under the sun" a wonderful inspiration to him and Dan.



Jim Delaney in high school.

J.J. Delaney in 1927.

On October 21, 1988, after Jim and Suzanne had divorced, James Wanamaker set Jim up on a blind date with Verona Gentry, a talented midwife. She was a widow of four years and the mother of Andrea Gentry Buschman of New Mexico and William F. Gentry II of Iowa. Jim and Verona met at the Whale's Tail and, by the end of the evening, were dancing. At the moment Jim took her hand to guide her to the dance floor, Verona said, she knew there was something very special between them. They danced to "Could I Have This Dance (for the rest of my life)" and were partners in life for 22 years.

Jim Delaney died on December 28, 2010, and a memorial service was held for him on January 12 at Holy Family Cathedral. At the service, Verona's son Reverend William Gentry opened his remarks with a reading from the Gospel of John when Jesus describes the Spirit of God as "the Advocate." As Reverend Gentry explained, the word translated as "advocate" comes from the Greek word for "lawyer" and, indeed, the Spirit of God acts in the way a lawyer does — He testifies, and He sparks faith in the hearts of people. Jim, who advocated for his clients for more than 30 years, "was a lawyer through and through."

John concluded his remarks at the service by describing his father as "a man of great faith" with the kind of true religious belief "that quietly inspires." His father confronted his mortality, John explained, with the courage and bravery of one "absolutely certain that there is a better life beyond this one." And so that faith inspired John to believe that his father had been reunited with those who preceded him in death: his father and mother, his sisters, and his son, Tim.

Jim is survived by son John Delaney, daughter-in-law Elizabeth, and grandson Luke of New York City; son Daniel Delaney of Los Angeles; and his life partner and companion Verona Gentry.

Information in this article was drawn from the following sources: Jim Delaney's Memorial Service, "Mass of the Resurrection," Action Video Productions (Jan. 12, 2011); Interview with Jim Delaney, in Anchorage, Alaska (June 22, 2010); Sheila Toomey, "Courthouses come and go, but aging crab apple stays," Anchorage Daily News, June 2, 1995; "New City Official Is Sunday Arrival," Anchorage Daily Times, Feb. 15, 1932.

"Main Street" Anchorage in 1917. On the back of this photograph, J.J. wrote, "The Metropolis of Alaska." This street is today's 4th Avenue.

Delaney home at K Street and Third Avenue in Anchorage. (Where the Boney Memorial Courthouse sits today.)

J.J. and Jim Delaney on September 4, 1938.

ECLECTIC BLUES

Like a rockin' LP, what goes around . . .

By Dan Branch

Those readers who enjoyed romantic evenings in the 80's drinking Everclear and listening to the Dead Kennedys Plastic Surgery Disaster album may be shocked to read further.

Early in this century Jello Biafra, the former lead singer of the band, entangled himself in litigation with three former members of the band and lost.

For the unwashed, the Dead Kennedys formed a punk rock band that performed from 1978 to 1986. The name of the band was a tribute to the ideals of John and Robert Kennedy. I am not sure how those ideals were served by their classic song, Let's Lynch the Landlord. ("Let's lynch the landlord / Let's lynch the landlord / Let's lynch the landlord man / There's rats chewin' up the kitchen / Roaches up to my knees").

The band's classic sound was heard after their break-up in 1986 and in 1998 they were still selling 134,000 records a year. In 1981, the Kennedys formed Decay Music, a general partnership. The members of the band were equal partners, with each having a one-quarter voting and ownership interest. True to the creed, they didn't get around to putting the partnership on paper until 1991.

After the break-up, Jello Biafra--known to people in his church as Eric Reed Boucher--along with fellow band member East Bay Ray and some other guy, formed Alternative Tentacles Records (ATR). Decay Records gave ATR a license to release Dead Kennedys records and otherwise further the punk cause.

"Nonetheless, the judge missed a great opportunity to explore the concept of the fiduciary duties of punk rockers."

By the mid-1980's Jello was sole owner of ATR. Thinking that the band's great fame made any promotional work unnecessary, Jello ignored it. This inattention cost the Dead Kennedys over $159,000 in lost royalties. In addition ATR paid the Kennedys a lower royalty rate than the other bands on its label like NoMeansNo, Neurosis and Voice Farm. This was probably just another bad decision on Jello's part to go along with his ill-fated-prank run for mayor of San Francisco in 1981 and the actions that placed him on trial for distributing harmful matter of a nonmusical nature.

For five years Jello battled Decay Records and former Dead Kennedys East Bay Ray, Flouride, and D.H. Peligro through the halls of various state and federal courts where they accused each other of breaching fiduciary duties.

All this is described in an unpublished opinion by Judge J. Rivera whose dry prose, at first read, appears to drain all the color from the Dead Kennedys afterlife. It is possible the this opinion is really a masterpiece of irony being filled, as it is, with lines like, "In any event, [Jello] Biafra's current position is untenable."

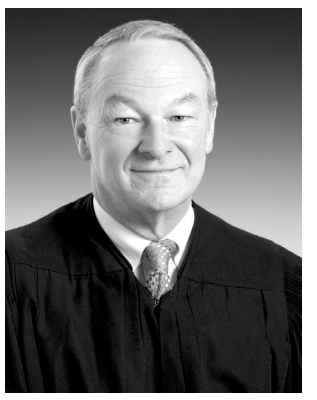
Nonetheless, the judge missed a great opportunity to explore the concept of the fiduciary duties of punk rockers. After an expenditure of a great deal of royalty money by all sides, Jello's jury found that he breached his fiduciary duty to the tune of $10,000 and that his malicious acts toward East Bay and the boys should cost him $20,000 in punitive damages. The jury, finding that Jello suffered $5,000 in damages from East Bay Ray's fraud, threw him a bone.

Foolishly, Jello appealed the judgment, allowing Judge Rivera to reverse the judgment against East Bay Ray.

Living in Bethel at the time, I never followed the Dead Kennedys during their performing years. Casey Kasem didn't feature them on his America's Top 40 program. This program, that played in Bethel on Armed Forces Radio every Saturday afternoon, was my only window into the world of rock and roll until I met a devout Mormon woman with an encyclopedic knowledge of Punk Rock. She brought the Ramones into my life (considered to be the first-born punk rock band). For that I have always been grateful. Hoping that Joey's & Johnny's band would never turn to litigation to resolve their creative differences, I did a quick search and found Richard Reinhardt (aka Richie Ramone and Richie Beau) v. John Family Trust of 1997, Taco Tunes Inc. et. al. (Alleging digital download copyright infringement of tunes he wrote.)

Hey Ho, Oh No! Richie sued Johnny's heirs. Someone say it ain't so.

Miller appointed to Superior Court



Gregory A. Miller

Gov. Sean Parnell appointed Gregory A. Miller to the Anchorage Superior Court on Jan. 3. Miller will fill the vacancy created by the retirement of Judge Stephanie Joannides.

Miller, of Anchorage, has practiced law for 22 years, most recently in private practice with the law firm of Birch Horton Bittner & Cherot, where he is also a shareholder. He serves as a litigation attorney with broad experience in civil, criminal, and administrative law.

Miller received a juris doctorate degree in 1987 from the Northeastern University School of Law in Boston He is a member of the Iditarod Air Force, the president of the Gold Nugget Triathlon, and a member of the Anchorage Triathlon Club.

"Mr. Miller's broad experience has prepared him for service in the judiciary," said Gov. Parnell in a January press release. "He will quickly become an excellent addition to the Anchorage Superior Court."

His installation ceremony will be held Mar. 16 in the Boney Memorial Courthouse, Supreme Courtroom, at 3:30 p.m.

Territorial Dinner set for June 10

William Tull takes his turn during the dinner "story hour" in 2010.

If you've been practicing law in Alaska for 40 years or more, mark your calendars for the annual Territorial Lawyers dinner. The annual event will be held June 10 at Aladdin's Restaurant at Tudor Road and the Old Seward Highway (Anchorage).

This will be the 14th year that the elder (and founding) members of the Bar have met for an informal evening since the first event in 1998. In recent years, the invitations have been "expanded" to include not only the Territorial lawyers and their spouses, but those who have achieved 40-year status in the 49th stste.

For more information, contact Jim Powell (planepowell@gci.net, 229-1013); or Lucy Groh for reservations (cjgroh@alaska.net, 760-567-5111).

THE KIRK FILES

High Plains Shyster (or, Bill 'em High)

By Kenneth Kirk

It couldn't have been more of a ghost town, if Zane Grey had built it himself. Most of the windows were boarded up, and the only sound to be heard, as the stranger's horse ambled into town, was the creaking of the door of a long-abandoned store, moving back and forth in an empty breeze. An obligatory tumbleweed rolled down the street, the only sign of life in a life-forsaken place. The horse's hooves echoed down the forlorn main street.

The stranger pulled his horse to a slow halt and looked around. To all appearances, there wasn't a sole about. Then he finally noticed an old-timer, leaning back on a chair in front of a boarded-up saloon, almost blending into the background.

"Morning, old-timer," said the stranger, "do ya know how much farther it is to Estateplanningville?"

The old-timer looked him up and down with disinterest, and finally replied "This here's Estateplanningville. And you'd best move on, stranger."

The stranger, taken aback, said "I ain't done anything to cause ya to roust me. I been riding 400 miles from St. Joe, looking for the gold mine at Estateplanningville. Been hearing about it for years. Why would you want me to leave?"

The old-timer spat on the ground, leaned back in his chair, and said "I can tell ya ain't no rich client. Only kind we're interested in here. I'd wager ya ain't no lawyer either, from the look of ya."

"You'd lose that wager," said the stranger. "I am a lawyer. Did some clerkin' back East. Now I come to make my fortune in Estateplanningville".

The old-timer snorted. "Ya ain't got no tax LLM, I can tell that though. You'd be showing it off if ya did. Nobody makes it in this town without the LLM. If ya ain't got that, and ya ain't a rich client, we got no need for ya, so move along." And he spat again and added "We got enough folks here, we don't need no more".

The stranger looked around. "Enough folks?" He asked. "I don't see no folks at all. I heard this was a thriving practice area. Where is everybody?"

The old-timer looked down at his feet, a bit deflated. "Lotta folks bailed out the last few years. It was them dang Bush tax cuts," he said, a tinge of bitterness in this voice. "Used to be, anybody with more than about $600,000 in assets, needed serious tax planning. Heck, they were looking at a 55% tax rate, which is like one for you, one for Uncle Sam, and then some more for Uncle Sam. Back then, them clients just handed over their poke to us, signed whatever we told 'em, and didn't ask too many questions. It was a gold mine, alright. Good times, good times indeed."

The stranger puzzled over this for a moment. "I know that's right, but... well, the tax cuts were ten years ago. I heard times were still good here, it couldn't have been more than 6, maybe 7 years ago."

The old-timer nodded. "And it was still good, at first. The tax rate went down to 45%, sure, but that was still high enough to get most people's attention. But it was the lifetime exemption, the amount ya git afore the tax rate kicks in, that got us. It went up to one million bucks, but an awful lotta people had more than one million in assets, 'specially when you count life insurance. Typical retiree had a few hundred thousand in IRA and 401(k) accounts to start with, and a paid-up house, maybe a few mutual funds. Yeah, there were plenty of folks with a million. But then every few years, the exemption amount crept up. One-point-five million a few years later. Few years ago, musta been about Aught-6, it automatically went up to two million. That meant more and more folks didn't need to do any estate tax planning, just regular, non-tax estate planning. And then two years ago, it jumps to 3.5 million. Now that's when we felt it. Not a whole lot of clients left in that range."

"And that's when everybody left town?"

"Nope," the old-timer replied. "See, them tax cuts were s'posed to expire in 2011. The exemption was gonna go all the way back to one million. Folks around here could see the light at the end of the tunnel."

The stranger paused to light a cheroot. "I heard that didn't happen though. They extended it, right?"

"That they did," the old-timer said mournfully. "That they did. Last minute, too. Two weeks before 2011 kicked in, they finally cut a deal. Now it's a five-million dollar exemption. Can you imagine? Five mill! How many people need sophisticated estate tax planning if the lifetime exemption is five million dollars? Not many, let me tell you."

"Any at all?" The stranger queried.

"A few old rich fellas and widders, living in the mansions on the ridge there," said the old-timer, "but even their numbers are dwindling, what with the economy and all." And he put his head in his hands.

"No way they'd extend the tax cuts again, just before the next election, would they?"

"So where did all the folks go," asked the stranger, "I mean, not the lawyers, but the clients? They just wandering around on their own?"

"Some are, some are. A few went over to Conduit Creek, using a kind of trust that helps with the income tax bite on inherited IRA's. Some headed over to Medicaid Mountain, trying to keep the State from taking their assets if they end up in a nursing home. Most, though, headed down the road to Familytrust Town, getting plain-vanilla trusts that don't have no sophisticated tax planning in 'em. Disgusting," the old-timer said, and spat on the ground. "Despicable. You should hear it: 'set up a living trust and avoid probate'. Some of the dang things are written in plain English, if ya can imagine that. And they actually want ya to explain it all to them. And tell 'em what it's gonna cost, in advance." And he spat again.

The stranger took a puff. "Can't blame 'em for it, can ya? A man works hard all his life, saves up a little nest egg, he wants to pass what he earned along to his kin. Quick and smooth-like. What's wrong with a simple trust that lets him do that?"

"Nothing wrong with it," the old-timer rejoined, with a faint sarcasm in his voice, "but where's the sport in it? Ya just set up some rules, transfer the assets in... no tax consequences either way! What's the point? Where's the challenge? And how much can a lawyer really make off-a that anyways?"

"Well, I suppose a working lawyer's gotta do something," the stranger mused. "A man can't live off a few aging multi-millionaires forever. Ya gonna retire, old-timer, or ya gonna head in some other direction?"

"Neither one, kid," said the old-timer. "I'm staying put. After all, them Bush tax cuts are set to expire again, in 2013. And it's gonna be one heck of a party then! Why, Pete and Bob already put a fresh coat of paint on their establishment, just to get ready."

The stranger smiled. "I suppose that's gonna happen. No way they'd extend the tax cuts again, just before the next election, would they?" But the old-timer missed the irony in his voice.

"Say, I kinda like ya, stranger," the old-timer said. "Wanna stay here, and work in my office? Contract, of course, paid on a percentage of receipts. And no partnership track unless ya go get an LLM."

"No thanks, old man," replied the stranger. "I think I'll just mosey on down the trail and find a place that has a little better prospects."

"Well, no mind then. Hey," said the old-timer, "ya got a business card? I'll put you on my referral list, for all those people who call my office and don't have any five million dollars."

"Ain't got no card," said the stranger, "cuz I ain't got no name to put on it". And with that he tugged the reins, and turned his horse toward the setting sun.

390 clients served on MLK Day 2011

By Zach Manzella and Leslie Need

Former Alaska Bar President Sidney Billingslea and attorney Ryan Roley provided advice at MLK Day in Anchorage. Jamie Lang Photography.

For many years East Coast communities have celebrated Martin Luther King (MLK) Day by using this special day not to relax and recreate but to assist the needy. For them, it's a day on, not a day off.

Every year in cities like Philadelphia tens of thousands of people participate in a variety of community service projects. Russ Winner, while attending the Obama Inauguration, learned of these activities and returned to Anchorage with a truly inspiring idea: Why can't the Alaska Bar Association come together to serve the public on MLK Day by offering a free legal clinic on that day? Russ presented the idea to the Bar's Board of Governors, and it immediately passed a resolution in support. Pro Bono Director Krista Scully, with her usual initiative and drive, helped form and lead a committee to develop an Anchorage program which has since served as a model for events in other communities.

In partnership with the Alaska Court System and Alaska Legal Services Corporation, the organizations planned events to assist people navigate the often thorny justice system. Various members of the Bar stepped up to assist in putting the program together on a statewide level: Justice Daniel Winfree, Russ Winner, Dave Case, Jon Katcher, Stacey Marz, Zach Manzella, Leslie Need, Lynne Lloyd, and Kathryn Hovey.

While the attorneys were presented as available to provide advice on family law, public benefits and landlord tenant, they did not hesitate to assist clients with a number of other issues.

Anchorage

The Mountain View Community Center in Anchorage graciously made its facilities available for the second year. The planning team worked with other community groups to promote the event. Much time was devoted to pre-event advertising to draw clients. A public outreach campaign that included more than 150 community sites, radio ads, a Compass Piece article, new partnership with United Way's 211 line for legal service referrals, and a bus ad campaign funded generously by the Anchorage Bar Association resulted in more than double the number of clients served in 2010.

The start and end times were shifted to better meet the needs of clients' schedules and our volunteers remained steady in the wake of a seemingly never ending line of clients. While the attorneys were presented as available to provide advice on family law, public benefits and landlord tenant, they did not hesitate to assist clients with a number of other issues including consumer protection and wills. The Anchorage event also added representatives from the Alaska Attorney General's office from the Consumer Protection Unit and Consumer Credit Counseling of Alaska.

An equally exciting addition in 2011 was the art room available for children during the event. Barbara Hood of the Alaska Court System

Continued on page 15

Above: Art room volunteers Annie Rabinowitz, Marilyn May and Barrow Superior Court Judge Michael Jeffrey. Photo by Barbara Hood, Alaska Court System.

Right: A young art room participant figured out a clever way of disguising his identity but showing off his art work. Jamie Lang Photography.

Anchorage attorney Russ Winner during his second interview with Channel 11 during the MLK event. The news station came back for a second round of interviews and extended event day story on the mission of Dr. King and lawyers giving back.

Attorneys Leslie Jaehning and Mark Regan of the Disability Law Center provided advice to clients on public benefit issues. Jamie Lang Photography.

390 clients served on MLK Day 2011

Continued from page 14

and member of the Law-Related Education Committee organized the all day event that included unlimited art supplies, cookies, and the talents of volunteers including visiting Superior Court Judge Michael Jeffery, Marilyn May, Annie Rabinowitz, and Kayleen Preston of the University of Alaska Anchorage's Pre-Law Society. Participants were able to submit their completed art work to the 2011 Justice for All art contest sponsored by the LRE Committee, Alaska Supreme Court's Access to Civil Justice Committee and Alaska Supreme Court's Fairness, Diversity & Equality Committee with the theme: *Fairness, Diversity, Equality—Our System Depends on Them*. What do they mean to you? The winner will be unveiled at the convention in Fairbanks.

The Rabinowitz Courthouse was the event site for the first MLK Day clinic in Fairbanks. The lobby area was used for client intake and consultations on Public Benefits. Photo by Ron Woods, Alaska Court System.

Fairbanks

We welcomed the Golden Heart City of Fairbanks to the MLK fold in 2011! Led by a planning committee of Amy Tallerico, Mark Andrews (BOG Board member), Paul Eaglin, retired judges Niesje Steinkruger and Meg Greene, Magistrate Schick and Ed Husted of UAF's Community & Technical College's Paralegal program, the group organized a phenomenal event that utilized the Rabinowitz courthouse and nearly 30 volunteers who served close to 100 clients.

Assistant Attorney General and Board of Governors member Hanna Sebold with MLK team member Karen Godnick in Juneau.

Juneau

We were also pleased that Juneau's second MLK Day was also successful despite the surprise of their first winter blizzard on event day. Led by Board of Governors member and Assistant Attorney General Hanna Sebold, Karen Godnick and Holly Handler of the Juneau Alaska Legal Services Corporation office, the Juneau MLK Day event utilized the Juneau courthouse's jury room, law library, and lobby to provide assistance and lunch to participants. The 2011 volunteer roster for Juneau was nearly double from 2010!

2012 and beyond

All three communities intend to continue their MLK Day clinics in the future and the impact of these events is drawing national attention. The event has been selected to be included in the next American Bar Association publication under their feature called Lawyers Giving Back.

We also hope that in addition to Anchorage, Fairbanks and Juneau, the Bar in communities like Kenai, Bethel, and Nome will take up the mantle and organize events in their locales. Pro Bono Director Scully and the rest of the committee would be more than happy to provide assistance.

One image continues to come to mind. A roomful of lawyers, young and old, from a variety of practices, sitting across from clients with problems large and small, all mutually benefitting from these limited interactions: the clients having their burdens of life lightened by lawyers, and the lawyers knowing they made a difference in the lives of others. Dr. King would have appreciated our honoring him through this service.

The Juneau MLK Day event utilized the Juneau courthouse's jury room, law library, and lobby to provide assistance and lunch to participants.

Juneau MLK volunteers Jan Rutherdale (Assistant Attorney General), Eric Vang (ALSC and Juneau Bar Association Secretary), Ben Muse (Judge Patricia Collins' law clerk) and Holly Handler (ALSC). Photo by Hanna Sebold.

Juneau turns out to help in January

As many know, on January 17, in honor of Martin Luther King Day, local attorneys offered free legal advice as a call to the challenge for this day of service. As a result of the hard work of many, Juneau residents received free legal assistance. Unfortunately, we had weather issues (blizzard) that may have affected us from helping more, but every person helped was grateful and that was the point.

This event would not have been possible without the list of volunteers who provided time and money. Special thanks go the following:

Karen Godnick	Erik Vang
Alex Hildebrand	Marie Marx
Russ LaVignes	Holly Handler
Jan Rutherdale	Ann Gifford
Tony Sholty	Jane Sebens
Bart Rozell	MaryAlice McKeen
Peter Froehlich	Louis Menendez
Ben Muse	Tim Nault
Janell Haffner	Chris Poag
Susan Cox	Fred Triem
Tom Wagner	Jim Sheehan
Beth Chapman	Eric Kueffner
Kristen Bomenger	Gary Brazeal
Marenke VanGelder	Carthy Bohna
Bruce Weyhrauch	Kate Burhart
Andrea Browning	John Leque
Rebecca Hattan	Annie and Bud Carpenetti
Patricia Collins	Deb Behr
The Glory Hole	AWARE
Juneau Bar Association	KTOO
Juneau Courthouse	Juneau Empire
Heritage Coffee	Alaska Legal Services, Corporation

I think the volunteers got as much out of it as the clients; I encourage everyone to participate next year.

--Hanna Sebold

Sarah Palin's Constitution: "When conversing with John Marshall"

By Peter Aschenbrenner

Our summery evening echoes to the sound of arriving hoofbeats.

"She's bringing smoked salmon," I inform the Master of Monticello, "of Turnagain-Turnagain provenance."

The former President attends to his dumb-waiter. "Chilled Montrachet, 1813, 'TJ' labeled, of course."

Our guest settles in and powers up her twinn'd netbooks with extra batteries.

"I hope your bandwidth holds out." The governor surveys the Blue Ridge mountains. "What kind of coverage can you get up here?"

"It's 1819," I reply. "So it's a bit iffy."

"What do you have for us?" Jefferson asks his guest, while tippling a generous pour.

"It's from the debates at the Virginia ratifying convention," she turns one of her netbooks his way.

The governor reads her screen: "Contemporary exposition of the constitution, by its authors, and by those who supported its adoption, was wholly repugnant to that now contended for by the attorneys for the Bank of the United States," she concludes in paraphrase. "*McCulloch v. Maryland,* 17 U.S. 316, 372 (1819)," she adds.

"Do the amendments drafted by Federalists to reassure their opponents following the ratification debates," I ask, "count for anything?"

"Ah, *McCulloch*," Jefferson muses. "Luther Martin defies John Marshall by quoting Marshall's remarks back to the Chief Justice. Isn't that the dream of every appellate advocate?"

"Beats the heck outa me," I mumble.

"Does this passage really trash the Tenth Amendment?" the governor studies her screen. "One former governor to another. 'Having the power antecedent to the adoption of the government, and not being divested of it, by any grant or restriction in the constitution'," the governor recites, " 'the states must necessarily be as fully possessed of such a power as ever they had been'."

"It would seem to encapsulate the mystery of these amendments precisely," Jefferson muses. "June 25, 1788. Marshall is answering Patrick Henry, arch-opponent of the federal constitution."

"Background us, Professor," Jefferson turns to me.

"1819 is a remarkable year, Governors. The times feature a remarkable burst of interest in American history, and especially in our constitutional history."

"Congress has ordered the journals of the constitutional convention published in 1818," the governor declares.

"Secretary of State John Q. Adams is still editing the journals," I continue. "At the time of the *McCulloch* decision, they won't be published until December."

"Madison," Jefferson adds, "didn't get his copy until June, 1820."

"So the ratifying debates – from 1787 to 1788 – were the only 'game in town'," the governor muses, "if you wanted to quote a Founder. By happenstance, the Virginia debates were published first."

"And became notorious for the remarks made by Marshall," I add.

"It's amazing what you can find on line. All that's required is persistence and a good sense of American history."

"Speaking of which," Jefferson agrees, "that brings us to John Marshall's assignment of history to the national side of the ledger."

"You do take the position," I lapse into cross-ex, addressing the governor, "that constitutional text is dead."

"As does Justice Scalia," the governor nods.

"All events that might be taken to elaborate constitutional text are events that, from September 17, 1787 are in the future. That is assignable to a future measured o*f that date*."

"From that point forward," she agrees, "and therefore irrelevant to constitutional reasoning."

"So it is important to know," I lead the witness, "what powers states exercised before 1787."

"Which is the point that Marshall made," the governor takes the floor. "States possess the powers that they enjoyed before 9-17-87. That's what the constitution, as amended, guarantees. Nothing more. Nothing less."

"Since states chartered banks and taxed their operations prior to 1787, Luther Martin argued to the court in 1819," I go on, "they could not be divested of this power by the constitution."

"Of course, it was obvious that self-preservation is a higher power," the governor declares. "The states could not tax a federally-organized interstate bank out of existence. But that's old hat," she observes.

"There is an interesting anecdote – " I begin.

"After Martin finished," the governor addresses her colleague, "Marshall turned to Justice Story and said: 'That did not turn out as badly as I thought it would'."

"So once again," Jefferson sighs, "another attempt to trap Marshall in his own words goes awry. He's the Wile E. Coyote of Chief Justices."

"Consider the implications," the governor declares, "of Marshall's remarks, highlighted at oral argument in McCulloch." She studies the relevant text. "Here are some of the service missions not spelled out in Article I, Sec. 8. For example, you don't see a nuclear arsenal in there."

"No," Jefferson concedes.

"You don't see the air force or the coast guard in there."

"True."

"Ditto world-wide military establishment and intelligence services," she adds. "Neither interstate highways nor national parks are mentioned."

"Nope."

"No railroads, airports and air traffic control. Nothing about clean water or clean air."

"Indeed," he concedes.

"Ditto social security, Medicare or Medicaid."

"Quite true," Jefferson concedes.

"Nor do you see environmental protection or toy safety."

"None of these service missions," I sum matters up, "were supplied by the states prior to 1787."

"But Martin Luther, quoting Marshall back to Marshall," the governor continues, "believed he was reminding the American people of this principle: that all powers unknown (as of 1787) were reserved as responsibilities to be fulfilled by the states, for the well-being of their respective populations. However, in that quote," the governor concludes, "Marshall supplied the underlying premise for national service missions being fulfilled by the national government."

"When conversing with Marshall," Jefferson declares, "I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone."

"If asked to concede," I cannot resist the temptation, "if it is broad daylight at noon, Jefferson would reply, 'I will take your word for it, sir'."

"Did you really say that?" the governor asks. "About John Marshall's logic?"

"Rutherford B. Hayes said that Justice Story said I said it," Jefferson confesses, "so I may as well own up to it."

"No wonder, by another of Justice Story's anecdotes, Marshall winked at Story after Martin fumed and fussed over the Richmond debates. Which brings us back to theoretical physics," the governor muses. "Does the future really have to belong to somebody?"

"My bad," Jefferson raises his hand.

"Don't forget," I wave off penance most presidential, "Marshall was on the wrong side of the suability issue in *Chisholm v. Georgia*."

"I've got the quote here. 'No gentleman will think that a state will be called at the bar of the federal court. It is not rational to suppose that the sovereign power should be dragged before a court'," the governor cites us to Elliot's Debates 555 (1836).

"Now that was unfortunate," Jefferson sighs. "John Marshall assures the convention in Richmond that Article III, Section 1 would never authorize federal courts to hear a suit against a state which has merely failed to pay its bills. And less than five years later the Supreme Court turns creditors loose on states, and – "

"Federal marshals are cued to liquidate claims from the state treasury," the governor continues. "When Marshall's assurances put the constitution over the top by ten votes," she recites from her Elliot's – 'the intent is, to enable *states* to recover claims of *individuals* residing in other states' – "he bamboozled the constitutional history of America back into – "

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NEWS FROM THE BAR

Board of Governors Action Items January 27 & 28, 2011

- Voted to publish an amendment to Bar Rule 43 permitting lawyers working exclusively for nonprofit agencies approved by the Board to practice law without being admitted to the Alaska Bar Association.
- Voted to adopt the ethics opinion: "Must a Lawyer Provide the Original File to a Former Client on Request, Rather than a Copy?"
- Voted to adopt the ethics opinion: "Propriety of Communication with an Employee of a Corporate or Government Entity by a Lawyer Engaged in Litigation Against that Entity."
- Voted to reimburse, from the Lawyers' Fund for Client Protection, $2,500 to a client in a LFCP matter.
- Discussed contracting with a law firm to collect from attorneys the outstanding Lawyers' Fund for Client Protection fees that have been awarded to clients, and wanted to clarify the costs.
- Voted to recommend 13 reciprocity applicants for admission.
- Voted to approve additional accommodations for a bar exam applicant with special testing accommodations.
- Voted to submit Douglas Mertz's name to the governor for appointment to the Judicial Conduct Commission to fill the remaining one year of the term of Tom Nave following his resignation upon his appointment to the bench.
- Voted to approve adding a juvenile delinquency panel on the Lawyer Referral Service.
- Voted to have the MCLE Subcommittee review the MCLE rule and report to the Board at the May meeting.
- Voted to appoint Gregory Fisher as Bar Rag editor.
- Voted to postpone further discussion of Administrative Rule 12(e) until the May meeting.
- Adopted the findings of the Area Hearing Committee's report in the disciplinary matter of Andrew Kurzmann, recommending a suspension of four years with conditions for reinstatement; and requested Bar Counsel to come back to the Board with the request for attorney fees and costs.
- Met with two members of the Lawyers Assistance Committee and reviewed the goals and objectives from the committee's retreat.
- Approved the stipulation in the matter of Attorney X, which calls for a public censure by the Alaska Supreme Court, a stayed suspension of six months and payment of $1,000 in costs and attorney fees.
- Approved the minutes of the October 2010 Board meeting.
- Referred a matter to Bar Counsel to investigate disability proceedings under Bar Rule 30.
- Discussed a proposed amendment to Bar Rule 43, which would provide for a voluntary paralegal registration program and asked for further information.
- Appointed an awards subcommittee: Jason Weiner, Hanna Sebold and Mike Moberly.
- Heard a report from the mentoring subcommittee about trying a pilot program in the fall.

Sarah Palin's Constitution: "When conversing with John Marshall"

Continued from page 16

"Go ahead," Jefferson nods.

"A universe where only Marshall could take its measurements," I conclude.

"But Marshall's false assurance – if it is less than Luther's accusation of outright fraud – was promptly corrected by an 'explanatory' [AIR QUOTES] constitutional amendment," Jefferson sniffs.

"1803, I take it," the governor offers her sympathy, "was not a good year."

"Napoleon Bonaparte made me an offer I couldn't refuse. So I didn't. It's really all my fault."

"Bar Rag 23, Jan-Mar 2010?" the governor raises an eyebrow in my direction. "Right?"

"After the treaty arrived, Jefferson proposed a constitutional amendment to empower Congress to acquire and settle the Louisiana Territory. Not a single person of any political stripe said," I summarize constitutional history from a year Green Bay did not win the Super Bowl: " 'Let's not buy it because the federal government lacks the power to buy it'."

"So that's how the future became federal," the governor concludes.

"There was a moment when Monroe said, 'no internal improvements without an amendment'," Jefferson goes on. "But then we all founded the University of Virginia – "

"Madison, Monroe & Jefferson," I interlude. "And everyone forgot about amending the constitution. They even forgot about taking Mrs. Patterson's title away from her."

"The Duchess of Baltimore, if I recall," the governor adds. "It was a lovely title, and her son was entitled to the noble name of Bonaparte thanks to the grace of Napoleon the Third."

And then Congress voted to subsidize telegraph companies and railroads – " I get us back on track. "That's forty plus years without an amendment while the industrial revolution transformed the world."

"So what's the answer here?" the governor asks. "Is the Tenth Amendment a shill game, Federalists hoaxing rural rubes? That was Luther Martin's defiance to Chief Justice Marshall, right?"

"A case could be made to that effect," Jefferson refills our glasses. "The debates have to be worth something. Jimmy said that the constitution was " 'nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions'."

"April 6, 1796, Annals 774 at 780," I provide the cite.

"But there were games being played," the governor points out. "If you are advocating the adoption of the constitution and you assure delegates that the national government will return to the people for additional authority, when that is neither possible nor desirable, then – "

"That is a more sophisticated take on Martin's argument. 'It was then maintained, by the enemies of the constitution, that it contained a vast variety of powers … . This apprehension was treated as a dream of distempered jealousy'," I supply the quote.

" 'The danger was denied to exist; but to provide an assurance against the possibility of its occurrence, the Tenth Amendment was added to the constitution'," the governor concludes.

"You're looking to us for answers?" Jefferson asks. "We have been giving it some thought," Jefferson confesses. "Aschenbrenner, pick up the thread here."

"Start with the innumerable references in any constitutional debate, at random, from Philadelphia to the proposed Eleventh Amendment in 1793-94, that the constitution operated only on individuals not states. So states could not be coerced by Congress.

"If Congressional responsibilities intersect with the fate of every American," the governor reasons, "that's just another way of saying that Congress takes the risk that individual needs will require national solutions."

"The more," Jefferson ponders this point, "states insisted that they took no risk that the world would change, the more that Congress was left with America's future."

"The future," I recycle the obvious, "had to belong to somebody."

"But there may be a way out," Jefferson suggests. "That is, a way to make the Tenth worth something. Take Obamacare. As I understand it, individuals will be compelled to buy health insurance on the private market, which is a subsidy to the health insurance carriers."

"It's government intrusion," I object, "into our domestic lives."

The governor waves me into a state of repose.

"Were states regulating private insurance markets before 1787?" she asks.

"Not really," I mumble.

"So I guess that responsibility wasn't 'reserved to the states … '."

"Probably not," I gulp.

"Go ahead, " the governor drills me. "Write a constitutional amendment that authorizes the federal government to deploy new technology to solve problems or directs the government to respond to threats foreign and domestic. Look, if you don't believe me, sit down and write, in thirty words or less, an amendment that addresses any of the topics listed above, which amendment is also 9-11 compliant."

"Excuse me?" I gasp.

"Compliant with the Ninth, Tenth and Eleventh Amendments," she answers.

"Perhaps an argument could be made," Jefferson suggests, "that federal oversight of life-style choices is unconstitutional."

"For instance," the governor picks up the ball, "unhealthy food, substance-abuse, and the passion for motorized sports are choices with price-tags attached. It's just that the federal government has the price-gun."

"Sounds like a Fifth Amendment argument to me," Jefferson studies his laptop. "Take a look at *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)."

I read the pertinent quotation to the governor. "What could be more private than the right to do nothing? I mean, there you are sitting on your duff – not making a nuisance of yourself — and the government orders you to get up and do something for your country. Like buy insurance. And not," I hasten to add, "to drive a car either."

"Are you making fun of our state, Professor? Risky behavior is a purely a private matter. I mean, a lot of people in Alaska ride snowmachines into trees or through avalanche country. Without helmets. Or insurance."

"Is it time?" Jefferson asks me.

"Look, governor," I ask, minding my cue. "What's with the trademarking your name?"

"Doesn't that make you the governor formerly known as ____ ?" Jefferson asks.

"It stops people from using my name without my permission," the governor explains. "Hence, protecting my franchise."

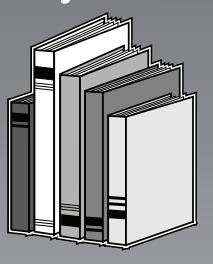
"But how would you be damaged if your name were used," Jefferson blurts his question, "for example, in this recreation of a sprightly dialogue, vintage 1819?"

"Isn't it obvious, Mr. President?" she asks. "And here is the proof. My points are well-reasoned, thoroughly researched and insightful. Indeed, am I not instantly recognizable, even if unnamed, from the quality of my repartee if not also, as in this case, my reportage?"

"You betcha," the former governor of Virginia agrees.

Law Library News

Research databases you may not know



By Catherine Lemann

The Alaska Court System Law Libraries have recently subscribed to a new database: *Legal Information Reference Center*. The primary content of the service is the full text of law books published by Nolo Press. Nolo publishes plain English books on a variety of topics. Subjects include family affairs and divorce, immigration, wills and estate planning, landlord-tenant and real estate, and more.

Nolo's primary audience is people who do not have a lawyer. There is not a lot of legal jargon and topics have very basic explanations. While these might not be useful for attorneys on a regular basis, it's good to know that this is available. The *Legal Information Reference Center* is available in all court system law libraries around Alaska.

Interlibrary loan is a service offered to attorneys. We are regularly asked to obtain copies of books and articles, often on non-legal topics. We can borrow almost anything from other libraries. And, of course, we reciprocally lend books or send copies to other libraries. To request an Interlibrary Loan, contact the Anchorage library at library@courts.state.ak.us or 907-264-0585.

When we are asked to fill an ILL for an article from a non-legal journal, we often look to see if the journal is available in one of the databases provided by the Alaska State Library. http://www.library.state.ak.us/index/index.html The State Library makes many of these databases available to all Alaskans. They are accessible from any computer in the state. You do not have to go to the library to use them.

EBSCO provides a number of the State Library databases. Academic Search Premier has full text of almost 4,700 periodicals covering nearly all subjects. Business Source Premier provides full text articles covering marketing, management, accounting, finance, and economics. Newspaper Source has full coverage for 40 U.S. and international newspapers and select coverage for almost 400 regional U.S. papers. Other databases include Medline, Consumer Health, Auto Repair, and many resources for students of all ages.

We often get calls from people who have been searching for a book by individually searching various library catalogs in Alaska. There is a much easier, more comprehensive way to do that search. WorldCat, www.worldcat.org, is a database that allows users to search for a book and then can tell you what library near you owns the book. You can click through to the catalog of the library near you and can then see if the book is on the shelf. If you have a library card, you may be able to place a hold on the book as well.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2011-1

MUST A LAWYER PROVIDE THE ORIGINAL FILE TO A FORMER CLIENT ON REQUEST, RATHER THAN A COPY?

QUESTION PRESENTED

If a former client asks a lawyer to provide his original file to him or to his new attorney, must the lawyer provide the original file rather than a copy?

CONCLUSION

Yes. The file belongs to the client, and the lawyer must provide the original file, rather than a copy, to the client or the client's new attorney, if the client requests.

DISCUSSION

Previous opinions address a lawyer's obligation to provide materials from his or her file to a former client, when the client requests.[1] These opinions focus principally on which materials in a file must be provided, and which if any may be withheld. But an earlier opinion, Ethics Opinion No. 95-6 also provides an answer to the question that most recently has been asked:

> [T]he client's original files are the property of the client. Accordingly, a lawyer must make available to his or her client all papers and property to which the client is entitled, and may not make receipt of them contingent upon payment for copying. . . .
>
> A lawyer may not charge the client for making a copy of the original documents for his or her own purposes.

The Committee now reiterates explicitly what is implicit in Ethics Opinion 95-6: The lawyer may make a *copy* for his or her own purposes, at the lawyer's own expense, but the lawyer must provide the *original* file to the client or the client's new counsel if requested.

To the extent that previous opinions from this Committee may inadvertently suggest that the lawyer could keep the original and give the client the copy,[2] the Committee disavows that suggestion.

This opinion does not modify any prior opinion with respect to which materials in a file may be withheld completely.[3] Neither does this opinion modify the obligations imposed by statute or court rule not to disclose certain materials directly to a client.[4]

This opinion also does not impose any new obligations on the attorney for file maintenance. The point is simply that, when a client requests his or her file, the lawyer must provide the original file as it exists at that time, rather than a copy of the file that then exists (subject, as noted above, to rules and statutes that permit or require the lawyer not to provide certain materials at all).

Finally, this opinion does not modify Ethics Opinion No. 2008-1, which authorizes lawyers to maintain certain materials electronically. If the routine practice of a law office in accordance with Ethics Opinion No. 2008-1 is to save most portions of closed files by scanning the materials to CDs, for example, and then discarding the papers, the lawyer would not violate this opinion by producing only the CD if the CD is all that the lawyer has retained at the time the file is requested by the former client.

Approved by the Alaska Bar Association Ethics Committee on December 2, 2010.

Adopted by the Board of Governors on January 27, 2011.

Footnotes

[1] *See* Ethics Opinion No. 2003-3 (lawyer need not disclose documents when disclosure would violate a duty to a third party, and need not disclose documents intended only for internal law office review and use, such as a preliminary assessment of the legal or factual issues in the case, unless non-disclosure would significantly prejudice the client); Ethics Opinion No. 2004-1 (lawyer may not withhold a report of an expert or an investigator, if withholding it would prejudice the client).

[2] *See, e.g.*, Ethics Opinion No. 2003-3 (framing the question as whether the lawyer must "provide a copy of everything in the file to the client"); Ethics Opinion No. 2004-1 (framing the question as whether the lawyer may "withhold a copy of an expert or investigator's report").

[3] *See, e.g.*, Ethics Opinion No. 2003-3 (giving examples of documents in a file that a lawyer need not provide to a client who requests his file).

[4] *See, e.g.*, AS 12.61.120(a); Alaska Crim. R. 16(d)(3).

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2011-2

PROPRIETY OF COMMUNICATION WITH AN EMPLOYEE OF A CORPORATE OR GOVERNMENT ENTITY BY A LAWYER ENGAGED IN LITIGATION AGAINST THAT ENTITY

QUESTION PRESENTED

What constitutes "managerial responsibility" discussed in the Comment to ARPC 4.2 concerning communications with a represented person?

CONCLUSION

Employees of an organization who have sufficient authority to speak on behalf of the organization and thus legally bind the organization, are subject to the provisions of Rule 4.2. Other employees are not.

DISCUSSION

Bar counsel has frequently received inquiries regarding when it is appropriate for an attorney to contact an employee of a corporation, governmental entity or other organization during the course of a lawsuit. The question implicates Alaska Rule of Professional Conduct 4.2, which provides:

> **Communication with Person Represented by Counsel.** In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The problem lies in drawing a line between those employees of an organization that are be covered by the rule, and thus cannot be contacted, and those employees who are not covered, and are thus accessible to opposing counsel. Too strict an interpretation will make reasonable investigation of claims unnecessarily difficult, while too lenient an interpretation runs the risk of interfering with the attorney client relationship between the organization and its attorneys, or destroying the right of the organization to the protections of the attorney client privilege.[1]

For example, an attorney would be prohibited from interviewing the president of a company regarding an automobile accident, because the president of the company would have authority to bind the company with his or her statements. But is the attorney also prohibited from interviewing the employee who was actually driving the automobile involved in the accident?

> The Commentary to the Alaska Rules of Professional Conduct addresses this issue:
>
> In the case of a represented organization, this Rule prohibits communications by a lawyer concerning the matter with persons having managerial responsibility on behalf of an organization.

ARPC 4.2, Comment at paragraph 6. Thus, according to the commentary, the Rule prohibits a lawyer from contacting anyone having "managerial responsibility" in litigation involving an organization. At the same time, the corollary also appears to be true: it is permissible for an attorney to contact employees of an organization who do not have "managerial responsibility."

Although the language of Rule 4.2 as adopted in Alaska is identical to the language of Rule 4.2 under the Model Rules, the Alaska commentary to Rule 4.2 appears to narrowly define the scope of the rule as it applies to organizational entities. In contrast, the commentary to the Model Rule suggests a broader interpretation of the Rule:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.
>
> Model Rules of Professional Conduct, Rule 4.2, Comment [7].[2]

The Alaska Supreme Court's choice to adopt different language cannot be ignored. The Court chose to adopt a different and much narrower commentary, a signal that the Court intended the bar on contacting non-managerial employees to be narrower than in the Model Rules.

Several jurisdictions have used an approach which appears to satisfy the requirements of Rule 4.2 and which is consistent with the commentary adopted in Alaska. The so called "managing speaking agent test" interprets the prohibition against contacting corporate or agency employees narrowly. Under that test,

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only employees who have authority to legally bind the corporation or agency are protected from contact by opposing counsel. This test was first articulated in *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984). The Washington Supreme Court found that current employees of the defendant would be considered parties under Rule 4.2 "if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation." *Id.* at 201.

The court made it clear that for purposes of the Rule employees who did not have authority to "speak for, and bind, the corporation" could be contacted without violation of Rule 4.2.

> We hold the best interpretation of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, i.e., those employees who have "speaking authority" for the corporation. This interpretation is consistent with the declared purpose of the rule to protect represented parties from the dangers of dealing with adverse counsel.... We find no reason to distinguish between employees who in fact witnessed an event and those whose act or omission caused the event leading to the action. It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts.

Id.

> Nevada has adopted a similar test:
>
> In applying this test, we specifically note that an employee does not "speak for" the organization simply because his or her statement may be admissible as a party opponent admission. Rather, the inquiry is whether the employee can bind the organization with his or her statement. Also, an employee for whom counsel has not been retained does not become a "represented party" simply because his or her conduct may be imputed to the organization; while any confidential communications between such an employee and the organization's counsel would be protected by the attorney client privilege, the facts within that employee's knowledge are generally not protected from revelation through ex parte interviews by opposing counsel.

Palmer v. Pioneer Inn Associates, Ltd., 59 P.3d 1237, 1248 (Nev. 2002).

Absent additional guidance from the Alaska Supreme Court regarding Alaska's Rule 4.2 and commentary, the Committee believes that the "managing speaking agent" test comes closest to expressing the sense of Rule 4.2 as it applies to represented organizations in Alaska. Thus, only those employees of the organization who hold a position of sufficient authority or responsibility so that they can be considered to be speaking on behalf of the organization with respect to the matter at issue, and in so doing are able to legally bind the organization, are covered by the restrictions of Rule 4.2.

This formula strikes an appropriate balance between the need to protect the clear right of an organization from inappropriate contact by opposing counsel and the ability of opposing counsel to conduct investigations, including informal investigations, necessary to properly represent the counsel's client.

This test also appears to be consistent with this Committee's prior ethics opinions on the subject.[3]

It is important to note that the managing speaking agent rule does not do away with the attorney client privilege. Investigating counsel cannot ignore the possibility that a witness may also be represented by an attorney at the time of the interview. Counsel may neither ask nor permit a current or former employee to disclose privileged communications. *See Brown v. State of Oregon, Dept. of Corrections*, 173 F.R.D. 265, 269 (D. Ore. 1997). Nor may counsel ignore the other ethical obligations that may apply to interviews with employees of organizations, including the ethical obligations with respect to unrepresented persons. *See, e.g*, Alaska Rule of Professional Conduct 4.4 (dealing with respect for rights of third persons); Alaska Rule of Professional Conduct 4.3 (dealing with unrepresented person); Alaska Rule of Professional Conduct 4.1 (regarding truthfulness in statements to others). Accordingly, the Committee believes that prudent counsel wishing to interview employees of an organization will take care to ensure that nothing in such interviews elicits privileged information or is misleading in any way regarding the nature and purpose of the interview.

Approved by the Alaska Bar Association Ethics Committee on December 2, 2010.

Adopted by the Board of Governors on January 27, 2011.

Footnotes

[1]As one court has stated:

> The Rule's protections undisputedly extend to organizational parties, who must act through their directors and employees. Accordingly, at least some of the organization's agents must be viewed as the equivalent of a "party" for the rule to have any effect. A conflict between policies arises, however. On one hand, the rule's protective purposes are best served by defining this pool of agents broadly. On the other hand, defining the pool more narrowly fosters the use of informal discovery methods.... The question then becomes how to apply the rule in a way that best balances the competing policies.

Palmer v. Pioneer Inn Assocs. Ltd. 59 P.3d 1237, 1240-41 (Nevada 2002)(footnotes omitted).

[2]The application of the Model Rule and its commentary has resulted in diverse interpretations and applications in jurisdictions across the country. For example, some jurisdictions have found that statements constituting an admission of a party opponent under Federal Rule of Evidence 801(d)(2)(D) qualify as acts or omissions to be "imputed to the organization" under the commentary to the model rules. See *Richards v. Holsum Bakery, Inc.*, 2009 WL 3740725 (D. Ariz. Nov. 5, 2009). ("Statement is admission for purposes of Rule 4.2 if it constitutes an admission of a party opponent under Arizona Rules of Evidence). Other jurisdictions have concluded that the Rule prohibits contact with persons who, although not part of the management of the organization or agency, are employees "whose conduct is at issue" in the litigation. *See Brown v. State, Department of Corrections,* 173 F.R.D. 265, 268 (D. Ore. 1997). Still other courts have adopted other tests interpreting the rule. *See, e.g., Weibrecht v. Southern Illinois Transfer, Inc.*, 241 F.3d 875, 883 (7th Cir. 2001) (Employee whose actions would be imputed to corporation for purposes of finding corporate negligence protected under Rule 4.2).

[3]*See* Ethics Opinion No. 71-1 (a lawyer may communicate with employees of a government entity so long as the communication is not made with employees of the entity who may be reasonably thought of as representing the entity in the matter in controversy); Ethics Opinion 84 11 (attorney representing opposing party may informally interview agency employee who is not "representing the entity in matters related to the matter in controversy" and does not have "managerial responsibility" on behalf of the agency).

Should other nonprofit legal services oganizations receive practice waivers?

The Board of Governors invites member comments regarding the following proposed amendment to the Alaska Bar Rules. Additions have underscores while deletions have strikethroughs.

Bar Rule 43. Waivers to Practice Law for Alaska Legal Services Corporation. This proposed amendment would allow a lawyer practicing law exclusively for a nonprofit legal services organization approved by the Board to practice law without being admitted to the Bar Association under the conditions listed in the rule.

Rule 43. Waivers to Practice Law for Alaska Legal Services Corporation.

Section 1. Eligibility. A person not admitted to the practice of law in this state may receive permission to practice law in the state if such person meets all of the following conditions:

(a) The person is a graduate of a law school which was accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools when the person entered or graduated and is an attorney in good standing, licensed to practice before the courts of another state, territory or the District of Columbia, or is eligible to be admitted to practice upon taking the oath of that state, territory or the District of Columbia;

(b) The person practices law exclusively for Alaska Legal Services Corporation or a nonprofit legal services organization approved by the Board of Governors on a full-time or part-time basis;

(c) The person has not failed the bar exam of this state.

Section 2. Application. Application for such permission shall be made as follows:

(a) The executive director of the Alaska Legal Services Corporation or a nonprofit legal services organization approved by the Board shall apply to the Board ~~of Governors~~ on behalf of a person eligible under Section 1;

(b) Application shall be made on forms approved by the Board ~~of Governors~~;

(c) Proof shall be submitted with the application that the applicant is an attorney in good standing, licensed to practice before the courts of another state, territory or the District of Columbia, or is eligible to be admitted to practice upon taking the oath of the state, territory or the District of Columbia.

Section 3. Approval. The Board ~~of Governors~~ shall consider the application as soon as practicable after it has been submitted. If the bBoard finds that the applicant meets the requirements of Section 1 above, it shall grant the application and issue a waiver to allow the applicant to practice law before all courts of the state of Alaska. The Board ~~of Governors~~ may delegate the power to the executive director of the Bar Association to approve such applications and issue waivers, but the Board shall review all waivers so issued at its regularly scheduled meetings.

Section 4. Conditions. A person granted such permission may practice law only as required in the course of representing clients of Alaska Legal Services Corporation or a nonprofit legal services organization approved by the Board, and shall be subject to the provisions of Part II of these rules to the same extent as a member of the Alaska Bar Association. Such permission shall cease to be effective upon the failure of the person to pass the Alaska Bar examination.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by April 18, 2011.

Ask the right questions when purchasing malpractice insurance

By Mark Bassingthwaighte

We've all seen the ads. Don't buy from the little guy when the big boys have so much more to offer. Looking back, how many of us truly foresaw AIG's troubles, the bankruptcy of GM, the collapse of Lehman Brothers, or that even a few large insurance companies would buy small banks in order to qualify for TARP funds in order to shore up the books. As I see it, big definitely doesn't equate with better, more secure, well managed or anything else. Big is just that, big. I'm not impressed.

But wait, the big boys then follow up with ads that promise the lowest price. It's the old "We won't be undersold!" song and dance. I will go to my death bed reminding my kids that you get what you pay for. While $20 knockoff sunglasses may make you look good and feel great about the savings, over the long haul they won't properly protect your eyes. You get what you pay for. I also remember that old joke about GM. They lost money on every car they sold, but they made up the difference with volume. That turned out well, didn't it? If the price isn't appropriate for the product or service being sold, one of two things will happen; the price will go up or the company won't remain in that particular market space.

So, what does all this have to do with malpractice insurance for lawyers? Quite a bit actually, particularly in an economy such as the one we're in right now. For insurers, the fundamentals say pricing should go up yet it isn't. This is due to a catch 22. Raise rates now and risk losing customers. Even governments are facing this conundrum. Tax revenues are declining across the board due to the economy, but if you raise tax rates to try and make up the difference, you risk putting even more people out of work due to the additional strain on the economy and you're potentially back where you started, if not worse. It's that simple. When a big boy says we're the only ones who can survive in these troubled economic times, I suggest you take it with a grain of salt and remember what happened just a few short years ago.

Now, I need to be clear on one point. This isn't a "buy from ALPS" piece. My intent is to try to help others help themselves when it comes to purchasing insurance. When someone says we're bigger and thus better and we can undercut anyone on price, ask yourself if that rings true and is meaningful to you. If so, fine. Buy from the big boys. They may or may not raise your rate next year and they may or may not remain in your market. That is going to depend on how much money you made them, whether or not their investment portfolio performed well, and what global losses looked like among all their lines. They'll let you know.

Yes, to some degree the above statement will be true for any company, big or small. If you can't make money, invest wisely, and responsibly handle your claims, you're not going to remain in business for long. The real issue for me is this: just what will I get for my dollar when I decide to purchase an insurance policy. Price is just one piece of the equation. There is value in knowing things like is the company financially stable on its own? Has the company ever pulled out of one or more markets, and if so, why? Then the big question is just what coverage will the policy provide? As an example, there is a huge difference between a policy that has defense costs inside limits (often referred to as a self cannibalizing policy) and a policy that has defense costs outside policy limits. Often a low price quote is an indicator that defense costs are inside limits, that the deductible is high, and/or that policy limits are low. Or perhaps the professional liability coverage is an incidental endorsement to another policy. If that is the case, boy I start to wonder just who would actually handle my claim, should one ever arise?

Then there are the "softer" issues. Does the company value me, meaning can I call and ask questions to the decision makers? Do they invest in my local bar in support of grass roots initiatives? Do they give back to the legal community as a whole? Do they offer loss prevention programs? Are all claims staff licensed attorneys? Personally, I prefer to work with businesses that take the time to get to know me, value my business, and invest in my profession in some manner. This will matter more to some than others and that's fine.

In sum, try not to fall prey to the temptation to focus only on the present when purchasing a malpractice policy. To focus solely on price and/or to buy into the sales hype, although tempting and so easy to do, is a misstep and here is why. In essence, you're about to pay to make certain that someone has your back should the worst happen. Focus on that, on what happens when dealing with a claim.

Who is this company and just what are they saying they will do for you then? I believe this to be a better perspective from which to make an insurance decision. After all, do you really want the company you're about to place in the position of "having your back" be the one who threw you a low ball price?

Take the time to ask the right questions and make sure. Learn to compare policies on the issues that are important to your practice and company services that are important to you and always remember, you get what you pay for.

Mark Bassingthwaighte is the risk manager for ALPS Corp.

U. S. District Judge John W. Sedwick: A brief profile

Continued from page 1

District of Arizona during an extended period of time when that District was shorthanded.

A career on the federal bench cannot be summarized by a string of case citations. However, in terms of significant cases that outside observers remember, many commentators would probably list *Payne v. Exxon* (concerning standards governing litigation-ending sanctions for discovery abuses), *Malabed v. North Slope Borough* (involving racial or ethnic employment preferences), Morse v. Frederick (the First Amendment "Bong hits 4 Jesus" case"), and *Alaska State Snowmobile Association v. Babbitt* (addressing snowmachine use in national parks) as being a few of the more memorable cases shaping substantive or procedural issues that Judge Sedwick handled. More recently, Judge Sedwick presided over several of the public corruption cases involving lobbyists and certain Alaskan legislators. Some of these cases are still pending.

Now that he is taking senior status, Judge Sedwick advised me that he plans to travel and spend much more time with his family. He also plans to continue hiking, biking, and skiing. However, there is never any true retirement for a federal judge. Judge Sedwick will undoubtedly continue to preside over a few cases and perhaps accept invitations to sit on future Ninth Circuit panels from time to time.

Ashley McDow

The author is an Alaskan Native. Ms. McDow is currently an associate with the law firm of Mirman, Bubman & Nahmias, LLP in Woodland Hills, California, and specializes in creditor's rights and business and commercial litigation, with an emphasis in secured transactions and receiverships.

Observations, thoughts, and notes from Judge Sedwick's former law clerks

Judge John Sedwick's former law clerks share their personal memories of the Judge and how their respective clerkships shaped their personal lives and professional careers.

The U.S. District Court judges & magistrate judges gathered for a group photo in November of 2007. Seated in the front row, left to right, were Senior Judge H. Russel Holland and Judge Timothy M. Burgess. In the back row (left to right) were Senior Judge James M. Fitzgerald, Magistrate Judge John D. Roberts, Senior Judge James K. Singleton, Judge John W. Sedwick, Magistrate Judge Deborah M. Smith, Judge Ralph R. Beistline, and Senior Judge James A. von der Heydt, U.S. District Court. Photo by Family Art Photo

John Bernitz (State of Alaska, Assistant Public Defender):

"Do Something"

I had the opportunity to be Judge Sedwick's first law clerk. I remember that he was invited to speak at a presentation for new attorneys. I think he attended this presentation even before he had a judicial case load. I went to learn more about my new boss. He told these young, eager attorneys that he had just started as a federal judge so he did not yet have "the wisdom that comes with experience from the bench." He did have lots of years working on complex civil cases. He mentioned the feeling of being overwhelmed and scared when a lawyer is handed a complex assignment. His answer was to just start to work. As he put it "do something." I have remembered that concept for the last seventeen years.

"Appellation Pettifogger"

A couple months into my clerkship there was an attorney who was filing below standard motions. These motions are difficult to oppose, or decide, because one first has to make sense out of the poorly reasoned argument and then oppose, or decide, the issue. Opposing counsel and law clerks end up doing the work for the moving party, which annoys everyone. This particular lawyer would routinely file such motions.

Normally, we would analyze the motions and then give the Judge a proposed order or memorandum. In this particular case, the Judge handed me an order he had drafted and asked that I review it. I do not remember the specific topic of the motion that prompted the Judge's order, but the motion presented a trivial, stupid argument. The last line of the order was something like: "motions of this kind bring to mind the appellation pettifogger." Sadly, or innocently, I did not know the word "pettifogger" at the time. I do now. After receiving this order the attorney changed his practice and withdrew several pending motions.

I try to make sure that, no matter what else is said about my work, no judge will use the appellation "pettifogger."

Gary Spraker (Christianson & Spraker)

I considered it a tremendous honor, and rare opportunity, to clerk for a federal district court judge at the start of his tenure. I was not disappointed. Throughout the two years of my clerkship, I was continuously struck not only by the respect Judge Sedwick showed to all, but by the collegial atmosphere he quickly created within his office among clerks, his secretary and case management clerks. In fact, my fondest memory came not at work, but at one of the get togethers he and his wife would host for the office where Debbie taught my infant daughter to crawl.

From the beginning, it was clear that Judge Sedwick had a distinct writing style that was direct, decisive, and often contained a memorable line. Within his first year, he tasked my co-clerk with the unusual task of obtaining permission to quote a line from a country song that was popular at the time by Lorrie Morgan. In his order, he enquired of counsel "what part of 'no" don't you understand?"

Pamela Weiss (Assistant Municipal Attorney, Civil Division, Municipality of Anchorage):

I appreciated Judge Sedwick giving me the chance to come to Alaska and teaching me the importance of attention to detail, professional demeanor and collegiality.

Irene Tresser (Part-time stay-at-home mom, part-time contract attorney, part-time legal advisor for Anchorage Youth Court, and adjunct instructor for Charter College paralegal program):

Judge Sedwick taught me the importance of professional integrity. He gave every decision the time, attention and thought that it deserved, recognizing that people's lives were greatly affected by his decisions. Watching and listening to Judge Sedwick, I gained a better understanding of the law and the role of the judiciary. Also, he was a kind and patient mentor who treated his law clerks like family. I thoroughly enjoyed the early Tuesday morning meetings, getting out of the building for lunch, and talks about politics, law, and Alaska. I feel so lucky to have had the opportunity to work for such a person.

Daniel Cheyette (State of Alaska, Assistant Attorney General):

To the extent I have an attorney role model, it is Judge Sedwick. By example he taught me how to be a professional. Reserved, studied and efficient, Judge Sedwick was always prepared on his cases, treated everyone fairly and commanded the respect of all who appeared in his court. He is one of the best-regarded judges in the state; he certainly has my admiration. It was a pleasure and an honor to work as his law clerk. I reflect on that experience regularly.

Edward Attala (Carsel & Attala, LLP).

Judge Sedwick allowed me to work as a summer intern in his chamber before offering the opportunity to be his law clerk. Because of the interest he took in my development as a lawyer, I learned more that summer about researching, legal analysis and writing than I ever could have imagined. As his law clerk, the opportunity to discuss with the Judge not only the law, but the performance and persuasiveness of attorneys shaped my career. I have always admired and tried to emulate the respect and professional courtesy the Judge shows to everyone.

Outside of chambers, I have been lucky enough to have the Judge and Debbie know my family. It is an absolute honor and a blessing to have my legal career associated with Judge Sedwick and a pleasure to have my entire family consider the Judge and Debbie as friends.

Amy Shimek (V.P. of Legal Affairs and Associate General Counsel, Alutiiq, LLC):

When I mentioned to my father recently that Judge Sedwick is about to move to senior status, he reminded me that fourteen years ago I emphatically told him: "I think this is the best job I will ever have!" Clearly, I absolutely loved clerking for Judge Sedwick. (And I was right.) I learned a lot about the practice of law from him, especially legal writing and analytical thinking, but the most important lesson I took from my clerkship was from watching him treat everyone--from filing clerks, law clerks, attorneys, fellow judges, criminal defendants, members of the Ninth Circuit, and more--with equal respect. I am beyond grateful to have worked for and learned from him. Thank you Judge Sedwick for making an important and positive difference in my life and my legal career.

Dawn MacKinnon (Partner, Holme Roberts & Owen LLP, Denver, Colorado):

It was a joyous day when Judge Sedwick offered me a position as his law clerk in 2001; not only was I going back to my beloved Alaska, but, according to several law professors, I was to embark on a remarkable professional experience. And, remarkable it was. Judge Sedwick guided my professional development with a kind hand and exemplified the highest standards of integrity, thoughtfulness and intelligence. He gave me the confidence to trust my instincts - a very valuable gift indeed. Thank you, Judge Sedwick, for treating me as a colleague and shaping my legal career in such a positive way.

Gregory Fisher (Partner, Davis Wright Tremaine LLP):

I never saw the Judge lose his temper even when we gave him every reason to do so. When I am at my professional best—and that may not be often enough—it is because of what I learned clerking for Judge Sedwick. He taught by example, and he taught us respect for the profession and the courts. The Judge valued integrity, sound intellectual reasoning, meticulous research, and the important role that the court plays in our society to safeguard the rule of law.

FAMILY LAW

Surviving the office's computer system upgrade

By Steven Pradell

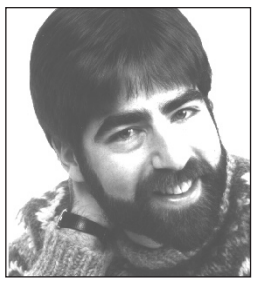
Family law lawyers are generally located in smaller law offices. While larger law firms may have IT departments and in-house computer gurus, rarely are solo practitioners experts in computer programming and repair. As such, they may be using the computers that they have had for years. Recently our office upgraded all of its computers. After years of using systems that had worked well at one time, we finally made the decision to upgrade into the 21st century. This article explores this experience.

Like many law offices, ours primarily does word processing and data entry for billing purposes. There are few graphics needed. The computers were originally set up years ago with the help of the teenage employees and their high school friends who were proficient with computers and could install, upgrade and repair the machines at relatively nominal cost.

Once these kids went off to college, those who remained hunkered down and learned to fix things as best we could as we went along, opting not to upgrade immediately every time a new version of the latest software came along.

The decision to completely upgrade an office's computers is not easily made. Rumblings from the office staff, computer crashes, old machines, obsolete operating systems, incompatibilities and clients who are used to the modern systems of emailing and scanning documents finally led to the ultimate decision to upgrade everything to become current.

Our office runs on Apple computers. Our Timeslips billing program stopped making upgrades for Apple computers in August of 2002. As a result, we have limped along using this system, which only worked in OS9, during the nearly 9 years when no upgrades were available. Our computers were the last holdouts that could still operate in OS9. In fact, my desktop model ran exclusively on OS9. The new computer on the other desk ran in OSX. To efficiently use the internet, I'd go from one computer to the other. But I was very fast on my computer. As the world around me moved forward, I was the last holdout in the office, finally giving in to an entire overhaul. The fear finally gave way to the reality that things had to change in order to serve the needs of the clients and to keep the staff content.



"After years of using systems that had worked well at one time, we finally made the decision to upgrade into the 21st century."

After looking around at what was out there, rather than purchasing anything, we made the decision to hire an outside contractor to come in and analyze our entire system and make objective recommendations as to what to replace, upgrade, and what could be salvaged from our existing computers. Luckily, one of the former teenage employees returned from out of state and was between jobs. He knew our needs and had the time to research the market and design a new system that would meet our needs. We discussed budgetary constraints. After reviewing numerous alternatives, analyzing all of the computers and copy machines in the office and consulting with both the office staff and another former computer assistant, recommendations were made, reviewed and approved. And for the first time, this meant that the office would now run in a Mac/PC environment, using Timeslips on the internet through a PC.

Once decisions were made, we had to plan for the implementation of the new hardware and software. Some computers primarily needed upgrades, such as more memory and newer operating systems. Others were completely replaced. We needed to work with our advisor to find a time when everyone and everything was available to change over the systems. The Christmas holidays proved to be a good time, and January 1 appeared to be the best time to begin using the new billing system.

There is a great deal of time required to implement new systems, especially when the entire office is being upgraded. It was important to plan as much as possible to accommodate the learning curve, the glitches and the time offline so that the needs of the clients would be met, the staff could learn the new programs, and the office could run effectively. With the help of our consultant, we were also able to turn a copy machine into a scanner, which was much more effective than our out of date model that we had been working with.

It took the entire month of January and many long calls to tech support for staff to learn the new billing system and everything was backed up and reentered in different ways so that data would not be lost. Effective backing up of the computer data was one important aspect of the upgrade, as well as ensuring that there was enough storage potential to save and store data in the future and to plan for future changes that might occur.

January was a difficult month but the billings went out in early February and things appear to be running effectively at this time. We are still adjusting to the changes. But it is nice to be able to have one new, shiny and fast computer on my desk that can do just about everything that needs to be done.

Using the iPad program logmein, (www.logmein.com) I can now get onto my office computers from anywhere and run them remotely. Now that's computing in the modern age.

ATTORNEY DISCIPLINE

Anchorage lawyer suspended after criminal conviction

The Alaska Supreme Court suspended Anchorage lawyer Kevin Morford following his conviction for possessing child pornography on his computer, a Class C felony. Police arrested him in August 2007 and, after he pleaded no contest, the superior court sentenced him to four years with two suspended, and five years probation. He was incarcerated from January 2008 till May 2009. Also in January 2008 the Supreme Court placed him on interim disciplinary suspension pending final resolution of ethics charges.

Upon his release from jail, Morford agreed to accept professional discipline for violating Alaska Rule of Professional Conduct 8.4(b). This rule forbids the commission of a crime that reflects adversely on a lawyer's honesty, trustworthiness or fitness in other respects. The Supreme Court approved a stipulation between Morford and the Bar Association specifying that he would be suspended for five years. The Court issued the suspension order on November 22, 2010.

To be reinstated to active practice Morford must comply with his criminal probation terms, and after reinstatement he will be on professional probation during the period of any remaining criminal probation.

Court suspends attorney for pattern misconduct

The Alaska Supreme Court upheld the Disciplinary Board after an attorney on interim suspension challenged the Board's sanction recommendations. The court agreed that attorney Eugene B. Cyrus be suspended from the practice of law for five years, with two of those years stayed. The court also ordered Cyrus to serve a three year probation if he returns to the practice of law. A condition of Cyrus's return to practice requires that he practice law solely as an employee of an agency or firm.

In May 2006 Cyrus began a six month suspension for neglect and lack of candor with the court. He returned to practice in March 2007 and approximately a year later state district court judges began to complain about his failure to comply with court rules and procedures. Bar counsel opened six complaints and requested Cyrus to file mandatory responses to the misconduct allegations. Cyrus did not file responses to any of the complaints and the allegations were deemed admitted.

In March 2009 the court put Cyrus on interim suspension pending resolution of the complaints. In April 2009 Cyrus admitted to most of the misconduct and waived the liability phase of a disciplinary hearing. Following a sanctions hearing, the Area Hearing Committee recommended a three year suspension from the practice of law with six months of that suspension stayed and imposed conditions in the event of reinstatement. The Disciplinary Board adopted the Committee's findings and conclusions but recommended a five year suspension with two years stayed along with reinstatement conditions. Cyrus challenged the Board's recommendations to argue only that he be allowed to engage in supervised pro bono work during the last year of the three year suspension during which time he would otherwise be unable to practice law.

In denying Cyrus's request, the court considered both the appropriate level of sanction for the admitted misconduct and the appropriateness of granting his request to perform pro bono work while serving a disciplinary suspension. First, the court pointed out that Cyrus knowingly violated ethical duties owed to his clients by failing to communicate with them, failing to appear at hearings, and failing to file pleadings and duties owed to the legal system by causing unnecessary delay in court proceedings and failing to respond to disciplinary charges. While Cyrus's earlier suspension for similar misconduct could support disbarment, the court agreed that the absence of a dishonest or selfish motive helped to mitigate a disbarment sanction to suspension.

The court rejected Cyrus's request to practice pro bono work under supervision during his third year of suspension. The court weighed Cyrus's commendable desire to help persons unable to afford legal services with the more compelling concern of protecting the public, the courts, and the legal profession. Also, clients unable to afford counsel should not risk a lesser standard of legal representation from a lawyer who fails to comply with rules of professional conduct.

The court ordered that Cyrus's term of suspension be applied retroactively to the date of his interim suspension in March 2009.

Anchorage lawyer disbarred

The Alaska Supreme Court disbarred attorney Dennis R. Acker from the practice of law, effectively immediately. The court's December 9, 2010 order also set out several conditions for readmission including restitution of monies to clients and the Bar, CLE attendance, and mandatory auditing and reporting of client funds.

Disbarment followed Acker's abandonment of his law practice and violation of ethics rules and duties owed to his clients. Acker failed to provide competent representation to his clients and failed to represent his clients diligently. He failed to charge reasonable fees pursuant to written fee agreements. He failed to act with candor toward a tribunal and failed to comply with Bar rules governing lawyer discipline. The Area Hearing Committee considered the most egregious violations to be his intentional and knowing commingling of client funds with his own and the periodic misappropriation of client settlement funds and incomplete accounting to his clients of client money.

In Memoriam

David Marshall

David Vance Marshall, a groundbreaking federal prosecutor and defense attorney, died Feb. 2 after a yearlong bout with kidney cancer. He was 60.

David Marshall liked to get things right. He was a top-notch skier, an enthusiastic musician and a fierce legal opponent known for meticulous preparation.

But the high-powered attorney also had a mirthful side. He showed up unannounced to his daughter's horse-riding competitions. He started dating his future wife after a playful dispute about cookies. And when forced to be on the road for work for a month, he called home every night using early videocam technology so he could read his children "The Hobbit."

"He constantly played at the top of his game," said Bud Walsh, a San Francisco-based attorney at Davis Wright Tremaine who worked with Mr. Marshall on ocean- and fishing-related cases. "He was a class act. You don't find a lot of people like that."

An Army brat, he was born in Baltimore Maryland, grew up in Germany, Japan, the Missouri Ozarks, Texas, Chicago, and northern Virginia. He received his Bachelor's degree at John's Hopkins University and his J.D. from American University Washington College of Law in 1975. He moved to Seattle in 1980 as an Assistant United States Attorney. An avid outdoorsman, from 1983 to 1989, he focused on environmental prosecutions determined to help clean up the Pacific Northwest. He joined Davis Wright Tremaine in 1989 and continued to work on environmental cases, as well as white-collar criminal defense, securities, and health care cases. In his spare time, he played guitar and served as a board member for the Seattle Classic Guitar Society, mentored young lawyers, fanatically skied, explored the San Juans by boat, hiked, and camped throughout the western states.

He worked for a while at the federal Department of Labor early in his career, but he really wanted to make his way out West. He saw Seattle for the first time in 1978.

"It was gorgeous. It was just beautiful," Mr. Marshall told the Seattle Post-Intelligencer during an interview in the mid-1980s. "It's funny. I traveled all over the world with my parents, and I had never been anyplace that felt like home. The minute I got off the plane here, it felt like home."

Already a rabid outdoorsman, Mr. Marshall was skiing and hiking his way through the Rocky Mountains two years later when he called his mother back East, who told him he'd been contacted about a job with the U.S. Attorney's Office in Seattle. He was hired later that year.

In the early 1980s, he became the first public face in the Northwest for the criminal enforcement of environmental laws, after the Environmental Protection Agency finally hired investigators. Mr. Marshall prosecuted their cases zealously.

"He was really one of the first people in the U.S. to focus on criminal environmental prosecutions," said Mark Bartlett, a colleague of Mr. Marshall's at the U.S. Attorney's Office and later at Davis Wright Tremaine. "And he was very passionate about it. He was the classic Northwest eco-guy before it was hip."

Mr. Marshall went after local companies that dumped waste, and he went after international corporations. His aggressiveness helped establish precedents that remain significant today.

"The case law was not yet developed," said Helen "Micki" Brunner, an assistant U.S. attorney who worked for him in the 1980s. "He was pretty creative and willing to assess a situation and be a pioneer."

He also could pour on the charm. Mr. Marshall was in court the day a pretty woman in his office brought chocolate-chip cookies. When he found out he had missed the treats, he made sure she knew he was disappointed. She came in the next day and left him a candy bar. Soon the two were dating.

The couple went sailing on Mr. Marshall's 26-foot boat and spent a year hiking and experiencing the Northwest. When he proposed to her at a Japanese restaurant, "I was crying so hard, I couldn't even seen the ring," recalled his wife, Maria Marshall.

Mr. Marshall left the U.S. Attorney's Office at decade's end and took a job with Davis Wright Tremaine. He represented seafood processors, cruise lines and Alaska Native corporations. The accolades continued: named a Super Lawyer in Washington Law & Politics magazine, a top business lawyer in Washington CEO Magazine, one of the city's best in Seattle Magazine.

When he got sick a year ago, he vowed to fight, and he hung on to see his daughter's 17th birthday and Christmas. "It was the best gift," his wife said.

In addition to his wife, Maria, of Bellevue, Mr. Marshall is survived by his daughter, Alina, and a son. A memorial service is planned for noon, April 4, at Daniels Recital Hall, the former site of the Methodist church where the Marshalls were married, 811 Fifth Ave., Seattle, WA 98104.

Craig Welch, Seattle Times

The absolutely true story of a local attorney as an extra

Continued from page 1

my email no more than once an hour. At last I received an answer which began: "Auto-reply. Do not respond to this message." Success! Lesser mortals would have been discouraged but to me it meant I was in the "Database of Future Stars!"

Some time later I received a more personal email with portions of scripts from three different movie characters attached! I was told to memorize them and to show up for a filmed audition in an office at the Dimond Mall. My pulse raced as I labored to memorize page after page of dialogue (approximately six pages in all).

At the appointed day and hour I went to the Mall and stepped into the elevator. As it rose – so did my spirits. This was it. My chance to shine! The audition turned out to be far different than the typical audition for local plays. There was no stage and there was to be no moving about. First they took their own headshots. Then I was told to stand with my toes on a tape mark on the floor and not to move. I could move my head a bit, but all acting and emoting had to come from my voice and facial expressions. There would be no body movement. The movie camera was fixed approximately two and half feet from my face.

I was to do three different parts – a general, a reporter, and an "expert" of some sort. The other part of the dialogue was read by the casting director from behind the camera. The director had me do each part three different times giving me direction each time to be "a bit more sympathetic" or "a bit more angry" etc. She told me I did well and that if I got a part I would be hearing from them sometime in early September IF I got a part. If I didn't, I would hear nothing. This was July…and the wait began.

(I heard from an actress friend that she only got one read-through and was done. Her scene was a brief one answering the phone in which she would have been paired with Drew Barrymore and Jon Krasinski (of "The Office" and Drew's love interest in the movie). Unfortunately, she was told, in so many words, that she was more attractive than Drew and they couldn't have someone that would show up their star! My friend was philosophical about it, though – of all the reasons to not get a part that had to be one of the better ones).

I knew from news reports that they were to start filming in mid-September. And so it was that the early days of September came and went without word from the casting director. And then late one day in mid-September I received a call. A personal call! Not an auto-reply email, but a call! No, I was not to get a part, but could I appear on three different days to play an extra? Seeing that two of the three days were on normal work days and not being able to afford the loss of pay for the thrill of being an extra, I politely declined. I received a response in return that said "We would love to have you even if it is only for a single Saturday!"

And so it was I learned one of my first lessons in the brutal "take no prisoners" world of getting ahead in Hollywood – negotiate from a position of strength and don't be afraid to hold out for what you want! My ego fully sated, I readied my self for my big day and went to sleep to the dulcet sounds of my siren singing sweetly in my ear. So I didn't get a "real" part, but perhaps I could still get "noticed." This could still be my big break!

I was given directions to arrive at Goldenview Middle School at 8 a.m. on the appointed Saturday. This was in the Upper Hillside area of Anchorage, an affluent area that I had never had occasion to visit in my nearly 25 years in Alaska. I was told that as I neared the school there would be signs to direct me. This was during the time of the "Great Fall Fog of 2010" that many of you will recall. Black lettering on bright yellow background signs announcing "ELW" easily stood out in the fog. "ELW" – "Everybody Loves Whales". My heart raced – the sound of my siren was almost painfully loud and I was loving it! As I pulled into the parking lot and got out, I looked around and was astounded by the amount of gear and equipment visible in what was the day's "base camp." There must have been 30 to 40 trailers in the lot including at least 15 locally rented identical RVs. There was also a huge catering trailer and a costume/wardrobe trailer both of which – I later learned – had been shipped up by barge from California, along with tons of other equipment.

I reported to the casting director inside and was given paperwork to fill out to ensure I would be paid appropriately. Extras get about $8 a day. Most of the morning consisted of waiting, getting make-up, waiting, dealing with costumes, waiting and more waiting. But it was also a chance to get to know fellow extras and learn a little about the parts we were to play.

There were 7 men and 5 or 6 women. The men were middle-aged and older and we were collectively referred to as the "Fat Cats" – as in oil company "fat cats." We were to play oil industry executives in a dinner scene with Ted Danson. Ted's character, I learned, was "J.W." the owner of "Northern Oil." The movie is considered to be a fictionalized account of the 1988 gray whale rescue off of Barrow and his character was loosely based on Bill Allen whose company, VECO, had played an important part in the rescue.

We men noticed that the ladies who were to play our "wives" were – to be plain – younger and better looking than any of us and so there was much speculation and jocularity as to who would be matched with who. In the end we discovered that we would not be together in the scene at all.

All ready for the shoot in costume, the fatcats & "wives" pose in the atrium at Goldenview Middle School. Todd is on the left.

The make-up area was set up on the stage at the school where make-up artists brought up from Hollywood were applying make-up to the "wives". We men received much less attention. I was rather humbled when I got into the chair and was told by the make-up person, as she gazed upon my "follicly" challenged dome, "looks like we just need to give you some anti-shine powder!" Sigh. My ego was slightly mollified later when I was sitting in the cafeteria waiting for the next move and another make-up person came by and decided I needed a bit more of something. I got up to follow her to the make-up area, but she insisted I stay there and she would come to me! Ah, now that is more like it I thought – the real Hollywood treatment. I figured it wouldn't be long before I was sitting in one of those folding canvas chairs with my name emblazoned on it: "Extra."

Throughout the morning I yakked with as many movie production people as I could. I was intensely curious about the process. One thing I learned is that there are very few company employees. Everyone I spoke to – costumers, make-up folks, production assistants (read – guys and gals with clipboards that are constantly tasked by people higher up the food chain) – were under contract just for that movie.

We had been told to arrive dressed in something that looked "80s". I wore a blue blazer, blue shirt, tan slacks and some brown shoes. Unlike most of the other actors, I failed the test, but the upside was that this meant a trip to the wardrobe van for an outfit! (When I later saw Ted Danson on the set in costume I noted that his outfit was identical to what I had shown up in – no wonder they made me shuck it for something from the wardrobe).

The wardrobe trailer was heated and carpeted and had rack upon rack of various men's and women's clothes, including heavy parkas. In talking to the costumers I learned that there are giant costume warehouses in Los Angeles where costumes are arranged by era. The costumers then go in and select what they want. In this case it was all put in the trailer and shipped up to Alaska. For me they selected a lightweight brown suit. Instead of a shirt and tie I was given a two-button lightweight sweater pullover to wear. This made me the casual guy of the bunch as all the others were in ties.

By this time it was getting close to noon and the production assistants were getting nervous because they were getting pressure to get us up to the set before the lunch break at 12:30. Unfortunately, my costume issues somewhat delayed us. The costumer tried to tape the hem on the pants but after I got them on they started to fall apart. She quickly grabbed needle and thread and on bended knee tucked in a few quick stitches while I stood there. This was another "Hollywood" moment where I felt I was getting the star treatment! It was just at that time that I heard the following over a two-way radio: "I don't care if the Fat Cats are ready or not! I want them up here NOW!" Yikes!

(I have to say that was the only mildly negative "Hollywood" moment of the day that resembled something seen in movies about movie making. Invariably, I found everyone associated with the production, from the lowest employee up to the stars and director, to be polite, friendly and hard-working. In short the industry resembles nothing you see in the tabloids).

With that we were hustled into a 15-passenger van and taken further up Hillside to a very affluent neighborhood and a very nice house whose owners had agreed to have turned into a movie set for the day. Again, the amount of equipment and trailers up and down the street, in the driveway and in the house was truly astounding. Huge cameras, lights and other equipment were everywhere. I was amazed at what goes into shooting a 30-second scene.

We were taken into the house and told to sit at a table in the dining area. A short time later Ted Danson (not yet in costume) came out and sat down at the head of the table. I was at the other end. He carried no "star" airs about him and talked with us as a group just like any ordinary human. The ladies of our group were out in the living room for their scene.

The director, Ken Kwapis, (perhaps best known for directing "License to Wed" starring Robin Williams, Mandy Moore and John Krasinski, as well as directing "The Sisterhood of the Traveling Pants,") came over to us dressed in jeans and a t-shirt, and talked to us a bit. Again, there were no airs about him at all. He

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ESTATE PLANNING CORNER

The 2010 Tax Act

By Steven T. O'Hara

What do the 2001 Tax Act and the 2010 Tax Act have in common besides years with the same numerals? They both — *on only a temporary basis* — make remarkable changes to the U.S. wealth transfer tax system, *changes that could lead to permanent repeal of U.S. wealth transfer taxes.*

The 2001 Tax Act is known as the *Economic Growth and Tax Relief Reconciliation Act of 2001*. The 2010 Tax Act is known as the *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*. These acts significantly reduce estate, gift and generation-skipping taxes.

Unfortunately, as mentioned, this tax reduction has not yet been made permanent. The 2010 Tax Act extends the "sunset" provision that preexisted in the law in connection with wealth transfer taxes. The net effect is that the new law provides that the tax reduction will last two years only, 2011 and 2012.

Specifically, Section 101 of the *2010 Tax Act* interrelates with Section 901 of the 2001 Tax Act to provide:

All provisions of … this Act shall not apply … to estates of decedents dying, gifts made, or generation skipping transfers, after [December 31, 2012]. *** The Internal Revenue Code … shall be applied and administered to years, estates, gifts, and transfers [after December 31, 2012] as if [this Act] had never been enacted.

The language in brackets is from the 2010 Tax Act.

In other words, the U.S. government has scheduled the years 2011 and 2012 for there to be a significant reduction in estate, gift and generation-skipping taxes.

Recall that the amount that may pass free of federal estate tax is generally known as the unified credit equivalent amount or, more recently, the applicable exclusion amount. From 1987 through 1998, this amount was $600,000. Beginning January 1, 2000, the applicable exclusion amount was scheduled to increase over time to a high of $1,000,000 in 2006.

"Anything is possible. Let's at least hope the uncertainty in federal wealth transfer taxes is eliminated if not the entire system."

Then the 2001 Tax Act was passed. Under the 2001 Tax Act, the applicable exclusion amount increased over time to a high of $3,500,000 in 2009. In addition, the 2001 Tax Act reduced the top estate and gift tax rate from 55% over time to a low of 45% beginning in 2007.

Now under the 2010 Tax Act, the applicable exclusion amount is increased to $5,000,000 and the top estate and gift tax rate is reduced to 35% (2010 Tax Act, Sec. 302).

Under the sunset provision discussed above this tax reduction is scheduled to go out of existence in 2013 as if it had never occurred. Thus in 2013 the top estate and gift tax rate is scheduled to increase back to 55% and the applicable exclusion amount is scheduled to decrease back to $1,000,000.

Consider a client, an Alaska domiciliary, who is unmarried. She has never made a taxable gift, and all her assets are located within Alaska. Her assets consist of her home, various bank accounts, and marketable securities. She has no debt. The total value of her assets is $5,500,000. Suppose under her Will she gives all to her children.

If the client dies in 2011 or 2012, total federal and state estate taxes can be estimated at less than $200,000 (i.e., 35% of $500,000). By contrast, if the client dies in 2013, total federal and state estate taxes can be estimated at well over $2,000,000 (i.e., the amount that may pass tax free is only $1,000,000 and graduated tax rates apply with a maximum of 55%).

So the new law contains good news, but the good news could be better. What the U.S. government gives, the U.S. government takes away. As the examples illustrate, the same family could face estate taxes of less than $200,000 in 2011 and 2012 but over $2,000,000 in 2013.

Look for compromise to be worked out over the next two years. For example, one obvious compromise is to make permanent the $5,000,000 applicable exclusion amount and the 35% top rate. Making these items permanent would be considered a compromise as compared to abolishing the wealth transfer tax system.

Anything is possible. Let's at least hope the uncertainty in federal wealth transfer taxes is eliminated if not the entire system.

Literally anything is possible. Consider the compromise in the 2010 Tax Act with respect to individuals who died in 2010. The new law allows an election to pay no federal estate tax, if the decedent died in 2010, even if the taxable estate is in the billions of dollars (2010 Tax Act, Sec. 301). The price of this election is that the persons entitled to the decedent's property would generally not obtain a tax basis in the property that is "stepped up" to the fair market value of the property (Id. and IRC Sec. 1022). Instead, limited tax basis increases would be available (Id. and O'Hara, *Will Congress Abolish Basis Step Up?*, The Alaska Bar Rag, Nov. Dec. 2001).

In other words, for 2010 decedents it is possible to pay no federal estate tax with the result that future income taxes could be higher when the subject property is sold.

Finally, it bears emphasizing that for the most part the 2010 Tax Act reinstates the general rule that when a property owner dies the persons entitled to the property obtain a tax basis in the property that is stepped up to the fair market value of the property (IRC Sec. 1014). As mentioned, the exception in the 2010 Tax Act is for 2010 decedents where an election may be made to pay no federal estate tax.

The absolutely true story of a local attorney as an extra

Continued from page 24

was relaxed and pleasant. He told us that we would be doing a light check before lunch and then come back to do the actual filming after lunch. He explained that our brief scene was set in a ranch house in Colorado which belonged to "J.W."

It was six months after the whale rescue and in the midst of the Exxon Valdez oil spill clean up (something that VECO ("Northern Oil") played an instrumental role in). We were told that as the cameras started rolling we were to engage in general "party conversation" and then be interrupted by "J.W." announcing a toast in which he says "to the Valdez – the gift that keeps on giving!" To which we then were to all heartily agree with and laugh about. Apparently, the idea was that the clean up provided a much needed cash infusion to oil field support companies that had been ailing under the low price of oil in the late 80s.

My assumption is that this scene would be used towards the close of the movie to show what happened to the various players after the whale rescue. Or perhaps it will be used as part of a flashback sequence. I have no idea, but fear it may end up on the cutting room floor since it doesn't deal directly with the whale rescue. On the other hand, they spent a huge amount of time to get the 30-second sequence on film, so there is hope yet that my bald dome may yet gleam brightly on the silver screen!

As the camera crews were fiddling we all engaged Ted in conversation. I asked him if he had been to Alaska

As a prime example of why cell phone cameras are not ready for movie prime-time, is this shot of Todd on the set at the fatcat dinner on the Hillside.

or Barrow before. He said that he had once made a brief visit to the oil fields as part of his environmental work some years before. Shortly after that we broke for lunch. As we were led back to our van, I couldn't help but notice that Ted was to be driven back down the hill in a huge, shiny, brand new, black Chevy Suburban. Later in the day I saw the same vehicle idling, with no one in it, on a day when it was 50 degrees out. Yeah. 'Nuff said.

Lunch was fantastic. As extras we were told we were to be at the end of the line, but there was plenty to go around and it was probably the best cafeteria style food I have ever tasted. I seem to recall baked halibut among other things. Although the catering company and equipment came from L.A. they were buying all their food locally I was told.

After lunch we were driven back up the hill to the house and taken inside once again. This time Ted came out in costume. Someone helped him put his blue blazer on and I couldn't help but think how every step was so carefully planned and controlled - or so it appeared. It was just a short time later when we had already done one shoot that Ted noticed, with some amusement, that there was still a tag on the sleeve of his brand new blazer! He just removed it with a smile and a bemused comment and gave it to an assistant.

This time our table had huge platters on it that were covered with mounds of ice topped with crab, lobster, and oysters – truly a meal worth of oil company fat cats! At our places we had glasses, plates and all the necessary tools for attacking the seafood. To my surprise the seafood was real! I had expected it to be plastic. Someone asked whether we should have any seafood on our plates – apparently this had not been thought of – and an assistant quickly began putting seafood on our plates. Some were to drink faux brandy or whisky (they got apple juice) and some of us were to have faux martinis (water with olives). Each time we did a shoot the guy playing the waiter would refill us before the next shoot. My water began to taste more and more like olives and less like water. Ah, but how we actors suffer for our profession!

Our little scene was shot at least 8 to 10 times. Sometimes we received a bit of direction from the director and tried again. Sometimes camera angles changed. At least three takes were done from my end of the table where I had been sitting, and I was out of the scene. Then we did several from that same angle but with me sitting on a crate right under the camera so that my voice would be heard, although I would not be seen.

In between takes we all shot the breeze with Ted and each other. He was quite interested in the story I told of "walking" with gray whales while in Barrow. (One summer evening two gray whales were swimming just 10 feet off the beach at such a slow pace I walked along with them for over a mile). He was also interested in a story I told of an encounter with a polar bear while in Barrow. He decided that for the last three takes I should be telling him that story during the initial general conversation.

After all the takes we were taken back down the hill, turned in costumes and signed the final paperwork for the day. All in all it was a fascinating and interesting day.

A few weeks later, I received an envelope in the mail. I tore it open, and there it was – a check for $62 signed by none other than my siren - Holly Wood. My siren had not failed me after all – I was now a professional actor! Perhaps someday I would see my name on the Hollywood Walk of Fame!

Todd Sherwood has been an attorney for over 24 years and currently is an Assistant Municipal Attorney for the Municipality of Anchorage. Since the ELW audition he was invited to audition for a part in a Jon Voight film and again failed to get a part, but he remains ever hopeful. He is also involved in the local acting community and can be seen in local productions from time to time - look for the guy with the shiny dome in need of anti-shine powder.

TALESFROMTHEINTERIOR

Grumps, too

By William Satterberg

"Dad, are you sitting down?" my daughter asked.

"Why?" I immediately inquired.

"Because you are going to be a grandpa!" she replied. My youngest daughter, Kathryn, always had a way of getting right to the point.

Picking myself up on the floor, I asked when the baby was due.

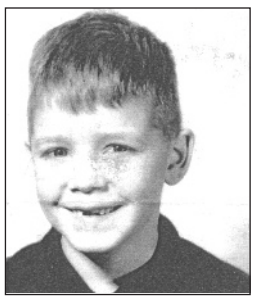
"Around New Years Eve" was the answer.

I did some quick mental calculations. Apparently, more happened on the last April Fools Day than just my yearly birthday party. With any luck at all, I reasoned, Kathryn would have the baby before the New Year. After all, I had long since given up on the much celebrated "New Years Baby," replete with boxes of baby formula, diapers, and newspaper photos of haggard mothers who had struggled so hard to be the first to usher in the New Year while the rest of us partied. No, it was far more important to qualify for this year's PFD, which was usually worth well more than a few hundred bucks of donated Similac and Huggies. The race was on!

For the next nine months, Kathryn blossomed – in more ways than one. She began to read up on things like childbirth and baby nutrition, and abandoned the ways that gave rise to the rise that got her pregnant to begin with. Motherhood was already beginning to arrive. But, Kathryn was not alone. Much to the contrary. My wife, Brenda, also went into full gear in preparation for the blessed event, trying her best to be matronly as she read books like "Chicken Soup for the Grandmother's Soul" and other "how to" manuals. But, not just personalities were changing.

Our house, too, experienced transformations in some subtle and in some not so subtle ways. After all, we were collectively readying ourselves for another Satterberg family adventure. "Childproofing" once again became the norm. Even though it would still be months before the "little grandbaby" arrived, let alone become an active familial saboteur, Brenda was intent upon training me to be an active participant. No longer could I leave my three-day-old underwear on the living room floor hoping to surprise some unexpected guests. It was better to be safe than sorry, I was told. Nothing was immune from Brenda's spontaneous grandbaby alerts. Childproofing soon became a sore point with me when I could not open the liquor cabinet because of some adult proof locks that had been installed one day.

Old toys long since relegated to the storage shed were resurrected and scrupulously scrubbed down with Lysol. In contrast to childproofing, Lysol was a good idea, since I was often known to put things into my mouth when I played with them. I was actually pleased to find that the toys had not been tossed. I had missed many of the toys and did not like to share. They were fun to play with and they belonged to me, the way I saw matters. Moreover, my two daughters were fully grown and no longer had need for their dolls.



"Old toys long since relegated to the storage shed were resurrected and scrupulously scrubbed down with Lysol."

A crib soon appeared. Then, a playpen and a high chair materialized. A baby intercom was installed. The obligatory vaporizers, mobiles, "Tommy Tippees" and plastic Disneyland and SpongeBob paraphernalia also magically arrived to assume coveted positions on the household shelves. At the same time, my classic Rambo and Rocky I, II, III, and IV movies were boxed up and put away. It was not long before both the family golden retriever, Lucy, and myself concluded that this was not to be a passing phase in my wife's life. No, Brenda, without doubt, was approaching grandmother-dom with unfettered zeal. She even developed a "toddle" in her walk.

I, for one, was not as committed to the grandparent concept. Not that I did not look forward to a grandbaby. But, I had yet to recover from the trauma of raising our own two girls. Although I had been an ambulance attendant for several years and had seen a rather extensive amount of emergency trauma, I had never grown accustomed to dirty diapers or the smell of urine on anyone except myself. In my book, babies equated to diapers. Diapers equated to visual, tactile, and olfactory images best left buried in the dark recesses of my mind lest my insecurities once again be given full reign. People used to tell me that "doing diapers" encouraged bonding, but I never saw the connection. I was assured by Brenda, however, that those duties which I had so scrupulously avoided in the past were even less likely to plague me in the future. After all, I was to be a grandparent. Diapers were for parents. Then, again, I had also known more than one grandparent who repeatedly wore diapers. It all Depends, I guess.

I thought of my own father, who had actually accepted grandfatherdom rather well, choosing to call himself "Grumps" instead of Pop Pop or Grampa or some other hokey name. I reluctantly decided that I, too, would adopt the name. In many respects, it would fit my personality well. I would be "Grumps," too.

In retrospect, what really subjectively distressed me was that I was implicitly entering the final phase of my earthly existence. No longer was I the carefree youth that used to scare the daylights out of my folks when they would learn of my shenanigans. The cavalier days of a horny, single college student who viewed classes as optional were also long gone. I had not yet fathomed how well over twenty years as a father and husband could come and go so quickly. Now, I was having to come to grips with the unavoidable fact that I was now to be a grandfather. Where Brenda delightfully embraced the concept, I began to realize that I was really a chubby, balding, grey haired old guy whose intestines were now supposed to react on command when my index finger was pulled. Kathryn was right. I needed to sit down. It just took me a while to realize it. Nine months, to be more exact.

My grandson, Jacob, chose to make his entrance to this world two days before the New Year, on December 30, 2008. The staff at Fairbanks Memorial Hospital were superb, as were Kathryn's attending caregivers. In retrospect, this was important, since I had long become the proverbial basketcase and definitely needed competent medical care.

Sean, Jacob's father, was also immersed in the process and stayed at Kathryn's side through the whole ordeal, even though it was also Sean's own 21st birthday and he likely would have enjoyed a few toasts with his buddies. Apparently, certain events ran in Sean's family. Like father, like son. Same birthdays. Still, Sean could now smoke the obligatory cigar, which I gave to him, provided that he left the hospital property.

The Satterbergs are a racially mixed family. Both of our daughters are adopted Pacific Islanders, previously known as Micronesians. Today, however, "Pacific Islanders" is the politically correct term. Brenda and myself became the girls' parents when they both were just newborns. As such, neither of us had ever experienced the rigors of childbirth, firsthand, although we had certainly expended some rather heroic and creative efforts on the subject, often well into the evening hours at some of the most unlikely locations. To my credit, I was personally well versed in that field, having regularly practiced various techniques zealously since the age of 13, when Hugh Heffner and I figuratively became friends.

The idea of sitting patiently in a waiting area in the hospital "women's floor" was entirely new to me. Besides, if it was supposed to be a women's floor, why was I even allowed into the vicinity? In college, women's floors were strictly verboten, even though most males tried to break through security, just like Tom Temple's scruffy hound dog trying desperately to climb over the family fence. Still, I personally wanted no part of the hospital women's floor.

For me, the women's floor was a terrifying place. From several rooms along the hall, a chorus of screams, moans, and unladylike grunts were emanating that made the place sound like a beach full of lovesick walrus' wanting to mate with every animal on Old MacDonald's (not the judge's) farm. Somewhere in that caldron of primal life was my little baby daughter, Kathryn, valiantly struggling to deliver a baby who was still more than happy to remain quite warm and secure in mommy's womb.

To add to my distress, Brenda had left me in the waiting area an hour or so earlier. She had gone to check up on Kathryn, and had not returned. I began to suspect that Brenda had chickened out, leaving me to cope with the event. After all, I was the only visible man on the women's floor. My fears were unfounded. I later learned

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Grumps, too

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that Kathryn had compassionately told her mom that, since Brenda had missed out on the birth of our own two adopted daughters, it was a good time to experience the miracle of childbirth firsthand. Not that I had any jealousy at all over the subject. Undoubtedly, I would have fainted, being unfamiliar with any serious trauma. No, it was best that I remained safely in the waiting area with my oldest daughter, Marianne, who was engrossed in a stack of outdated People magazines, seemingly unaffected by the torment of those around her. Still, Marianne did show concern for me from time to time, occasionally reassuring me with words like "Breathe, Dad, breathe. It will be ok." And, "Sit down Dad! Quit pacing!"

A small person, Kathryn's labor was clearly an ordeal. As it turned out, her baby was the size of a respectable rib roast. A stubborn child, however, Kathryn would not agree to a C-section, even though it was suggested on more than one occasion. A resolute kid from the day she was born as a nine week early "preemie," Kathryn was not about to give in and take the easy way out. This was simply another battle that she was determined to win.

After several hours, I excused myself. I told Marianne that I had to make a phone call. After all, a phone call was something that even my now suspicious Marianne would believe, my addiction to telephones being legendary among the family. Any other excuse would be immediately suspected. I quickly left the room before Marianne could reconsider. However, rather than making my promised call, I snuck down the hall to stand quietly outside Kathryn's room. I wanted to see if she was the source of the unearthly wailing and screaming. To my relief, Kathryn's room was serene. The next door neighbor, however, clearly needed a lesson in hospital etiquette, being unashamedly loud and occasionally profane in her efforts at delivery.

Several voices were calmly talking in Kathryn's room. Something was being discussed, but it was hard to discern. Since my presence was not needed, I figured I probably looked foolish hovering outside the room. Besides, I was supposed to be in the cafeteria on the phone. It was time to return to my post before I was busted by Marianne. As I turned to leave the area, I heard an unmistakable new voice making itself clearly heard above the rest. Early on, he was assuming control, announcing loudly that he had just entered into this world. He obviously wanted to get matters started out correctly and on his own terms. His name was Jacob. He was my new grandson. And, just to emphasize matters, Jacob had pooped on himself.

I later learned that Jacob had also stressed his points by generously baptizing everyone within range with a spontaneous shower, having yet to perfect his aim. This is something which Jacob still does from time to time, and one of the other reasons why diapers and I have a healthy disrespect for each other. Even though I have been repeatedly reassured that being tinkled upon promotes bonding, I still disagree. If that were to be the case, I have likely bonded with over half the men that I have stood next to at urinals throughout the world, even if they didn't know it at the time. (That's one reason, ladies, why men don't talk at the urinal. Except at the Chicago Greyhound Station. Conversation spoils both the concentration and the aim, which is also why men usually do not naturally gravitate to "doing the diapers").

Something changed in me on December 30, 2008. At first, I regarded "Jake" as the proverbial food-processing unit who had a unique way of making his presence both known and felt. Fortunately, after the first six months, Jake's unique personality began to emerge. I have now actually begun to again enjoy child raising. Each day with the little guy is truly an experience, as are the rest of the family's ooh's and aaah's over Jake's many milestones. These experiences come on a daily basis ranging from "his first army crawl," (the dog got a surprise on that one also) to "his first step" (we had to move Brenda's antique figurine collection to another shelf) to "his first words" ("I told you to watch your language, Bill!") to "his first no." ("No, Jacob" has now become a common phrase. In fact, the poor kid might even be starting to think that his real name is "No, Jacob! Leave the cat alone," and just "Jacob" for short.)

Early on, he was assuming control, announcing loudly that he had just entered into this world. He obviously wanted to get matters started out correctly and on his own terms.

Jacob's photographic baby book, meanwhile, continues to grow rapidly, causing us to remember that Kathryn is also a quarter Japanese and thus has a natural affinity for cameras. All I can do is stand back and watch Kathryn and her mother shoot scads of pictures of Jacob's every move while saying a silent "thank you" to whomever had the common sense and foresight to develop the digital camera. In retrospect, that person probably saved more than one family from bankruptcy.

It was during Jacob's second year when his true personality began to show. He became a real enjoyment for me as our daily rituals emerged. For example, I learned that, like myself, Jacob appreciated his "morning shot". Where my morning shot was traditionally strong coffee, Jacob's varied. For Jacob's first year, the shot came in human form. But, by Jacob's second year, he had graduated to solid foods. Solid foods were both a good and a bad thing, depending upon whom did the diapers. Strong coffee was still out, but I soon did discover that Jacob had a special desire for whipped cream. As such, it was not long before every morning would find us both at the refrigerator raiding the Redi-Whip spray container, with a shot of whipped cream in each one of Jacob's small hands and one directly into his open mouth, for extra pleasure. Usually, 6 shots of whipped cream were more than enough to get him started for the day.

Like myself, Jacob also developed a special desire to play with "big boy's toys." Our family lives on a large yard outside of Fairbanks, with a number of acres of lawn that need to be mowed. Several years ago, I purchased a golf course lawnmower known as a "0-radius turn" mower. The mechanism that operates the mower is a set of push/pull levers. The operator simply pushes and pulls the levers back and forth to make the mower forward, backwards, or turn in very tight circles to the left or the right. During the summer of Jacob's second year, I had him sit on the mower with me one day while I carefully mowed the lawn. The little boy's curiosity soon took the better of him, and he began to shove the levers back and forth while I held tightly onto him. It was not long before Jacob had mastered the concept of driving the lawnmower. For added fun, he delighted in chasing his terrified mother around the field.

Our communications also improved during year two. Because Jacob was learning sign language as an additional method of communication, he developed two special hand signals. One was for his shot of whipped cream, which was a finger pointing to the palm of his hand, coupled with a "sshh" sound to imitate the sound of the dispenser. The other sign was for "lawnmower." This sign had two fists held upright with the muscular little arms motioning backwards and forwards as if steering the contraption, combined with the insistent command, "Tractor, Grumpa!" Virtually every day last summer, Jacob would communicate with me via his expressive sign language that he first wanted his shots of whipped cream and then to ride the lawnmower. Clearly, we had developed a unique language of our own.

I have now accepted grandpa-dom. Jake and I regularly watch television together, although our preferred choice of shows is not always the same. ("Turn off the cage fighting, Bill. Jake has been acting out again in his playpen!"). We also play various imaginary games, as well. I actually enjoy Jake's toys and Jake likes mine. However, sometimes limits need to be established. This past Christmas, the little toddler quickly ran off with my yellow Tonka dump truck before I even had a chance to break anything on it. As a consequence, I promptly stole his plastic red fire engine in direct retaliation. Two can play that game, too.

It is now clear that Jake is a quick study and has learned to pull my index finger with traditionally predictable results. He is also working on developing a respectable belch, just like me. After all, I'm a grandfather.

Still, when it is time to "do the diapers," I have learned that it is time to exercise my recognized grandparental authority with "Kathryn? I think that Jake needs to see you again. He has a special present for you!" I then kick back in my recliner to enjoy a short nap until the next event, while Brenda silently prays that Jacob will not sneak up and pull my index finger again when the guests arrive. After all, I would hate to disappoint the little guy by not reacting as expected.

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