The Alaska BAR RAG

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Dignitas, semper dignitas

If your life is changing, how does it affect your practice?

By Cliff Groh

You just paid your Bar dues for 2012 (or at least you should have).

Have changes in your health, your financial situation, or your interests made you want to review your relationship with the Alaska Bar Association? Maybe you want to stop working for a while, or maybe you want to get out of the practice of law altogether.

How do you explore your options for leaving active status with the Bar?

A number of Alaska lawyers know little about this subject, perhaps because the topic seems remote to most attorneys and perhaps because the relevant information is not gathered in a handy guide in one place.

To school yourself, you could read the Alaska Bar Rules, the Bylaws of the Alaska Bar Association, the website of the Alaska Bar Association, and the Standing Policies of the Board of Governors of the Alaska Bar Association. You could also call (907) 272-7469 and speak with Deborah O'Regan, the Association's Executive Director, who stands ready to answer your questions about getting out of active status.

Or you could start by reading this article. Maybe you could clip it and save it for future reference.

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WHAT'S YOUR STATUS?

Social networking poses ethical dilemmas

By Kevin Cuddy

Social networking websites have opened a new frontier for many lawyers to get access to easy, efficient, and inexpensive fact-gathering. These websites enable and encourage users to post a wide array of information about themselves to be shared with others.

With a few clicks of the mouse in these networks, you may be able to learn a surprising amount of information about your adversary and potential witnesses – educational background, job history, marital status, religious beliefs, whom they know, where they have been, and how they spend their time. For example: Was John Doe really bed-ridden for a month after the car accident, as he claimed in the lawsuit he just filed against your client, or was he instead playing beach volleyball in Hawaii as his vacation album on Facebook shows? Access to this information is often limited only by the poster's willingness to share, his or her understanding of the privacy settings for the website, and the lawyer's own ethical duties. This article highlights some of the ethical considerations that lawyers face while using social networking websites in connection with their practice.

The odds are high that your client and/or your adversary in most cases will be a member of one more of these social networking sites. Facebook alone boasted 160.9 million visitors in June 2011, with LinkedIn and Myspace tallying 33.9 million and 33.5 million, respectively.[1] Given the immensely valuable information that can be obtained through social media, it is perhaps not surprising that lawyers in various jurisdictions have tested some of the ethical boundaries in their efforts to zealously represent their clients.

How far is too far? How do the rules of professional conduct apply in this setting? While neither the Alaska Bar Association's Ethics Committee nor the Board of Governors has acted on the issues raised in this article, these are important issues for you to keep in mind while considering how to use social networking sites ethically in your own practice. Here is a small sampling of the ethical issues arising from the use of social networking sites, and how different ethics and disciplinary committees have addressed those issues.

Can you look at your opposing party's public social networking pages even if you were not part of the intended audience?

Generally speaking, yes. Privacy settings for the particular content are usually dispositive. If the opposing party has made his social media content available to the general public (which is frequently the default mode), there is nothing improper about counsel viewing that same content. It does not matter whether the other party actually intended that a lawyer – or anyone else – would or would not be able to view this information. What matters is whether the party took affirmative steps to shield it from public disclosure. If the party took no such steps, then it is fair game.[2] Because viewing public content does not require any "communication" with the party, Alaska Rule of Professional Conduct ("Rule") 4.2 is not implicated.[3]

What if the opposing party used privacy settings to make certain content off-limits to the public – can you "friend" her to gain access to her private social media content?

A quick explanation for those unfamiliar with social networking parlance: Some of the more popular social networking websites (e.g., Facebook) allow users to keep certain content private and disclose it only to approved "friends." The act of seeking access to this private content is through a "friend" request.

Where the purpose of "friending" the opposing party is to gain access to information that will be used in the litigation, this will likely be deemed an improper communication with a represented party.[4]

How does the analysis change if the person you want to "friend" is an unrepresented witness, rather than a party?

This gets more murky. Rule 4.2 does not apply because the witness is unrepresented, but Rules 4.1 (truthfulness in statements to others), 4.3 (dealing with an unrepresented person), and 8.4 (engaging in conduct involving dishonesty or misrepresentation is misconduct) may well apply. The Philadelphia Bar Association's professional guidance committee concluded that the act of "friending" the witness would violate Rule 8.4(c) because the lawyer would be omitting a material fact – namely, that the requester is a lawyer who is seeking access to information for use in a lawsuit.[5]

The New York City Bar's professional ethics committee took a different view, concluding that a lawyer could properly "friend" an unrepresented witness so long as the lawyer used his real name and profile to send the "friend request."[6] Unlike the Philadelphia opinion, the New York opinion had no problem with the lawyer declining to disclose his reasons for making the request. Any use of affirmative deception – e.g., using an assumed name to convince the witness to accept the "friend request" – would violate Rules 4.1 and 8.4(c).

What if I use a secretary or investigator to make a "friend request" to the witness?

The use of a third-party – whether a secretary or private investigator or otherwise – does not alter the analysis. Per Rule 5.3, the lawyer is responsible for the conduct of a nonlawyer who is employed, retained by, or associated with the lawyer, and must make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. The lawyer will be found responsible for conduct of the nonlawyer that would be a violation of the Rules if engaged in by the lawyer if, for example, the lawyer orders or knowingly ratifies

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PRESIDENT'S COLUMN

Thanks for a great year

By Donald W. McClintock

Is your office prepared for a disaster? I am talking about a physical disaster, not a bad jury verdict. Not the most pleasant thought to contemplate, but to attorneys in Galveston, New Orleans, and Minot, it made the difference between being able to help your clients in the midst of their own time of great need and being a victim yourself. In those towns, simply having a computer back up outside of the office was not enough when homes and offices were equally deluged. The Alaska Bar Association through the Young Lawyers Division of the American Bar Association is in the process of coming up with the Alaska Bar Association's own disaster relief plan. But now is a time to review or plan your firm's own policy.

A good plan is essentially a business continuity plan. How do you communicate with co-workers and your clients? How do you recreate files and records? Make payroll? Where will you work? The good news is the American Bar Association has already invested a lot of work and thought in helping you through this process through its Committee on Disaster Response and Preparedness. Check out the resources at: http://www.americanbar.org/groups/committees/disaster.html .

I am gratified because we accomplish a lot with what we have-- efforts that are fueled by a strong volunteer bar, and supported by the day to day stability of experienced and strong bar staff.

There is also good news from the national ABA. Thanks to the efforts of Maryann Foley, the ABA Family Law section is meeting in Anchorage on April 16-20, 2013. The meeting will be at the Hotel Captain Cook and will address appellate practice, custody and native law issues in family law, and domestic violence. This presents a good opportunity for family law practitioners to economically attend a national level conference and network with your peers from out of state.

Our ABA delegate Lynn Allingham also reports that the GP/Solo Practitioner section of the ABA will meet in Anchorage May 23-25, 2013. We will have yet another opportunity to improve your professional network and hopefully show our out of state guests our Alaskan hospitality.

"Cooperation and collaboration are perhaps the side benefits of a smaller collegial bar that offsets the lack of sheer budget resources."

Attending several national conferences over the last year has left me both daunted and gratified. I am daunted in part by the realization that sheer membership size does bring greater resources to bear; something Alaska will always have to do without. The volunteer and mandatory bars in our country often face the same problems, but we will not be able to address them in the same way. I am gratified because we accomplish a lot with what we have-- efforts that are fueled by a strong volunteer bar, and supported by the day to day stability of experienced and strong bar staff. A tradition of collegiality sponsored by both our courts and our bar membership has avoided some of the problems that wrack other associations and has given us new opportunities.

The Supreme Court LIVE program is an excellent example of a civics initiative lead by our court system, but that required volunteers from the bar to serve as the advisors and mentors to help prepare the classes.

The Anchorage, Juneau, and Tanana Valley bars have just established volunteer mentorship programs in cooperation with the Alaska Bar Association. Cooperation and collaboration are perhaps the side benefits of a smaller collegial bar that offsets the lack of sheer budget resources.

Further in the vein of a volunteer bar, I want to thank those firms who have institutionalized pro bono services by entering into service agreements with our legal service providers. Please consider if you as a solo practitioner, or a small firm, or a large firm can consider undertaking a similar commitment. The commitment provides for reliable and better service to those who otherwise would not have access to our legal system and reliable support to our cash strapped legal services providers. So thank-you to the following firms who have made commitments with the indicated legal services provider:

Alaska Legal Services Corp.:

- Simpson Tillinghast et al (wills/probate)
- Baxter Bruce & Sullivan (bankruptcy)

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EDITOR'S COLUMN

Judicial rentention and independence

By Gregory S. Fisher

The general election is eight months away. We can expect an increased turnout. It's a presidential election year. And, if recent trends hold, we'll see renewed attempts to reshape the judiciary. We have roughly thirty judicial officers facing retention elections this year. In my memory, judicial retention elections have mostly been rubber-stamping exercises in the grandest tradition of any Politburo. In 2006 one district judge in Kenai was not retained by a 52% "no" vote. In 2010, a district judge in Anchorage received a 54% "no" vote. Another district judge in Bethel was narrowly retained in 2008 notwithstanding a "no" recommendation from the Alaska Judicial Council. Typically, however, judicial officers facing retention collect 60-65% of the "yes" vote. There's not much drama.

I'm not sure I know any average "Joe or Jane Doe" Alaskan who has a clear idea of what they are voting for in judicial retention elections. Judges are people. Like all of us they fall on a Bell Curve. Retention standards are akin to impeachment. A judge will probably get a "yes" nod so long as he or she has not shot Willie Wonka. Even then I suspect there are some who might question whether it was self-defense.

The Alaska Judicial Council actually undertakes a fairly involved evaluation process. The Council examines affirmance rates, recusals, peremptory challenges, and salary warrant withholdings. They also consider information from judicial observers, members of the Bar, and court staff. The polls are flawed—what poll isn't?—but at least the polls are a good faith attempt to survey people. The Council then issues an impressive report with recommendations. I haven't met anyone who reads the report or votes based on the Council's recommendations. I suppose most Alaskans are voting for or against a concept--something abstract like "judicial independence" or "judicial activism."

I don't know what those terms mean, not really at least. I like the sound of "judicial independence" but could not define it. I don't want judges stampeded into a decision by a mob. But at the same time courts are co-equal with executive and legislative branches. Ours is a system of coordinated checks and balances. I believe judges should be aware of and sensitive to community needs, values, and interests.

"Judicial activism" alarms me. However, as Jeff Feldman observed: "an activist is a judge who rules against you." That's funny. Still, I don't want judges ignoring settled precedent, refusing to apply the rules, or making things up to fit their own personal or political agenda. I want judges with courage, integrity, experience, and intellect—judges that will make decisions based on the law and facts regardless of popular sentiment.

"I believe judges should be aware of and sensitive to community needs, values, and interests."

The new phrase is "judicial philosophy." That carries weight. It implies a sober debate staged in a brick hall somewhere back in civilization (say, Ithaca). Actually, though, it's more like drunken fists swinging at the NCO club on Fort Sill. I know some people who always vote "no" just because they got a photo radar speeding ticket once upon a time. Seriously. I don't know if under-votes are tabulated.

All of it makes for good theater. In the past it was harmless fun. However, the process is now becoming politicized (with a capital "P"). During the last election cycle we witnessed a relatively sophisticated, high-powered attack on Justice Fabe. A well-funded and well-timed "no" campaign picked up 46% of the vote. Sanity prevailed. Justice Fabe kept her seat on the Alaska Supreme Court by a comfortable 54% "yes" vote. I suppose "comfortable" is relative. The post-election message was clear. Judicial officers who offend someone's "judicial philosophy" will face increased attempts to unseat them.

I am not criticizing those who engineered the "no" vote campaign. They were exercising their rights within the system as the system is set up. Our system allows the voters to non-retain any judicial officer for any reason or no reason. "Judicial philosophy" is a

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The Alaska BAR RAG

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Board of Governors meeting dates
January 26 & 27, 2012
(Thursday & Friday)
April 30 & May 1, 2012
(Monday & Tuesday)
May 2 – 4, 2012
(Wed. - Friday: Annual Convention)
(Anchorage)

Letters to the Editor

Pay dues, get the Bar Rag

Over the soft wonderment of my wife, I again tender my dues to the Alaska Bar Association to maintain the profound privileges of inactive status.

In fact, I do so to continue receiving the wisdom of those who write for the Bar Rag (who will go nameless), such as those in Fairbanks (who will go nameless), who have a sense of the realities of solo-practice (who will go nameless), and who spread these across a clean, white, full page with indiscriminate joy (who will go nameless) from detailed incite to insight.

I thank the editors and staff for their service and empathy.

— Rand Dawson (1976)
Oregon Coast

Thanks for a great year

Continued from page 2

- Dorsey Whitney (Attorney for the Day)
- Lane Powell (Attorney for the Day and adoption)
- Patton Boggs (adopted region of North Slope Borough)
- Christianson Spraker (bankruptcy)
- Faulkner Banfield et al (probate)

Alaska Network on Domestic Violence & Sexual Assault (ANDVSA):

- Atkinson Conway et al (protective order)
- Borgeson & Kramer (pro se project)
- Oravec Law Group (pro se project)

Alaska Immigration Justice Project (AIJP):

- Ashburn & Mason (juvenile immigration)

In this, my last column, I also want to thank all who helped me make my way through the year, and especially all of those who put in the hours that are necessary to keep our committee and section system healthy and functional. I have discovered that strong leadership exists within our bar at all age levels and this bodes well for the success of our bar in the future.

See you at the convention and be prepared to dance!

Judicial retention and independence

Continued from page 2

reason (or not). In other states judicial officers are elected in regular, general elections. They have opponents. They run campaigns. They solicit contributions. The voters then decide which of two or more candidates will be elected judge or justice. It appears unseemly to us only because we have what we call a merit-selection system.

I believe our merit-selection system is the best system not because I know that to be true but because that is what I have been told for over twenty years. If you hear something enough times you begin to accept it without question. However, I don't think any of us can state that a pure political system yields corrupt or inefficient judicial officers. If we want to accept that premise we must be willing to accept its corollary—that American Justice is corrupt or inefficient—because most judicial officers in America are elected in regular political campaigns. I myself do not believe that American Justice is corrupt or inefficient. Elections are a form of pure market transparency.

But, although I am not criticizing those who organized the "no" vote against Justice Fabe, I believe those of us in the Bar should consider the ultimate consequences. Our judicial officers take a lot of needless grief. Their jobs are thankless. Some took a pay cut to serve on the bench. They have to make decisions, all of which are going to be criticized because someone is going to be unhappy. They work long hours. They file affidavits to get paid. They complete reports each retention period to justify why they should get to keep their positions. All for the privilege of having their "judicial philosophy" attacked for applying the law and precedent to a set of facts and reaching a decision. They deserve better from us.

I'm not sure it's our place as lawyers to necessarily recommend "yes" or "no" votes to our fellow citizens: perhaps it is, perhaps it isn't, I don't know. I'm not sure the general population would respect our views anyway. However, if the subject is "judicial philosophy" we might observe that it's hard to beat applying precedent in an even-handed manner. At least one knows why one lost. Our system depends on the appearance of impropriety. People must have trust and confidence in the administration of justice. It's all we have. If we sacrifice that for something as abstract as "judicial philosophy" we're abandoning concepts we've relied upon since Edward II. We aren't assured results we like, just results based on some pretext of legal reasoning and hopefully made by fair and impartial decision-makers. Approaching the election, maybe that's the best and most effective message we can communicate to support the Bench.

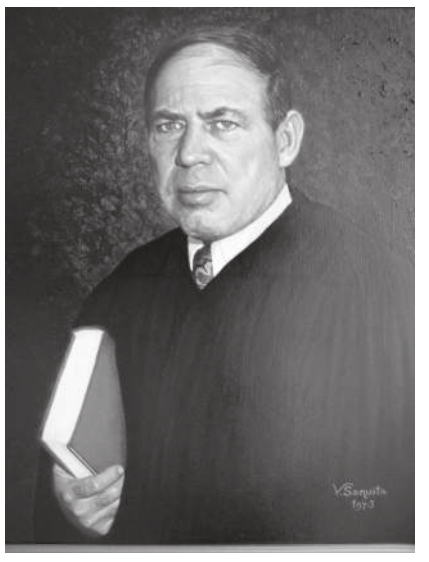
ABA launches new solo center

The American Bar Association said in January that it is offering assistance for the nation's largest law practice demographic with its new online Solo and Small Firm Resource Center.

The Solo and Small Firm Resource Center can be accessed at ambar.org/soloandsmallfirms. The website is the product of the ABA Presidential Task Force on Solo and Small Firm Membership Development. ABA President Wm. T. (Bill) Robinson III appointed the task force in August to focus the association's efforts on the value ABA membership brings to this practice segment.

"Solo and small firm practitioners have unique needs because they don't always have the same resources as large firms," Robinson said. "We are therefore excited to launch the ABA Solo and Small Firm Resource Center for all lawyers, free of charge, to level the playing field with online information for lawyers in small practice settings."

It will now be the James M. Fitzgerald U.S. Courthouse



The U.S. House of Representatives on March 5 passed legislation naming the federal courthouse in Anchorage after the late Judge James M. Fitzgerald. The Senate passed the bill in December 2011.

The Alaska congressional delegation introduced legislation to name the courthouse after Judge Fitzgerald, who served Alaska from 1959 to 2006 on the first Alaska Superior Court, on the Alaska Supreme Court, and on the U.S. District Court for the District of Alaska.

Judge Fitzgerald passed away in April, 2011. He was born in 1920 in Portland, Oregon. He served in World War II with the United States Marine Corps in the South Pacific. He returned to Oregon after the war, and married his wife Karin in 1950. Fitzgerald received his law degree from Willamette University in 1951. Shortly afterwards he and his wife headed north to Alaska. The Judge served well and honorably in several state capacities before being appointed to the federal bench in 1974. He took senior status on January 1, 1989.

"I'm honored to have been a part of this process to name the courthouse after the late Judge Fitzgerald," Sen. Mark Begich said. "He was an incredible jurist, respected by his colleagues, and known to be a master of his courtroom with great respect for the law. I know this honor means a great deal to the Fitzgerald family, and to all Alaskans, as a fitting tribute to a pioneering Alaska judicial leader."

"Judge Fitzgerald was one of the architects of Alaska's post-statehood legal system and served our people with great distinction through our State's first 50 years," said Sen. Lisa Murkowski. "Fitz served as Counsel to Alaska's first Governor Bill Egan, the State's first Commissioner of Public Safety, Superior Court judge, Alaska Supreme Court judge and U.S. District Court judge. How fitting that the Anchorage federal courthouse will bear his name in perpetuity."

"Celebrating a Sister State's Centennial: Arizona's Navy goes to War"

Arizona recently celebrated its Centennial. This brief side-bar note is intended to honor our sister state's milestone by addressing one of Arizona's more colorful legal and political events.

Water is king in the desert southwest. In early 1934, the federal government concluded plans for the Parker Dam project to create Lake Havasu as a reservoir for the Metropolitan Water Project of Southern California. In a sense this was the last major water project of William Mulholland (the water baron of "Chinatown" fame) because he acted as an informal adviser. The plan was to divert water from the Colorado River across the Mohave Desert via the Colorado River Aqueduct to several cities in Southern California.

Arizona's Governor Ben Moeur resolved to make sure that Arizona got its fair share of water. In March 1934, he dispatched a handful of Arizona National Guard soldiers to observe the construction scene aboard the *Nellie Jo*, a ferry boat donated by a Yuma County state senator Nellie Bush. Arriving at the scene, the soldiers reported back that California had sent surveyors across the Colorado River into Arizona. The press dubbed the expedition "The Arizona Navy," a label that quickly gained comical notoriety after the soldiers-turned-sailors snagged their vessel in cables and had to be rescued by the "enemy" Californians.

Construction on the dam began on September 10, 1934. Undeterred by the prior mishap, the Governor doubled-down and declared martial law. Arizona deployed 60 soldiers armed with machine guns to prevent any construction on the Arizona side of the river. Conflict loomed. People blinked. The U.S. Secretary of the Interior Harold Ickes intervened. Ickes promised that no further work would be completed until Arizona's protest was resolved. Governor Moeur recalled the troops after securing the Roosevelt Administration's approval for the Gila River project by which some of the water would be allocated to Arizona. It was a David and Goliath moment—an unexpected political win for Arizona.

However, Ickes brooded. The Roosevelt Administration had its own philosophy regarding federalism. States that dared defy federal authority set bad precedent. Something had to be done. On January 14, 1935, the United States filed suit against Arizona, seeking to enjoin any further interference with the Parker Dam Project. In something of a surprise, the U.S. Supreme Court (Mr. Justice Butler writing for a unanimous Court) ruled in Arizona's favor, concluding that the United States lacked grounds for any relief because Congress had never authorized the Parker Dam project. See *United States v. Arizona*, 295 U.S. 174 (1935). The Court's opinion was filed on April 29, 1935. Mulholland died less than three months later on July 22, 1935. In the end, Arizona's Navy prevailed. Bravo Zulu.

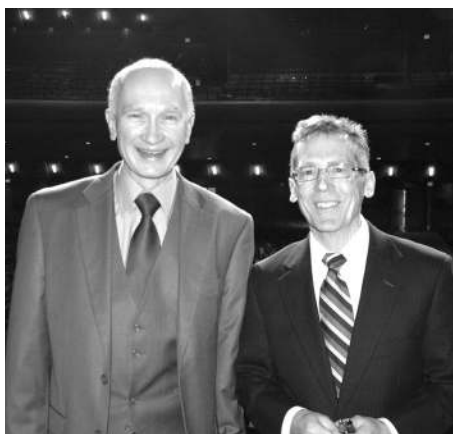
Editor's Note: this side-bar was published in The Arizona Attorney to commemorate Arizona's Centennial (February 1912-2012) and is reprinted here with permission.

At the close of the Fairbanks Supreme Court LIVE program, participating teachers and volunteer attorneys joined the justices on the Hering Auditorium stage at Lathrop High School. Fifteen Fairbanks volunteer attorneys, in teams of two, visited 22 high school classrooms in advance of the event. Fourteen teachers from seven schools in the Fairbanks area participated in the program.

Chief Justice welcomes students to Supreme Court LIVE

Before we hear today's oral argument, I wanted to take just a few moments to consider with you why the Alaska Supreme Court is here today. Alaska's justice system will touch the great majority of you at some point in your lives.

Think I'm exaggerating? Let's do the math. First, how many of you receive a Permanent Fund Dividend? If you continue to do so, once you reach the age of 18 you're likely to be called for jury service. Over the course of a lifetime, the chances are high that you will be summoned. Beyond jury service, thousands of people enter the doors of our courthouses each year. Many are called as witnesses in court proceedings. Others are involved in civil lawsuits — like the one you will hear about today — as either the plaintiff or the defendant, and others are charged with crimes.



Fairbanks attorneys Robert John, L, and Paul Ewers, R, meet onstage before the oral argument commences. John represented Appellant Yong H. Yi in the case and Ewers represented the police officer and the City of Fairbanks. Both attorneys answered questions from students in the audience after the court left the stage for deliberations.

Second, even if you don't enter the courtroom, each day in those courtrooms decisions are made that affect the lives of Alaska's citizens in countless ways. Laws are interpreted, and that will affect you. Sometimes laws are struck down as unconstitutional. Occasionally a court even decides which votes are counted in a state or national election.

Inevitably, sometime in your future, each of you will be affected, either directly or indirectly, by what happens in our justice system. So it's critical that you understand our justice system as best you can. And in our view, understanding comes not only from knowledge gained through study, but from direct experience. By learning about actual cases involving the lives of actual people, and seeing how those cases are decided, we hope you will develop an appreciation for the laws that bind us, and for the legal process that brings these laws to life.

But I also have another motivation for being here today. I have been a lawyer for 41 years, and a judge for just over 30. My wife is a lawyer, my dad was a lawyer (and a judge), my brother is a lawyer, and three of my children are pursuing legal careers. To say that my family loves the law would be an understatement. It is a good and honorable profession. So it is my hope that today's proceedings, and the work you have been doing in the classroom to prepare, might inspire some of you to love the law as much as I do, and to consider legal careers.

The promise of "justice for all" is one of the most important promises a government can make to its people. Ensuring that this promise is fulfilled in the future will fall not on my shoulders, or the shoulders of my colleagues on the Alaska Supreme Court who sit here today. In the future, "justice for all" will depend on the talents, intelligence, dedication, and understanding of people just like you; in fact, it will depend on you.

Thank you very much for being here today.
--Chief Justice Walter Carpeneti

Thank You

The Alaska Supreme Court would like to thank the following people for their invaluable support for Supreme Court LIVE in Fairbanks:

Volunteer Attorneys:
Magistrate Tracy Blais
Susan Carney
Matthew Cooper
Paul B. Eaglin
Robin Fowler

Danielle Gardner
R. Poke Haffner
Andrew Harrington
Cynthia M. Klepaski
Cameron Leonard

Shelby Mathis
Judge Michael McConahy
Michael O'Brien
Amy Tallerico
Aisha Tinker Bray

Participating Teachers:
Sharon Ashlock,
Ben Eielson High School
Elizabeth Hursh,
Ben Eielson High School
Patrick Mayer, Principal,
Delta Junction High School
Linda Sloan,
Ft. Greely Middle School
Warna Bellamy,
Lathrop High School
Barbara Marshall,
Lathrop High School
Danette Peterson,
Lathrop High School

Alex Cole,
Monroe Catholic High School
Steve Heckman,
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Patricia Behner,
North Pole High School
Amy Gallaway,
West Valley High School
Joy Grubis,
West Valley High School
Coby Haas,
West Valley High School
Thomas Kennedy,
West Valley High School

Fairbanks Supreme Court takes LIVE cases to schools

The Alaska Supreme Court heard oral argument on Feb. 6, before an audience of over 500 students at Lathrop High School's Hering Auditorium in Fairbanks.

The case argued—Yi v. Yang (Supreme Court No. S-13427)—is a civil case involving claims of false arrest and civil right violations against a Fairbanks police officer and the City of Fairbanks.

The case was dismissed on summary judgment by the trial court, based on findings of qualified immunity, and the appeal followed. Teams of volunteer attorneys from the Tanana Valley Bar Association visited participating high school classes to help students understand the appellate process and the case itself, using a case summary and other information from the court's website: http://www.state.ak.us/courts/outreach#scl.

The program included question-and-answer sessions with both the attorneys arguing the cases and the members of the Alaska Supreme Court. At the close of the event Chief Justice Walter Carpeneti recognized and thanked the participating teachers and attorneys whose support made the program possible.

Dave Dershin, Interim Principal of Lathrop High School in Fairbanks, visits with members of the Alaska Supreme Court backstage at Hering Auditorium before the February 6 event. L-R: Justice Daniel Winfree, Chief Justice Walter Carpeneti, Dershin, Justice Dana Fabe, and Justice Craig Stowers.

Volunteer attorneys and teachers participating in the Anchorage Supreme Court LIVE program pose with members of the court for a group photo on the stage of West High School Auditorium at the close of the February 8, 2012, event.

Supreme Court LIVE-- Anchorage

The Alaska Supreme Court heard oral argument on Feb. 8, before an audience of over 800 students at West High School Auditorium in Anchorage.

The case argued was State of Alaska, Department of Natural Resources v. Exxon Mobil Corporation, Operator of the Point Thomson Unit; BP Exploration (Alaska) Inc.; Chevron U.S.A. Inc.; ConocoPhillips Alaska Inc. (Supreme Court No. S-13730).

The case concerns the dispute between the State DNR and the major oil companies doing business in Alaska over whether DNR can terminate the production unit at Point Thomson upon its determination that the companies have made inadequate progress towards bringing the unit into production. Teams of volunteer attorneys visited over 30 participating high school classes across the Anchorage School District to help students understand the issues in the case.

Richard J. Todd, Senior Assistant Attorney General in Anchorage, argued on behalf of the Petitioner State of Alaska, and Charles C. Lifland, O'Melveny & Myers LLP, Los Angeles, argued on behalf of Exxon Mobil and other Respondents. Despite the complicated nature of the oil and gas issues raised in the case, students asked thoughtful questions and seemed engaged in the question-and-answer session with the case attorneys, which took place after the argument while the justices deliberated backstage. When the justices returned to the stage to take questions themselves, lines of students waited at the microphones for a chance to pose questions on topics unrelated to the case.

Now in its third year, the Supreme Court LIVE program has been presented five times—in Anchorage, Fairbanks and Juneau—and more than 3,000 Alaskan students have participated in this unique civic learning opportunity.

Thank You

The Alaska Supreme Court would like to thank the following people for their invaluable support for the 2012 Anchorage Supreme Court LIVE program:

Volunteer Attorneys:
Joan Clover
Emily Cooper
Marcia Davis
Kathleen Doherty
Monica Elkinton
Laura L. Farley

Heather Gardner
Leslie Hiebert
Alisha Hilde
Ben Hofmeister
Kathy Keck
Doug Kossler

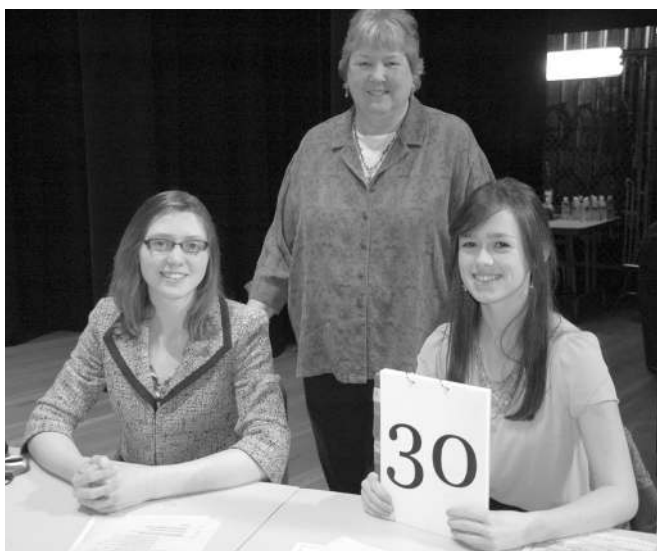
Lloyd Miller
Rachel Plumlee
Robert Polley
Bryan Schroder
Wayne Watson
Tara Wheatland

Participating Teachers:
Traver Pierson, AVAIL
George Campnell,
Chugiak High School
Debbie LaRue,
Chugiak High School
Kathie Steele,
Chugiak High School
MaryBeth Hammerstrom,
Dimond High School
Lem Wheeles,
Dimond High School
Katherine Campbell,
Eagle River High School
Bernette Lindamood,
East High School
Mona Grib,
Romig Middle School

Deborah Benson,
Service High School
Lisa Healow,
South Anchorage High School
Brandon Barter,
West Anchorage High School
Troy Carlock,
West Anchorage High School
Kristina Gwynn-Dobler,
West Anchorage High School
Gina Ireland-Kelly,
West Anchorage High School
Jenny Kimball,
West Anchorage High School
Jody Nordby,
West Anchorage High School

Anchorage School District officials gather outside West High Auditorium as students pass through security for Supreme Court LIVE. L-R: Pamela Orme, Social Studies Curriculum Coordinator for the Anchorage School District; Dr. Darla Jones, Director of Curriculum and Instructional Support for the Anchorage School District; and Rick Stone, Principal of West High School.

Members of the West High School Air Force Junior ROTC, who served as ushers, pose with members of the Alaska Supreme Court after the Anchorage program.



Marilyn May, Clerk of the Appellate Courts, meets with volunteer timers from the West High School National Honor Society before the Supreme Court LIVE program in Anchorage. L-R: Katy Grosch, Marilyn May, Ellen Simpson.

The metes and bounds of the Haskervilles: It's elementary, My Dear Madison!

We have been summoned to the magnificent offices of Alaska's leading philosophic investigator.

"The premises were formerly occupied by the Alaska Bar Association," Inspector Wittgenstein excuses the opulence that surrounds us. "If it were up to me, I'd still be serving in the Gebirgs-Artillerie. Ah, the Carpathians!"

"You were a decorated war veteran," the former Governor notes. "True, on the other side."

"December the Seventh," the Inspector sighs. "A date that will live – "

"You're talking about Pearl Harbor?" I blurt my question. "But you served in the British ambulance corps in World War II."

"Congress declared war on Austria-Hungary," the Inspector sniffs at my blunder, "on December 7, 1917."

"Let's get down to business," the governor oils the waters.

"What have you got for us?" Inspector Wittgenstein queries The Sarah.

"Here's my theory. Circus dogs, trained to pick the locks of their cages, escape to accomplish their dastardly enterprise and on return – "

"A perfect alibi," I gasp. "These must be the Houdini hounds, whose prowess so impressed Sir Arthur."

"Since the victims were all buried on the perimeter of the Haskerville Estate, I feared much worse," the Inspector declares. "And yet, you have not deployed the science of induction. May I posit that reasoning ex hypothesi," Wittgenstein asks, "is legal in Alaska?"

"You rang?" Dolley Madison, Jimmy in tow, exits the elevator on the forty-ninth floor. "My husband needs an alibi. And pronto. The ghost of Alexander Hamilton – "

"He's been after me ever since the debate over the bank bill in ninety-one," Madison interrupts. "John Marshall assured me my crimes against semantics would be wiped clean, after I signed the second bank bill in eighteen sixteen."

"It's time to review the forensic evidence," the Inspector drawls. "This is going to be gruesome."

He hands the governor a thick file. It's marked 'CSI.'

" 'Crime Scene' is now filming in Anchorage? By happenstance, I possess aspirations as a thespian," I ahem politely.

"Actually," the governor corrects me. "That's 'Constitutional Semantic Index.' The victims had something in common."

"What's that?" I ask.

"They'd been reading volume three of Farrand's Records of the Federal Convention."

"Not volume three!" Madison swoons.

"A glass of sherry!" Dolley orders.

I pour. She sniffs.

"How did you know there was a hidden panel?" she asks me, airing her esters.

"Here's the score," the Inspector begins. "Madison used the word 'constitution' 140 times after February 2, 1791."

"That date should live in infamy!" Madison groans. "I took on Hamilton's bank. He had the last word!"

"He served in the Washington administration as Treasury Secretary," I point out. "And Washington asked for his opinion on the bill, three weeks after your speech. You had to expect Hamilton would get the last word."

"But I tried my darndest to get everyone to use 'constitution' as meaning 'text' and only the text! After the debate in 1791, I was able to score – "

"You racked up 84 of 140 on the CSI-o-meter," the Inspector points out. "Of course, that's a score in favor of Hamilton's use of the word 'constitution.' But you did your best. Meaning-wise."

"I'm sure the phrase 'semantic cleansing'," Dolley declares, "is a term that has acquired, ahem, a certain dignity. N'est-ce pas?"

"Actually," the governor points out, "that isn't a really impressive score at all. Your husband scored twenty-two out of twenty-four in his speech on the floor of the House. That is, rendering 'constitution' as 'text,' a result entirely anti-Hamiltonian."

"I made things clear," Madison adjusts his wig. "And suffered for it. 'Can a government with responsibility for national finances, trade and defense organize a national bank to achieve its goals?' Hamilton asked. 'Does constitutional text permit Congress to charter a national bank'? That was my position. Semantics-wise."

"I guess we'd better go back to the beginning. Aschenbrenner?"

I heed the Inspector's cue.

"Take ten of Madison's most cited Federalist Papers. Now take Hamilton's top ten. Count the usages of constitution = text. Madison's word count tips decisively towards constitution = government. Hamilton's count is dead-even, at 38 to 39 in favor of constitution = text."

"We were collaborators," Madison objects, "on numbers 18 through 21. Computer science proved that point."

Dolley looks over my shoulder at the tables I have prepared.

"Did you do these?" she asks me. "Did you use a computer?"

"I read every word and made the assignments – text, government, British and ancient or state constitutions – myself."

"Until it's been validated by software, my husband should have the right to remain silent."

"Here's the point," the governor takes over. "Jimmy – your husband – was pretty even handed in his use of the term 'constitution' before and after his speech on the floor of the House. In that speech, he attempted to purify his references, such as, 'Reviewing the Constitution with an eye to these positions, it was not possible to discover in it the power to incorporate a Bank.' He scored over ninety-one percent. In his attempt to sanitize (at least) his references to the word 'constitution'."

"The year was ninety-one. We were there. You weren't, Madam Governor," Dolley fixes The Sarah with her trademark steely gaze.

"But if 'nature of government' reasoning – Hamilton's preference – is a means of resolving constitutional disputes," the governor parries, "then Hamilton's bank was not 'condemned by the rule of interpretation arising out of the Constitution'."

Neither is willing to back down.

Inspector Wittgenstein coughs politely.

He produces a set of toy cars and places them on the magnificent conference table formerly belonging to the Bar Association.

"Perhaps I can represent the semantic controversy in these terms. Hamilton is selling cars in a variety of colours."

"The received orthography!" the governor sighs. "How Hamiltonian!"

Wittgenstein gestures to his vehicles, placed under jaunty, but tiny coloured streamers; a neon sign, to scale, flashes 'Crazy Ludwig Sells Cars.'

"However, my husband," Dolley picks up the thread, "insisted that everyone buy product of a single hue. Voilà! 'Madison's Motors'."

We study the competing lot the President's wife lays out on the table.

"It's a bit drab," the governor points out.

"We're all supposed to use the word 'constitution' the same way," Jimmy exclaims. "I may be credited with insisting on a usage that is preferable to the meaning prevailing in Athens or London."

"With respect," the Inspector counters, "what you said in your speech of February 2, 1791 and what you repeated in your Cabell letter (of September 18, 1828, truncated by Farrand), was that the parties' 'general use' of a phrase, or the 'objects generally understood' or 'contemporary and concurrent expositions' would serve as 'reasonable evidence of the meaning of the parties'."

"Oho!" the governor turns to our formerly fourth President. "You take the position that meaning can be established by 'the parties to the instrument'."

The Madisons examine the splendid Gobelins tapestry depicting The Bar Fight of Sixty-Four.

"Was that wrong?" Dolley asks.

"If I may continue on cross-X," the governor obtains our consent. "You believed the controversy would center on your assertion that twelve states, through their ratifying conventions, were the parties whose views counted."

"Even Hamilton agreed with me on that point!"

"So that's not where the trouble is," the governor studies her nails.

"Give him a hint!" I plead Madison's brief. "He's a graduate of Princeton!"

"The Cratylus," the governor purrs. "Stephanus citation 433e."

" 'Making the small great and the great small!'," Dolley dabs at her eyes. "By agreement!"

"I suppose it's up to me," Inspector Wittgenstein intones. "No one accepted that the only meaning of constitution was text, that is, up to February 2, 1791. You asserted that semantic harmony could be negotiated or achieved through persuasion in ordered discourse."

"Have you ever seen the House of Representatives in action?" Dolley sniffs.

"Hermogenes preceded you in taking that position."

The Inspector recites from memory, his gaze fixed on a large mountain north of the city, whose summit is higher than any of Carpathian pedigree. " 'Those who say that whether you abide by present conventions [constitution is government, Athenian, British, Hamiltonian, and so forth] or make a new and opposite one [text alone has the answers], it makes no difference if you are only agreed.' I hope my translation meets with everyone's approval."

The governor whips the pertinent volume of the Bibliotheca Oxoniensis off the shelf.

"Spot on!" she verdicts. "So," she asks James Madison, "how did your 'new and opposite' meaning work out for you?"

"The law professors fell for it," Dolley fights the husband's corner.

"The Supreme Court, likewise!" Madison adds. "And it passed through the radar Chemerinskian."

"This is all true, Jimmy. But your 'new and opposite meaning' was not 'a contemporaneous exposition.' Which you yourself required."

"Perhaps I can help," the Inspector references his Traynor's Latin Maxims. "Would the phrase 'ab initio' apply here? If Madison's new meaning for the term constitution was launched on February the Second and if lawyers and judges accept it afterwards, can't the exposition be dated back to seventeen ninety-one?"

"Here's an interesting fact," I gasp. "The Virginia legislature refused to ratify the Bill of Rights while Wolfgang Amadeus Mozart lived."

"That's quite true," the governor agrees. "The Divine Wolfgang died ten days before ratification of the first ten amendments to our constitution. That's the Muse of History. And at her most convincing!"

"But my cars!" Inspector Wittgenstein pleads his case. "They must stand for something!"

"Old hat, counselor," James Madison sniffs. "Everyone uses Power Point these days."

ECLECTIC BLUES

Our naturalist finds peace in the valley

By Dan Branch

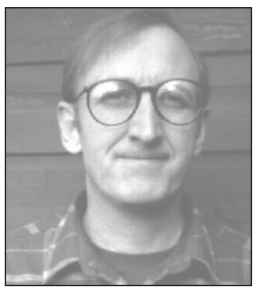
Weather in Juneau rides a pendulum between the seasons. For most of January it brought us serious winter with the cold and heavy snowfall that comes with it. Now, in the middle of February it feels like early spring. It's a good day for Aki, our small poodle mix, and I to head over to the Mendenhall Wetlands for a stroll.

Even though the town wraps around it, the Wetlands receive few visitors who are not carrying shotguns. There are a few well used dog walking trails that skirt the area but most is empty ground. For Juneauites it is just something to glance at during the morning commute from the Mendenhall Valley bedrooms to the SOB. (That's the local name for the State Office Building. Juneau visitors shouldn't expect the sound of sadness to reach them as they enter the building.)

Back to the Wetlands, where the road noise from Egan Expressway fades very quickly as you walk toward Gastineau Channel. Soon into a walk, only startled Canada Geese and transiting airplanes will raise the decibel level above a whisper. The whole area can flood during high tide so we always keep a tide book in the car to time visits.

The start of this day of the walk promised spring-like weather but delivered gray skies and a chilling wind. We should be in the thick woods by the glacier where the day's 40 degree temperatures would not have to fight with wind to set the tone. Instead we are crossing a slick patch of ice formed on the Wetlands above the high tide line. Down channel a sunrise streaks the sky with strips of gray and weak orange light.

Aki cruises right over the ice but I must do the tundra shuffling slide or crash to the ground. Even with legs slightly apart, feet parallel, weight evenly distributed I almost fall when my left boot slides over a slight rise in the ice. I am forced to concentrate only on the ice and ignore a bald eagle that vocalizes its resentment at our presence on this hunting ground. The slow speed of transit forced by slick ice has a blessing. It gives me the time to appreciate reflected sunrise colors that almost set the ice aglow.



"The slow speed of transit forced by slick ice has a blessing. It gives me the time to appreciate reflected sunrise colors that almost set the ice aglow."

Once off the ice we cross wet grasslands where each dead blade, brown, tan or straw yellow, has been pushed down flat by the recent heavy snow. In the middle of this destruction sits a weathered driftwood tree that has rested here long enough to earn badges of lichen. It lays on its side so that its circle of shallow roots are at a 80 degree angle to the ground. One foolish spruce seedling grows between the skyward pointing roots. Growing above salt soaked ground, the spruce has no chance of being more than a bonsai decoration to welcome the geese and ducks that will soon be resting here on their northbound migration.

I have mixed feeling about this isolated spruce striving to grow on its precarious perch. Its is a life wasted, but history is full of honorable fools who joined the forlorn hope. I'd admire this tree for its courage and determination if it had a soul. Instead I admire the life force it represents and the power, nature, that imprinted all spruce seeds with need to root and grow wherever they land. They affirm the preciousness of life. So too, do the birds who each spring fly thousands of miles to nest. Tree, birds, man: The need to live drives us all.

Aki is whimpering now so I look down to see the wind bending back her ears and flattening her facial fur. When I stop she holds up a paw as if it to dry it in the cold wind. We've reached the deep channel of Duck Creek that cuts us off from the rest of the Wetlands so I grant Aki's request and turn toward the Sunny Point bluffs jutting into the Wetlands. We walk along them to the car.

Aki finds a long strip of snow perfect for her diving then rolling game. My boots crunch with each step after I join her there, sending seven Canada Geese breaking for the sky.

We return to grasslands when the snow strip ends. Here a paper-thin layer of ice lays like a sheet over the tussocks of flattened grass. Only frozen salt water has such flexible strength. Several things had to happen at the same time to create this. This fragile sheet of ice would not be here if last night's high tide hadn't manage to cover the grass just as the night's temperature dropped enough to freeze it into this thin white covering.

I wonder at the purpose of covering beaten grass with a beautiful translucent sheet when we hear the nervous cackling of worried ducks huddled 50 feet away. They burst from cover and fly deeper into the wetlands, necks stretched out, willing more speed. Aki looks away as if embarrassed by their cowardliness. If she would understand I would tell her that they are only driven by the will to live.

Imagine the blues, pinks and grays that wash the wetlands with light. Photo by the author.

TALES FROM THE INTERIOR

Sixty year old virgin

By William Satterberg

My medical life has been benign. I have always refused any type of anesthesia. In fact, when I had my colonoscopy approximately nine years ago, I refused to take any drugs, including the memory drug (which I can't seem to remember). As such, my internist and I have always enjoyed a very close, deep relationship for some unspoken reason.

All that changed at the age of 60. Two years earlier, I began to experience progressive pain in my right shoulder which would not subside. My arm's mobility also became increasingly limited. My doctor told me that I had developed an arthritic growth on my right arm bone, known as the humerus. The recommended procedure was to replace the head of my humerus with a titanium ball under general anesthesia. Personally, I saw nothing humorous about it.

Having never been under any anesthesia before, except for that which was self-administered, I became quite apprehensive. I interviewed various individuals. I generally heard good reports, but I also heard the reports of people who had almost died. I began to fear that I would end up seeing the white light before it was all over. And, as my surgery approached, I became more apprehensive. Would I survive? Become infected? Have blood clots? Or a sex change?

One day, one of my well meaning friends stated to me when I asked him how he went to the bathroom under anesthesia that I would not have to worry since I would be catheterized.

"A catheter?!," I exclaimed. "No way. No one is going to touch Little Billy."

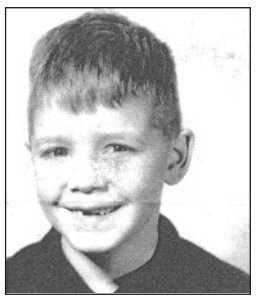
Little Billy and I had been fast friends since the age of 12. We had done virtually everything together. I had been extremely protective of him, as had he of me. The concept of anything being put in Little Billy was abhorrent. There was no way that I was ever going to let anybody violate me or Little Billy, especially under anesthesia.

My friend tried to be reassuring. "Don't worry about it, Bill," he stated. "You will be sleeping. You will not even know what happened."

"Apparently, Peter, you don't understand. Little Billy has a mind of his own. Moreover, he has done lots of things when I have been sound asleep. I can't control him."

I hastened to add that, in the event that anybody tried attack Little Billy during my sleep, he undoubtedly would go into deep hiding. I was from a cold climate and used to such things. No longer was I concerned about complications on the operating table. Rather, my concerns now centered upon my very best friend.

I contacted the doctor's office and laid my concerns on the table. I was assured that catheters were normally for three hour or longer events. However, I still had to urinate before the hospital would release me. If not, the dreaded catheter would be employed as a last resort.



"Looking back on my shoulder surgery, I later realized that my fears were unfounded, and that my concern about loss of control was overrated."

On December 7, my wife, Brenda, and I arrived at the hospital approximately three hours before the surgery for a preoperative consultation. To avoid any error, the surgeon also signed my right shoulder, so that it was clear what shoulder would be the target.

I then returned to the hotel room and soaped up my body with a very strong soap known as Hibiclins. Hibiclins is used to prepare for surgery. It kills 99% of known bacteria. It is also great for solving problems with sweaty armpits and stinky feet. Hibiclins, however, also removes any ink on the body, including signatures such as my doctor's. So, I took matters into my own hands, grabbed a pen, and forged the doctor's name on my body. Then, to be sure, I drew an arrow across my chest pointing at the shoulder.

The recovery room nurse asked me how I felt. Contrary to the horror stories which I had heard, I felt no nausea. Rather, I wanted a ham sandwich and a vanilla milkshake.

Brenda and I then once again hiked the long, two-block walk to the Swedish Hospital from our hotel. Already nervous again, my anxiety increased even more when the receptionist prepared my wristband, telling me to wear it "so we will know who you are."

I refused. She looked at me incredulously, until I pointed out that she had listed my sex as being female. My old self esteem issues surfaced again. Still, I did not want to run the risk of undergoing a sex change operation, nor being confused with somebody else who had. The accuracy of medical records is not always that good and I now had proof. The mistake was corrected, and I once again became a male.

I was next ushered to a staging room, and ordered to put on a flimsy gown with an opening in the back. I then sat in a reclining chair, and had an IV started. Soon, a kindly nurse gave me a shot of valium to calm me down. In retrospect, valium was a good idea.

As the appointed hour approached, a social worker asked if I had everything in order, including my medical records, my personal effects, and my "Do Not Resuscitate," or "DNR" order. That last one bothered me. The concept of a DNR order, and my last image to remember being a mask forced over my face was not something that soothed by anxiety. Nor did the valium at that point.

As I was wheeled to the operating room, I allegedly began to babble nervously. From my perspective, I do remember perhaps being a bit loquacious and asking the anesthesiologist how the whole process was going to work, and how I would go to sleep, and how the gas would be administered, and how I would wake up and, how I would feel, and how…

At some point, apparently hearing enough, the anesthesiologist simply stated to me as she pushed a clear plastic mask over my face "Just try to breathe three times."

The next thing I remember was being told to wake up. Opening my eyes to a familiar reality, I looked over and saw that my right shoulder was wrapped tightly in a sling. I tried to move my fingers, but could not. There was a paralyzing nerve block in my right shoulder which had deadened everything on my right side. Even my one reliable middle finger would not respond to the usual commands to extend.

Looking back on my shoulder surgery, I later realized that my fears were unfounded, and that my concern about loss of control was overrated.

The recovery room nurse asked me how I felt. Contrary to the horror stories which I had heard, I felt no nausea. Rather, I wanted a ham sandwich and a vanilla milkshake.

Then, in a panic, remembering my little buddy, I did a quick check. Fortunately, Little Billy had not been violated. In fact, he was obviously quite happy. Our friendship remained solid.

After a bit, I was transferred to my hospital room. Recognizing that there was still one more goal to attain before I could be discharged, I asked my nurse if I could tinkle. At the time, I was rather loopy, and I am surprised that she even let me get out of bed. In fact, she valiantly tried to dissuade me and handed me a Kool-Aid pitcher as an option. I explained that there was no way that I was going to tinkle into any Kool-Aid jug. I had already fallen for that prank in college. Besides, I planned to take everything they had given me in the hospital as an expensive souvenir. I was not going to ruin the jug by tinkling in it. I would save it for margaritas.

I hobbled to the toilet. To my relief, Little Billy again did not fail me. Having proven that I could tinkle, I proudly returned to bed, played with the bed's various controls, and snoozed.

Later, to identify with my clients, I decided to try a few shots of the pain juice that was hooked up to my IV button. For fun, over the next two hours, I triggered the button five times. Soon, it was time to go to the bathroom again. Only, this time, I stood up and then almost fell over, being saved by my nurse at the last second. Clearly, I was not a druggie.

As I stumbled back to bed, I was warned that, because of the pain relievers that I had profusely taken, I likely would be constipated. I had to process a bowel movement within two days, or other problems could develop, for which enemas were the preferred solution. Once again, I panicked. Enemas were worse even than catheters. Obviously, these folks wanted to get me coming or going. Still, no part of me was to be violated.

That afternoon, I was discharged and moved into a downtown hotel. Remarkably, the chronic pain in my right shoulder was gone. I regretted not having the surgery earlier. Constipation was my only remaining concern.

After two days, matters clearly had to be taken into my own hands. By then, I had consumed virtually every food which would normally have a moving effect upon me. None worked. As such, in desperation, I bought a flavored bottle of Milk of Magnesia and doubled the dose that evening. By morning, things still had not moved. So, I doubled the dose again. Enemas were not an option.

Only after I had gulped my second dose of laxative did Brenda explain that one should never take a laxative within the first waking hour of the morning. Apparently, it is a known fact that after the mind wakes up, certain other physical processes wake up shortly thereafter also. And, that is exactly what happened. Within 30 minutes, I was a very regular guy. I began also to regret the morning's double dose of Milk of Magnesia. Those regrets continued throughout the day. Fortunately, everything came out well in the end.

Looking back on my shoulder surgery, I later realized that my fears were unfounded, and that my concern about loss of control was overrated. On the other hand, when I asked the doctor for a videotape of the operation for home viewing, I was told that none existed.

Admittedly, that last part bothers me. There may not be a videotape, but I still plan to check YouTube closely for the next several months to make sure I do not become a Reality TV star. Little Billy, as well, has his own concerns. After all, neither one of us really care to be viewed as standup comics.

Pro Bono

New project is opportunity to serve those who serve us

By Mary C. Meixner

Army private Sam Griffith received the type of phone call that no parent ever wants to receive: A child welfare caseworker in Alaska had just removed Griffith's young daughter from the home of the child's mother—Griffith's ex-wife—based on suspicion of abuse and neglect. Griffith dropped everything to travel from Fort Hood, Texas, to recover his daughter in Alaska.

But upon his return to Texas, he was faced with a very difficult legal situation. The child's mother still retained legal custody of the child under an Alaska court order and there was an open child welfare case in the Alaska juvenile court. On top of all that, Griffith was soon scheduled to deploy overseas to Iraq. Though he had met with a legal assistance attorney at his Fort Hood JAG office, there was little the Texas-licensed attorney could do to help him with what was entirely an Alaska legal matter, and with a very limited income, Griffith could not even begin to imagine how he would be able to get a civilian attorney to help him untangle these legal problems.

What the military attorney was able to do, however, was refer Griffith to the American Bar Association's Military Pro Bono Project. Once referred, the case was matched up with an Alaskan attorney who volunteered with the Project to handle cases for servicemembers pro bono. The attorney quickly appeared in the case for Griffith and, after a series of hearings—including those conducted with Griffith appearing by phone from Iraq—the court granted him permanent custody of his daughter. As a result, he was able to focus on his mission in Iraq without concern for any unresolved legal problems or the welfare of his child.

Although the names and locations in this story have been changed, it is based on a real case and it illustrates how the ABA Military Pro Bono Project helps our servicemembers receive the legal help that they need.

ABA Military Pro Bono Project connects servicemembers facing civil legal matters with volunteer attorneys

Servicemembers often have legal problems that fall outside the scope of the assistance provided by military legal assistance attorneys (JAGs). Junior-enlisted servicemembers often have difficulty affording legal representation. And, like in the example above, they frequently encounter legal problems that arise in locations far from where they are stationed.

Recognizing these issues, the ABA Military Pro Bono Project, an initiative of the ABA Standing Committee on Legal Assistance for Military Personnel, was launched in late-2008 with the mission of connecting junior-enlisted, active-duty servicemembers who have civil legal matters with civilian attorneys who will provide pro bono assistance. The Project, a web-based program on www.militaryprobono.org, accepts case referrals from military attorneys across the country and around the world, and connects the referred servicemembers with pro bono attorneys throughout the United States. The Project also includes Operation Stand-By, through which attorneys may volunteer to provide lawyer-to-lawyer consultations to military attorneys, so the military attorneys can further assist their servicemember clients.

In just over three years of operation, the Project has become widely recognized as a very effective means to help meet the legal needs of servicemembers. But that success has, understandably, resulted in ever-increasing demands for pro bono help for servicemembers in need, including those in need of legal assistance in Alaska. Recognizing these needs, the Alaska Bar Association has helped raise awareness of our servicemembers' legal needs and the ABA Military Pro Bono Project's pro bono opportunities.

Register with the ABA Military Pro Bono Project to help our servicemembers

If you are an attorney interested in giving back to the men and women of the armed forces, please visit www.militaryprobono.org to further explore how you can help our servicemembers receive the legal representation that they need by joining the Project roster or making a tax-deductible financial contribution.

Although signing up with the Project does not obligate you to take any particular case, it is hoped that you will give consideration to these volunteer opportunities that arise in your geographic area and substantive legal area of expertise. Lend a hand to our military personnel and their families, recognizing the sacrifices they make on behalf of us all.

The author is the ABA's Military Pro Bono Project Director. The Alaska Bar Association was approached in 2011 to help the American Bar Association enhance its Military Pro Bono Project's efforts in Alaska. In response, we created a space for advertising their unique military involved cases on our website. We are thankful to the following people who have taken cases as part of this initiative: Dani Crosby (Ashburn & Mason, P.C.), Gayle Brown (Law Office of Gayle J. Brown), Kimberlee Colbo (Hughes Gorski Seedorf Odsen & Tervooren, LLC), Eric Fjelstad (Perkins Coie) and Ann DeArmond (Sterling and DeArmond).

Clover thanks legal community

By Joan Clover

This past fall semester I had the opportunity and privilege of teaching a Family Law class at UAA. I asked members of our legal community to help in a variety of ways with their particular expertise. They were gracious in their willingness and I want to publicaly thank them.

Almost every week we had a guest lecturer for the last hour of class and then students dialogued online about them and their topic. The students were very engaged and intrigued and it is easy to understand why.

Attorney Allison Mendel discussed what is happening locally and nationally in the gay/lesbian rights arena and about Collaborative Divorce. Stacy Marz, Director of the Family Law Self-Help Center, took the students on a "tour" of the FLSHC's website and discussed other innovative programs going on at the Courthouse, such as the "Early-Resolution Calendar." Katherine Yeotis, Director of the 3rd Judicial District's Custody Investigation Office, spoke about what her busy office does. Russell Leavitt is the Chief of the Legal Assistance Office at Joint-Base Elmendorf-Richardson and he explained the Servicemembers Civil Relief Act (SCRA) and how his office assists with family law issues. Linda Beecher, Deputy Public Defender of the Civil Division at the Public Defender Agency spoke to us about Child In Need of Aid cases and how her office is working to improve visitation and contact for families in that system. Heather Kendall-Miller is the senior staff attorney in the Anchorage office of the Native American Rights Fund and she shared her expertise about how state courts and tribes are interfacing in the family law arena. The Hon. Suzanne Cole, Standing Master, spoke about domestic violence and the view from "the other side of the bench."

Obviously, each one of these speakers fielded questions about how they got where they are, what they do each day, and so forth. A pretty amazing line-up! I learned a lot!

Attorneys Karla Huntington and Ryan Roley each taught a class for me during the semester. It would be a disservice to call them "substitutes" because they were really "guest instructors" giving the students both a break from me and an opportunity to hear their unique perspectives developed over decades of experience in family law.

Each student did a semester project focusing on a family-law-related topic of his or her choice. One of their resources had to be an interview. Members of our legal community stepped up. I only know the people that students put in their bibliographies…so if someone is missed, I very sincerely apologize. Clearly all interviewees should have been in the bibliographies, but… So, kudos to Susan Adams, Katherine Alteneder, Allen Bailey, Larry Cohn, Judith Conte, Loren Hildebrandt, Jennifer Holland, Mara Kimmel, Pamela Montgomery, Pat Ross, Marjorie Thayer, and unidentified individuals at the Alaska Youth and Parent Foundation, the DV courthouse "counter," the Anchorage Office of Children's Services and the Anchorage office of the Child Support Services Division.

Finally, several of my close friends – who also happen to be members of the bar – listened and advised me without complaint or obvious boredom. They go unnamed, but you know who you are.

Thanks to all of you. This is community service and pro bono time in action. Once again, I am proud to be a member of the Alaska Bar.

Substance Abuse Help

LAWYERS ASSISTANCE COMMITTEE — ALASKA BAR ASSOCIATION ©

We will
- Provide advice and support;
- Discuss treatment options, if appropriate; and
- Protect the confidentiality of your communications.

In fact, you need not even identify yourself when you call. Contact any member of the Lawyers Assistance Committee for confidential, one-on-one help with any substance use or abuse problem. We will not identify the caller, or the person about whom the caller has concerns, to anyone else.

Anchorage

Michaela Kelley Canterbury
276-8185

Dale House
269-5044

David S. Houston
278-1015

Mike Lindeman
245-5580

Suzanne Lombardi
771-8300 (wk)

John E. McConnaughy
278-7088

Brant G. McGee
830-5518

Michael Sean McLaughlin
269-6250

Michael Stephan McLaughlin
793-2200

Greggory M. Olson
269-6037

John E. Reese
345-0625

Jean S. Sagan
929-5789

Moira Smith
276-4331

Palmer

Glen Price
746-5970

Fairbanks

Valerie Therrien
452-6195

Bethel

Megyn A. Greider
543-1143

Lawyers trade 'day off' for 'day on' for MLK Day

By Zach Manzella and Leslie Need

For many years East Coast communities have celebrated Martin Luther King Day by using this special day not to relax and recreate but to assist those in need. 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 President Obama's inauguration, learned of these activities and returned to Anchorage with a truly inspiring thought: 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, who 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 challenging justice system. Since 2010 the event has served nearly 1,000 clients by the use of 445 volunteers who have given a combined 2,250 hours of volunteer time totaling more than $147,000 worth of donated services.

Anchorage

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

The clinic's start and end times were adjusted to better meet the needs of clients' schedules and our volunteers remained steady in their service of the 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, immigration and wills.

A fun carryover from 2011 was the art room available for children during the event. Barbara Hood of the Alaska Court System organized the all day event that included art supplies, cookies, and the talents of volunteers including many judges, court system staffers and AmeriCorps volunteers. Participants were able to submit their completed artwork to the 2012 Justice for All art contest sponsored by the Law Related Education 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 2012 Law Day luncheon at the annual Bar Convention in Anchorage.

Juneau

We were also pleased that Juneau's third MLK Day was also successful despite the abnormally low temperatures that 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 2012 volunteer roster for Juneau was nearly double from their first year!

Volunteer Sky Starkey celebrated his third year volunteering at MLK Day.

Fairbanks

We were delighted that the Golden Heart City of Fairbanks continued their great work on MLK Day. Led by a planning committee of Amy Tallerico, Mark Andrews (BOG Board member), Paul Eaglin, 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.

Sitka

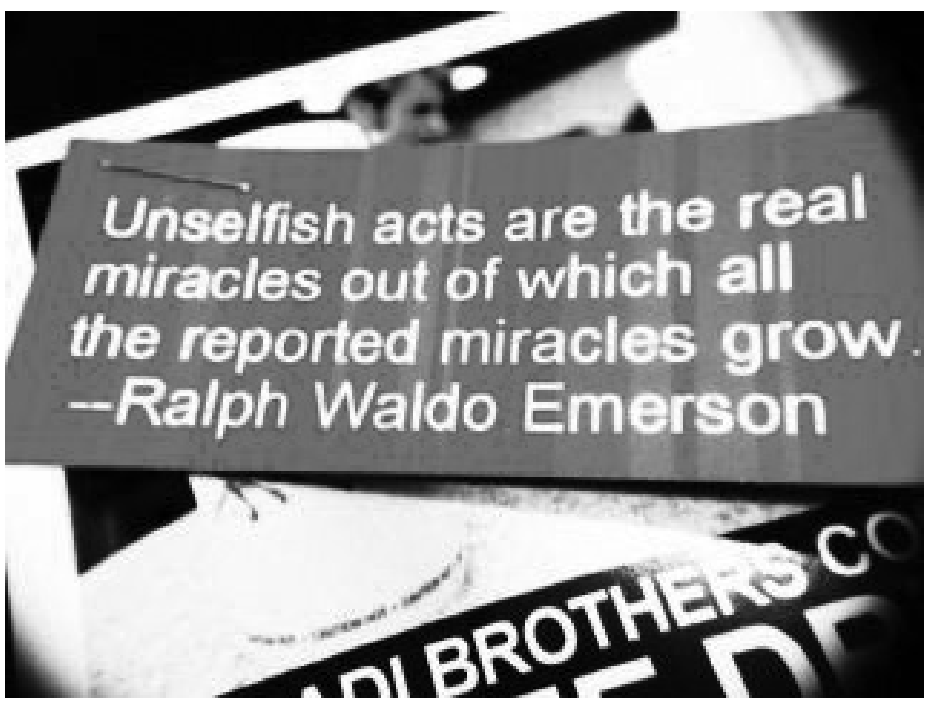
We welcomed the city of Sitka to this year's event offerings with Sitka bar members Christine Pate and Teka Lamade at the helm. Their inaugural event utilized 11 volunteers who offered expanded topic service areas in employment and small business.

We also hope that in addition to Anchorage, Fairbanks, Juneau, and Sitka 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.

Zach Manzella is a solo practitioner located in Anchorage; Leslie Need is a law clerk at the Federal District Court and newly appointed New Lawyer Liaison to the Board of Governors.

Photos by Jamie Lang Photography



Each Anchorage volunteer were given complimentary drinks by Kaladi Brothers Coffee, a community project supporter.

Volunteer Kathy Weeks celebrated her third year volunteering at MLK Day.

New volunteers and law clerks Russell Johnson and Kimberly Tsaousis.

Formidable adversary plagues lawyer

By Holly Wells

As I sat down to write my first piece for the *Bar Rag*, I was determined to write a fascinating article about my practice, something genius that would capture the attention of my fellow attorneys while creatively imparting upon you all some important bit of knowledge that only I possess.

Unfortunately for you, the only bit of knowledge my mind seemed capable of possessing this weekend was the art of war against a most formidable enemy: the Squirrel.

Our story begins with a sweet and harmonious relationship; just a woman and her squirrel. A month ago, I would have proudly reported that I have two dogs, a toddler, and a friendly resident squirrel. "Squirrely," as we so cleverly named him, was always frolicking around the yard, bringing joy to my daughter and playfully taunting the dogs.

I would occasionally watch Squirrely disappear under the roof and think, "Boy, I hope Squirrely isn't too cold and makes it through the winter healthy and happy…silly little squirrel." While I didn't know it then, our peaceful little bubble was about to burst, and our sleepy little tale about two dogs, a toddler, and a squirrel was about to come to a horrible end.

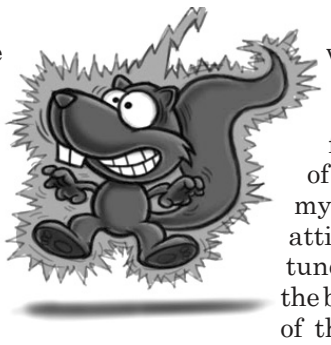
A few weeks ago the power to half my house started to go. Suddenly, there was a strobe light affect in the bedrooms and within a few days, a total electrical outage to half the house. I called in an electrician and prepared for the worst, some sort of systems failure that would cost me thousands and require a complete rewiring of our home. The electrician reported instead that there was a "squirrel" problem. A "squirrel" problem?! It was just so hard to hear. Thankfully, the electrician fixed the wiring problem in a few hours but warned that unless I killed the squirrels, I could end up living by candlelight, at best.

I was devastated. Squirrely, how could you? We had been so warm and hospitable to him and yet here I was…searching desperately on the internet for the best way to "kill" a squirrel and save your wiring. After a few days I decided I just could not do it and made arrangements to bring in a professional killer. Unfortunately, Squirrely had apparently got to them first as the "professional" I called rescheduled several times and eventually stood me up outright…twice.

On the last day I was stood up by my "Professional," Squirrely artfully took out another wire. This time it wasn't just a few lights but half my kitchen. While I have no doubt that there are many impressive people who can exist without a dishwasher, garbage disposal, and microwave; I was paralyzed and still stare longingly at my microwave hoping to will it back to life. That day I went to war.

My first stop was Home Depot where I bought an inordinate amount of rat poison, this powder that is supposed to irritate squirrel's skin, and some plug in sonar repellants. According to the internet and my "Professional," rat poison was the way to go. It would kill the squirrel and then he would dry out from the inside and there would be no decay. This seemed sad but magical; just set it and forget it. I plugged in the sonar repellants all over the house hoping that maybe the squirrel would flee without the need for poison… take that squirrel! While perhaps it would have been best if I just blindly went the poison route, my research revealed that death by poison may actually be illegal. Plus, while I will spare you the details, the description of how rat poisoning works makes the "dry up and disappear" scenario virtually impossible. The sonar repellants, by the way, seemed to do absolutely nothing, except take up all my outlets which in essence acted as another strain on my already lacking electrical system.

After rejecting the poison and sonar approach, I adopted Plan B: Operation Catch and Release. This plan was simple, buy a trap, bait it with peanut butter, catch Squirrely, and release him far away from my house in a wonderful forested area. If, however, there is a law prohibiting such a release or the squirrel is protected by the Save the Squirrel from Relocation Act of 1969 then, ahem, this article is based wholly in fiction and there has been no interference with squirrel habitats, even if those habitats were paid for and heated by yours truly.



For some reason, as much as I liked this plan, I found it incredibly hard to execute. The idea of opening the attic, setting the trap, and then escorting the live squirrel from the attic was petrifying. Every time I pulled the string to access the attic stairs, I pictured a mob of angry zombie squirrels attacking, passing all their diseases on and flooding my home with squirrel chaos.

As I stared lovingly at my microwave, I realized I had to find the strength to win the war. I started my training, setting the trap over and over again so I could be stealth in my mission and avoid a squirrel attack. I prepared for the worst but hoped for the best. That fateful day, I put on an old motorcycle helmet, snow pants (which I was sure would protect me from the vicious squirrels), several winter jackets (yes, I did say several) and thick winter gloves. I banged on the attic door with a broom announcing my presence and encouraging all squirrels to leave, if they knew what was good for them. It was time.

As I pulled down the string to the attic door, my biggest fears flashed before my eyes as mounds of squirrel droppings rained down on my head. I slammed the door and looked at my speckled carpet in terror. How many were there?? I would be using my single little trap for years before I defeated the colony. I was doomed! I took a deep breath and went back in, I would not accept defeat.

This time, I made it past the droppings and up into the rafters. It looked like the hulk had transformed in my attic, insulation everywhere, torn to shreds, and a massive amount of droppings. I did a quick scan for beady little eyes and found only a dead squirrel (apparently the enemy was fighting amongst themselves, which could only be good for me) and a bunch of chewed wires. I set my trap and exited the attic, while imaginative tunes of victory played in the background. I disposed of the dead squirrel and wondered if maybe I was wrong about Squirrely. Perhaps Squirrely was actually our protector and he laid down his life to protect the sanctity of our attic against intruders. Perhaps Squirrely was loyal to us after all. Ah, we will miss Squirrely.

The next day, I put my battle gear on and opened the attic expecting to see that the crafty squirrels had evaded my first attempts at Operation Catch and Release.

I was shocked and awed to see a cute little squirrel peeking out at me from its prison and even more shocked by the disdain I felt for this cute cuddly little demon. It was one thing to destroy my attic and take out my microwave, but quite another to murder Squirrely. While I guess there is a slight chance that Squirrely died chewing a wire rather than defending my attic's integrity, I will never know and thus choose to have faith in our furry little friend.

On the long ride up the Glenn, I replayed the harrowing events of the last week through my head and noticed that I was a changed woman. Perhaps on the next trapping I would brave the attic without my battle gear...except the helmet because you never know who is lurking in the rafters and it would be simply reckless to open that attic door without the helmet.

While I have won the battle, the war continues with nightly trappings baited with peanut butter and dreams of TV dinners and cup-o-soup. So I hope you all hear me when I say, squirrels are not your friends and if they are, they most likely will be taken out by their evil counterparts.

So secure those attics and sheds and keep plenty of peanut butter on hand.

Lawyers trade 'day off' for 'day on' for MLK Day

Ersula Harkley-Herrington, a facilitator with the Family Law Self-Help Center, visits with her son [*] while volunteering for the art room. [*] was the most prolific artist of the day, completing nearly ten works in a variety of mediums.

Justice Dana Fabe, Chair of the Alaska Supreme Court's Fairness, Diversity and Equality Committee (C) and Anchorage Clerk of Court Cynthia Lee (R) admire artworks created by Art Room participants Hailey, L, and Preston, R, during the MLK Day festivities at Mountain View Community Center.

Art room focuses on "justice for all" in honor of MLK Day

In honor of Rev. Martin Luther King Jr. Day on January 16, volunteers from the Alaska Court System and legal community helped Anchorage youth create artworks for the "Justice for All" Art Contest in the Mountain View Community Center Art Room.

The event was held in conjunction with the Anchorage MLK Day legal clinic sponsored by the Alaska Bar Association, Alaska Court System, and Alaska Legal Services Corporation.

The "Justice for All" art contest asks students to interpret through two-dimensional works of art the meaning of fairness, diversity and equality in our justice system. The contest is open to students statewide and there are two prize categories: K-8 and 9-12. Generous cash prizes of $500 for first place, $300 for second place, and $200 for third place will be awarded in each category. Prizes have been provided by Perkins Coie LLC and by funds for civic education administered by the Alaska Bar Association and Anchorage Bar Association.

The contest is co-sponsored by the Alaska Bar Association's Law-Related Education Committee, the Alaska Supreme Court's Fairness, Diversity and Equality Committee, and the Alaska Supreme Court's Access to Justice Committee. The deadline for entries is March 15, 2012, and entry forms and additional information may be found online at http://www.courts.alaska.gov/outreach.htm#art.

Art contest sponsors thanked the 14 volunteers who helped with the event.

May a lawyer file this property lien?

ALASKA BAR ASSOCIATION ETHICS OPINION 2012-1
MAY A LAWYER RECORD AN ATTORNEY'S LIEN (AS 34.35.430) AGAINST A CLIENT'S REAL PROPERTY

Question Presented

Under the Alaska Rules of Professional Conduct, may a lawyer record a statutory attorney lien?

Facts

A client is represented by a lawyer in a divorce action. As a result of a fee dispute, the attorney is terminated. Following termination, the attorney records an attorney lien pursuant to AS 34.35.430. After the completion of the divorce, the recorded lien is discovered several years later when the client seeks to sell real property unrelated to the divorce.

Conclusion

Recording a lien for attorneys' fees pursuant to AS 34.35.430 violates Alaska Rules of Professional Conduct 1.5, 1.8 and 1.16.

Discussion

Alaska Statute 34.35.430 sets out the procedure for asserting an attorney lien for fees against client papers or money in possession of the lawyer or an adverse party. Unlike other lien statutes of Chapter 35, AS 34.35.430 does not reference recording. One court has specifically held that AS 34.35.430 does not authorize the recording of an attorney lien. *In re Rodvik*, 367 B. R. 148 (D. AK 2007). For a general discussion of the procedure for asserting, perfecting, and enforcing a statutory attorney's lien, the reader is referred to *Sheehan v. Estate of Gamberg*, 677 P.2d 254 (Alaska 1984). *See also Miller v. Paul*, 615 P. 2d 615 (Alaska 1980)(statutory lien rights must be balanced against harm to client). Even if recording a lien was statutorily permissible, it is our conclusion that doing so would violate the Alaska Rules of Professional Conduct as further discussed.

A lien that has been recorded remains recorded indefinitely. This potentially harms the client in a number of ways. For example, the recorded lien adversely affects the title of *all* real property owned by the clients, whether the subject of litigation or not. Because the recorded lien may only become known at the time that the former client is seeking to sell real property, it circumvents the principle that all claimed attorney fees are always subject to review by a court or Fee Arbitration Panel. *See* Ethics Opinion 2009-1.

Recording the lien also creates the potential for a lawyer overreaching with respect to fee collection at a time when there is the greatest pressure on the client to resolve the fee dispute in favor of the attorney, i.e., at the time of sale of real property when the client wants to complete the transaction and is expecting to receive money. As a practical matter, title companies will not complete a real estate transaction if an issue exists as to a potential lien. In such circumstances, the client is required to resolve the matter or place the amount in dispute in trust.

Rule 1.8(a) of the Alaska Rules of Professional Conduct prohibits a lawyer from acquiring a security interest adverse to a client unless there is specific compliance with the procedure of Rule 1.8(a), including but not limited to, full and reasonable terms, full disclosure, the recommendation that the client seek independent representation, and the requirement of informed consent by the client. *See* Alaska Bar Association Ethics Opinion No. 88-6 (propriety of securing attorney's fees by means of a lien on real property). For that reason, even if an attorney were to argue that recording a lien was permissible under statute, doing so would create a security interest adverse to the client that would be improper without complying with the procedure required by Rule 1.8.

The prior termination of the attorney-client relationship provides further reason why a lawyer should not record a lien. Rule 1.16(d) of the Alaska Rules of Professional Conduct requires a lawyer "to take steps to the extent reasonably practicable to protect a client's interests" with Rule 1.16(d) indirectly addressing attorney liens by referencing the retention of client property "only to the extent permitted by law." Recording a lien does not reasonably protect a client's interests and, as previously discussed, does not appear to be permitted by law.

Finally, whether before or after termination of representation, Rule 1.5(f) of the Alaska Rules of Professional Conduct encourages a lawyer to be zealous in efforts to avoid controversies over fees with clients and attempt to resolve amicably any differences on the subject. Recording a lien without resolving the dispute makes no effort to avoid controversy.

Published ethics opinions support the conclusion that recording of the lien is ethically improper. ABA Informal Opinion 1461, addressed the specific issue of an attorney lien in the context of a divorce proceeding, stating:

> Mere existence of a legal right does not entitle a lawyer to stand on that right if ethical considerations require that he forego it. For instance, EC 2 23 exhorts lawyers to forego a legal right to ". . . . sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." The same standard should be applied in determining whether or not to exercise an attorneys' lien.
>
> . . . .
>
> The burden is on the lawyer to determine whether the circumstances justify withdrawal before pending matters are concluded and whether, in addition, they justify assertion of an attorney's lien to which he may be entitled under law.

Colorado Bar Association Ethics Opinion 110 also addresses the issue of recording a lien in the context of divorce representation, observing that "until the lien is reduced to judgment, funds held by a lawyer remain the property of a client" and the "*mere assertion of the lien in most situations will be insufficient to give the lawyer the right to record the notice of lien against real property*." In doing so, the Colorado Bar Association cited Colorado's counterpart to Alaska's Rule 1.8 and 1.16.[3]

Alaska Bar Association Ethics Opinions have repeatedly affirmed the principle that the lawyer must, to the extent reasonably practicable, protect the interests of both existing and former clients even if doing so means yielding leverage as to payment of fees. *See* Ethics Opinion 2004-01 (Lawyer must not withhold expert reports even if client refuses to pay); Ethics Opinion 2003-03 (Client entitled to entire file, even if lawyer unfairly discharged; "the lawyer's interest in getting paid must be subordinate to the rights of the client."); Ethics Opinion 95-6 (Upon discharge, client entitled to return of complete file; lawyer entitled to assert a lien *against the file*; however lawyer's interest in getting paid must be subordinate to the rights of the client and lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case); Ethics Opinion 83-2 (return of client's papers required upon termination). The same policy considerations lead to the conclusion that an attorney lien should not be recorded.

If an attorney wishes the security of a recordable lien on real property, the attorney has the ability to do so notwithstanding this opinion. The attorney can reduce the fees claimed in the lien to judgment with the final judgment being recorded. Because this procedure requires that the client be advised of the fee arbitration procedure and affords the client a full opportunity to respond to the fee claim, this is the appropriate procedure to accomplish this goal.

Approved by the Alaska Bar Association Ethics Committee on November 3, 2011.

Adopted by the Board of Governors on January 27, 2012.

WITHDRAWAL OF ALASKA BAR ASSOCIATION ETHICS OPINION 69-5

At its January 26-27, 2012, meeting in Anchorage, the Board of Governors voted to withdraw Ethics Opinion 69-5.

Inspection of bar exam results

Proposed rule changes

The Board of Governors invites member comments regarding the following proposed amendments to Alaska Bar Rule 4, Section 5, and Bylaw Article VII, Section 1(a)(11). Additions have underscores while deletions have strikethroughs.

Alaska Bar Rule 4, Section 5. This proposal clarifies that an applicant won't have access to Multistate Bar Examination or Multistate Professional Responsibility Examination materials if there is a blanket prohibition by the National Conference of Bar Examiners.

Rule 4. Examinations.

Section 5. If written request is made to the board within one month following notice of failure to pass a bar examination, an applicant who takes and fails to pass the bar examination has the right to inspect his or her essay examination books, the grades assigned thereto, and a representative sampling of passing and failing essay answers to the bar examination at the office of the Alaska Bar Association, or at such place as the board may designate. Absent a blanket prohibition by the National Conference of Bar Examiners (NCBE), ~~A~~an applicant who takes and fails to pass the bar examination has the right to inspect a copy of his or her Multistate Bar Examination (MBE) answer sheet or Multistate Professional Responsibility Examination answer sheet, scores, and the correct answer key to the form of his or her MBE examination or Multistate Professional Responsibility Examination under the procedures designated by the board. An applicant has no right to a copy of any of these MBE materials or Multistate Professional Responsibility Examination materials for removal from the place of inspection. An applicant who passes the bar examination is not entitled to inspect any examination books or discover the grades assigned thereto. However, a passing applicant may be informed of the applicant's MBE score upon written request to the Executive Director. (Amended by SCO 1487 effective April 15, 2003)

Bylaw, Article VII, Section 1(a)(11). This proposal changes the name of the Committee for Fair and Impartial Courts to the Committee on Fair and Impartial Courts.

ARTICLE VII. COMMITTEES AND SECTIONS

Section 1. Committees.

(a) **Standing Committees.**

…

(11) the Committee ~~for~~ On Fair and Impartial Courts, a Committee responsible for recommendations to the Board for activities that the Bar can undertake to explain and promote the concept of judicial independence, and to undertake to educate the public about and promote the concept of judicial independence;

…

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, 2012.

Bar People

Bar People: if you have changed firms or relocated to another city, and would like this information listed in the Bar Rag, send an email to oregan@alaskabar.org or info@alaskabar.org.

Doug and Landa Baily are operating Old Baily Heritage Farm near Oakland, Oregon where they raise rare breeds of American livestock. Visit oldbailyfarm.net. Doug is an active firefighter with North Douglas County Fire and EMS Department and a former Alaska attorney general.

Delaney Wiles, Inc. announced that **Scott J. Gerlach** was admitted as the firm's newest shareholder on January 1, 2012. Mr. Gerlach joined Delaney Wiles, Inc. as an associate attorney in June 2008. His practice focuses on business and commercial law, complex litigation, natural resources, health care law, and medical malpractice defense. Mr. Gerlach received his Juris Doctor from the Louis D. Brandeis School of Law, cum laude, in 2007 and he is admitted to practice in both state and federal courts in Alaska.

John W. Erickson, Jr. has left the Dept. of Law and has been temporarily assigned to Headquarters NORAD and USNORTHCOM, Peterson Air Force Base, Colorado, as the National Guard Legal Advisor.

Peter J. Mintzer, for many years with Cozen O'Connor in Seattle, WA., recently opened a Seattle office for a Los-Angeles based firm, Chamberlin, Keaster & Brockman, LLP. Mintzer's practice continues to focus on insurance coverage and other commercial litigation, with a focus on environmental and construction defect matters.

Chester D. Gilmore, David A. Monroe and **Devin W. Quackenbush** have joined the law firm of Clapp Peterson Tiemessen Thorsness & Johnson, LLC. A former member, Scott Hendricks Leuning, is also rejoining the firm. Scott, Chester and Devin practice in the Anchorage office. David is in the firm's Fairbanks office. The firm represents clients statewide and concentrates is practice on the representation of businesses, individuals and professional entities with an emphasis on litigation, representation of professionals, product manufacturers, political entities, and employers.

2012 Bar Convention in Anchorage

Wednesday, May 2 - Friday, May 4
Dena'ina Civic & Convention Center

Make Hotel Reservations

Hotel Captain Cook
(907) 276-6000 or
(800) 843-1950

We have secured a special room rate of $130 per night for single/double occupancy plus 12% tax.

This special rate is available until April 1, 2012 or until the room block is exhausted.

• • •

MAKE YOUR RESERVATION EARLY!

Wednesday, May 2

- Ethics: Thou Shalt Not Lie, Cheat and Steal: 10 Commandments of Legal Ethics
- Ethics: "Lawghter" is the Best Medicine
- Top Ten Technology Mistakes Your Firm Cannot Afford to Make
- Time, Billing, Accounting: If You Don't Bill, You Dont Eat!
- Using Focus Groups and Simulated Trials to Evaluate and Refine Your Case

Special Events:
Law Day Luncheon
Opening Reception with light hors d'oeuvres and AKSAXO JAZZ

Thursday, May 3

- U.S. Supreme Court Opinions Update
- Alaska Appellate Update
- Ethics & Technology: The Pitfalls of Daily Law Office Computing
- Ethical Considerations in High Profile Litigation and the Media

Special Events:
Local Bar Presidents' Breakfast
Bench and Bar Lunch and Awards
Dinner, Dance, Awards Banquet and 25, 50 & 60 Year Member Recognition

Friday, May 4

- Understanding PTSD and How it Fits (or Not) into your Case
- The Practice of Law Goes Global: Do You Want to See the World?

Special Events:
Section Chairs Breakfast
Annual Meeting Luncheon

Visit www.alaskabar.org for more information

All program details are subject to change without notice

The affordable care act: Breaking it down to the basics

By Carloyn Heyman-Layne

As a healthcare attorney, people frequently ask my opinion on the Patient Protection and Affordable Care Act ("PPACA" or the "Affordable Care Act" or "Obamacare" depending on who asks). If the person asking is a non-lawyer, my standard response is "You're probably better off waiting until the Supreme Court reviews it, since it could all change." My hope is that will steer the conversation in a different direction and I can avoid the whole topic altogether. If a lawyer is asking, that usually doesn't work, because then they want to discuss the possible directions the Supreme Court could take: repeal it all, repeal only the mandate, repeal the mandate and the restrictions on insurers, leave it all intact…there are endless possibilities. So in a lawyer-to-lawyer conversation, my standard response is "I tend to concentrate on HIPAA, Medicaid audits and other areas of healthcare law that are less controversial and slightly more settled." But on occasion, a colleague or client will ask me to break down the Affordable Care Act for them, and this is my attempt. (Please keep in mind that I was not a clerk, so I never learned to concisely summarize laws and issues in a logical and informative manner. I do, however, have a 4 year-old, who requires short and simple explanations of everything from why she has to wear clothes to the concept of gravity.)

Three acts, eight focus areas, ten titles and 90,000 pages of regulations

The majority of the Affordable Care Act was enacted through the Patient Protection and Affordable Care Act on March 23, 2010 (the "Act"). However, not everything that is referenced as part of "health reform" is contained in just the Act. The Health Care and Education Reconciliation Act was enacted a week later, on March 30, 2010, and it encompasses several amendments to the Affordable Care Act that either corrected perceived errors or closed loopholes contained in the Act. Last, but not least, the TRICARE Affirmation Act was signed on April 26, 2010, and it confirmed that TRICARE (the military health plan) and the health benefits of the Department of Defense would both qualify as minimum essential health care coverage under the Act. For the purposes of this article, all three acts will be referred to collectively as the "Affordable Care Act".

The Affordable Care Act focused on eight main areas, covered in Title I through Title X of the Act: (1) individual insurance coverage; (2) delivery of health care; (3) prevention and public health; (4) health care workforce; (5) fraud and abuse; (6) health technology; (7) assistance for seniors and the disabled; and (8) taxes and fees. This resulted in approximately 900 pages in the consolidated version of the Act and is predicted to result in approximately 90,000 pages of regulations. The focus of most of the debate and concern is the individual insurance coverage, although one could argue that several other areas are inextricably connected to the individual insurance coverage requirements (more on that later). The remaining areas contain efforts and incentives to improve the other aspects of the healthcare system, from programs to encourage health care innovation at the patient level to increased funding for methods and technologies that will increase efficiencies on an organizational or system-wide level. And of course, the taxes and fees section covers how we will pay for all of this.

The individual insurance mandate

As lawyers, many of us tend to seek out controversy. This is either because of an inherent personality trait, or because it keeps us employed. Regardless of the reason, we will now skip to the controversy – the individual insurance mandate - and sidestep the feel-good provisions, such as the ones that increase the number of healthcare providers or enhanced payments for primary care. The building block of the Affordable Care Act is that in the year 2014, most U.S. citizens and legal residents will be required to have health insurance. There are some exceptions, for religious or financial reasons, or if you are an American Indian or Alaska Native that is eligible for related health benefits. But the majority of Americans will be expected to sign up for qualifying coverage or face a tax penalty that varies depending on the year (penalties are being phased in) and the income. The minimum is $95 in 2014 and the maximum is 2.5% of income or three times the penalty, whichever is greater. Qualifying insurance must cover the essential health benefits – catastrophic coverage will not qualify. Insurance will be available both through traditional methods, such as employer plans and privately purchased policies, and through a new forum called health insurance exchanges. This is intended to be a competitive market that has common rules and pricing and offering policies, and that provides more information for consumers about the aspects of each option.

By requiring everyone to obtain qualifying insurance plans, the argument is that the customer base for insurance will increase significantly, and low-risk individuals who previously opted out of insurance would be forced into the market and would balance out the high-risk, high-cost individuals. This is how the Affordable Care Act hopes to retain a variety of insurers despite the new policy requirements, including but not limited to: (1) prohibition on exclusions for pre-existing conditions; (2) dependent coverage extended to 26 years of age; (3) annual limits phased out; (4) lifetime limits prohibited; (5) rescission not permitted; (6) policy and renewal guaranteed; (7) premium adjustment only for region, tobacco use, age and family composition; and (8) no gender discrimination. Imposing these restrictions on insurance policies without expanding the market would put many insurers out of business – plans would be required to cover high-risk, high-cost individuals and low-risk, low-cost individuals would opt out of the system to avoid bearing the additional cost. For that reason, the individual mandate is linked in theory, and in legal arguments, with the various changes to insurance policies. Additionally, because the fines and penalties resulting from non-coverage are intended to pay for a large portion of the feel-good provisions, those are arguably linked as well. As a result, if the U.S. Supreme Court determines that the individual mandate is unconstitutional, it will be faced not only with discussing that decision, but also with determining which parts of the Affordable Care Act are linked to the mandate.

How the Affordable Care Act will Impact Employers

For those of you who represent midsized businesses, the most important impact of the Affordable Care Act may be the various employer requirements for offering insurance. If an employer chooses to provide health insurance to all employees, the health insurance must meet both of the following requirements to completely avoid a penalty: (1) insurance must pay for at least 60% of covered health care expenses for a typical population; and (2) any given employee should not have to pay more than 9.5% of the family income for the employer plan. If an employer wants to avoid part of the penalty, but does not want to offer a plan that meets both of those requirements, it could offer a non-compliant plan. However, employers have to be very careful in estimating the number of employees who are interested in the plan, because a non-compliant plan with the wrong number of enrollees could end up costing as much or more than not offering a plan at all. Here is an illustration:

#	Description	Penalties	Cost
1.	Provide PPACA compliant health coverage for all employees.	None	Cost of health insurance plan that pays for at least 60% of covered health care expenses, with employee cost limited to 9.5% of family income or less.
2.	Provide limited health plan to employees.	Penalty A = $3,000/yr. x (# of full-time equivalent employees receiving the tax credit - 30)	Cost of limited health insurance plan for those employees who choose the plan + Penalty A. Penalty A Example 1: If Employer has 100 full-time equivalents and 80 select the employer plan and 20 select the tax credit for alternate coverage, then there would be no penalty because the number of employees receiving tax credit does not exceed 30. Penalty A Example 2: If Employer has 100 full-time equivalents and 50 select the employer plan and 50 select the tax credit for alternate coverage, then the penalty would equal $3,000 x (50-30) = $60,000. Penalty A Example 3: If Employer has 100 full-time equivalents and 10 select the employer plan and 90 select the tax credit for alternate coverage, then the penalty would exceed the total for Penalty B below ($3,000 x 90-30 = $180,000) and so Penalty A would equal Penalty B: $140,000. Employer would pay this penalty in addition to the cost for the ten employees who selected the plan.
3.	Continue to provide no insurance for employees.	Penalty B = $2,000/yr. x (# of full-time equivalent employees – 30)	Penalty B Penalty B Example: If Employer has 100 full-time equivalents, it would pay $2,000 x (100-30) = $140,000

Applying the various formulas alone is confusing, but adding the guessing game of estimating the number of employees who will opt for the plan (rather than a spouse's plan or a plan through the health insurance exchange) and estimating the family income (without asking what an employee's spouse earns) eliminates any reasonable certainty in a company's insurance costs. Essentially, if an employer is able to reasonably estimate the variable components, the following formula should apply:

• Cost of fully PPACA compliant health plan < Penalty B = Implement compliant plan

• Cost of fully PPACA compliant health plan > Penalty B, then conduct additional analysis of limited health plan costs:

• Estimated cost of limited plan + Penalty A < Penalty B = Offer limited plan.

• Estimated cost of limited plan + Penalty A > Penalty B = Offer nothing.

Easy, right? Unless you or your client are psychic or can lawfully get the necessary information out of employees in advance, some companies may just have to take a loss the first year until they get a better grasp on who will elect to enroll in their plan.

What do lawyers need to know?

Given the uncertainty with regard to the Affordable Care Act, it may not be worth your time to study the details of each requirement, penalty and program until the Supreme Court renders a decision. However, if you continue to get questions from clients or friends who want the legal viewpoint on the Affordable Care Act, here is my advice: pick the issues that are relevant to your area of practice and start with the information available on the internet. The Kaiser Family Foundation has an excellent website that summarizes many of the key aspects.

So as a recap, if you were hoping to get the Affordable Care Act in a Nutshell or Affordable Care Act for Dummies, my apologies. If you have to explain the employer provisions to any of your midsize company clients, my sincere apologies. And if you were hoping that the Affordable Care Act would solve America's health care crisis, can you let me know who your doctor is? Because mine will not prescribe me those drugs.

THE KIRK FILES

Objection, subjection, total rejection

By Kenneth Kirk

Buford James Williams, plaintiff
vs.
Jeffrey Harold Clemm, defendant

Order resolving post-trial motions

This case involves a claim by plaintiff Williams, a rapper who uses the stage name "Bigg Baddazz Pappuh" against defendant Clemm, another rapper who goes by "Stone Hawdd" professionally. Despite the requests of the parties, the Court will continue to use their actual names in pleadings, if only because the Court has to deal with spell-check. Williams claims that Clemm's rap song "Ho's and Homies" is substantially the same as his own rap song "Offin' Pigs", and is suing for royalties and punitive damages.

The jury found in favor of the plaintiff in regard to royalties, but the defendant in regard to punitive damages. Both parties filed post-trial motions. For the reasons stated herein, the Court denies all motions and upholds the jury's verdict.

1. Plaintiff finds fault with this Court's ruling, in response to a motion in limine, that the N word, spelled in the traditional manner, is the same as the N word spelled with a Z on the end, and that it should not be used by witnesses or counsel except when absolutely necessary to quote a lyric. Plaintiff claims this caused difficulties for several of his witnesses who are accustomed to using the modern variation on the word. The Court notes that in the context of testimony it is impossible or difficult for the ear to distinguish between the two, that it is offensive to many people, and that the Court merely admonished said witnesses when they slipped, rather than taking more aggressive action such as holding them in contempt. Plaintiff's argument that the Court's ruling was inconsistent with its allowing "shizzle" to be used, is unconvincing.

2. Defendant complains of the Court's insistence that the volume control on the equipment which was used to play the respective rap songs for the jury, be kept down to a reasonable volume. Defendant argues that to understand the true flavor of the music, it must be played at a very high decibel level. The Court's ruling was made for three reasons. First, when an attempt was made at playing the music at the requested level, a judge in another courtroom sent his in-court deputy over to complain. Second, at that level it would have been impossible for the Court to hear any objections. And third, one of the jurors appeared to be covering her ears, doubling over and crying.

"...to someone unfamiliar with a style of music, any two songs within the same genre can sound almost identical."

3. Defendant also argues that the jury's ruling was not supported by the evidence, and in particular notes that only he called any kind of expert witness to testify about the distinction between the two songs. He argues that to someone unfamiliar with a style of music, any two songs within the same genre can sound almost identical. The Court acknowledges this phenomenon, for instance the Court is sometimes puzzled that so many people cannot distinguish between Vivaldi and Mantovani. In response to the argument, plaintiff notes that during jury selection, several of the veniremen who were ultimately selected for the jury, acknowledged listening to rap music. Defendant rejoins that they may not have understood the distinction between gangsta rap on the one hand, and hip-hop on the other. However the defendant could have explored that in more detail at the time.

4. In addition, the jury could have found defendant's expert to be unconvincing. And they could have done so for reasons other than unfair prejudice. The Court made every effort, in its rulings before and during the trial, to keep from the jury the fact that the expert was testifying telephonically from a correctional institution. However the fact that his testimony was interrupted once for a prisoner count, and then again because of a knife fight, may have made his legal status obvious to the jury. On the other hand, even the Court was puzzled by, to give one example, his statement that the defendant's song was "a straight up skeezy medicine head disasterbation stole from a classic as f*** freeballing epiphany". The jury could have concluded that his thinking was muddled.

5. On the other hand, the jury could have legitimately found that at least some of the numerous witnesses who testified for the plaintiff, were credible. Granted, out of those eight witnesses, at least five appeared to be under the influence of narcotics, and four of them were involved in that unfortunate altercation which occurred just after the defendant's argument for a directed verdict. And granted, several of them had criminal records. And three of them had slept with at least one of the parties. And one of them, during his testimony, called upon the world to occupy the courthouse. And another openly stated his belief that Taylor Swift is the antichrist. Nonetheless, the credibility of the witnesses is better left to the jury, who presumably took these eccentricities into account.

6. The Court does not apologize for its ruling that headwear must be removed in the courtroom, except for religious or other good cause. This rule is based on a long-standing tradition which shows respect to the Court and the parties. If that made it more difficult to tell which of the people in the courtroom was affiliated with which of the parties, that was at best harmless error. Which color bandanas they were wearing would have been of limited relevance.

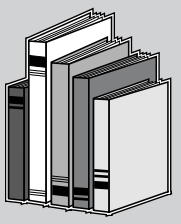
7. The Court will not reconsider its earlier denial of summary judgment on liability. The fact that both songs primarily dealt with prison, drugs, fallen women, and anger at authorities, does not necessarily mean they are the same. That would be akin to finding that two country-western songs are the same because they both reference pick-up trucks, divorce, and beer.

8. Finally, the Court denies the cross-motions for attorney fees. The Court did not realize, until after trial had concluded, that neither of the attorneys in the case were actual, licensed members of the Bar. Had the Court realized that these individuals were former acquaintances of the parties who they met while incarcerated, the trial would not have been allowed to proceed as it did. The proper authorities have been alerted by the Court.

The jury verdict is sustained.

Anchorage law library remodel

By Susan Falk



The Anchorage Law Library remodel has begun! At the beginning of February, we rolled up our sleeves and packed up much of our collection in order to clear space for renovations. If you've stopped by the library in the last few weeks, you probably noticed that some of our space is currently closed. Both mezzanines are slated for remodeling during the first phase of the project. Nonetheless, there's still plenty of open space to spread out and work.

Much of our print collection is now in storage, but we tried to identify the materials you're most likely to need, and those should still be available to you. Some of the print items we packed away are available electronically, and the most widely-used books are still on the shelf. If you need a book and you're not sure whether or not we have it, check our online catalog or give us a call at 264-0585. If we don't have it, we can try to get it for you through interlibrary loan. It just might take a bit longer, so please plan ahead as much as possible.

We expect the Anchorage library to remain open throughout all phases of the remodel, and we will provide the same level of service you've come to expect from us. Superseded statutes and other Alaska materials are available. Legislative history materials, including microfiche, are also available. You can still use our computers, you can still access Westlaw and HeinOnline, and you can still get wi-fi. Most importantly, you can still call or email us with your reference questions, or stop by for help in person.

If you have any questions, please contact Susan Falk at (907) 264-0581 or sfalk@courts.state.ak.us. You can find updates on the remodel at www.courts.alaska.gov/libremodel.htm.

Federal courts jurisdiction and venue clarification act of 2011

By Jonathan Segal

On December 7, 2011, President Obama signed into law a bill making several changes to statutes governing jurisdiction, venue and removal. This briefing provides background on the changes, the effective date of the changes, a summary of the key changes to the statutes, and practical pointers.

Background

Many judges believe that the former statutory provisions governing jurisdiction, venue, and removal were unnecessarily complex and obscure. They made a series of recommendations for clarifying these provisions through the United States Judicial Conference, some of which have now been enacted into law. Among other subjects, these new provisions address:

- Removal and Remand Procedures
- Determining the Amount in Controversy for Removal in Diversity Cases
- Diversity Jurisdiction in Cases Involving Resident Aliens
- Citizenship of Corporations and Insurance Companies with Foreign Contacts
- Creating a General Venue Rule
- The Definition of Residency for Purposes of Venue
- Treatment of Non-Residents for Purposes of Venue
- Transferring Cases with All Parties' Consent

Effective Date

The amendments went into effect on January 6, 2012, and govern any action commenced after that date. An action or prosecution commenced in state court and removed to federal court will be deemed to commence on the date the action was commenced in state court. Cases already pending as of the effective date should be unaffected.

SUMMARY OF THE CHANGES

A. Changes to Removal Procedures

Separating provisions for removal of civil and criminal cases

`The Act amends 28 U.S.C. §§ 1441 and 1446 to apply to civil cases only. The Act creates new sections, 28 U.S.C. §§ 1454 and 1455, to address removal of criminal actions exclusively, including provisions formerly part of §§ 1441 and 1446.

Changes to 28 U.S.C § 1441(a)-(b) (rules regarding removal in diversity cases)

The Act reorganizes provisions that already existed in the law in an effort to make it easier for litigants to locate the provisions that apply uniquely to cases where the only basis for removal is diversity of citizenship. It includes a specific statement that individuals sued under fictitious names are to be disregarded for determining whether diversity exists. It also reiterates the rule that if federal jurisdiction rests only on diversity of citizenship, then removal is barred if *any* of the parties that have been served reside in the same state as the court from which the case is being removed.

PRACTICAL POINTERS: Fictitious defendants do not enter into the diversity calculus, so do not take them into account when analyzing whether removal is possible.

Changes to 28 U.S.C § 1441(c) (severance and remand of separate and independent state law claims, or state law claims that are nonremovable by statute)

The Act changes how courts deal with removed cases that include both federal claims and separate and independent state-law claims. Under § 1441(c), as amended by the Act, courts are now *required* to sever and remand state-law claims that are within neither original nor supplemental federal jurisdiction, as well as state-law claims that are nonremovable by statute. Under the prior law, federal courts had the option to exercise jurisdiction over all of the claims in a case, including state-law claims that could not have been brought in federal court originally because they were not part of the same "case or controversy" as the federal claims. This section of the law was added to "better serve the purpose for which the statute was originally designed, namely to provide a Federal forum for the resolution of Federal claims that fall within the original jurisdiction of the Federal courts," and to respond to several courts' findings that the prior statute was unconstitutional because it purported to give federal courts "authority to decide state law claims for which the Federal courts do not have original jurisdiction," according to the House Judiciary Committee report on the Act.

PRACTICAL POINTER: Unless a federal court has supplemental jurisdiction over state law claims under 28 U.S.C. § 1337, be prepared to litigate concurrently in state and federal court.

Changes to 28 U.S.C § 1446(b) (codification of rules for cases with multiple defendants)

The Act changes § 1446(b) by codifying the well-established "rule of unanimity" for cases that involve multiple defendants. The rule, which has been part of the case law since 1900, provides that *all* defendants who have been properly joined and served must consent to the removal.

Additionally, the Act clarifies that *each* defendant may remove within 30 days after it receives or is served with the initial pleadings or summons, and further states that an earlier-served defendant may consent to a later-served defendant's removal even if the earlier-served defendant's 30-day time period has expired. Previously, it was unclear whether an earlier-served defendant could consent to removal filed by a later-served defendant if that earlier-served defendant's 30 days had expired. Besides clarifying the law, the Judiciary Committee believed that this change insures fairness to later-served defendants, which "necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially."

PRACTICAL POINTER: To minimize the possibility of a prolonged removal period, serve all defendants at the same time. If you represent a defendant, then recognize that you still have 30 days to remove even if an earlier-served defendant failed to remove the case within its 30-day window.

General Changes to 28 U.S.C § 1446(c) (rules regarding removal for diversity jurisdiction)

The Act replaces the previous version of § 1446(c), which dealt with the removal of criminal actions, with a new section addressing removal of actions in diversity cases, to assist lawyers in finding the statutory rules that apply to removal of cases on the basis of diversity. The procedure for removal of criminal cases is now found in a new section, § 1455.

PRACTICAL POINTER: New § 1446(c) should be the first place to turn to when evaluating the procedures for removal on the grounds of diversity, including time limits.

New section: 28 U.S.C § 1446(c)(1)

While there had previously been a one-year limitation, calculated from the time of commencement of an action, on removal on the basis of diversity, the Act adds an exception to this rule where "the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." This exception was added because plaintiffs had adopted removal-defeating strategies designed to keep their cases in state court.

New sections: 28 U.S.C §§ 1446(c)(2)-(3) (calculation of the amount in controversy for removal purposes)

The Act clarifies and codifies rules related to calculating the amount in controversy for purposes of determining whether a case is removable on diversity grounds. (The amount in controversy is irrelevant in federal-question cases.) Previously, there were several conflicting standards for dealing with situations where the amount in controversy was not stated in the Complaint, or otherwise unclear from the face of the Complaint.

The Act now states that, in general, the amount demanded in the Complaint is deemed to be the amount in controversy. However, if the Complaint seeks nonmonetary relief, if state law does not permit the plaintiff to state the amount demanded, or if state law allows a recovery greater than the amount demanded in the Complaint, then the removing party may state its own amount in controversy in the removal papers. If the removal notice and accompanying exhibits show "by the preponderance of evidence" that the amount in controversy exceeds $75,000, the case is removable.

Additionally, the Act provides that if the face of the complaint does not show that the amount of controversy is more than $75,000, a defendant may have 30 days to remove from the time that it discovers that the amount in controversy is over $75,000. According to the Judiciary Committee, this clarifies that "the defendant's right to take discovery in the state court can be used to help determine the amount in controversy."

PRACTICAL POINTER: If the amount in controversy is unclear from the face of the complaint, attach evidence to your notice of removal showing that the amount in controversy does exceed $75,000. If you cannot

Continued on page 17

Federal courts jurisdiction and venue clarification act of 2011

Continued from page 16

provide such evidence, you can use state court discovery to acquire it, and gain a new 30-day window for removal.

B. Changes in Federal Jurisdiction

Changes to 28 U.S.C § 1332(a) (treatment of resident aliens)

The Act amends 28 U.S.C. § 1332(a) to clarify rules regarding the exercise of diversity jurisdiction in cases involving aliens. The new law states there is no diversity jurisdiction over a dispute between a citizen of a state and a lawful permanent resident alien who is domiciled in the same state. The new statute replaces previous language that had given rise to controversy and had led to unintended results. It remains to be seen whether the new language gives rise to similar difficulties, particularly in cases with multiple parties.

PRACTICAL POINTER: The law of diversity jurisdiction in cases involving aliens is complex and counterintuitive. For instance, there is no diversity jurisdiction over cases in which aliens are on both sides of the dispute. *See, e.g., Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 71 (D.C. Cir. 2011). Look carefully at the jurisdictional issues in any case involving aliens.

Changes to 28 U.S.C § 1332(c) (treatment of corporations and insurance companies with foreign contacts)

The Act amends 28 U.S.C. § 1332(c) to clarify that a corporation is a citizen of *every* domestic and foreign state where it is incorporated or has its principal place of business. This forces courts to take account of a corporation's domestic *and* foreign contacts when determining whether diversity exists. Previously, the law stated that a corporation was deemed a citizen of *any* domestic or foreign state where it was incorporated or had its principal place of business.

Under the former rule, some courts were not accounting for both a corporation's domestic and foreign contacts when analyzing diversity, picking or choosing one that would allow the exercise of jurisdiction. For example, some circuits have treated a U.S. corporation with its principal place of business abroad as a citizen only of its place of incorporation. Now, however, courts must analyze *both* the corporation's domestic and foreign contacts. This will result in the elimination of diversity jurisdiction in at least two situations: suits between a foreign corporation with its principal place of business in domestic State X and a citizen of that same State X (State X citizen vs. State X citizen); and suits between a citizen of a foreign country and a U.S. corporation with a foreign principal place of business (foreign citizen vs. foreign citizen).

Similar changes apply when divining the citizenship of insurance companies in direct actions.

PRACTICAL POINTER: Take account of *both* a corporation's principal place of business and its place of incorporation when calculating diversity. If use of either one results in a case where two foreign citizens are litigating against each other, or where two citizens of the same state are litigating against each other, there is no diversity jurisdiction. In multi-party cases, remember that complete diversity is normally required (with some exceptions such as interpleaders).

C. Changes to Venue Rules

New section: 28 U.S.C § 1390 (general definition of venue, discussion of admiralty and removal)

The Act adds a new section, 28 U.S.C. § 1390(a), offering a general definition of venue as "the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general." Section 1390(a) clarifies that venue does not refer to "any grant or restriction of subject-matter jurisdiction." This is an important distinction, as venue requirements, unlike subject matter jurisdiction, can be waived by the parties.

New section 1390(b) simply states that the venue statutes do not apply in admiralty cases.

Additionally, new section 1390(c) clarifies that the venue chapter does *not* determine the proper district court to which a state court action should be removed, but it does govern whether a case that has been properly removed may be transferred between federal districts.

New section: 28 U.S.C § 1391(a)(1) (new general venue rule)

With the addition of 28 U.S.C. § 1391(a)(1), the Act creates general requirements for venue choices based on current law, which provides "uniformity and lessen[s] the need for special venue provisions," according to the Judiciary Committee. Section 1391(a)(1) states that the section will govern "the venue of all civil actions in the United States." However, an introductory proviso leaves intact the special venue provisions in the antitrust, securities, and other statutes. According to the Judiciary Committee, the general venue statute will govern "diversity and Federal question litigation outside those special areas."

The Act also eliminates the existence of separate venue rules governing cases grounded in federal question jurisdiction and diversity jurisdiction. Previously, separate sets of rules governed federal question cases and federal diversity cases. Now, they are governed by a single set of rules.

New section: 28 U.S.C § 1391(a)(2) (elimination of the "local action" rule pertaining to real property)

The Act's addition of 28 U.S.C. § 1391(a)(2) eliminates the "local action" rule which had previously required that certain kinds of actions related to real property could only be brought in the district where the property was located. This created a disjuncture in trespass cases, where a court where the real property was located may not have been able to obtain personal jurisdiction over a trespasser.

New section: 28 U.S.C § 1391(b)(1) (venue in state where all defendants reside)

The Act amends 28 U.S.C. § 1391(b)(1), which deals with the situation in which all defendants reside in the same state. Formerly the statute provided that in such a situation venue was proper in a judicial district where *any* defendant resided. Since a corporation "resides" in any state in which it is subject to personal jurisdiction, this language read literally authorized venue in any such state even if most of the defendants (and the corporation) resided in another state. The new language of §1391(b)(1) clarifies that when venue is based on this statute, the action must be brought in a district within the state where all the defendants reside.

PRACTICAL POINTER: This new section eliminates an opportunity to venue-shop across the country when all defendants in a case reside in the same state.

New section: 28 U.S.C § 1391(b)(3) (fallback venue provision)

The principal venue provisions are § 1391(b)(1) (a district in the state where all defendants reside) and § 1391(b)(2) (a district where "a substantial part of the acts or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is located"). Where no district meets these tests, new § 1391(b)(3) permits the case to be brought in any district in which any defendant is subject to personal jurisdiction with respect to the action.

The Act unifies two different provisions that governed so-called "fallback venue," in order to avoid possible misinterpretations, according to the Judiciary Committee report.

New section: 28 U.S.C § 1391(c)(1) (clarifying the meaning of residency for individuals)

The Act clarifies the definition of residency by the addition of 28 U.S.C. §1391(c)(1). An individual, including a resident alien, is now deemed a resident of the judicial district where he or she is domiciled under § 1391(c)(1). Previously, courts in the Second, Ninth, and Tenth Circuits have held that a person domiciled in one state could be a resident of other states as well, leading to the possibility that venue could be proper in districts in all such states.

PRACTICAL POINTER: Determine whether a person is domiciled in a district to determine if he or she is a resident, for purposes of venue.

New section: 28 U.S.C § 1391(c)(2) (creating parity of venue rules for corporations and unincorporated associations)

The Act adds 28 U.S.C. §1391(c)(2) in order to clarify the rule for determining the residency of a corporation *or* an unincorporated association, such as a trade union, for purposes of venue. The Act states that when any "entity with the capacity to sue and be sued . . . whether or not incorporated" is a plaintiff, it is deemed to be a resident of the location of its principal place of business, for venue purposes. When such an entity is a defendant, it is deemed to reside in any judicial district where it is subject to personal jurisdiction for the action that is being adjudicated. This rule was meant to eliminate confusion and to create parity between corporations and non-corporate entities.

PRACTICAL POINTER: For venue purposes, when corporations *and* any other legal entities are defendants, their residency is determined by analyzing where they are subject to personal jurisdiction.

New section: 28 U.S.C § 1391(c)(3) (venue for nonresident defendants)

The previous version of 28 U.S.C § 1391(c)(3) stated that an "alien" may be sued in any district. The Act shifts the focus of this provision from alienage to residency; it states that "a defendant not resident in the United States may be sued in any judicial district." Thus, the new statute applies the same venue rules to citizens and aliens, whether they are residents or nonresidents.

PRACTICAL POINTER: Resident aliens are given some protection against being sued in distant forums. Nonresidents of the United States can be sued in any district, regardless of whether they are United States citizens. The inclusion of nonresident defendants does not affect venue as to other defendants.

Changes to 28 U.S.C § 1404(a) (transfer of venue to any district to which all parties have consented)

The Act allows parties to transfer venue to any district to which all parties have consented, so long as the court found it to be for the convenience of the parties and witnesses and in the interest of justice. Previously, a court could only transfer a case to a district where it might have been brought, meaning that the transferee Court had to have both personal jurisdiction over the case and had to have been a proper venue. Now, a transferee district does not have to be a proper venue, as long as all parties are agreeable.

PRACTICAL POINTER: If all parties agree to a transfer to a different district, the fact that the venue where the district is located is improper should not be a factor.

The author is a litigator at Davis Wright Tremaine, LLP, with a focus on the media, entertainment, and technology industries. Prior joining Davis Wright, Jon served as a judicial clerk for the Hon. Cormac J. Carney of the United States District Court for the Central District of California, and worked as a reporter and editor at newspapers around the United States.

(In law and life) It is not possible to drive without distractions

By Joan Wilson

I'm certain it's because I woke her too early after putting her to bed too late. When I've done that, no good can come out of it. The pancakes won't have enough syrup. When that breakfast doesn't work, the cornflakes will be too soggy.

If she had her way and knew any different than the three-year-old she is, I'm certain she'd replace the Sesame Street station I have playing on Pandora for her with a medley of ACDC hits to match her mood.

I try reaching her creative side.

"Shall we wear your red dress?

"No, it's too hot!"

"How about your favorite purple one?"

"I hate purple."

I look at my watch. My meeting starts downtown in less than an hour. Between my Bear Valley home and the office, I have one sad little girl to bring to her Montessori. Don't even think of a stop for coffee.

I make a game plan and leave Abbie momentarily in what I think is the good company of Bob singing, "Who are the People In Your Neighborhood." While she meets the postman and fireman, I load up the Element. Once the lunch box, the snow pants, the soggy cereal, and even her coat and shoes are packed, I come back for her.

"Darling, I know you don't understand, but there are people counting on me and we have to go."

It's going to be too hard to wrestle her into tights. Her brown pants, pink turtleneck, and mismatched socks are on before she knows it.

And we are off.

On the ride, I think of the day ahead of me. The 8:30 meeting that I will barely make on time should last an hour. Then I have to draft that amendment to the employment contract. What day to I have to travel next week? I have to plan around that. I don't yet know I'll be called at 11:30 to attend an emergency board meeting telephonically in less than 15 minutes. But I do know that before I leave work once again I will need to have finished those interrogatories, talked to four lawyers to determine if I really have to file motions to quash two subpoenas next week, and, and…. Dang it, I'm forgetting something. I know it.

I remember. It's the memo I started weeks ago and keep putting down in order to fight those daily fires.

The raucous emanating from the car seat is not ending.

"Here Sweetie." I hand her the iPad with "The Princess and the Frog" already loaded. How I did that while driving, I'll never tell.

She's throws it. She actually throws it.

"Abbie, Abbie, sweetie, calm down, we are just going to school."

"Not the Gulag Archipelago," I want to add, but I know she won't get the reference.

School? I laugh to myself. This is what working parents have to call daycare for three year olds, even if it is a Montessori. It's how we survive in good conscience.

"We've got to go BACK!" she screams, channeling her best Jack Shephard from my former favorite television show LOST (when I had time for television.) By now she has managed to get her upper arms out of the car seat. Is today the day she escapes that monstrosity?

She's reaching for home. And if she were to achieve it by sheer desire alone, there is no doubt, the car would go in reverse all the way up the hill, the fire would be burning in the wood stove, and we would once again be enacting Toy Story 3, or is it 2 that has the prospector?

What is it again about today that's so important that I don't turn around?

I know. I get to be a lawyer for a living and people are counting on me, everyone except this little one.

We are imperfect, beautiful creations. And maybe by admitting our humanity to each other and telling our stories, we can actually become better lawyers. While we're at it, maybe even better people.

In *Don't Let's Go to the Dogs Tonight*, Alexandra Fuller chronicles her upbringing as the daughter of colonialist farmers attempting to retain ownership of their land during the emancipation of Zimbabwe. While this memoir could have been the story of the catastrophe of apartheid or the cost of commitment to misplaced ideals, the reason the story triumphs is because the author keeps it local. That is, despite the overarching backdrop of war and division and lack of understanding, the more important tales are the deaths of her three siblings and the saga of her grief-stricken mother suffering from an absence no amount of alcohol can fill.

Don't Let's Go to the Dogs doesn't have the mass popularity of a JK Rowling or a John Grisham story, but what it may lack in an audience size, it makes up with honesty. In a 2005 interview, author Fuller explained how the book she wrote was much different than the story she expected to tell about how to survive war. She said,

The cracks with which I went into this journey [of writing] were simply that. They were cracks and I was doing a reasonably good job of painting them over in my life, the spiritual Botox so to speak. … The lie I wanted to tell was I came in with cracks, but look the cracks are all fixed and I am now a perfect vessel. And look, you can pour water in me and I won't leak...

And instead what happened [through writing] was these cracks in my vessel were fingered wide open and the vessel no longer exists. I don't have a vessel. I can be nothing but the essence of myself, in other words, soul. And that was for me ultimately and finally healing.

Last May, I got an idea. (I get a lot of ideas.) Why not do the same for lawyers? Why not help us, story by story, realize that we are not the perfect containers we present to our colleagues and our clients? We are humans first, after all; a bundle of nerves and feelings and priorities and pressures. We are imperfect, beautiful creations. And maybe by admitting our humanity to each other and telling our stories, we can actually become better lawyers. While we're at it, maybe even better people.

I was gung-ho to write quarterly articles about being better people. You know who some of us are. The lawyers that actually volunteer their time on Martin Luther King Day or write the Bar Exam year after year. Or the ones that can throw a climb in on Mount McKinley or can write searing poems about the unexpected death of their spouse. I wanted to write about them. The heroes of daily living and lawyering. "Tell me," I wanted to ask, "how you do it?"

I get to have adventures and use my talents in ways that make me a good lawyer and a better Mom.

But two deadlines passed and nothing crossed my keyboard. To write these columns would require phone calls and interviews and ideas and then more ideas and then more writing when I have a job and a husband and a baby and four dogs and two cats and five chickens and I really must exercise, oh and my aging parents, and then there's my sister….

Perhaps you can see why I gave up, at least for now.

Until, I received the kindest e-mail from Gregory Fisher. He did not even once mention two missed deadlines. He just said, it might be nice to have some contributors with an XX chromosome now and then.

I haven't got my interviews lined up. No cracks in the vessel of any super lawyer and person to explain or unglue, to show that searing humanity.

But, I do have me, and now you do, too.

And here is my best secret. My most successful negotiations often occur between the breakfast table and the Montessori school, okay, day care, drop off.

On my better days, here is what I say to a child in full smile.

"Dearest Abbie, you are the light of my life. I get to go work today so I can keep a beautiful roof over your more beautiful head. I get to have adventures and use my talents in ways that make me a good lawyer and a better Mom.

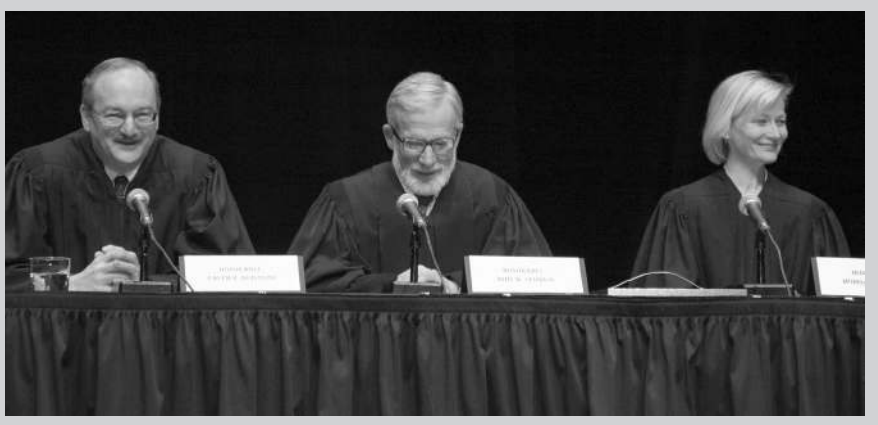
And when I see you at the end of my day, you are my champion, my dearest, my biggest fan (as I am you) and my best responsibility.

I'm going to be a good lawyer for you darling, just for you."

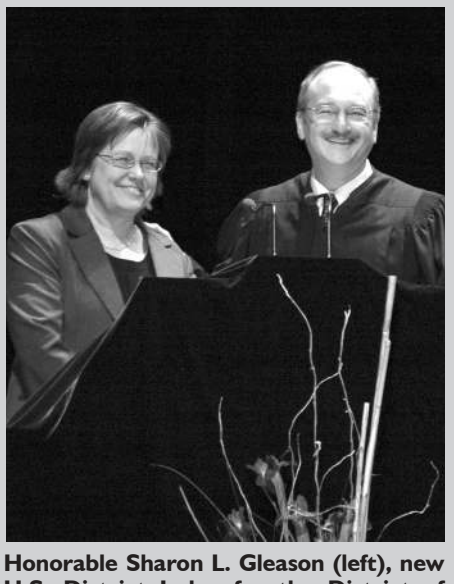
"Now, would you like the iPad?"

Joan Wilson is a lawyer in private practice. She recently, believe it or not, received her Master of Fine Arts in Creative Writing and the Literary Arts from the University of Alaska at Anchorage. She promised herself she would never write about being a lawyer. She was wrong.

Gleason joins the federal bench



Senior U.S. District Judge John W. Sedwick (center) offers remarks at Judge Gleason's investiture ceremony. Judge Beistline and Judge Christen also spoke at the January 10, 2012, event.



Honorable Sharon L. Gleason (left), new U.S. District Judge for the District of Alaska, is congratulated by Honorable Ralph R. Beistline, Chief Judge of the U.S. District Court for the District of Alaska, at her investiture ceremony held Jan. 10 at the Discovery Theater of the Performing Arts Center in Anchorage.

Judge Gleason, (at right) shares a laugh with friends and colleagues Judge Morgan Christen, (l), of the U.S. Court of Appeals for the Ninth Circuit, and Judge William Morse, of the Anchorage Superior Court, during her investiture ceremony. All three judges once served together on the Anchorage Superior Court bench.

Road map to status changes in the Alaska Bar Association: If your life is changing, how does it affect your practice and dues?

An attorney who has ever been a member of the Alaska Bar Association can be in one of the following status categories:

1. Active (either in-state or out-of-state)
2. Inactive
3. Retired
4. Resigned
5. Suspended (for non-payment of Bar fees/dues)
6. Disability inactive (can be interim)
7. Suspended (for disciplinary reasons)
8. Disbarred

Note that this listing omits the categories of deceased and honorary, and also omits the subcategories of suspension for failure to complete requirements related to continuing legal education (CLE) and suspension for failure to pay fee arbitration awards or child support obligations. Note also that emeritus is a subcategory of inactive or retired members who provide pro bono services only under the supervision of qualified legal services providers—more on this below.

Let's look at each of those first five status categories listed: active; inactive; retired; resigned; and suspended for non-payment of Bar fees/dues.

Active members:

1. Can practice law
2. Owe annual dues by February 1 of each year for that year ($660 for 2012) unless they show hardship as a result of a medical condition, mental condition, or an involuntary change in economic status—proof of hardship requires submission of affidavit, copy of last two federal tax returns with supporting schedules, and detailed listing of real and personal property (with estimated values) and outstanding debts

Inactive members:

1. Can't practice law in Alaska (this means having all cases and matters be over or transferred AND no representing, advising, or counseling of clients)
2. Can't have practiced law at all in Alaska during any calendar year for which they are inactive
3. Owe annual dues by February 1 of each year for that year ($215 for 2012)
4. Must submit an affidavit to transfer to inactive status by January 1 of the first year for which the member doesn't want to pay dues for active membership
5. (If inactive or retired for less than a year), can become active again by payment of appropriate dues and furnishing of names and addresses of employers and businesses during period of inactivity or retirement
6. (If inactive or retired for more than a year), can become active again by payment of appropriate dues and showing of character and fitness to practice law under Alaska Bar Rule 2(1)(d)

Retired members:

1. Can't practice law in Alaska or any other state
2. Can't have practiced law at all in Alaska during any calendar year for which they are retired
3. Must have passed their 65th birthday
4. Do not owe dues
5. Must submit an affidavit for retired status by January 1 of the first year for which the member doesn't want to pay dues for active membership
6. Can re-enter the practice of law under conditions as set out above in #s 5-6 for Inactive

Resigned members:

1. Can't practice law in Alaska
2. Must be out of the practice of law in Alaska, including having given proper notice and sufficient opportunity for clients to find substitute counsel without prejudice to their cases
3. Cannot have any pending disciplinary, fee arbitration, or Lawyers' Fund for Client Protection matters
4. Must be current on fees
5. Must submit an affidavit of resignation that they are not practicing law in Alaska by January 1 for the first year for which they do not want to pay Bar dues—failure to do so results in suspension for non-payment of Bar dues
6. Cannot re-enter the practice of law without satisfying all the requirements for new lawyers, which would include re-taking the bar examination

Suspended (for non-payment of Bar fees/dues) members:

1. Face suspension after going approximately 60 days without paying the dues past the deadline of February 1—getting reinstated after suspension also requires the payment of penalties, which run $10 per week for each week of non-payment up to $160 total in penalties
2. Can't practice law during the period of suspension
3. Have their names sent to the Clerks of Court around the state, but do not face seeing their names printed in newspaper advertisements the way members who are disbarred or suspended for disciplinary reasons do
4. Can re-enter the practice of law under conditions as set out above in #s 5-6 for Inactive

Conversations with long-time Alaska lawyers suggest that these points deserve emphasis:

A. Retired members don't have to pay dues

B. Retired and inactive members remain in good standing with the Bar Association, including getting sent the mailings—there just can't be any practice of law

C. An inactive member of the Alaska Bar Association can practice law in Alaska only when that member is an active member of another state's bar and associates *pro hac vice* with an active member of the Alaska Bar Association or in the limited subcategory of emeritus described below

D. A retired member of the Alaska Bar Association cannot practice law or serve as a judge in any state except in the very narrow exception of emeritus described below

E. Setting aside for the *pro hac vice* exception described above for an inactive member who is an active member in another state, the only way for inactive or retired members of the Alaska Bar Association can practice law is the tightly defined exception carved out for emeritus members, a narrow subcategory which is limited to inactive or retired attorneys who provide pro bono services only under the supervision of a qualified legal services provider

F. The Alaska Bar Association takes the position that if you have practiced law for a minute in Alaska during a calendar year, you owe the full dues for active status for that year

The bottom line for 2012 is that an active member of the Alaska Bar Association who didn't submit an affidavit by January 1, 2012 to become an inactive or retired member owes $660 in dues for 2012 plus $10 in penalties for each week since February 1, unless that attorney resigns from membership. If a member who has not resigned—or has not applied by January 1, 2012 for inactive or retired status—does not pay the dues of $660 plus any penalties owed, that member faces suspension.

Absent resignation—which is taking a one-way door out of the practice of law—if you want to get out of active status with the Alaska Bar Association, you should start thinking about how to do that no later than December to avoid paying the dues owed February 1 for active membership for the next year.

And now a special bonus. Here's an addendum from Bar Counsel Steve Van Goor on how to avoid a "painful" departure from the active practice of law:

> A lawyer suffering from a disability may wish to consider a transfer to disability inactive status. Although this is not a revolving door because reinstatement proceedings are required to prove that the disability has been removed or ameliorated, disability status is not a disciplinary status and no dues are incurred.

In other cases, a lawyer may decide that the stress and strain of practice is too much and the lawyer should pursue other alternatives. Rather than neglecting or abandoning clients, a lawyer in this situation should consider closing his or her practice and choosing inactive or retired status. Unfortunately, Alaska's disciplinary history is replete with serious disciplinary sanctions for lawyers who simply give up rather than closing their practices in a professional and orderly manner.

Cliff Groh remains a happily active member of the Alaska Bar Association, as he assured the Bar Association's Executive Director when he got her to review this article. He will return to discussion of crime and corruption in the next edition of the Alaska Bar Rag.

Social networking poses ethical dilemmas

Continued from page 1

the conduct involved.[7] Further, Rule 8.4(a) prohibits a lawyer from violating or attempting to violate a rule of professional conduct through the acts of another.

Is it improper to "friend" the judge I'm appearing in front of? Is it improper for the judge to accept a "friend request"?

Most jurisdictions permit lawyers and judges to be "friends" on a social network. After all, lawyers and judges are frequently friends in real life and it is hard to see why cyberspace should be any different. That being said, these jurisdictions have implemented some common-sense limitations. The Supreme Court of Ohio's disciplinary board issued an advisory opinion stating that judges may "friend" counsel who appear before them, but must remain vigilant to ensure that all ethical rules are followed. For example, the judge may not foster social networking interactions that erode confidence in the independence of judicial decision-making, and the judge must not comment on any currently pending matters. Kentucky, South Carolina, and New York take a similar view.[8]

To state the obvious, it is also improper for a lawyer and judge to have ex parte communications about an active case through social media sites (or otherwise). While this seems too obvious to merit mentioning, it was apparently not so obvious to a judge in North Carolina who received a public reprimand for precisely this type of conduct.[9]

Florida's Judicial Ethics Advisory Committee, on the other hand, takes a hard-line (and, to date, outlier) approach prohibiting judges from being "friends" with lawyers who appear before them. In a 2009 opinion, it concluded that when a judge has "friended" a lawyer who appears before her, that act may reasonably convey to the public that this lawyer is in a special position to influence the judge.[10] In order to avoid even the appearance of any improper influence, these judges are required to exclude any lawyers who may appear before them.

What takeaway lessons can be derived from these sometimes conflicting opinions?

First, while the factual setting is new, the analytical tools are not. When addressing the new ethical challenges posed by social networking sites, the committees have consistently turned to the rules and prior ethics opinions as a way to analogize social networking scenarios with other established factual settings. Lawyers considering the use of social networking sites as part of their practice should think carefully about how the rules would apply to this type of conduct if it were outside of cyberspace. For example, no lawyer would think it was appropriate to call up a represented opponent to discuss the details of the case; doing the same thing through a Facebook "chat" is equally improper.

Second, this is an unsettled area for ethical guidance. The Alaska Bar Association's Ethics Committee has not issued an opinion on any of these issues, and neither have many other states' committees. A consensus may yet emerge, but that is at least several years away.

Third, given the uncertainty in this evolving area, it's a good idea to proceed with caution. Better safe than sorry. If you are confused or concerned about how the ethics rules might apply to a particular situation, ask for advice from Steve Van Goor or seek an opinion from the Ethics Committee.

Social networking sites can provide a treasure trove of useful information for your next case. Just keep in mind that the ethical rules and your ethical obligations apply with full force to usage of these sites. Used properly – and ethically – they can provide you with an extra edge to help win your next case.

FOOTNOTES

[1] http://www.bloomberg.com/news/2011-07-08/linkedin-tops-myspace-to-become-second-largest-u-s-social-networking-site.html (last visited Aug. 15, 2011). For a discussion of several of the issues raised in this article, see generally Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous, Feb. 1, 2011, http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/.

[2] *See, e.g.*, San Diego County Bar Legal Ethics Committee Bar Opinion 2011-2, § III.A.3(b), (May 24, 2011), http://www.sdcba.org/index.cfm?pg=LEC2011-2 ("San Diego Op."); Oregon State Bar Association Ethics Opinion 2005-164 (Aug. 2005), http://www.osbar.org/_docs/ethics/2005-164.pdf; New York State Bar Association Committee on Professional Ethics Opinion #843 (Sept. 10, 2010), http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208.

[3] Alaska R. Prof. Conduct 4.2 generally prohibits a lawyer from communicating about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter.

[4] San Diego Op. § III.A.2; The Association of the Bar of the City of New York Committee on Professional Ethics Formal Opinion 2010-2, at 2 n.2 ("NYC Op.") (Sept. 2010) http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf

[5] Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02, at 3 (Philadelphia Op.) (March 2009) http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf. The Committee also concluded that this omission would also violate Rule 4.1, which prohibits knowingly making false statements of material fact to a third person. The San Diego County Bar's legal ethics committee concurred with this approach. See San Diego Op. § III.B.

[6] NYC Op. at 2.

[7] Rule 5.3(a)(2), 5.3(a)(3)(A); see also Philadelphia Op. at 2; NYC Op. at 3

[8] Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Advisory Opinion 2010-7, Dec. 3, 2010, http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/Op_10-007.doc; Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Opinion JE-119, Jan. 20, 2010, http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf (citing analogous opinions from South Carolina and New York).

[9] http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

[10] Florida Supreme Court Judicial Ethics Advisory Committee, Opinion 2009-20, Nov. 17, 2009), http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html; *see also* California Judges Association Judicial Ethics Committee, Opinion 66, Nov. 23, 2010, http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf (concluding that it may be permissible for a judge to interact on a social network site with an attorney who may occasionally appear before the judge, but requiring the judge to "unfriend" any lawyer who was part of the judge's online community and now has a case actively pending before the judge).

Kevin Cuddy is a partner with Feldman Orlansky & Sanders and a member of the Alaska Bar Association's Ethics Committee. The views expressed in this article are solely those of the author.

Intentional partnerships -- an alternative for the "significant other" and other non-traditional interpersonal relations

By David Graham

Humans have a natural tendency to want to connect with others. People thrive on their interpersonal relations, grow with them, learn from them, and interact with the rest of the world through them. It would be hard to argue with the proposition that historically, traditional interpersonal relations have contributed to the course of human development and promoted stability of communities and nations.

But there have been major changes in attitudes towards traditional interpersonal relations in the last 50 years. Not only do we find people who are disillusioned with marriage, but interpersonal relations among members of the same sex and people who believe in polyamory are no longer uncommon in our society. Younger generations have grown up with new paradigms, and many interpersonal relationships today fall outside of traditional parameters.

While there is no universal term to describe the varieties of non-traditional interpersonal relations, this article will define them as "an ongoing intimate relation involving some form of express or implied commitment between consenting adults that, whether by choice or disqualification, are not governed by the laws regulating marriage." "Commitment" in this definition means that the parties have agreed to act in good faith. "Intimacy" means a close connection with another rather than a euphemism for sex.

While there have been changes in the laws governing interpersonal relations over the years, state laws do not always keep up with or want to recognize the realities that people often face in non-traditional interpersonal relations. Individual agreements supported by consideration, including the formation of corporate or partnership entities, might allow people to structure their interpersonal relations using contract and corporate or partnership laws. Without legislation, the formation of these entities might not grant the traditional benefits from governments or third parties that come from a formal marriage. However, corporate or partnership structures can still provide substantial benefits if the goal is to give legal structure, economic stability, and acceptance to these non-traditional family units. Thus, these structures may provide an appropriate model.

It's not surprising that some of the people involved in non-traditional relationships have experimented with strategies to obtain recognition and validity for their own situation. The use of a Delaware L.L.C. to structure non-traditional intimate relations between individuals has been advertised for a number of years. Indeed, much of what is contained in the sample agreement is adopted from agreements others have published and used. I propose the label of "Intentional Partnership" for this species of entity, and have suggested general provisions that might be useful to anyone, regardless of the type of relationship they may be floating in.

Sample intentional partner agreement

PURPOSE AND INTENT. I freely enter into this agreement concerning the relations between myself ("I") and each other party to this agreement ("you"). I am a free and independent human being, and I accept personal responsibility for my words and actions. I choose to live in the present and remaining openhearted to future expansion of this agreement and of our family. My intent and purpose in entering into this agreement is to create obligations that will be respected, and to define the basis of my relations with you to the extent set forth herein, without intending to be limiting in any way. I agree to act fairly, and with the utmost good faith, in all of my dealings with you. This agreement will become effective upon my approval, has no fixed date of expiration, and as to the matters set forth, I agree to be bound to you.

LOVE. I will share love, joy, and caring with you. I will help empower you. When I want something from you, I will ask clearly, not hint or expect you to read my mind. I will never attempt to own you nor possess you. I will not agree to do things with you unless I truly want to, yet I will be respectful of, and sensitive to, your needs and feelings. I will not create expectations in my own mind concerning you or your actions.

COMMUNICATION. I will communicate with you, which means at a minimum I will listen as well as speak. I will enjoy sharing hopes, dreams, and plans for the future with you now. I will not judge you against my past relationships, good or bad. Nor will I hold on to issues or grudges.

PRIVACY AND RESPECT. I will be truthful towards you. I will communicate to you what privacy means to me, and I will accept your definition of privacy for you. Any private actions or words that relate to something we said or did together will be kept that way unless we have agreed otherwise. I will not use your words against you nor divulge your private thoughts and actions to others without your consent.

SHARING. I choose to share with you. I am equal to you, neither more nor less. I will enjoy your different qualities and work towards "win-win" situations. I feel proud of you and will not take you for granted. I will accept you as you are and not try to change those aspects of yourself I am uncomfortable with. I will endeavor to keep my mind open and my boundaries flexible. I will be open to new experiences with you. I will support your growth processes. I will value and seek intimacy with you, and recognize that intimacy may be verbal or non-verbal, emotional or physical. I will use intimacy as a way to connect with you on a more spiritual level, to help open pathways for communication, to express my emotions, and to experience physical sensations. I will not withhold intimacy to punish you or use intimacy to control you, your sexuality, or your emotions. I will not feel threatened when you are intimate with another. I will not do things I am uncomfortable with and may not agree with every desire you have.

TIME. I agree that our time together has a high priority in my life. I will value our time and will make conscious efforts to ensure I give as much time to you as you need, consistent with my other obligations

Continued on page 21

Perils and pitfalls of a social workforce

By Elizabeth Pifke Hodes

Employers view social media from a variety of lenses. From hiring, to marketing, to productivity management, work forces and work practices continue to become more intertwined with Facebook, Twitter, blogs, LinkedIn and other social media. This article briefly highlights key legal issues employers should consider to avoid conflicts over social media. When drafting a social media policy, first and foremost employers should be practical and realistic about the standards and expectations being identified in that policy. A policy that is not followed in practice is not worth the paper it's written on (or the server space it's saved on).

Social marketing and a lawful social media policy

Most employers are fully aware that social media has benefits and pitfalls with respect to marketing and the corporate reputation. While companies exploit social media to reach target audiences with increased efficiency and through new forums, disgruntled or careless employees may intentionally or inadvertently expose the company's proprietary information or harm the corporate reputation on a global scale. Employer policies should address these concerns by expressly identifying the prohibited conduct, any proprietary information the company is concerned about, and any disciplinary action that may result from one's failure to comply with the policy.

If an employer asks or encourages its employees to tweet, blog or create social profiles in support of their work, to publicize their expertise and/or build client relationships, a written agreement or policy should address not just ownership of the content but also who owns the actual twitter handle, profile or account name. Employers should be cognizant of the potential consequences of employee ownership and take action to ensure that Twitter handles, followers and social media profiles are retained by the company if or when the employee leaves. If the employer is not fully informed about the intellectual property rights of its employees and the limitations of the work for hire copyright doctrine, it should seek legal advice about those issues when preparing a social media policy.

Employees should also be told to use disclaimers in their personal use of social media. A good disclaimer should identify the employee's affiliation with the company and explain that the relevant posts, opinions and commentary are those of the employee personally and not those of the company. Failure to make this distinction may expose the employer to *respondeat superior* liability for defamation, copyright infringement or false advertising.

Even employers who are aware of the general pitfalls of social media can be less cognizant of issues raised by securities laws, Federal Trade Commission regulations, and the National Labor Relations Act.

For example, regardless of whether your workforce is unionized, the National Labor Relations Act protects employees' concerted activities addressing the terms and conditions of their employment. Employers must take care not to retaliate against employees for engaging in concerted activity through social media. The NLRB has recently issued a number of decisions taking a close look at employer social media policies and disciplinary action taken under those policies. The Board is broadly interpreting the scope of NLRA protections for concerted activity and finding NLRA violations in policies that many people consider innocuous. Employers cannot simply prohibit employees from posting communications that are harmful to the company's reputation or other interests. Not only is an overbroad policy unlawful, but discipline or discharge of an employee based upon an unlawful policy can be an unfair labor practice.

In the past, it was common practice for companies to approach NLRA concerns in personnel policies with a general statement at the beginning or end of a policy manual explaining that the policies should not be administered in such a way as to restrict employees' protected rights to concerted activity. It now appears that something more will be required. A better approach is to include a disclaimer in each specific section of the handbook that might become suspect, define key terms such as "appropriate" and "inappropriate" online posts, and provide specific examples of concerted activities that are permissible versus the impermissible behavior the policy is intended to prohibit. Seek legal advice in developing definitions and examples and be sure that they are developed based upon a thorough and practical understanding of the social media at issue and how that media is used by employees. Employers must keep in mind that there is a fine line (increasingly narrow as the NLRB issues more social media decisions) between protecting the company's reputation or employee morale and engaging in unfair labor practices.

Additionally, employees may disclose insider information through Twitter or Facebook or post false or misleading statements prohibited by federal or state securities laws. Likewise, October 2009 revisions to FTC guidelines explain that an employee's blog comments about his employer's products or those of a competitor may be considered endorsements or testimonials requiring clear and conspicuous disclosure of the employee's relationship to the company. The FTC guidelines do not distinguish between employee comments that are authorized, approved or solicited by the company and those that the employee posts independently on his personal time. See 16 C.F.R. § 255.

Legal exposure arising from increased access to information

Significant information can be obtained about applicants through social media searches, but keep in mind that what you learn can be used against you. These searches expose the employer to information about applicants' protected classifications (i.e. disability, sexual orientation, etc.), and once that knowledge exists, the door is open to claims that the employer's hiring decision was affected by an unlawful animus. Exposure to ADA and other disability or perceived disability discrimination claims is particularly noteworthy because a wide range of conditions may be considered disabilities (i.e., obesity, alcoholism, mental health disorders). Additionally, employers should consider that increased knowledge about an applicant may increase potential exposure to third party negligent hiring claims. Employers should take care to be consistent about when, if and how online searches can be conducted and utilized as part of the hiring process.

Social media investigations at times lead employers to question whether a current employee can be disciplined for off-duty activities. The answer to this question varies from state to state and may depend upon whether the employer is a public or private entity. Employee activity that threatens, intimidates or harasses a co-worker may actually require some action on the part of the employer. The employer should consider whether its personnel policies prohibit the relevant conduct, whether the evidence of the conduct is reliable and whether the off-duty conduct at issue is protected by law. It is also a good idea to consider whether the employee has a reasonable expectation of privacy in the material that has been discovered (unrestricted tweets, unprotected Facebook posts and blog posts are public, but one probably has a reasonable expectation of privacy in a restricted Facebook account). When it comes to privacy, employers should be wary of state and federal laws prohibiting unauthorized access to online accounts.

Every employer must take into consideration its own business objectives, corporate culture and industry-specific circumstances when navigating through the legal issues described above. But employers cannot afford to shy away from implementing social media policies. Decisions need to be made and information disseminated about what role social media will play in your workplace.

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Intentional partnerships -- an alternative for the "significant other" and other non-traditional interpersonal relations

Continued from page 20

and commitments. I also recognize that you may need separate time. I will understand when your work or other interests take a high priority in your life. I will respect your right to be apart from me, and I expect you to respect my right to separate time also. I have friends and interests that may not be in common with you; you also have friends and interests that may not be in common with me. I will not be possessive or jealous of your time away from me, recognizing that the fulfillment and joy you receive benefits me as well.

CONFLICT RESOLUTION. When conflicts occur, I will work with you to resolve them as soon as possible. I will not expect either of us to be perfect. I understand that you may occasionally get frustrated, stressed and disappointed. When I am upset or conflicted, I will center myself, clarify my feelings, and determine my issues before confronting you. Only then will I approach you to discuss my issues. I will not let my fear control my actions. I will not attack you in public or private when something occurs that I don't like. I will instead accept it as a part of who you are and rationally discuss it with you in private in order to more fully understand who you are. I will understand that you will have times of anger, sadness, fear, and pain and will want my emotional support, as will I. I will not feel you are attacking me when you express frustrations or bad feelings, and I will neither reject you nor attempt to control your feelings. I will not make threats of breaking my commitments to you, leaving you, or asking you to leave. I will never intentionally physically harm you nor threaten to do so.

HEALTH. I will respect your health, including your wishes when you are sick or hurt, even if it means you want me to do nothing at all for you. I will respect that, in most instances, you know what is best for you, and what you need from me. However, I will not let you purposefully hurt or destroy yourself without attempting to persuade you otherwise. I will be strong and emotionally stable, especially in time of crisis or need.

ECONOMIC. I will take responsibility for contributing to our mutual obligations. I will respect and care for your property, as well as any common property we may acquire, as if it were my own. I will make agreements with you concerning mutual financial matters. I will not try to control you through any economic means, and will always be fair in our financial dealings.

MODIFICATION AND TERMINATION. I may seek your agreement to amend this agreement at any time. I may terminate this agreement at any time. In the event I choose to terminate this agreement or to discontinue our relations, I agree to part peacefully, respectfully, and as a whole and free person.

SELF AFFIRMATION. I commit to loving myself deeply and to thereby develop the capacity to love you. I will do my utmost to live up to the letter and spirit of this agreement.

* * *

Discussions about the appropriateness of these models can assist people in reaching their individual goals. These discussions can also provide folks in non-traditional relations with information about how they might obtain a legal status, economic stability, and perhaps even acceptance for who they are and their individual choices. And if people would begin making agreements promising to treat each other in good faith, with love, respect, and honest communication instead of secrecy, anger or jealousy, the earth might become a better place for all of us to live on.

Attorney Discipline

Anchorage lawyer suspended by Alaska Supreme Court

On November 10, 2011, the Alaska Supreme Court suspended attorney Christopher N. Pallister (Alaska Bar Member No. 9806018) from the practice of law for two years and one day for misconduct involving neglect and failure to respond to the Bar's disciplinary investigation and petition for formal hearing.

Mr. Pallister represented a client in a civil suit arising from allegations that his client embezzled earnings from a family business. Mr. Pallister failed to meet pretrial deadlines or defend his client in any meaningful way. Mr. Pallister did not appear at trial and the court entered default against his client. Plaintiffs put on unrebutted evidence regarding damages and the court entered a judgment in the amount of $573,841. With prejudgment interest, costs and attorney fees, the total judgment entered against Mr. Pallister's client was $990,621.67.

Mr. Pallister did not respond to bar counsel's request for information regarding the underlying suit. Following a disciplinary investigation, bar counsel charged Mr. Pallister with neglect, failure to expedite litigation, and failure to furnish information to bar counsel during the Bar's investigation. Mr. Pallister did not answer a petition for formal hearing and charges were deemed admitted.

After default was entered, Mr. Pallister agreed to stipulate to discipline by consent. Bar counsel and Mr. Pallister agreed that he acted knowingly when he neglected his client's interests, failed to comply with the court's scheduling orders, and failed to respond to bar counsel's requests for information. The parties agreed that health-related issues were a factor that mitigated a sanction recommendation. The parties agreed that a suspension of two years and one day was appropriate in part because Mr. Pallister will be required under Bar Rule 29(c) to demonstrate by clear and convincing evidence at a reinstatement hearing that he has the moral qualifications, competency and knowledge of law to resume the practice of law and that his resumption of the practice of law will not be detrimental to the Bar, the administration of justice, or public interest. The Disciplinary Board adopted the stipulation and recommended its acceptance to the court.

The court approved the proposed stipulation which required as a condition of reinstatement that Mr. Pallister complete nine hours of practice-related CLE and six hours of CLE in the field of ethics. The Supreme Court will publicly censure Mr. Pallister for his failure to file a mandatory response to the Bar grievance.

Anchorage lawyer suspended by Alaska Supreme Court

The Alaska Supreme Court suspended Anchorage attorney Keenan R. Powell (Alaska Bar Member No. 8306057) from the practice of law for six months, with 90 days to serve and 90 days stayed, effective December 12, 2011. Ms. Powell also appeared before the court on February 9, 2012 to receive a public censure. The court imposed the discipline for violations of professional conduct rules addressing the professional independence of a lawyer and responsibilities regarding nonlawyer assistants.

Ms. Powell engaged an independent contractor to do paralegal work and shared fees with the paralegal in violation of Alaska Rule of Professional Conduct 5.4. After the paralegal demonstrated significant competency, Ms. Powell allowed the paralegal to take on more tasks and over time Ms. Powell engaged in less oversight of the paralegal who was operating out of a different office location. Her failure to provide direct supervision violated Rule 5.3.

When Ms. Powell learned of some irregularities she examined her client files and office accounts more closely. Ms. Powell learned that the paralegal had performed certain legal tasks without Ms. Powell's supervision. Ms. Powell contacted clients and confirmed that no clients were legally prejudiced. Ms. Powell had procedures in place that protected her client trust account and office general accounts, but the paralegal had taken petty cash.

Ms. Powell agreed that it was inappropriate to share fees with her paralegal based on the recovery secured in the matter. She also agreed that she grew lax in her level of supervision because she had developed a trust in the experience and competency of her paralegal.

Ms. Powell will begin to serve a two-year probation period after she serves her 90-day suspension and returns to practice. A supervisory lawyer will file reports with bar counsel on a scheduled basis to confirm that Ms. Powell's practice comports with the rules of professional conduct, particularly in the area of law office management. Any new breaches of rules regarding inappropriate fee sharing or failure to supervise staff will result in the imposition of the stayed suspension in addition to new discipline. Ms. Powell paid the Alaska Bar Association $1,000 in costs and attorney fees.

Anchorage lawyer on interim suspension following criminal conviction

On December 2, 2011, the Alaska Supreme Court placed attorney Erin A. Pohland (ABA Member No. 0812100) on interim suspension effective immediately. Ms. Pohland shall not practice law until the court reinstates her license.

The interim suspension followed a September 9, 2011, judgment of conviction in a concealment of merchandise case. The misdemeanor offense was considered a serious crime under Bar Rule 26(a) because it involved theft and related offenses against property under the Alaska Statutes.

The court also directed that Bar disciplinary proceedings under Bar Rule 26(g) commence. The sole issue for the Area Hearing Committee to consider in disciplinary proceedings will be the extent of the final discipline to recommend for Ms. Pohland's misconduct.

ESTATE PLANNING CORNER

2.1 million reasons to gift in 2012

By Steven T. O'Hara

The present year, 2012, may be the only year where certain individuals may fund an irrevocable trust or otherwise make taxable gifts with as much as $5,120,000 without incurring federal gift tax.

One of the most effective ways to reduce taxes is to make lifetime gifts. Aware of this fundamental rule of estate planning, Congress has put into place limits that affect lifetime transfers, including a gift tax system.

The federal gift tax system includes a tax credit. This tax credit is known historically as the "unified credit" because at points in time it has been the same amount as the credit under the federal estate tax system.

The unified credit reduces gift tax that would otherwise be payable with respect to the cumulative amount of taxable gifts made by a U.S. citizen or resident throughout his or her entire lifetime.

For calendar years 2011 and 2012 only, Congress increased the amount of cumulative taxable gifts that the unified credit might shelter from gift tax from $1,000,000 to $5,000,000. For 2012, this $5,000,000 number has been adjusted for inflation to $5,120,000. *Revenue Procedure* 2011-52, 2011-45 I.R.B. 707 (Nov. 7, 2011). Think of this figure as the unified credit equivalent amount.

For example, if a U.S. citizen had never previously made a taxable gift it is possible he or she could in 2012, under the law in effect as of January 1, 2012, make taxable gifts of as much as $5,120,000 in value without having to pay any federal gift tax.

The bad news is that at this time the unified credit equivalent amount is scheduled to shrink automatically from $5,120,000 in 2012 to $1,000,000 as of January 1, 2013. In other words, the amount of cumulative taxable gifts that the unified credit might shelter from gift tax is scheduled to return to $1,000,000 for taxpayers who make gifts on and after January 1, 2013.

In addition, the top federal gift tax rate has been reduced from 55% to 35% for 2011 and 2012 gifts only. This top rate is scheduled to return automatically to 55% for taxpayers who make gifts on and after January 1, 2013.

Recall that an irrevocable trust is one of the most effective forms of lifetime gifts in terms of providing long-term management as well as reducing taxes.

For purposes of illustration, consider a client who resides in Alaska or in another jurisdiction that does not impose a tax on gifts or on generation-skipping transfers. The client has sufficient wealth to undertake gifting as discussed below. The client has never made a taxable gift of any significant amount. The client is a U.S. citizen and all his potential beneficiaries are U.S. citizens. *Cf.* IRC Sec. 2801 and 6939F.

The client has created an irrevocable trust, although his gifts to the trust to date have been insignificant. The irrevocable trust has acquired insurance on the client's life. Thus the trust is known as an Irrevocable Life Insurance Trust or "ILIT."

As an aside, there is of course no requirement that the irrevocable trust acquire insurance on the client's life. The tax benefits of gifting can be achieved without life insurance. Besides all the other benefits of life insurance, one or more life insurance policies owned by the ILIT can serve as a nudge for the client to make gifts and thus achieve the goal of reducing taxes.

Moreover, in the event of the client's death the life insurance proceeds within the ILIT may supply precious liquidity. For example, the ILIT may serve as a private lender that may help to avoid having to liquidate the family business -- and lay off employees in the process -- to pay taxes and expenses arising in connection with the client's death.

"One of the most effective ways to reduce taxes is to make lifetime gifts."

The ILIT anticipates maintaining its investment in the life insurance throughout the client's life, provided the ILIT can afford to pay the premiums under the policies and neither the insurance companies nor the policies fail.

The premiums payable with respect to the life insurance over the client's expected lifetime are projected to exceed $1,000,000. At this time the ILIT does not own other assets that generate any material amount of income or gain. Thus the revenue side of the ILIT's budget is dependent upon gifts from the client.

The client has been careful to file an annual gift tax return -- with adequate disclosure --not only to keep track of the cumulative amount of taxable gifts but also to preclude the IRS from raising any valuation or other issue in later years. Treas. Reg. Sec. 25.2504-2(b) and 301.6501(c)-1(f)(2).

Now consider two scenarios. Under the first scenario the ILIT is expected to pay from this point forward $2,500,000 in additional life insurance premiums. This projection is based on the client's life expectancy as well as factors such as the amount of death benefit and the expected performance of the life insurance companies.

Accordingly, the client plans to make, over his lifetime, taxable gifts of at least $2,500,000 to the ILIT. But the client is busy with other matters and making those gifts to the ILIT is in the future and out of sight and out of mind. Thus the client does nothing in 2012 and, by default, effectively decides against gifting $2,500,000 to the ILIT in 2012.

Under this first scenario, if the client does nothing in 2012 and the $5,120,000 unified credit equivalent amount is reduced to $1,000,000, the client might expect to pay at least $680,000 in federal gift tax over his lifetime. This tax estimate is based on the federal gift and estate tax rates scheduled to return as of January 1, 2013.

Now consider a second scenario. Here the ILIT is expected to pay from this point forward $5,120,000 in additional life insurance premiums. This projection is based on the client's life expectancy as well as factors such as the amount of death benefit and the expected performance of the life insurance companies.

Accordingly, the client plans to make, over his lifetime, taxable gifts of at least $5,120,000 to the ILIT. But again the client is busy with other matters and making those gifts to the ILIT is in the future and out of sight and out of mind. Thus the client does nothing in 2012 and, by default, effectively decides against gifting $5,120,000 to the ILIT in 2012.

Under this second scenario, if the client does nothing in 2012 and the $5,120,000 unified credit equivalent amount is reduced to $1,000,000, the client might expect to pay at least $2,111,000 in federal gift tax over his lifetime. This tax estimate is based on the federal gift and estate tax rates scheduled to return as of January 1, 2013.

So under the first scenario, the client's decision against gifting $2,500,000 to the ILIT in 2012 may cost him roughly $680,000. Under the second scenario, the client's decision against gifting $5,120,000 to the ILIT in 2012 may cost him roughly $2.1 million.

Now double these numbers if a husband and wife are clients, are U.S. citizens who have never made taxable gifts and have sufficient wealth to undertake gifting as discussed above. For example, if they decide against gifting the maximum that may be transferred in 2012 without having to pay federal gift tax, the decision may cost roughly $4.2 million.

These estimated tax costs do not include other possible tax costs. As examples, consider increased estate tax on appreciation and accumulated income that might otherwise have occurred in the ILIT, increased estate tax on consolidated interests that could have been fractionalized in gifting with possible valuation discounts, and tax on tax under the estate tax system (i.e., the amount payable to the IRS is not deducted in the computation of tax payable). The client may also have property with a connection to a state that has a significant estate tax but no gift tax. Also consider the generation-skipping transfer ("GST") tax. The GST tax system includes a GST exemption that is also scheduled to shrink very soon. This exemption could be applied to shelter an ILIT from the possible 55% GST tax rate that is scheduled to apply on and after January 1, 2013, assuming the ILIT is designed to pass to or for grandchildren or other beneficiaries two or more generations below the client's generation. The GST exemption is scheduled to shrink automatically from $5,120,000 in 2012 to $1,000,000 plus an inflation adjustment as of January 1, 2013.

Although lifetime giving can save a fortune in taxes, many wealthy clients look at you like you have three eyes when you recommend consideration of significant lifetime gifts. For personal reasons that are nobody's business, they have no interest in making lifetime gifts and will not do so. In considering these clients, the preceding paragraph may serve as a rough summary of the tax costs of not making lifetime gifts. Inasmuch as the gift tax savings illustrated in this article does not apply to them, it does not matter whether the gift tax unified credit equivalent is $5,120,000 or $1,000,000.

In considering gifting with clients, give some time to discussion about the possibility that Congress could repeal the $5,120,000 gift tax unified credit equivalent at any time, even retroactively, as well as the possibility that Congress could extend the $5,120,000 figure beyond 2012. As an example of possible retroactive repeal, there was a rumor going around the tax community in 2011 that Congress in December 2011 would reduce the then $5,000,000 figure to $1,000,000 for taxpayers who make gifts after Thanksgiving Day 2011.

Nobody knows what Congress will do. Anything is possible. Therefore, anyone considering gifting in light of 2012 tax law needs to sit down with his or her tax advisors, in advance of any gifting, and customize a plan that fits the client's particular facts and circumstances, including the client's tolerance for risk. This year is pivotal in the wealth transfer area.

2 attorneys have books published

Retired Anchorage attorney Vincent Vitale and his wife Judith Rich, have been published by horseracingpublications.com, a Florida publishing company specializing in fiction and non-fiction relating to thoroughbred horse-racing.

The Claimers: A Tale of Skullduggery on the Backstretch is the story of a crusty retired accountant turned jockey-agent and his teen apprentice jockey goddaughter, and their discovery of a race fixing scheme so perfect it threatens to destroy them and the life they love.

The story takes place on the backstretch, during races, in the jockeys' silks room, as well as in corporate America. It's about people who love horses and the races and their attempt to save the industry from both individual and corporate greed.

Vitale retired from the practice of law in 2001. He and Ms. Rich retired to Arizona in 2009. "Vincent Vitale and Judith Rich have ridden a winner with this one; witty, interesting, informative horse racing mystery for racing and non-racing fans alike," said Joe Vesper formerly with American Turf Monthly Magazine.

Also recently published is Margaret D. Stock's *Immigration Law and the Military*, exploring common issues of immigration and citizenship laws and effects on members of the U.S. Military and their families.

The founder of the AILA Military Assistance Program, Stock uses case examples covering enlistment rules, naturalization, disciplinary proceedings and courts marshall, and civilians who work with military members among other topics. She also cites resources available to the military and family.

The book is published by American Immigration Lawyers Association Publications of Maryland, www.ailapubs.org.

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