The Alaska
BAR RAG

Dignitas, semper dignitas

VOLUME 38, NO. 1 January - Mach, 2014

BAR EXAM IS NO DAY AT THE BEACH

--PAGE 17

An Excerpt from 'Mining for Citizens'

John Minook's prospects create their own gold rush

By Mike Schwaiger

John Minook was a man who deserved a bigger obituary. But even the short announcement written by the Associated Press and published in the *Anchorage Daily Times* on April 30, 1930, under the heading, "Aged Russian Miner Passes," suggested he was honored throughout his life and counted many friends.

In fact, many men were wealthy because of the eponymous Minook: by the year he died, several individual claims on creeks named in his honor had already produced more than $1 million in gold.[1] According to the *Times*, "All the whites and natives in the vicinity attended the funeral."[2]

Long before the Gold Rush and the purchase of Alaska, Minook's father, Ivan Pavlof, Sr., was born in Sitka and became a manager for the Russian America Company and a trader prominent enough that a bay was named after him. To some, Pavlof was a Creole; to others, a Russian. Minook's mother, Malanka, was an Alaska Native, born and raised in Nulato. She had nine children with Pavlof, several of whom survived to adulthood and became important in the Yukon gold mining community, including Minook's brother, Pitka Pavlof.[3] Malanka gave birth to Minook at St. Michael sometime in the 1840s or 1850s.[4]

Like many Alaskans of the era, Minook used multiple names in the course of his life. Minook may have been born "Ivan Pavlof, Jr.," and he may have used "Ivan Pavlof" or "John Minook," depending on the circumstances. As a boy, Minook dealt with Russians, a variety of Alaska Native peoples, and "Bostonian" whalers; as a working adult, he saw the Gold Rush and canneries draw in people from all over the world. At Old Station, Minook met Yawhodelno, the

Continued on page 5

Federal Bar plans ambitious program year

By Darrel J. Gardner

The Alaska Chapter of the Federal Bar Association extends its sincere condolences to the family and friends of retired Senior Alaska District Judge James A. von der Heydt, who passed on Dec. 1, 2013, at the age of 94. Judge von der Heydt's contributions to Alaska's legal history stand as a monument to his continuing legacy.

The Alaska Chapter of the Federal Bar Association (FBA-Alaska) continues to grow, hitting a new all-time record of 60 members in January 2014. In 2013 FBA-Alaska's membership increased by 22%, making it one of the fastest growing chapters in the nation.

In 2014 we will continue to offer great programming including regular CLE-approved lunchtime presentations featuring local speakers of interest to the federal bench and bar, and the hosting of two visiting panels from the Ninth Circuit court of Appeals in May and August.

We have plans for a luncheon with Senator Mark Begich on April 14, following the dedication ceremony at the federal courthouse, which is being renamed as "The James M. Fitzgerald Federal Courthouse."

Also, there will be an unprecedented visit by the current national president of the Federal Bar Association, U.S. District Judge Gustavo Gelpi. Judge Gelpi, who resides in Puerto Rico, will participate in several events during a full-day CLE event on August 22. There will be a historical presentation on the constitutional development of U.S. Territories, and a panel presentation marking the 50th anniversary of the Criminal Justice Act and the Civil Rights Act. There will also be a half-day CLE on federal sentencing that will be co-presented by a staff attorney from the United States Sentencing Commission, all followed by a gala reception. No active FBA national president has ever visited Alaska, so this promises to be a highly anticipated event! Mark your calendar now if you are interested in attending. Non-FBA members can attend FBA events by paying a non-member registration fee.

The tenth and last meeting of 2013 took place on Dec. 19, 2013: "Taking It Up - Appellate Practice and Procedure with Judge Morgan Christen." Our own Ninth Circuit Court of Appeals Judge, Morgan Christen, shared her experiences and observations after more than a year with the Ninth Circuit. Judge Christen recounted a historic event, the first "all Alaskan" Ninth Circuit panel which convened in Pasadena, CA in October. The members of the panel, who were randomly assigned, consisted of Senior Circuit Judge Andrew J. Kleinfeld of Fairbanks, Circuit Judge Morgan Christen of Anchorage, and Senior District Judge John W. Sedwick, also of Anchorage.

The first meeting of 2014 took place on February 11, 2014: "The State of the Court," featuring Chief Judge Ralph R. Beistline, who was joined by District Judge Sharon Gleason and Magistrate Judge Deborah Smith. Judge Beistline highlighted recent events at court, including the addition of Wi-Fi internet service in the Fairbanks and Juneau courthouses; the establishment of 18 federal beds at the Cordova Center for re-entering federal inmates; and, the opening of a new attorney lounge in the Anchorage courthouse; and the renaming of the federal courthouse in Juneau as "The Robert Boochever Federal Courthouse. Judge Beistline also recounted the retirement celebration for Magistrate Judge Roberts, who will continue to assist the court until early April 2014. In that same vein, Judge Beistline reported that he will reach Senior Judge status in approximately 22 months.

Initially, Judge Roberts' position was not going to be refilled. However, after much effort, the court was able to obtain authorization for a new part-time magistrate judge. Judge Smith described the search process for the new magistrate judge, which has mostly been completed. A special merit selection committee (comprised of five attorneys and two non-attorneys) has reviewed the 21 judicial applications, conducted interviews, and made final recommendations to the court, which has taken the matter under advisement. The announcement of the court's newest member of the bench will likely be made public by the time this issue of the Bar Rag goes to press.

Judge Gleason announced the formation of a Civil Rules Com-

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PRESIDENT'S COLUMN

Be kind

By Mike Moberly

I've encouraged everyone to think of and follow through on doing:

1. something special for ourselves outside our practice (being "Fit to Practice");

2. something special for those around you (being present); and

3. something special for ourselves professionally (attend the Bar Convention in Anchorage, May 7-9, 2014).

Now, I encourage everyone to consciously make an effort to *do something* ***positive*** *that they would not otherwise do* – be it making good on one of these earlier encouragements, something as simple as holding a door for someone or smiling at a stranger, or some form of volunteerism. This may sound odd for a Bar Rag article, but it is not.

We are in a profession often beset with a poor public image, or public distrust at a minimum. Consequently, our everyday actions are under greater critical observation than many other professions. This extends beyond our professional lives; outside of our work we are held to a higher standard of ethical conduct not only under the Rules of Professional Conduct, but by the public at large. And, while many of us don't define ourselves by the career we've chosen, the public often still sees us as lawyers first. As such, whatever we do, professionally or otherwise, is open to scrutiny.

By consciously making the effort to *something positive* that we might not otherwise do, we can push back and attempt to change these perceptions.

"I encourage everyone to consciously make an effort to do something positive that they would not otherwise do."

Of equal importance to this improvement for our profession, we all benefit personally by thinking of and following through on these efforts. It is not a coincidence that concepts like "pay it forward" or "random acts of kindness" have been in our collective consciousness (shared beliefs, ideas and moral attitudes which operate as a unifying force within society) for millennia. "Random acts of kindness" are a means by which we make a deliberate attempt to brighten another person's day by doing something thoughtful and caring for them.

Kindness is a way of showing others that they count, and that, even in the face of hostility and selfishness, you're making a stand for kindness. By doing kind acts for others, we help create kindness. It creates a community that values generosity of spirit and action and kindness towards others as an essential part of the community.

Being thoughtful of the needs of others, whether they are close to us or complete strangers, is something we can all improve upon. Kindness can become infectious. When we are willing to share our kindness, others may be inspired by our example and do random acts of kindness themselves. Whether letting another motorist merge into congested traffic, holding the door for someone, complimenting someone, or even simply using our manners, we are promoting kindness in our community. Each of these actions is achieved at minimal expense to us in our daily routine, but the dividends can be immense.

For those more inspired, volunteering can be equally rewarding to both the volunteer and those the effort benefits. Helping others more in need--working at a soup kitchen, building shelter, or providing direct assistance--are some of the most universal images depicting a sense of community. There are myriad ways we can personally give to benefit others. We should all look for such opportunities in our personal and professional lives and take advantage of them by being more involved. We should also go out of our way to recognize those who ***do*** volunteer and thank them for their contributions, since we are all beneficiaries.

What does this have to do with us? All too often such kindness and

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EDITOR'S COLUMN

Brevity in communication comes full circle

By Gregory S. Fisher

Great communications share three characteristics: purpose, brevity, and clarity. For some reason, the best communications are often induced by stress. Surrounded by Germans at Bastogne, General McAuliffe responded, "Nuts!" when invited to surrender his command. It was the perfect message, perfectly expressed: purposeful, brief, and clear.

Maybe you shared the same experiences as I did when you started to practice law? Dave Thorsness and Craig Hesser handed me a microcassette player and told me to start dictating everything. Yes, this was back when dinosaurs still roamed the earth. The thinking was that dictation was the best training for a new litigator. You had to learn how to think and express yourself "on the fly" (so to speak) without benefit of notes, pen, notepad, or other crutches. You also had to learn how to talk in complete sentences, and to make yourself clearly understood. You also had to learn "word economy"--how to say more with less. Dictation was a good, sound, practical method for achieving all of these goals. That's what I was told.

For litigators, dictation was exercise. You wrestled with your case theory. Dave told me, and I have come to believe it is true, that you do not understand your own case until you can express it in a brief sentence or two. Dictation helped you work the problem. Craig hammered home the uncomfortable message that you never mastered the task. That is why they called it the "practice of law." Each day you tried to get better, tried to become a better, more effective communicator.

Back then communications and the practice of law were different. People called. They left messages. The messages were recorded on preprinted memo slips. The memo slips came in different colors: yellow, pink, green, white, and blue. The colors identified who had called, whether client, opposing counsel, potential client, court, or "other." The top of the memo slip had a blank line. Your secretary would helpfully note that "Joe called," and a corresponding box would be checked ("please call back," or perhaps "urgent," or maybe "will call back"). The memo slip would sit in your in-box. Maybe you would call back in an hour or so. Maybe not. Maybe Joe would call you again. Maybe not. Maybe you would just see Joe on the street, or at a Chamber of Commerce lunch, or the ski or bike trails, and you'd catch up with him on whatever it was that needed to be discussed at that point. Maybe not. Things moved at a slower pace.

"Eventually, our motions will be one page photos or sketches. Until then, follow me on Twitter: @GregorySFisher1."

Computers, the Internet, and emails changed communications, as did cell phone improvements. I think things started picking up speed around 1996. Emails became common. Computers were on every desk. Cell phones added features. Legal research was conducted on-line. Time-consuming trips to the library faded from memory. We started emailing drafts to and from work and home. Everyone had a home computer. Each month or quarter brought new technological advances. Texting replaced dictation. We learned we had thumbs. Now, suddenly, clients expected an immediate response. Everything became urgent. You did not have to necessarily have an answer (although it helped if you did). But everyone at least expected an acknowledgement that you had received their question.

Linguists and anthropologists have long-studied whether or not communications affect how we think and process information. No one is sure. Since at least 2008, a debate has raged concerning the Internet and its impact on our ability to think, reason, and deliberate. I don't know how I come out on that. But I've come to appreciate that how we communicate—the methods—affect how we practice.

Twitter (tweeting) is now replacing texting. It's texting on a wide scale. I resisted Twitter. My understanding of it was limited. It was new. New is different. Different is scary, sometimes even bad. I thought that Twitter was mostly something that professional athletes, models, actors, actresses, or pop singers used to crow about their exploits. It struck me as being narcissistic. It is. But it is more than that, too.

Twitter or any form of social media is boon and bane. It can help one market to clients and potential clients, and network with colleagues and others. It can be a great tool for keeping abreast of legal developments, and for passing those along to clients, potential clients, and others. There can be ethical and professional problems, however.

But, on balance, Twitter is a great communications trainer. You need a purpose to "tweet" a message, and it has to be brief. In order be effective it also needs to be clear. You have 140 characters. You must use them wisely. Twitter teaches relevance and economy. Twitter is an excellent tool for new associates (assuming you trust their judgment) and experienced litigators, too. I think we are headed to photos. Eventually, our motions will be one page photos or sketches. Until then, follow me on Twitter: @GregorySFisher1.

The Alaska BAR RAG

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

Board of Governors meeting dates
January 23 & 24, 2014
(Thursday & Friday)
May 5 & 6, 2014
(Monday & Tuesday)
May 7 – 9, 2014
(Wed. - Friday: Annual Convention)
(Anchorage)

Letters to the Editor

Really? Page 1?

I am a bit nonplussed regarding the coverage of the Blakely's sail across the South Pacific. (*Alaska Bar Rag,* Oct-Dec. 2013). Perhaps I am unaware of some aspect of the situation that warrants front page pictures and coverage of their travels. Truthfully, it does not seem worthy of more than a small article in a single issue. Is there something compelling regarding their vacation than I am unaware of?

— *Tim Cook*

Support marijuana reform

As a lawyer who strongly believes in protecting individual and constitutional rights, I am asking that interested bar members join me in supporting a policy reform grounded in a concern for the individual liberties of Alaskans.

On Aug. 19, 2014, Alaskans will have the chance to vote on a ballot initiative that will end the harmful and ineffective policy of marijuana prohibition and replace it with a system in which marijuana is taxed and regulated like alcohol. It will restrict legal use to adults 21 years of age or older and allow limited sale of the substance through licensed, taxpaying businesses that test their products and require proof of age.

Local governments may prohibit or adopt their own regulations regarding use. Employers may restrict the use of marijuana by employees. Driving under the influence of marijuana is still prohibited. This all makes good sense.

According to a Gallup poll released in October 2013, a majority of Americans agree that it is time to replace the failed policy of prohibition with a more sensible approach. Additionally, a major poll released earlier this month showed that 55 percent of Alaska voters are in favor of regulating marijuana like alcohol, with just 39 percent opposing the concept. We all know that law enforcement officials' time and resources would be better spent addressing serious crimes instead of arresting and prosecuting adults for using marijuana.

There are other compelling reasons to support this reform. A new industry based around marijuana would create new jobs and generate much-needed tax revenue for Alaska. That money is currently going to criminals in the underground market, but should be going toward building schools and improving Alaska's infrastructure. Colorado projects $100 million in new revenue from its marijuana tax - three time the amount that it receives in Alcohol taxes.

I don't personally support the use of marijuana and will not use it if this sensible policy change is adopted. However, I believe there is little logic in having policies that allow responsible adults to be arrested and incarcerated for choosing to use a substance that is objectively safer than alcohol.

It is time for lawyers to stand up and support this commonsense change in policy. For further information and opportunities to assist, please visit RegulateMarijuanaInAlaska.org.

—*Kenneth P. Jacobus*

Bar Rag editor steps down

Dear Reader:

With the publication of the March 2014 issue, I enter my fourth year as Editor in Chief of the *Alaska Bar Rag*. I've much enjoyed the opportunity. This has to be the best volunteer job of all time. However, good guests know when it is time to leave.

When I took over from Tom Van Flein, I started with a handful of modest goals.

I wanted to try and recruit greater diversity in our columnists and correspondents, and particularly was hoping to get submissions from more women and minorities. I wanted to see if we could somehow coax more submissions from beyond the Railbelt. I wanted to see if we could establish a regular federal page to cover issues and topics of interest to the Federal Bench and Bar. And, finally, I wanted to maintain the same standards (some would say "lack of," which I suppose is fair) set by all of my predecessors from Judge Harry Branson down to Tom.

I've accomplished pretty much what we set out to do. One thing I learned during my tenure is that the Alaska Bench and Bar are filled with bright, intelligent, talented, professional, and funny people. We are lucky to practice law in this great state. I was fortunate to share my tenure with so many terrific colleagues. Finally, I wanted to thank Deborah O'Regan, Sally Suddock and Susan Bybee. People do not realize all of the work they do behind the scenes each month and quarter for the *Alaska Bar Rag*.

Best wishes to my successor,
Gregory S. Fisher

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Interested in serving as the Alaska Bar Rag's Editor-in-Chief? Send a letter of interest to Deborah O'Regan at oregan@alaskabar.org by March 31.

2014 Alaska Bar Association Convention Schedule at a Glance • Register online at www.alaskabar.org

Wednesday, May 7

7:30 a.m. — **Registration and Exhibits Open — Continental Breakfast,** THIRD FLOOR
Local Bar Presidents Breakfast, TIKAHTNU E

8:30 a.m. - Noon — 3.0 Ethics Credits each

CONCURRENT SESSIONS

Trials of the Century
Todd Winegar, Salt Lake City, Utah
TIKAHTNU A/B

Understanding Generational Characteristics to Improve Professionalism and Collegiality
Kassia Dellabough, PhD, University of Oregon
TIKAHTNU C

12:15 - 1:30 p.m.
Lunch — Myth, Traps, & Absurdities in Our Immigration Laws
Margaret Stock, Cascadia Cross Border Law Group LLC
TIKAHTNU A/B

1:30 - 3:00 p.m. — 1.5 General Credits each

CONCURRENT SESSIONS

The Failure of Moral Courage Among Lawyers and Judges — How We Have Fallen from Grace
Richard Friedman, Friedman|Rubin Law Offices
TIKAHTNU C

Bankruptcy Year In Review and Looking Ahead
Chief Judge Gary A. Spraker, Judge Herbert Ross, Larry D. Compton, Trustee, and Michelle L. Boutin
TIKAHTNU D

Immigration Law and Its Effect On Your Family Law, Business, and Criminal Defense Practice
Lea McDermid & Michael Stahl
TIKAHTNU E

What's It Like To Be An Owner?
Anchorage Association of Women Lawyers: Tonja Woelber, Jennifer Wagner, Renea Saade, Susan Orlansky, Cheryl McKay, Aimee Anderson Oravec
KAHTNU 1 (2ND FLOOR)

3:00 - 3:30 p.m. **Break**

3:30 - 5:00 p.m. — 1.5 General Credits
Alaska Appellate Update
Dean Erwin Chemerinsky, University of California, Irvine School of Law
TIKAHTNU A/B

5:00 - 6:00 p.m. **Speed Silent Auction to Benefit Legal Service Providers,** (TBA)

6:00 - 8:00 p.m.
Casino Night Welcome Reception
THIRD FLOOR FOYER AND TERRACE

Wednesday, May 7 (continued)

8:00 p.m.
Hospitality Suite — Sponsored by Anchorage Bar Assoc.
Hotel Captain Cook, Endeavor Room, Lower Level

Thursday, May 8

7:30 a.m. — **Registration and Exhibits Open — Continental Breakfast** THIRD FLOOR

8:30 - Noon — 3.0 General Credits
Advanced Legal Writing and Editing
Professor Bryan Garner, LawProse.org
TIKAHTNU A/B/C

12:15 to 1:30 p.m.
Law Day Luncheon: Law Related Education — New Frontiers in Community Education and Outreach from Alaska's State and Federal Judiciaries
TIKAHTNU A/B/C

1:30 - 5:00 p.m. — 3.0 General Credits
US Supreme Court Opinions Update
Dean Erwin Chemerinsky and Professor Laurie Levenson
TIKAHTNU A/B/C

Reception at 6:00 p.m. and Dinner at 7 p.m.
The Future of Legal Education
Keynote Address: Dean Erwin Chemerinsky
TIKAHTNU A/B and Terrace for Reception

8:00 p.m.
Hospitality Suite — Sponsored by Anchorage Bar Assoc.
Hotel Captain Cook, Endeavor Room, Lower Level

Friday, May 9

7:30 a.m. — **Registration and Exhibits Open — Continental Breakfast** THIRD FLOOR
Section Chairs Breakfast KAHTNU 1 (2nd Floor)

8:30 a.m. - Noon — 3.0 General Credits

CONCURRENT SESSIONS

Legal and Social Developments from Genetics
Dr. Nita Farahany, Duke University and Professor Hank Greely, Stanford University
TIKAHTNU A/B

Advanced Constructive Cross Examination
Roger Dodd, Dodd & Burnham, Valdosta, Georgia
TIKAHTNU C/D/E

12:15 to 1:30 p.m.
Annual Meeting Luncheon, TIKAHTNU A/B

1:30 p.m. — Convention Ends

Be kind

Continued from page 2

caring, and the efforts and images associated with them, are not associated with lawyers. We should all do something about that. Volunteer, and thank others who do (including those fellow attorneys who volunteer on Bar committees or Sections). Be more involved (attend the Bar Convention, and find someone to partner with for a "2-for-1" registration). Do something kind that you might not otherwise do, you might be surprised at the unexpected benefits you get in return. We should all hold ourselves out as a community that values generosity of spirit and action and kindness towards others as an essential part of that community. Good luck.

Succession planning really isn't optional

Mark Bassingthwaighte

At ALPS, be it from RISC visits, on applications for insurance, or at CLE events we continue to find that a significant number of solo practitioners have yet to take the step of creating a succession plan.

When working with these attorneys our message is always the same, if no plan is in place, now is the time. You really don't want to leave the headache of having to deal with stacks of closed files to an unsuspecting non-lawyer spouse, and yes, such calls continue to come in. Always remember that someone paid for the production of every file you have in your possession and that someone has an interest in their file. We all know that client property cannot be destroyed whenever an attorney feels like doing so; but of course, non-lawyer spouses aren't bound by our rules, and it happens because they don't know what else to do. Heaven forbid that post attorney death and after a grieving spouse has had all the old files destroyed, a certain file is needed to properly defend against a claim of malpractice. Making matters worse, it turns out that there is no insurance in place to cover the fallout of the claim because no one knew they had to timely contact the malpractice carrier in order to purchase tail coverage after the attorney passed. The end result is that the deceased attorney's estate may now not be what everyone was counting on it being. The failure to plan can end badly; but wait, there's even more.

Rule 1.3 of the ABA Model Rules of Professional Conduct addresses diligence. The Rule reads, *"A lawyer shall act with reasonable diligence and promptness in representing a client."* Most attorneys, if not all, are well aware of this rule. As lawyers, we are to act with commitment, dedication, and where appropriate even zealous advocacy. Our workloads are to be reasonable so that all matters can be resolved competently. Procrastination is an enemy to be avoided at all costs; for it has and will continue to lead to malpractice claims if and when clients are ever harmed as a result. In the end we are all to strive to deliver our services in a professional, competent and timely fashion. Yet our obligations do not end here. There is an obligation to prevent neglect of a client matter post attorney death or disability.

In 2002 the comments to ABA Model Rule 1.3 were amended with the following language. Comment 5 now states, *"To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine if there is a need for immediate protective action."* Given all that I have seen and experienced over my years with ALPS, I personally have trouble coming up with a set of circumstances where I would feel comfortable saying no such plan would be required for a solo. The only question for me is how to get there.

The most important aspect of planning for your death or disability is in the designation of an attorney who will be responsible for administering the winding down of your practice. This attorney should be competent, experienced, and someone who displays the utmost professionalism. This person should have the time, or the ability to make the time, to come into the practice. She must be able to make rapid decisions and assume, at least for a period of time, something of an additional practice. Now remember that the purpose of the designated attorney is not to come in and take over the practice but rather to take the lead in winding down the practice. It's about being expeditious with file review, client notification, protective action, and transitioning files to other attorneys. Perhaps these responsibilities could even be shared among a select group if time constraints are a concern. Obviously, the designated attorney ought to be someone quite familiar with your practice areas and also not likely to have a significant number of conflict concerns arise as a result of ever having to step in.

Finally don't overlook the importance of making certain that appropriate employees are aware of who the designated attorney is and how to contact this individual in an emergency. One added benefit of choosing a designated attorney (and often this is a reciprocal designation) is that this individual can also act as your backup attorney thereby allowing you to take extended absences from your office for work, pleasure, or health reasons.

Beyond designating an attorney, there are a number of other things that should be done with your practice if they are not already taken care of. Consider providing notice of the existence of and reason for a designated attorney in your fee agreements so that clients are aware of the steps you have taken to protect their interests in the event of an emergency. Maintain a current office procedures manual that discusses the calendaring system, conflict system, active file list, open and closed file systems, accounting system, and any other key system as this can be valuable in expeditiously bringing the designated attorney up to speed on how your practice is run. It is imperative that critical systems such as the calendar and conflict systems be kept current at all times and make certain that all files are thoroughly documented.

The designated attorney will need to review all client files as quickly as possible in order to make a determination as to whether any immediate protective action is necessary. Mistakes can and will be made with poorly documented files. Finally, write a letter for the designated attorney that details duties for all employees; includes passwords for and instructions on the use of the computer system; provides financial details such as location and account numbers for all bank accounts, particularly client trust accounts; and contact information for all staff and principal vendors such as banks, insurance companies, utility companies, and the landlord. In short think about what you would need to know if you were the person coming in to wind down your practice and capture that intellectual capital in a way that will be useful to the designated attorney.

If you feel that you need assistance in developing a plan for your death or disability, the Oregon State Bar Professional Liability Fund has published a handbook with related forms that can be of real help. This handbook, available to out-of-state lawyers at a reasonable price, will also provide significant help to the designated attorney should his or her services ever be needed. In this book entitled *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, you will find items such as a checklist for closing another attorney's office, a sample notice of designated assisting attorney, sample letters to clients, a sample authorization for the transfer of a client file, and much more. Also be aware that a few useful resources based upon the materials in this Oregon guide are available on the websites of a number of state bars. Finally, the ABA has published a similar resource entitled *Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events* that might be of use as well.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology.

New book explores work attitudes of millennials

The first wave of millennials has come of age during extremely difficult economic conditions, providing this young generation with a harsh introduction into the world of work. A new business-oriented book from the American Bar Association explores this transition and examines how their perspectives differ from previous generations.

"You Raised Us — Now Work with Us: Millennials, Career Success and Building Strong Workplace Teams" lays out a comprehensive and nuanced view of a generation that is entering into the workplace in large numbers, even as their generational reputation has been established for years.

Author Lauren Stiller Rikleen separates myths from the realities, bringing unique insights to this hot topic. For years, she has extensively researched millennials while serving in her roles as president of the Rikleen Institute for Strategic Leadership and as the executive-in-residence at the Boston College Center for Work & Family in the Carroll School of Management. Her work includes a detailed survey that offers unprecedented data gathered from millennials during the height of the past economic crisis.

"You Raised Us — Now Work with Us" provides a blueprint for a better understanding of millennials as they move through the workplace and is a valuable resource for all generations. The book offers insight and strategies for corporate executives, human resource specialists and managers. It also helps millennials navigate the complexities of today's work environment and provides tools to help them develop their skills as future leaders. The book helps all generations develop stronger relationships with each other and promotes organizational excellence.

"You Raised Us — Now Work with Us" is the first business trade book from the American Bar Association. It serves as a ground-breaking resource that:

- Analyzes and builds upon extensive research, including the author's own survey, to provide sophisticated insights and rebut stereotypes about how millennials view work as they begin their careers in the midst of an economic crisis.
- Helps boomers and Gen Xers respond to the opportunities that millennials bring to the workplace by offering practical recommendations for effective leadership and talent development.
- Identifies opportunities available for all generations to make needed changes in the workplace that will benefit everyone.

The author, a noted speaker and consultant, has written two previous books relating to women's leadership and advancement.

Publisher: ABA Publishing; Pages: 267
Product Code: 1620615; ISBN:978-1-62722-585-4
Price: $24.95; Orders: 800-285-2221
Alaska Bar members receive a 15% discount, using code: PAB6EAAB

John Minook's prospects

Continued from page 1

daughter of Chief Manacowallea. They married and had many children together. When Minook completed a census form in 1900, he identified his children—like himself—as "mixed color."[5]

In Alaska, long-time residents generally did little prospecting or mining during the Gold Rush. But Minook and his family were an exception. He and his children prospected together and made several gold discoveries in interior Alaska, even though it was risky for them to do so. In 1893, Minook's brother Pitka and his brother-in-law Sergei Cherosky made a major gold strike on Birch Creek, near Circle, but white miners did not respect their claims and forced them out. That same year, Minook made the first of several discoveries in the Rampart district. At the creek that was to bear his name, Minook cut a drain, whipsawed sluice boxes, and shoveled gravel for a week before a freshet tore apart his work; the one box he was able to save and process turned out to contain $150 in gold.[6]

In stark contrast to how white miners treated his brother in Circle, white organizers of the Rampart mining district recognized Minook's mining claims. Article II, section 1 of the Bylaws of the Rampart Mining District, written on April 20, 1896, read simply, "No Indian with the exception of John Manook shall hold or represent ground in this district."[7] When USGS geologist Joshua Spurr ran across Minook in Rampart, Minook had a crew of men working a claim.[8] Spurr described Minook as "a good-natured fellow with a fair knowledge of English, which he was proud to air, especially the cuss words, which he introduced into the conversation gravely and irrelevantly."[9] In August 1896, Minook took $3,000 in gold from a hole only eight feet wide and fifteen feet deep, and Rampart boomed with the news, ballooning to three times the size of Sitka by the next year.[10] According to Gold-Rush historian Pierre Berton, "Were it not for the Klondike, Minook would himself have caused a stampede from the United States."[11]

In addition to prospecting, Minook obtained town site lots in Rampart when it was incorporated and continued to buy and sell lots in 1897. He ran a business selling goods to white miners. Minook also performed jobs forbidden to Alaska Natives in other places, such as piloting riverboats on which he ferried white miners into interior Alaska mining districts. Although it is possible Minook commanded the respect of white miners by asserting his ability to call on his father-in-law for security, it seems Minook very probably earned respect by maintaining an excellent reputation among his friends and neighbors. He, his wife, and his daughter continued to file mining claims in the early 20th Century, and he continued to prospect with several groups of miners.[12]

Of course, given the racism of the era, Minook had his share of detractors—some miners considered him an American Indian chief who "thinks he is something like George Washington."[13] When voters in Rampart considered whether to incorporate, Minook's leadership may have become a poison pill. A suggestion by a prominent miner that Minook should sit on any city council created after incorporation caused the already controversial idea to be postponed.[14]

On August 25, 1900, Minook declared his intention to become a U.S. citizen, very likely because he believed he stood a better chance of having his mining claims respected if he was a Russian alien than if he was a Creole.[15] That day, Minook formally swore that he was a subject of the Russian czar, but, by his declaration, he renounced forever his allegiance and fidelity to the emperor of Russia and swore to support the Constitution and laws of the United States and the laws of the district of Alaska. He put his mark to the name he gave the clerk, "Ivan Minook," a name that reflected the Russian and Alaska Native influences of his "Creole" heritage.[16]

Three years later, after many of Rampart's residents had either left Alaska or moved on to Nome or Fairbanks, Minook's friends and neighbors stood with him in another makeshift courthouse in Rampart. They testified that he had lived in Alaska all his life, that he had married and raised a family in the Christian faith, that he spoke English and understood U.S. law, and that they had named the largest mining stream in the Rampart mining district after him in recognition of his value as a man and a miner. Minook's supporters testified that he was a "fit and proper person to be made an American citizen." Abraham Spring, a Fairbanks lawyer and a personal and political ally of Judge James Wickersham, even submitted an amicus brief supporting Minook's petition.[17]

Although he had been born and raised in Russian America and had never left home, the ground beneath Minook's feet had become part of the new Pacific empire of the United States. Would a federal judge respect Minook as some of his fellow miners in Rampart had? Or would Minook lose by law all the respect he had achieved in society? The answer is far from the most important moment about Minook in Alaska history, but the fact that he had already done so much made possible a historic outcome.

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From left to right: Ambrose Minook (John's son), Helen Pitka McRae (Sally Heeter's half sister), Maragret Kokrine (Helen's daughter) Lucy Minook Callan (John's daughter), Fannie Callan (Lucy's daughter), Fannie Minook (John's daughter), Sally Silver (daughter of John's oldest daughter), Mrs. John Minook, John Minook (with axe at his feet), and Sally Heeter. The family is standing in front of their home in Rampart, circa mid-1890s. Photo from the Mr. and Mrs. Gregory Kokrine collection, Alaska and Polar Regions Collection, University of Alaska, Fairbanks Polar Archives (Photo: UAF-897-2a)

Footnotes:

[1]Aged Russian Miner Passes," *Anchorage Daily Times*, April 30, 1930; David J. Szumigala, Garth E. Graham, and Jennifer E. Athey, Alaska Resource data file, Tanana Quadrangle, Alaska, USGS Open File Report 2004-1386 (2004): 142.

[2] "Aged Russian Miner Passes."

[3]Ibid.; Erinia Pavaloff Cherosky Callahan, "A Yukon Autobiography," *Alaska Journal* 5 (1975): 127–28; Phyllis Downing Carlson and Laurel Downing Bill, *Aunt Phil's Trunk: An Alaska Historian's Collection of Treasured Tales* (Anchorage, AK, 2006), 1:300; Mitchell, *Sold American*, 141–42.

[4]Dates of Minook's birth vary widely. His obituary indicates that he was born in 1844 or 1845. "Aged Russian Miner Passes." Court testimony indicates he was born in 1849. *In re Minook*, 2 Alaska at 200. The 1900 and 1910 censuses indicate that he was born in September 1858 and September 1850, respectively. Year: 1900; Census Place: Rampart, Northern Supervisors District, Alaska; Roll: T623_1829; Page: 6B; Enumeration District: 8; Year: 1910; Census Place: Fort Gibbon, Division 2, Alaska Territory; Roll: T624_1749; Page: 19B; Enumeration District: 0007; Image: 756; FHL Number: 1375762.

[5]Callahan, "A Yukon Autobiography," 127–28; Year: 1900; Census Place: Rampart, Northern Supervisors District, Alaska; Roll: T623_1829; Page: 6B; Enumeration District: 8.

[6]Hunt, *North of 53°*, 261; Rosalie E. L'Ecuyer, U.S. Dept. of the Interior, Bureau of Land Management, *Prospecting and Mining Activity in the Rampart, Manley Hot Springs and Fort Gibbon Mining Districts of Alaska, 1894 to the Present Era,* Open File Report 61, Feb. 1997, 5; Mitchell, Sold American, 141–42; Callahan, "A Yukon Autobiography," 128; L'Ecuyer, *Prospecting and Mining Activity,* 5; "The Story of Minook Creek," *Rampart Whirlpool*, January 15, 1899.

[7]Bylaws of the Rampart Mining District, Little Minook Creek and Hunter Creek, By-Laws, 1896–1898, Minook Creek Recorders Office record books, Alaska State Archives, B416-00062.

[8]Thomas K. Bundtzen, "Ivan John Minook," Alaska Mining Hall of Fame, http://alaskaminninghalloffame.org/inductees/minook.php.

[9]Quoted in ibid.

[10]Pierre Berton, *The Klondike Fever: The Life and Death of the Last Great Gold Rush* (New York, 1958), 207; Carlson and Bill, *Aunt Phil's Trunk,* 1:310; Ducker, "Gold Rushers North," 208.

[11]Berton, *The Klondike Fever,* 207.

[12]Minook Creek (record of town lots), Minook Creek Recorders Office record books, Alaska State Archives, B416-0068; Wickersham, *Old Yukon,* 47–48; "Aged Russian Miner Passes"; Spicer, *The Constitutional Status,* 42–43; Callahan, "A Yukon Autobiography," 127; L'Ecuyer, *Prospecting and Mining Activity,* 21, 78; Rampart Mining Locations, P-M, 1902–1904, Rampart Recorders Office record books, Alaska State Archives, B416-00021; Notice of Location, Rampart Recorders Office record books, Alaska State Archives, B416-00022.

[13] "Alaska Gold Fields," *Arizona Silver Belt,* July 13, 1899.

[14]L'Ecuyer, *Prospecting and Mining Activity,* 57.

[15] Ibid., 60.

[16]*In re Minook,* 2 Alaska at 200; Declaration of Intent to Become a U.S. Citizen. Gwenn Miller uses the Russian term *Kreol,* rather than *Creole*, contending that the Russian term means something closer to *métis* or *mestizo*. Gwenn A. Miller, *Kodiak Kreol: Communities of Empire in Early Russian America* (Ithaca, NY, 2010), 106. In Russian America, Creoles included individuals who had one parent from the Old World (Russians, Scandinavians, and Yakuts) and one parent from the new world (Alaska Natives or American Indians) and individuals who had a Creole parent. Michael Oleksa, *Orthodox Alaska: A Theology of Mission* (Crestwood, NY, 1992), 145; Andrei Grinev, "Social Mobility of the Creoles in Russian America," *Alaska History* 26:2, trans. Richard Bland (2011): 21; Lydia T. Black, *Russians in Alaska*, 1732–1867 (Fairbanks, AK, 2004), 209. But *Creole* did not refer to a biological or hereditary category; rather, it was a social category that included many Alaska Natives regardless of ancestry. *Oleksa, Orthodox Alaska*, 145. I have used Creole because that is the term used in Wickersham's opinion.

[17]Terrence Cole, *Crooked Past: The History of a Frontier Mining Camp: Fairbanks, Alaska* (Fairbanks, 1991), 49; *In re Minook,* 2 Alaska at 200–202; James Wickersham, diaries, April 28, 1903, Nov. 15–16, 1904, April 3, 1905, and Sept. 24, 1905.

Social climber

By William Satterberg

My grandson, Jacob, is my best little buddy. We do a lot of things together. We travel. We have coffee. We eat waffles on Saturday mornings with the old guys at the Diner. And we share all sorts of fun.

True, Jacob is barely 5 years old, but we have the same degree of mental intellect. Whether Jacob has come up to my level, or myself to his, cannot be said. We do share a common bond, regardless. Jacob is no longer the 3 year old inquisitive little toddler. Rather, he is walking like a real human being, talking intelligently, and being critical of that which he does not understand.

For example, the other day as I was driving my pickup down the road, I became momentarily distracted. My truck swerved. No, I was not texting. Nor was I drunk. I was just not paying attention. It's an old age thing. It did not go unnoticed. Jacob, from his rear car seat immediately announced "Grandpa? Hello? Focus, focus!" The irony was not lost upon me. But, Jacob has not stopped at that point. Recently, he learned the concept of the word "precocious." He now describes himself accordingly.

Rather than our traditional adult vacations, 2013 was to be Jacob's vacation summer. Europe and the Far East were out. To the contrary, Southern California was the preferred venue. The San Diego Zoo, Disneyland, California Adventure, the beach, and the finale, Legoland, were the targets of opportunity.

It was to be a five day family trip with my wife, Brenda, our two daughters, Marianne and Kathryn, and Jacob. Rather than renting a hot BMW, we instead rented a six-passenger Kia van.

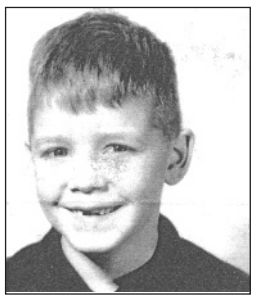
On the first day of the trip, we landed in San Diego, where we planned the next day's attack. Whereas in the past, I had enjoyed the Gas Town area of San Diego and watching the Navy Seals exercise on the beach, I was outvoted 4 to 1. Day two would be the San Diego Zoo.

On day two, we traveled to the zoo and toured the vast facility. All in all, it was an enjoyable experience, except for the monkey house. Personally, I felt that Jacob was a little too young for that exhibit, although it certainly was educational. Otherwise, we were able to see most of the entire zoo and learned a lot of gross things about animals. Jacob was one tuckered out kid by the end of the day. However, to top things off, my girls finished with some power shopping at the local shopping malls.

On day three, we traveled to Anaheim, where we checked into a hotel suite for three nights. Like a staff of general officers, we then prepared for our onslaught on Disneyland and the neighboring California Adventure amusement park while Jacob bounced on the beds imitating his hero Kevin from "Home Alone."

Jacob is only 42¼ inches tall. Still, on most rides, he was able to brush just closely enough to the minimum height requirements that he was able to experience the roller coasters and other amusements. True, there were some attractions that Jacob could not ride, but I did not enjoy those rides either, so we actually got along quite well.

Disneyland/California Adventure consumed two full days. Once again, by the end of each day, Jacob's Grandpa was totally tuckered out. One thing that I must compliment Disneyland on, however, is the tremendous amount of creative thinking that has been devoted to separating grandparents from their money. Given my own profession, I began to admire Disney's creativity, and studied the various techniques utilized hoping to get valuable CLE credits for inventiveness in billing.



"The highlight of the trip came when Jacob asked me if he could scale a 35-foot climbing wall."

Following the day at the zoo and two days of amusement rides, we adjourned for a day at the beach in Carlsbad, California. I actually found the experience enjoyable. I was able to lay on the cold sand and watch the scenery walk by. The highlight of the day was when I buried Jacob up to his neck in the sand and then challenged him to extricate himself as I sat on top of the pile.

The fifth activities day was devoted to Legoland. It was a truly plastic experience. Clearly, I was spoiled by that time from Disneyland and California Adventure, with all the high-tech rides and characters running around giving autographs. Legoland, on the other hand, was definitely geared to the under-5 year old crowd. I soon began to feel my age. Virtually everything was constructed from colored plastic blocks. In contrast, Jacob thoroughly enjoyed the experience. Fortunately, the Lego characters had been solidly glued together.

The highlight of the trip came when Jacob asked me if he could scale a 35-foot climbing wall. By then, I was growing weary of all the park's hard sell techniques. The idea of spending $3 to watch my grandson fall off a Lego wall after having only climbed 4 feet was not particularly appealing. After all, three dollars was an atrocious sum, especially after the thousands of dollars I had already spent on the trip. Jacob was insistent, however. He assured me that he could climb the wall.

Still realizing that this was likely an ambitious promise made in childish good faith, I reluctantly agreed to the request and paid the $3 to the gatekeeper. As Jacob was being harnessed into his climbing safety harness, I decided to entice him by offering a crisp $100 bill if he could push the buzzer at the top of the wall. I figured that my offer was safe. For the last 20 minutes, 8 and 9 year old kids had been regularly falling off the wall. None had reached the buzzer. In fact, 10 year olds were barely making the climb. A 4 ½ year old didn't stand a chance.

Fixing me with a determined stare, it was clear to me that Jacob had foolishly accepted the challenge. Other parents in the area apparently also noted my offer. The battle was on.

Resolutely approaching the barricade, Jacob squared off and bravely began his climb. To my surprise, after climbing only 3 feet, Jacob began to protest. I had expected a better effort, at least. But Jacob was fading fast. He claimed that he could not continue. In response, the other onlookers and I urged him on. After all, I wanted some value out of my three dollars. The Satterberg family honor was at stake.

Clearly uncertain, Jacob hesitated for another moment. But he would have nothing of it.

We all yelled louder words of encouragement.

"It's OK, Jakie. Just keep climbing." We instructed him next on where to put his feet and how to find hand holds.

Meanwhile, the two other, older children on the climbing wall had both failed in their attempts to push the buzzer. They were being slowly lowered to the ground on their safety lines with sad looks on their faces. Their failures seemed to invigorate Jacob.

With renewed vigor, Jacob continued his climb, stopping once again at the 10-foot level--this time not with a scared look, but with a puzzled look on his face. He was not scared anymore. Rather, he only needed guidance. By then, the other parents in the crowd had joined in, apparently aware of the $100 incentive. Either that, or they just wanted to see the young guy succeed. Soon, several people were calling out Jacob's name and offering encouragement and advice on where to move next.

Soon, several people were calling out Jacob's name and offering encouragement and advice on where to move next.

Buoyed by the crowd gathering below, and following my advice to not look down but just to continue to climb, Jacob suddenly scampered up the remaining 25 feet of wall like a squirrel carrying a mouthful of purloined nuts to its treetop nest. In short order, the buzzer was pushed. In response, the crowd happily cheered and clapped, as did our family. As for me, I also recognized that I had just been hustled out of a crisp $100 bill by a preschooler.

But, the show was not over. For his part, having reached his goal, Jake became the consummate grand-stander, just like his grandpa. He turned and smiled at the crowd below, clearly relishing the view from the top.

Then, Jacob did something that no other kid had done so far. Previously, the children who had either failed the climb or even those older ones who had been successful were content to be gently lowered to the ground like a sack of flour on a hoist. Jacob, however, was not satisfied with the mundane. Instead, perhaps seeking to add insult to my injury, Jacob put his feet up against the wall and confidently laid back perpendicular to the ground in a very gutsy move. He then kicked out from the wall and rappelled down to the ground in a sequence of four confident repetitions reminiscent of a SWAT team assault.

Upon reaching the ground, the young boy then turned to me, stretched out his little hand, and promptly demanded his crisp $100 bill. Initially, I began to explain that I would give it to him later. He would have no part of that answer. Under the watchful eye of the crowd, I succumbed and surrendered the bill, which Jacob clutched happily in his hand for almost 10 seconds before his mother snatched it away, declaring that it would later be used to buy hockey skates.

As the crowd began to disperse, I proudly hugged Jacob. I then asked him why he had chosen to descend the wall like he had. He replied, "Grandpa, it's easy. That's how the Teenage Mutant Ninja Turtles do it! Haven't you ever seen them on T.V.?"

As we were walking away from the wall, the show clearly over, the gatekeeper approached me stating, "Sir, that was amazing! I have never seen an 8 year old ever do that before."

I responded, "And you haven't yet. My grandson is only four and one half."

A worried look crossed the man's face. He looked as if he were going to say something to me, but hesitated. On balance, I figured that he decided that it was best to let things rest. After all, it was clear that I apparently had not seen the age limitation sign, most likely due to my advanced age. Besides, there was nothing to be gained by calling it to my attention after the fact. After all, it is easier to beg absolution than permission, I'm told.

REQUEST FOR COMMENTS

The United States District Court for the District of Alaska has recently begun a review of the Local Civil Rules with the assistance of an advisory committee of local attorneys. The Local Rules are available on line at the District Court's website: http://www.akd.uscourts.gov/

We welcome any comments or suggestions you may have, whether favorable, adverse, or otherwise. This may include any suggestions for changes, identification of those rules that you believe work particularly well, and information about local rules in other district courts that you believe might work well in Alaska. Please send your comments as soon as possible, but no later than March 31, 2014, to the following address:

United States District Court
Clerk's Office
Attn: Pam Richter, Operations Supervisor
222 West 7th Avenue, #4
Anchorage, Alaska 99513

ECLECTIC BLUES

Why do people think we are so sleazy?

By Dan Branch

Retirement offers a chance for reflection. I've been reflecting on lawyering, a profession that is generally frowned upon by average citizens until they need legal help.

In 1992, my 15th year of legal practice, a survey pegged the attorney profession as the 16th sleaziest way to make a living. It put us way ahead of drug dealers (sleazy one), TV evangelists (sleazy 3), prostitutes (sleazy 4), Congressmen (sleazy 7), insurance salesmen (sleazy 10), and oil company executives (sleazy 15); but behind soap opera stars, movie stars, and stockbrokers. (*The Day America Told the Truth,* by James Patterson). Those folks must not have known Lord John Brown.

By consensus, those surveyed most admired firemen, paramedics, Catholic priests, farmers, grade school teachers, dentists, mailmen, housekeepers, babysitters, flight attendants, scientists, accountants, and doctors. Apparently none of the surveyed attended Sister Adrian's 5th grade class, flew on Northwest Airlines in mid-winter, or went to the sadistic dentist I had in high school.

Mr. Patterson, who conducted the survey, was then the chairman of the country's largest advertising agency. He probably viewed his sleazy list as an advertising, targeting, tool. It makes you wonder why he never encouraged the American Bar Association to hire some spin-doctors. People still think we are a sleazy bunch.

"Somehow, we have allowed the public to view the profession through a narrow lens."

My decision to join the legal profession dismayed my dad. Once, when I was home on break from law school, he picked up one of my textbooks, opened it to a random page, and sighed. His attitude changed when I went to work for Alaska Legal Services in Bethel. On his first visit to the Legal Services office, he said something like, "Oh, I get it, you are helping people."

Those asked to list the 20 sleaziest professions must have been ignorant of the lawyers who help--legal aid workers, public defenders, district attorneys, assistant attorneys general, and private attorneys who take cases because it is the right thing to do.

Would it have made a difference if those surveyed had known Rob Meachum, who served as a public defender in Juneau and then Bethel before his death? He received the David Snyder award in 2007 for his excellent legal work. When told of the award, Rob said he was surprised, humbled and grateful. Judge Larry Weeks, who had watched Rob handle difficult child protection cases before him for years said, "He cares about his clients and puts in additional effort into caring for them and caring for their legal problems."

Since I worked for five years as a defense attorney in Bethel, I have a special appreciation for public defenders who spend their professional lives defending felony cases. Few thank them for their work. Often their clients blame them for their convictions. The public vilifies them for any acquittals. They have to sink into police reports describing horrible fact patterns, view gruesome forensic photographs, and cross examine vulnerable victims, sometimes children, in order to zealously represent their clients. At the beginning of their practice, they can partially shed the burden with gallows humor and liquor. Twenty years later, the accumulation of pain must begin to tell.

Those asked to list the 20 sleaziest professions must have been ignorant of the lawyers who help--legal aid workers, public defenders, district attorneys, assistant attorneys general, and private attorneys who take cases because it is the right thing to do.

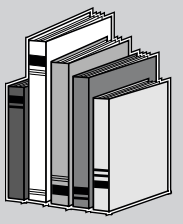
Other attorneys sacrifice fees and time with family to protect client rights in civil cases. *Bar Rag* columnist Ken Kirk worked hard to push back against the state's child support collection machine. Others work on cases for free, fulfilling the lawyer's pro bono obligation.

Somehow, we have allowed the public to view the profession through a narrow lens. They judge all lawyers based on apocryphal stories of overreaching, thuggary, and unseemly large fee awards. (There may be some truth about the large fee stories). Some still simmer after a former spouse's zealous attorney prevented them from salvaging any material comfort from the failed marriage. Others believe that all lawyers are capable of drafting the unfair contract that placed them over a barrel when their business started to fail. Are these lawyers the spoiled apples in our barrel?

It takes only a few hundred words of text to identify the problem, even when they are structured in my meandering style. I don't know if there is a fix. The bar associations could redefine the limits of ethical practice to reduce the actions perceived as bullying by those subject to them. They could do more to tell the stories of people like Rob Meachum, who work long and hard for a modest paycheck to protect their client's rights. Or, more lawyers could find ways to apply Rob's helping principles to their own practice.

Law Library News

Law Library searches simplified with new tool



By Susan Falk

Have you searched the library's online public catalog recently? Looked for a book or an article on a new subject? If you've conducted a search on the library's webpage, you may have noticed something new.

The law library is proud to announce the addition of a discovery layer to our search interface. This new search tool consists of one, simple search box. Now library users can enter a search in one place and retrieve results from the library catalog as well as from electronic databases like HeinOnline. The discovery layer is designed to be user friendly, and supports Google-like natural language searching. Once you've run a basic search, you can narrow your results by content type, subject terms, or more, helping you zero in on relevant material quickly and efficiently. You can also expand your search to include material outside the library's catalog, to identify titles we may not have, but can acquire for you through interlibrary loan.

Next time you're looking for a library resource, try our new discovery tool. And *let us know what you think.*

Update on the Anchorage Law Library Remodel

The Anchorage Law Library has completed its penultimate move. In March, library staff moved the available collection from the Reading Room into our new stacks area, in the central part of the library. This new area boasts modern, compact shelving, which holds many more volumes in far less space. In addition to our books, we moved all library services into this newly remodeled space, including public copiers and computers, the microfiche reader and printer, and the reference desk. Though seating space for public patrons will be somewhat limited during this last phase of the renovations, library operations will be unaffected. Reference staff is available to help you with your research, and all the treatises and Alaska resources that have been on the shelf throughout the remodel remain available in this last phase. The library entrance is currently off the lobby, just to your left after you pass through security.

The final stage of the remodel tackles the Reading Room. The new reading balcony on the north side of the library will be extended, and a second staircase will be added. The reference desk will be relocated to the center of the room for greater visibility. When construction is finished, the library's entrance will return to its previous location. The renovation is scheduled to be complete in late 2014.

THE KIRK FILES

Bushwhack to the future

By Kenneth Kirk

I felt my device land with a thump, and the blurriness around me cleared enough to recognize my surroundings. I was still in the parking lot from which I had left, but I could see that it was different. Some of the young trees that had been planted only a few years before were now tall and mature, and the vehicles around the parking lot were strange to my sight. It was a success! My invention had worked, and I had traveled forward in time.

I walked up to the building, which had similar features to my old office but differences in design and coloring, and saw the name "Eli, Wells & Murdock" above the door. It must be the successor to my old firm, I thought, as I remembered an enterprising associate named Wells who was most certainly on the partnership track.

Inside, where had once sat the front desk receptionist, was what I assumed to be a hologram. It appeared as an attractive young woman, but I could see that it was not quite real. And here I ran into difficulty, because she kept asking for my access code. Having no such code, and her not responding to my entreaties, our conversation ground to a halt.

Inside, where had once sat the front desk receptionist, was what I assumed to be a hologram. It appeared as an attractive young woman, but I could see that it was not quite real. And here I ran into difficulty...

As I stood in frustration, trying to suss out what to do next, a real-life human wandered into the reception area. He was male, middle-aged, and wearing a sort of suit although rather than a tie, he appeared to be wearing a T-shirt with the tie printed on it. Seeing me there, in my obvious confusion, he asked me if he could assist.

"I just wanted to stop by and visit my old firm," I explained. "I spent 10 years here as an attorney. Although that was many decades ago."

He smiled broadly. "Really? I'm an attorney too." And then gesturing to a younger man down the hall, "Hey George, this guy used to be an attorney here."

After introductions were made, I explained my appearance. "I invented a time machine back in 2014, and used it to jump into the future and see what the practice of law looked like." They glanced at each other with a sort of discomfort, and said nothing, so I tried to make conversation. Turning to the older one I asked "Are you one of the name partners? Perhaps Eli or Murdoch?"

He chuckled. "None of those guys have been around for years. In fact I've never even met them. The firm name is just a brand, which the owners keep going for name recognition."

"But surely," I countered, "the current partners want to include some of their own names within the name of the firm? At least the more senior ones?"

He looked down at his shoes. The younger one spoke up. "They don't really have partners anymore, *per se,* at least in the old sense of lawyers who work here and also own the firm. In fact, as lawyers we aren't allowed to own any part of the law firm. We just work here on salary, dealing with some of the more difficult cases. Sort of trouble shooters for when the paralegals run into a problem."

"In fact, as lawyers we aren't allowed to own any part of the law firm. We just work here on salary, dealing with some of the more difficult cases."

I was confused. "In my day, only lawyers were allowed to own an interest in a law firm. If the lawyers don't own the firm, who does?" And then I drew in my breath in horror. "Surely law firms aren't publicly traded?"

"Oh no, good heavens, no" the older one assured me. "Nothing like that. But after the Law Practice Wars, the paralegals actually own the firms and the lawyers just work for them."

"Law Practice Wars? You mean, they actually had disputes between the lawyers and the paralegals over control of law firms?" I found it hard to believe.

"Yes, it was quite a battle," said the younger attorney. "I was just a kid, but I followed it in the papers. It wasn't a physical war of course, but it was a fight. Most of the public sided with the paralegals, as did the legislative branch. The lawyers kept suing to block the bills they passed. It was pretty ugly for a few years, but the lawyers were mostly winning. And then it finally ended in a settlement."

I was even more confused now. "The lawyers were winning, but they agreed to a settlement in which the paralegals own the law firms and they just work there? How did that happen?"

I was even more confused now. "The lawyers were winning, but they agreed to a settlement in which the paralegals own the law firms and they just work there? How did that happen?"

The younger attorney shot a harsh glance over at the older one, who looked down at his shoes and said "I'm afraid I was part of the negotiation team that worked out the final settlement. We thought it was a pretty good deal. But when everybody got the signed agreement later, it had all of these provisions…."

I buried my head in my hands. I knew what had happened. "Don't tell me…."

"But we always relied on our staff to review final drafts," he complained. "None of us was in the habit of actually reading the whole document before signing it."

I decided I had heard enough, and had no wish to remain here in this (for me, at least) depressing future. But as I was excusing myself to head back to the parking lot, I had one final request of my future colleagues. "The time machine is kind of a rough ride, and before I go back on it, can you point me to the restroom?"

"Sure," said the older one, "it's right over there." And pointed to a door.

"Thanks," I said, as I headed in that direction. "I trust this is a normal bathroom, doesn't have three seashells or something?"

The older attorney looked off in a different direction. The younger one said "No, no seashells. Just regular old scratchy toilet paper. We actually had the three seashell technology at one point, and it was great. It worked 99.9% of the time. Unfortunately based on that 0.1% there was a big class-action lawsuit, and the company that owned the patent stopped making them."

"And that," added the older attorney, "is what started the Law Practice Wars."

SUBMITTING A PHOTO FOR THE ALASKA BAR RAG?

- Rename all digital photo filenames with the subject or individual's name!!! (Example: lawfirmparty.jpg or joe_smith.jpg)
- Include caption information or companion article with it in a separate Word or text file with the same filename as the photo. (Example: lawfirmparty.doc or joe_smith.doc or joe_smith.txt)
- If the photo is a simple mug shot, include the name of the individual on the rear of the photo if a hard copy, or in the body of your e-mail.
- Send photos with numbers for filenames, such as IMG-1027, DSC-2321, IMG08-19-08, etc.

An artist's work needs to be considered in estate

By Jeffrey Davis

Ralph Waldo Emerson said, "Every artist was first an amateur." There is a good chance some of your clients are artists or amateurs with an extensive collection of self-created art in their possession. Like many of us, creative individuals want to be remembered after their death. They want the body of work they spent a lifetime creating to continue to be seen and enjoyed, if not by the public then by friends and loved ones.

This is where estate planning attorneys can help. Creativity is often at odds with orderliness, and artists are not always best known for their organization and preparedness. Without proper planning, an artist's creations are at risk when they die. Art is often mistakenly lumped in with other personal property in an estate plan, if included at all, when it should receive its own special treatment. An alert estate planner must think about the preservation, appraisal, sale, taxation and intellectual property rights of an artist's estate.

A walk through the galleries during Anchorage's First Friday shows the depth of mediums and techniques used by artists in the Great White North – painting, sculpture, photography, screen printing and even shoes. There are also musicians, tattooists, writers, and performance artists, all of whom may leave behind a sizeable body of self-created work. Each of these mediums will have its own planning peculiarities, but there are some basic estate planning issues relevant to all artists of which an attorney should be aware.

The first issue to discuss with an artist-client is organization during his or her lifetime. Just as a successful estate should have a portfolio of a client's business ventures and their values, a successful artist-client's estate should have a database of every work listing: the full title, current location (gallery, studio), size, description (size, medium, etc.), where any related works can be found (such as studies and sketches), and estimated appraised value.

Most artists keep studies and sketches of works and many keep journals and notes on works. These documents add context to an artist's life, create a legacy and, as *Antiques Roadshow* has taught us, increase the value of a collection. Many artists do not become famous until after their death so these resources are valuable to future collectors or academics researching an artist. As an estate planner, you should encourage your client to scan and catalog these documents to preserve them for future generations. Artists should consider creating supplementary explanations of their works including the materials and the processes used. This can be done through written artist statements or even video recordings.

The next issue is finding the proper personal representative (or trustee) for an artist-client's estate. The personal representative should have specific knowledgeable of the artist-client's work and share the vision for that work. Like all personal representatives, he or she should be organized and responsible. However, an attorney also has to be aware of potential conflicts of interest. An artist's dealer or gallery owner may seem like a good choice, but that dealer or gallery owner may be conflicted when it comes to valuing a piece for sale versus for estate taxes. In some cases, appointing a separate "art advisor" with predefined authority or power to be in charge of the art may be appropriate.

An attorney also has to think about preservation of an estate's art. Does the appointed personal representative know how to properly store a client's art? An already cast sculpture may require little attention, but a wax mold requires proper storage. A more likely scenario is photographs. Alaska probably has more photographers than pilots. Negatives and prints are highly susceptible to our often damp climate and care must be taken in storing them. Digital photography will require consolidating and preserving hard drives and computers. It is not only important to preserve an artist's work for art's sake – but a personal representative also has a fiduciary duty to preserve and protect estate assets. No attorney wants to be involved in litigation because careless planning and flooding or a fire sprinkler destroyed a client's lifetime of work. An artist-client should consider insurance for his or her collection and a personal representative handling an estate should also make sure an artist's collection is insured. Finally, an artist-client should consider planning for incapacity or disability by granting a power of attorney to a trusted a relative or friend who knows the artist-client's work and is capable of preserving and protecting it.

Storage space comes with a cost, and there must be money in the estate to pay those costs. If the artist's studio was at his or her home, that home may have to be sold and the art moved. If the artist has a studio, the art may be able to stay there, but the rent or mortgage has to be paid. If the artist-client is the stereotypical starving artist, there may not be liquid funds to do so. Life insurance can often be a solution to this problem.

Even if all your efforts and planning are a success, and the estate is solvent and the art protected, the next question is what is to be done with it all? Should it be sold or donated? If so, to whom? If an artist never achieved fame during his or her life, it is unlikely there will be museums fighting for the collection. However, there are many other institutions that would gladly accept a donated collection – local art centers, universities, historical societies, libraries, public schools, non-profit organizations and hospices and hospitals are all potential places to have an artist's work on display. It is advantageous to make these arrangements during the artist's lifetime in order assure proper distribution and lessen the burden on the personal representative. More successful artist-clients with significant assets may consider creating a trust or foundation to preserve and promote their work. If an estate plan calls for selling an artist's collection, an estate can also obtain a "blockage" discount on the fair market value of that estate because releasing all of an artist's work into the market at once would reduce the selling price.

Intellectual property rights often become a point of contention in donating artwork. The 1976 Copyright Act vests initial ownership of copyright in the artist who created the work. Under current law, an artist or an artist's estate can convey artwork while maintaining ownership of the underlying rights to the image. Without the underlying intellectual property rights, a museum or gallery cannot make promotional materials and merchandise featuring the artwork. Thus, a museum or gallery is less likely to take the artwork if they cannot make a profit from it. Moreover, to qualify for charitable income tax deductions, generally, a donor artist or that artist's estate planning documents must donate *both* the work of art and the underlying copyright. An estate planner must also be aware of Alaska's opt-in community property statute. The copyright to any artwork created under a community property agreement will retain its character as "community property" and a surviving spouse will retain an interest in it.

Taxes need to be addressed in any estate plan. Section 1221(a)(3) of the Internal Revenue Code excludes copyrights and literary, musical or artistic compositions created by a taxpayer as capital assets and therefore an artist recognizes ordinary income on royalties or the sale of his or her creative property during life. An artist's basis in his work is the value of the supplies used to create the work, not the fair market value of the created work. Because creative property is ordinary income property during the artist's life, artists may only deduct their basis, i.e. the value of the materials, when donating work to a tax-exempt organization.

In regards to gift taxes, gifts of art by an artist to others during life are valued at fair market value for gift tax purposes. However, the donee will receive the gift at the donor's carry-over basis, which is likely $-0- or close to it. A donee also follows the artist's income tax basis in whether a gift is ordinary income property or a capital asset. Because a work created by an artist is ordinary income property, a lifetime gift to a donee retains its ordinary income character and the donee will be subject to ordinary income tax if the gifted art is sold. The gifted artwork ceases to be ordinary income property when the donee sells the artwork to another person.

For estate tax purposes, it is often advantageous for the artist to keep artwork until the time of death. In determining estate tax, the income tax basis of an asset in a decedent's estate is adjusted to its fair market value including works of art. Thus, artists face a double tax burden by not being able to take fair market value deductions for charitable donations during life, but then have their estate adjusted to fair market value at death. Also, at death of the artist, his or her work becomes a capital asset and is not subject to ordinary income tax. Therefore, a beneficiary receiving art on the death of the artist receives the art with an adjusted basis and as a capital asset that will generate capital gain when sold.

For married artists wishing to benefit their spouse during life or on death, gift and estate taxes may not be an immediate problem since there is there is an unlimited marital deduction for property passed to a surviving spouse who is a U.S. citizen. Artwork has the potential to significantly appreciate in value, so both portability of the federal estate tax exemption and credit shelter trusts need to be considered in planning an estate. The lifetime estate tax exemption for 2014 is $5.34 million and will shield many artist-client's assets from federal estate tax assuming the current laws do not change.[1] For unmarried artists or artists with non-citizen spouses, taxes will be a significant planning issue. For some, the annual gift tax exclusion amount of $14,000 may also be a useful way to transfer valuable art during the life of an artist, but at the cost of the carry-over income tax basis discussed above. An artist-client may also make an annual exclusion gift for non-US citizen spouses. In 2013, the amount was $143,000.

Trying to plan for any type of tax can be futile if the value of the estate is not known. For proper planning, artists should know the appraised value of their art. Lifetime gifts or deductions of artwork over $5,000 must be supported by a written appraisal from a qualified and reputable source. The Estate Tax Return, Form 706, requires a filer to list, under oath, any works of art whose value at date of death exceeded $3,000. The IRS even has its own Art Advisory Panel to determine the fair market value of works. This panel reviews art appraised at $50,000 or more and will also issue a Statement of Value on a piece of artwork for a fee of $2,500.

Another option for an artist-client's estate plan is the use of entities like family limited liability companies and S corporations. Entities can reduce transfer taxes while transferring ownership of an artist's works. Artists can then transfer interests in the entity. This allows transfers below the annual gift tax exemption and minimizes problems that come with direct ownership of interests in situations like divorce, insolvency or forced sales. Entities also allow for the lifetime management of an artist's works and creditor protection.

Although this article cannot cover every issue you may encounter when creating an estate plan for an artist-client, it should alert you to some common concerns. It also did not cover art collectors who have their own distinct issues. Just as every artist has his or her own style, every client is unique. It is the duty of an estate planner to find the issues, identify the nuances and plan for them accordingly.

Jeffrey Davis is an amateur artist and attorney at Manley & Brautigam, P.C. Please visit their new website at www.mb-lawyers.com.

Footnotes:

[1]Alaska does not have a state estate tax. However, many others do impose a state estate tax. For example, Washington imposed a state estate tax on assets greater than $2 million. Thus, appropriate state planning issues need to be considered as well.

What forum did you select?

A review of *Atlantic Marine Construction Co. v. United States District Court, W.D. Texas*

By Kevin Clarkson

It is very common for contracting parties who have not agreed to some form of mandatory alternative dispute resolution process such as arbitration, to include within their agreements a provision that requires any and all disputes that might arise between them to be brought in only one judicial forum or jurisdiction. These types of contractual provisions are referred to as "forum-selection clauses" and/or "venue-selection clauses." One of the things that a lawyer should always do when filing a complaint for a client in a case wherein there is a governing contract between the parties, is to check the contract for a forum or venue-selection clause. "Not so fast" is a good rule of thumb—you may not have free reign to choose where your client's complaint can be filed from among the available courts that have jurisdiction.

There are different types of forum or venue-selection clauses, and as would be expected they vary depending on the specific language that the parties elected to use in their contract. Courts recognize some clauses as being "mandatory" because they require any dispute to be brought only in a specified court or jurisdiction—these clauses use clear and unambiguous words of mandate and exclusion such as "any action under this contract shall be brought only in the superior court for the state of Alaska, Third Judicial District at Anchorage." Courts recognize other clauses as being "permissive" in nature, essentially establishing only a party's submission to a particular court's jurisdiction and venue—these clauses use more permissive language such as "any action under this contract may be brought in the superior court for the state of Alaska, Third Judicial District at Anchorage" or "the parties submit to jurisdiction in the State of Alaska." Forum-selection clauses can be both partially mandatory and partially permissive at the same time—e.g., a provision stating that "any action under this contract shall be brought in the Third Judicial District at Anchorage, Alaska" would be mandatory as to geographic location (Anchorage, Alaska) but permissive as to the court (state or federal) because both state and federal courts accept filings in Anchorage, Alaska.

But, what happens if federal diversity jurisdiction exists over a contractual dispute between the parties and venue is statutorily proper within a particular federal district, yet a contract forum-selection clause mandates that the forum for the dispute be a particular "state court" or a different "federal court"? If the plaintiff files its action in, or a defendant removes an action to, a federal court based upon diversity of citizenship within a district in which venue is statutorily proper under 28 U.S.C. § 1391, what impact does a contractual forum-selection clause have upon whether the action remains in that federal district court? And, this brings me to the subject of this article, the United States Supreme Court's December 3, 2013, decision in *Atlantic Marine Constr. Co. v. United States District Court for the Western District of Texas.*

Federal Jurisdiction and Venue: The Basics.

Before getting into the specifics of *Atlantic Marine* and the Court's holding, however, let's set the stage by talking just a little bit about federal jurisdiction and venue. Federal courts are courts of limited jurisdiction—a federal court's jurisdiction to hear a case is strictly controlled by Article III of the U.S. Constitution and federal statute. Federal district courts have original jurisdiction over all civil actions where the mater in controversy exceeds the sum of $75,000, and is between citizens of different states. With some minor exceptions, as a general rule any action brought in a state court over which the district courts of the United States have original jurisdiction may be removed by the defendant(s) to "the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441.

Within a federal district court's original jurisdiction, a civil action may be brought—meaning venue is proper—in (1) a district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no other district in which an action may otherwise be brought, then in any district in which any defendant is subject to the court's personal jurisdiction with respect to the action. 28 U.S.C. § 1391.

Atlantic Marine: The Facts and Procedural Posture.

Atlantic Marine, a general contracting construction company incorporated in Virginia with its principal place of business in Virginia, entered into a contract with the U.S. Army Corps of Engineers to build a child-development center at Fort Hood in the Western District of Texas. Atlantic Marine entered into a subcontract with J-Crew Management, a Texas corporation with its principal place of business in Texas. The subcontract included a forum-selection clause which stated that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division." When a dispute about payment under the subcontract arose, J-Crew sued Atlantic Marine in the U.S. District Court for the Western District of Texas, invoking the court's diversity jurisdiction. By the terms of 28 U.S.C. § 1391, venue was proper in the Western District of Texas where "a substantial part of the events or omissions giving rise to the claim occurred."

Atlantic Marine moved to dismiss the case arguing that the contractual forum-selection clause rendered venue in the Western District of Texas "wrong" under 28 U.S.C. § 1406(a) and "improper" under Fed. R. Civ. Pro. 12(b)(3). In the alternative, Atlantic Marine moved to transfer the case to the Eastern District of Virginia under 28 U.S.C. § 1404(a). The district court denied Atlantic Marine's motions and retained the case in the Western District of Texas. The district court held that so long as venue in an action is proper under the terms of the venue statute, 28 U.S.C. § 1391, the case is not subject to dismissal for "wrong" or "improper" venue under either 28 U.S.C. § 1406(a) or Fed. R. Civ. Pro. 12(b)(3) simply because a contractual forum-selection clause mandates another federal forum. The district court concluded that 28 U.S.C. § 1404(a)—which provides for the transfer of an action as between federal district courts when venue is otherwise proper in the court of original filing—is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum. The district court then proceeded to deny Atlantic Marine's requested venue transfer based upon its consideration of a number of factors, with the forum-selection clause being but one of the factors.

Atlantic Marine petitioned the Fifth Circuit for a writ of mandamus directing the district court to dismiss the case under § 1406(a) or to transfer the case to the Eastern District of Virginia under § 1404(a). The Fifth Circuit denied Atlantic Marine's petition and the United States Supreme Court granted certiorari.

Atlantic Marine: The Supreme Court's Decision. Justice Alito delivered the opinion for a unanimous court. The Court held first that "[w]hether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause." Thus, under Atlantic Marine, a forum-selection clause has no impact upon whether or not venue is proper in any federal district court. If venue is proper under § 1391, then venue is proper—period, end of story.

The Court held next that so long as the action is filed in a district within which venue is statutorily proper, dismissal is never the appropriate response to a forum-selection clause. Section 1406(a) and Fed. R. Civ. Pro. 12(b)(3) only authorize dismissal of an action when venue is "wrong" or "improper." Whether venue is proper is determined solely based upon the terms of § 1391. As the Court explained, "[w]hether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b)."

The Court held that although a forum-selection clause does not render venue in a court "wrong" or "improper" within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a). Section 1404(a) provides that "[f]or the convenience of the parties," "in the interests of justice," a district court may transfer a civil action "to any other district or division where it might have been brought or to a district or division to which all parties have consented." Section 1404(a), the Court held, requires that "in all but the most exceptional cases" a forum-selection clause must be given controlling weight in a district court's decision regarding whether to transfer a case to another federal court designated by the clause. When the parties have placed within a controlling contract a forum-selection clause that directs the case to another federal court, a § 1404(a) motion should be denied "[o]nly under extraordinary circumstances unrelated to the convenience of the parties. . . ."

In the event that a mandatory forum-selection clause directs the case to non-federal forum, i.e., a state or foreign court, Atlantic Marine instructs litigants and the district court to address the forum-selection issue only under the doctrine of *forum non conveniens*. This is required because § 1404(a) only permits the transfer of cases as between federal district courts. According to Atlantic Marine, under the doctrine of *forum non conveniens* a mandatory contractual forum-selection clause is to be given the same weight that it is given under § 1404(a).

Conclusion.

Read your contract closely. If you are the plaintiff and you have a mandatory forum-selection clause, it will probably be best to follow it and file in the directed court. If despite a mandatory forum-selection clause you elect to file in another forum that has jurisdiction and wherein venue is statutorily proper, then you should tell your client that you are taking a calculated risk that you may be on the receiving end of a § 1404(a) motion for transfer of venue or a motion under the doctrine of *forum non conveniens*—this is only a calculated risk in that "improper venue," unlike a lack of subject matter jurisdiction, can be waived. If someone has filed a complaint against your client in a federal court that has both jurisdiction and proper venue, but that is different than the court(s) that is/are specified in a mandatory forum-selection clause, your options are (1) stay where you are, (2) move to transfer to the contractually designated federal court under § 1404(a); or (3) file a motion under the doctrine of *forum non conveniens* to get the case into the contractually designated mandatory state court.

Board of Governors invites comments

The Board of Governors invites member comments regarding the following proposed amendments. Additions have underscores while deletions have strikethroughs.

Alaska Bar Rule 31(g)(3). Bar Rule 31 permits bar counsel to petition for the appointment of a trustee counsel to inventory the practice of a deceased or unavailable lawyer. Trustee counsel notifies clients of the lawyer's death or unavailability and assists with file transfer to the clients or new counsel. This valuable service protects the lawyer's clients, opposing parties and their lawyers, the court system, and the public in general.

Trustee counsel is compensated either from proceeds from the lawyer's practice on application by the trustee to the superior court or from the Lawyers' Fund for Client Protection on approval by the Board. Rule 31(g)(3) currently limits compensation from the Fund to $10,000 but there have been complicated appointments involving numerous clients where the reasonably incurred expenses have exceeded that amount. In those instances, the Board has exercised its discretion to pay in excess of the limitation.

Since the Fund is the exclusive responsibility of the Board, this amendment would confirm the Board's authority to make reasonable determinations of the fees and expenses to be paid to trustee counsel.

Rule 31. Appointment of Trustee Counsel to Protect Client's Interest.

…

(g) **Compensation.**

…

(3) In the event that the estate of the unavailable attorney is insufficient to compensate trustee counsel, an attorney appointed to serve as trustee counsel may submit a claim to the Board of Governors of the Alaska Bar Association. Reasonable compensation paid from the Lawyers' Fund for Client Protection shall be determined by the Board ~~and will not exceed $10,000~~.

…

Alaska Bar Rule 2, Section 1(e). Bar Rule 2, Section 1 details the factors which the Board may consider in deciding whether an applicant possesses the character and fitness necessary to practice law in Alaska. Specifically, Section 1(d)(10) lists disciplinary action by an attorney disciplinary agency, by another professional disciplinary agency or by any governmental or administrative agency of any jurisdiction as cause for further inquiry.

Even if an applicant in this situation were to pass the bar examination, he or she would be subject to reciprocal discipline under Bar Rule 27 and not able to practice until reinstated in the jurisdiction imposing attorney discipline.

Nevertheless, there is nothing in the current rule that prevents an applicant like this from submitting an application and causing the Bar to incur administrative time and expense.. Other jurisdictions have addressed this problem by adopting a straightforward rule barring applications from these individuals.

Rule 2. Eligibility for Admission.*

Section 1.

…

(e) An applicant who is disbarred or suspended for disciplinary reasons, has resigned with disciplinary charges pending, or is otherwise not in good standing for disciplinary reasons in any jurisdiction may not submit an application for admission.

Alaska Bar Rule 2(c). The Board recently had to determine whether a reciprocity applicant had sufficiently engaged in the "active practice of law" for five of the seven years immediately preceding the date of the application under Bar Rule 2, Section 2.

Since there was no time requirement set out in the rule, the Board decided not to penalize the applicant because of the rule's vagueness. In addition, the Board commented that Section 2(c)(1) should be amended to eliminate the "fee basis" language since pro bono practice qualifies as active practice.

This proposal eliminates the "fee basis" language and specifies a minimum of 1,000 hours per year to qualify as "active practice."

Rule 2. Eligibility for Admission.*

Section 2.

…

(c) For the purpose of this section, the "active practice of law" shall mean no fewer than 1,000 hours per year in one or more of the following activities:

(1) engaged in representing one or more clients ~~on a fee basis~~ in the private practice of law;

…

Alaska Bar Rule 9(e). Bar Rule 9(c) currently requires each member of the Bar to inform the Bar, or otherwise make available to the public, his or her current mailing address and telephone number to which communications may be directed by clients and the Bar.

Since e-mail has become a primary means of communication, this amendment would allow the Bar and a member's clients to learn a public e-mail address that may be used by them to contact the member. In addition, MCLE Administrator Mary Ellen Ashton believes that this amendment would materially assist her in communications with members about their MCLE credits under Bar Rule 65.

Board policy currently restricts the use of member e-mail lists to communications from the Bar and the Alaska Court System. This amendment would not change that policy nor would it permit service on the member by e-mail. Further, the e-mail addresses of judicial officers would only be available to the Bar.

Finally, the amendment would eliminate the language "or otherwise make available to the public" for two reasons. First, the language arguably permits a member not to inform the bar of this roster information because the member claims the information is available publicly. Second, the public is already able to contact the Bar office to learn a member's public roster information.

Rule 9. General Principles and Jurisdiction.

…

(e) **Attorney Roster.** Within 30 days of any change, each member of the Bar has the duty to inform the Bar ~~or otherwise make available to the public~~ of:

(1) his or her current mailing address and telephone number to which communications may be directed by clients and the Bar, and

(2) his or her public e-mail address, unless he or she certifies that e-mail is unavailable, to which communications may be directed by clients and the Bar. The e-mail addresses of judicial officers shall be available only to the Bar.

…

Alaska Bar Rule 37. The Bar has been very fortunate over the years to have experienced practitioners willing to volunteer their time as area fee dispute resolution division members. These lawyers serve as single arbitrators or on a three person panel depending on the size of the fee dispute. When the parties agree, they also serve as mediators.

The Court recently adopted an amendment to Bar Rule 12(a)(1) which permits a member in good standing to be a member of an area discipline division without maintaining an office for the practice of law.

The Fee Arbitration Executive Committee and fee arbitration staff propose a similar rule for fee arbitration panel members.

Rule 37. Area Fee Dispute Resolution Divisions; Arbitration Panels; Single Arbitrators.

(a) **Appointment of Area Division Members.** Members of area fee dispute resolution divisions (hereinafter "area divisions") will be appointed by the president of the Bar (hereinafter "president") subject to ratification by the board. One area division will be established in each area defined in Rule 34(f). Each area division will consist of:

(1) not less than six members in good standing of the Bar, each of whom resides ~~maintains an office for the practice of law~~ within the area of fee dispute resolution for which (s)he is appointed, and

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, 2014.

Board of Governors takes action on 19 items Jan. 23 & 24, 2014

- Voted to publish an amendment to Alaska Bar Rule 31(g)(3) removing the $10,000 limitation on compensation from the Lawyers' Fund for Client Protection to trustee counsel.
- Voted to publish an amendment to Alaska Bar Rule 2, Section 1(e) which would prohibit a lawyer who has been suspended or disbarred in another jurisdiction for disciplinary reasons from submitting an application for admission.
- Voted to publish an amendment to Alaska Bar Rule 2(c) defining the active practice of law for reciprocity purposes.
- Voted to publish an amendment to Alaska Bar Rule 9(e) requiring Bar members to provide his or her public e-mail address to which communications may be directed by clients and the Bar unless he or she certifies that e-mail is unavailable.
- Voted to amend the Standing Policies of the Board to delete the option for an applicant to submit a character investigation report from NCBE.
- Voted to amend the Standing Policies of the Board to make the deadline for testing accommodation requests coincide with the application deadline.
- Appointed David Wilkinson as the New Lawyer Liaison to the Board, effective following the annual convention and May Board meeting.
- Voted to adopt the Lawyers' Fund for Client Protection subcommittees' recommendations in three matters, and deny reimbursement on the claims.
- Voted to reimburse Trustee Counsel from the Lawyers' Fund for Client Protection for work done in a Trustee Counsel matter; voted to reimburse the Bar Association for payments made to legal assistants for work done in the matter.
- Voted to adopt the findings, conclusions and recommendations of the area hearing committee in the disciplinary matter involving Deborah K. Ivy and recommended disbarment to the Supreme Court.
- Voted to amend the Standing Policies of the Board to delete the salary ranges for exempt staff.
- Voted to deny the appeal in the Admissions Matter Involving Applicant No. 4066.
- Voted to approve seven reciprocity applicants for admission.
- Voted to approve a Rule 43 (ALSC) waiver for Pearl Pickett.
- Voted to approve two requests for special accommodations for the February 2014 bar exam.
- Voted to appoint Jim Torgerson to the Alaska Judicial Council.
- Voted to approve the minutes from the October and December Board meetings.
- Established a subcommittee to review and recommend Board awards: Wildridge, Bryner, Sebold and Granger.
- Approved a request to form a new section on Service Members, Veterans & Military Families.

ESTATE PLANNING CORNER

Transfers for educational or medical expenses

By Steven T. O'Hara

If you make a gift, you may be required by law to report the gift to the Internal Revenue Service regardless of whether you owe gift tax. (IRC Sec. 6019 and 7203.) The gift tax is considered necessary as long as there is an estate tax, because otherwise there would be a giant loophole from estate tax. To try to avoid estate tax, you might systematically gift all property away during your lifetime.

Recall that the amount that may pass free of federal estate tax is generally known as the unified credit equivalent amount or, more recently, the applicable exclusion amount. (IRC Sec. 2010.) Here we call it the "exclusion amount."

Under the 2010 Tax Act, the exclusion amount increased *temporarily* to $5,000,000 for both estate and gift taxes and an inflation adjustment was added. (IRC Sec. 2010 and 2505.)

Then the 2012 Tax Act put this large exclusion amount on "Permanent Extension." (Title I, Sec. 101(a), of the Taxpayer Relief Act of 2012.)

For 2014, the effect of the exclusion amount is generally to exempt cumulative transfers of up to $5,340,000 per donor from the imposition of any gift or estate tax, regardless of the donee. (IRC Sec. 2010 and 2505 and Revenue Procedure 2013-35.)

If there is optimism about the "Permanent Extension" of the exclusion amount, it needs to be cautious optimism. What the U.S. government has given, the U.S. government can take away. Accordingly, it is generally advisable from a tax-minimization standpoint to use the exclusion amount now, before death, by making substantial gifts. In the vernacular, the thought is use it or lose it.

Even with the large exclusion amount, you still are required to report your gifts to the IRS by filing annual gift tax returns. (IRC Sec. 6019 and 7203.) Under the gift tax system in conjunction with the estate tax, gifts are generally part of the estate-tax computation at death. (IRC Sec. 2001(b).) There are other exclusions from gift tax, however, that may free you from having to file annual gift tax returns. Yet it is a good idea to file annual gift tax returns because then you can be intentional about making all available special elections and beginning the statute of limitations running on the value of gifts. (*See* IRC Sec. 2632(c) and Treasury Regulation Sec. 25.2504- 2(b) and 301.6501(c)-1(f)(2).)

"As always, estate planning comes down to the particular circumstances of the client as well as responding to and anticipating changes in tax law."

The annual exclusion from taxable gifts is the best known exclusion, but it has traps for the unwary, such as gifts in trust do not qualify unless you use esoteric language.

The annual exclusion from taxable gifts is the best known exclusion, but it has traps for the unwary, such as gifts in trust do not qualify unless you use esoteric language. (See IRC Sec. 2503(b) and O'Hara, *Understanding the Gift Tax Exclusion, Alaska Bar Rag,* September-October 1989.) Increased periodically to keep up with inflation, this important exclusion as of 2013 is $14,000 per donor per donee per calendar year. (Revenue Procedure 2013-35.)

Far less known is the exclusion for certain transfers for educational or medical expenses. (IRC Sec. 2503(e).) The education-medical exclusion provides that you will not be considered to have made a taxable gift if you pay, on behalf of another, tuition to an educational organization or to a person who provides medical care, regardless of the amount of the payment.

This exclusion is in addition to the $14,000 annual exclusion. (Treasury Regulation Sec. 25.2503-6(a).) Direct payment to the educational organization or medical-care provider is required in order for this exclusion to apply. (Treasury Regulation Sec. 25.2503-6(b)(2).)

The educational organization must be qualified in order for this exclusion to apply.

For example, suppose grandfather wishes to pay the college tuition of grandchild, and suppose tuition for one year is $17,000. If grandfather pays the tuition directly to the college, no taxable gift will result, and grandfather will still have his $14,000 annual exclusion to use with respect to that grandchild.

On the other hand, suppose grandfather does not pay the college directly. Instead, he writes a check to grandchild, who then pays the college. In general, under such circumstances, grandfather would be considered to have made a taxable gift of $3,000 (i.e., the amount in excess of the annual exclusion) and would be required to file a federal gift tax return.

Recall that Congress also has enacted a generation-skipping transfer tax system. (IRC Sec. 2601 et seq.) Congress created this tax because the federal government would like an estate tax paid at each generation - when you die, when your children die, when your grandchildren die, etc. So in general, the generation-skipping transfer tax is designed to catch transfers that avoid estate tax at your children's generation. Suffice it to say that, in general, grandfather in our last example also would be considered to have made a generation-skipping transfer. (IRC Sec. 2612(c), 2613(a)(1), 2642(c) and 2651(b)(1).)

By contrast, if grandfather had paid the college directly, the payment would not have been considered a generation-skipping transfer. (IRC Sec. 2611(b)(1).)

Just as the education-medical exclusion does not apply to indirect payments, so the exclusion does not apply to reimbursements. For example, suppose grandchild is injured in an automobile accident. He requires medical treatment, and although he has no medical insurance, he is able to pay the bill of $17,000 for the medical care. Grandfather then reimburses grandchild for the medical expenses paid.

In general, under such circumstances, grandfather would be considered to have made a taxable gift and a generation-skipping transfer. (Treasury Regulation Sec. 25.2503-6(c)(example (4)) and IRC Sec. 2612(c) and 2642(c).)

The education-medical exclusion does not apply to amounts paid for medical care that are reimbursed by medical insurance. (Treasury Regulation Sec. 25.2503-6(b)(3).)

The exclusion also is not available for amounts paid for books, supplies, dormitory fees, board, or other similar expenses. (Treasury Regulation Sec. 25.2503-6(b)(2).)

The educational organization must be qualified in order for this exclusion to apply. For these purposes, a qualifying educational organization is one that maintains a regular faculty and curriculum and has a regularly enrolled student body. (*Id.*)

The medical expenses also must be qualified in order for this exclusion to apply. In general, qualifying medical expenses include expenses incurred for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body, or for transportation essential to medical care. (Treasury Regulation Sec. 25.2503-6(b)(3).)

Amounts paid for medical insurance on behalf of another also are considered medical expenses for purposes of the exclusion. (*Id.*) The transferor must, again, be careful to pay the insurance company directly.

Where do qualified state tuition programs fit within the various transfer-tax exclusions? Qualified state tuition programs are sponsored by various states, including Alaska. These programs allow you to shelter transfers into managed funds, for the benefit of designated beneficiaries, through use of the $14,000 gift-tax annual exclusion. (IRC Sec. 529(c)(2)(A)(i).) Indeed, it is possible to transfer to a qualified state tuition program -- in a single year -- $70,000 per beneficiary, without incurring any gift or generation-skipping tax. (IRC Sec. 529(c)(2)(B).) Here you may elect to treat transfers made in one year to a qualified state tuition program as made ratably over five years. In the event of your death within five years of your making this election, part of the transfers made to the program will be included in your estate for tax purposes (IRC Sec. 529(c)(4)(C)) and generation-skipping tax could be triggered.

Thus the foundation of qualified state tuition programs is the $14,000 gift-tax annual exclusion. Unfortunately, transfers into qualified state tuition programs do not qualify for the education-medical exclusion under the gift and generation-skipping tax. (IRC Sec. 529(c)(2)(A)(ii).)

As always, estate planning comes down to the particular circumstances of the client as well as responding to and anticipating changes in tax law.

Nothing in this article is legal or tax advice. Non-lawyers must seek the counsel of a licensed attorney in all legal matters, including tax matters. Lawyers must research the law touched upon in this article.

The erosion of protections in rules against propensity evidence

(Part Two)

By Daniel B. Lord

In the first part of this article,* I touched on two of the three protections for the rule against the admission of a defendant's prior bad acts or uncharged misconduct. The first of these protections is Alaska. R. Evid. 404(b)(1), which provides for the prohibition of propensity evidence; the second is Alaska R. Evid. 403, which provides that, even if found relevant for a purpose other than propensity, such evidence may be excluded by a judge if its probative value is substantially outweighed by unfair prejudice. Discussed now will be the third protection -- that of limiting instructions from the judge.

A limiting instruction is an instruction to a jury to consider certain evidence only for a limited or specific purpose. See Alaska Criminal Pattern Jury Instruction 1.25 (rev. 2012) (Limiting Instructions -- Generally). Under Alaska R. Evid. 404(b), a defendant's uncharged misconduct may be shown as evidence of motive or intent or some other purpose, but it cannot be used to show the defendant's bad character or propensity to commit the prior bad acts. With this type of evidence, the judge if requested must give an instruction to the jury to the jury that they can only consider the information for a limited purpose. See Alaska R. Evid. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. . . .").

As with other evidentiary rulings, the standard of review for limiting instructions is abuse of discretion. *Shane v. Rhines*, 672 P.2d 895, 901 (Alaska 1982); *Tripp, Inc. v. Kenneth A. Murray Ins., Inc.,* 600 P.2d 1361, 1368-69 (Alaska 1979); *but see Harris v. Keys,* 948 P.2d 460, 465-66 (Alaska 1997) (questions whether allegations of prejudice in instructions should be subject to de novo review).

Limiting instructions are apparently the weakest of the three protections. For it is the consensus view, seemingly supported by empirical research, that limiting instructions are generally ineffective. See, e.g., Tarika Daftary-Kapur, Rafaele Dumas & Steven D. Penrod, *Jury Decision-Making Bias and Methods to Counter Them,* 15 Legal & Criminological Psychol. Rev. 133, 136 (2010) (concluding that research is "mixed when it comes to the effectiveness of limiting instructions"); J.. Alexander Tanford, *The Law and Psychology of Jury Instructions,* 69 Neb. L.Rev. 71, 97 (1990) (noting that empirical research "clearly demonstrates that they are not effective in preventing the jury from improperly using information."); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt,* 9 Law & Hum. Behav. 37, 41-44 (1987) (prior convictions increased mock jurors' verdicts of defendant's guilt). By "effective" is meant that a limiting instruction works; that is, that a judge's instruction to a jury to consider evidence of prior bad acts for the limited purpose -- and not for character evidence -- is followed by the jury.

However, a recent comprehensive and critical review of the empirical research places that view into question. *See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other,* 65 Stan. L.Rev. 407, 407 (2013) (reviewing empirical research on disregarding inadmissible evidence and limiting instructions, questioning presumption that such instructions do not work and professional "myth" that if they work they must do so flawlessly). Professor Sklansky characterizes the prevalent view of the ineffectiveness of limiting instructions as cynical, that what studies suggest is what should be expected: "that evidentiary instructions work, but imperfectly, and that they work better under some circumstances than others." *Op cit.,* at 439.

But it should be stressed that there is a difference between effectiveness, which is getting the right thing done, and efficiency, which is getting the thing done in the right way. *Cf.* Daniel D. Blinka, *Delusion or Despair: The Concept of Limited Admissibility in the Law of Evidence,* 13 Am. J. Trial Advocacy 781, 804 (1989) (judge's obligation to present limiting instruction upon party's request raises two questions: "First, can the jury follow such an instruction? Second, will they follow it?"); Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps,* 106 Nw. U. L. Rev. 1537, 1598 (finding "structural errors" in how jury receives an instruction, such as having them presented piecemeal). Even if it were the case that limiting instructions are more or less effective in preventing juries from the improper or unfair use of prior bad acts, an instruction may so confuse a jury as to impede its arriving at a decision that accords with the instruction's intent. *Cf.* Edith Greene & Kirk Heilbrun, Wrightsman's Psychology and the Legal System 1, 373 (7th ed. 2012) (when jurors do not understand a judge's instructions, they are more likely to engage in "familiar factors to guide their verdicts"). Indeed, the presenting of limiting instructions may be so inefficient as to be ineffective.

Take the case of *U.S. v. Powers,* 59 F.3d 1460 (4th Cir. 1998), before the Fourth Circuit Court of Appeals. In his dissenting opinion, Senior Circuit Judge Donald Lay criticized the majority's evaluation of the jury instructions under the Rule 403 rubric, as follows:

> The majority concludes that the testimony is more probative than prejudicial because the district court issued a series of limiting instructions and because the damage of prejudice is slight in view of the evidence of overwhelming guilt. I cannot agree. . . . [T]he first limiting instruction clearly compounded the prejudicial effect of the evidence by twice telling the jury the evidence could be considered to show [the defendant's] lack of respect, hardly an element of proof for statutory rape. Even assuming this instruction was not plain error, it does not follow that the limiting instructions obviated the prejudice that resulted from admission of other evidence.

Id. at 1478 (Lay, J., dissenting) (footnote omitted) (emphasis added). As this statement of the senior federal judge implies, a limiting instruction is not meant to erase prejudice; rather, it is to lessen the unfair prejudicial impact from such evidence by directing the jury to limit its use of that evidence; this it cannot do when there is repeated mention of the uncharged misconduct. *Cf.* Tanford, *op cit.*, at 97 ("courts continue to assert that the instructions dispel prejudice even though admonitions to disregard are only likely to make matters worse").

A true inquiry into whether a limiting instruction is given with efficiently by a judge is shielded by Alaska R. Evid. 606(b), a shielding which "assures that no post-trial 'final examination' tests the jury's comprehension of the judge's instruction, substantive or procedural." Blinka, *op cit.*, at 805; *but see* Diamond et al., *op cit.*, at 1546 (reporting "unique" dataset from Arizona Jury Project of observations of actual jury deliberations, showing how juries handle limiting instructions in civil trials).

Similarly, a limiting instruction may be ineffective by incoherencies in applying the character rule itself. *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials,* 47 Ga. L. Rev. 775, 789 (2013) (contending that "the typical limiting instruction offers nothing more than a confusing distinction between the proper and improper use of the evidence"). Consider the case of *Sowinski v. Walker,* 198 P.3d 1134 (Alaska 2008). In *Sowinski*, two minors, after drinking alcohol, drove their ATV on an access road, hit a cable, and died; the families of the decadent minors sued the liquor business for selling the alcohol. On appeal, the business argued that the trial court erred in admitting the testimony of minors, who claimed that the business prior to the accident sold alcohol to other minors, in addition to selling alcohol to the decedents before the accident. The Alaska Supreme Court rejected the argument, ruling that testimony was permissible "prior act" evidence to "demonstrate potentially reckless behavior" of the business on the punitive damages claim. *Id.* at 1159. It also found that Alaska R. Evid. 105 provided that the liquor business could have requested a limiting instruction to "restrict the evidence to its proper scope and instruct the jury accordingly," but that the business did not request the limiting instruction, "and thus cannot complain that none was given." *Id.* at 1160.

As suggested by Professor Colin Miller, the instruction would have to include language to the effect that the testimony of the other minors "was not to prove 'Once an underage alcohol seller,' but was admissible to prove that the business had a pattern of selling alcohol to minors." *See CM, Unlimited: Alaska Case Reveals the Futility of Limiting Instructions for Common Plan Evidence,* EvidenceProfBlog, January 13, 2009, http://lawprofessors.typepad.com/evidenceprof/2009/01/limiting-instru.html. Further, the Alaska Court of Appeals' decision in *Pavlik v. State*, 869 P.2d 496 (Alaska App. 1994), appears pertinent. Under *Pavlik*, "common plan or scheme" standing alone will amount to propensity evidence prohibited under Alaska R. Evid. 404(b)(1), unless the plan or scheme tends to "elucidate identity or intent, or to establish some other disputed point apart from the defendant's general tendency to commit similar crimes." *Id.* at 498.

Following *Pavlik* and the suggestion, as well as Alaska Criminal Pattern Jury Instruction 1.29 (rev. 1999) (Prior Bad Acts -- Evidence Rule 404(b)), the limiting instruction might state the following:

> Evidence has been introduced for the purpose of showing defendant committed bad acts other than those for which the defendant is on trial.
>
> Such evidence may not be considered by you to prove that the defendant is of bad character or has a tendency to commit crimes.
>
> Such evidence may be considered by you only for the limited purpose of deciding if it tends to show a pattern (or common plan or scheme) indicating that the defendant acted intentionally (and not out of accident or other innocent reason).
>
> For the limited purpose for which you may consider such evidence, you should weigh it in the same manner as you do all other evidence in the case, and give it the weight, if any, to which you find it entitled on the question of intent.

So how, one might ask, does this help the jury avoid the propensity inference from character, that the defendant business with a history of selling alcohol to minors has a propensity to do so, and that is therefore what it intended to do with the alcohol in this case? *Cf.* Milich, *op cit.,* at 786-87.

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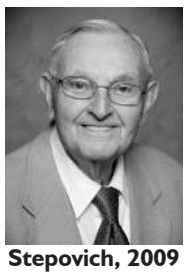
**Part One: Alaska Bar Rag, Vol. 36, No. 4, Oct. - Dec., 2012*

In Memoriam

Fairbanks pioneer leaves legacy of Statehood

Michael Anthony Stepovich

1919-2014


Stepovich, 2009

Former Alaska Gov. Mike Stepovich passed away on Feb. 14. He was 94.

He was the last Territory of Alaska governor, appointed by President Dwight D. Eisenhower, and led the final campaign to establish Alaska as the 49th state in 1959. He was also Alaska's youngest governor, and lived to see the 50th Anniversary of Statehood. He died from head injuries sustained from an accidental fall while traveling in California.

Stepovich was born on March 12,1919 at St. Joseph's Hospital in Fairbanks, the son of immigrant gold miner Marko and Olga Stepovich. He grew up in Oregon after his family moved and was educated in Portland at the Holy Cross preparatory school and university, finally completing his undergraduate degree at Gonzaga University in Spokane, WA in 1941.

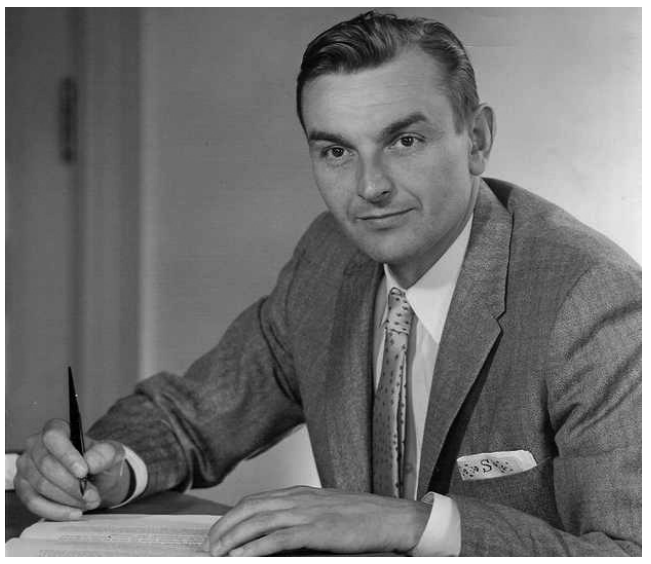
Stepovich received his law degree in 1943 from the Holy Cross Fathers at Notre Dame University. After passing the Bar in Indiana, Stepovich enlisted in the Navy and served as a lawyer at the Great Lakes Naval Station in Illinois and Fleet City in California. Discharged in 1947, he returned briefly to Oregon to propose to Matilda Baricevic, and returned to Fairbanks, where he passed the Alaska Bar and established his law office.

He served in the Territorial Legislature from 1950 until 1957, when he was appointed Governor. He seized the task of advocating for Statehood in the Lower 48, including an appearance on "The Tonight Show" with Jack Paar, an appearance on the "What's My Line" game show (which has found its way to YouTube), and capturing the cover of *Time* magazine in 1958. The new governor's efforts not only helped persuade Congress to pass a Statehood bill for Alaska. He also helped win over President Eisenhower, who saw Alaska as a potential military buffer between the U.S. and Russia. After yielding the Territorial governorship to run (unsuccessfully) for one of Alaska's two new seats in the U.S. Senate, Stepovich returned to his law practice in Fairbanks in 1958.

A gifted trial attorney, Stepovich made sure that his varied clients received the full protection of the law. He was proud that no one he defended ever received the death penalty. Longtime friend and colleague Charlie Cole told the *Fairbanks Daily News-Miner* in February that Stepovich "was a formidable trial lawyer; I sometimes think he could convince a jury that black was white."

He often received payment "in kind" including Native handwork from the villages, the family's first TV set and his first snow skis. Stepovich's instinctive knowledge of human nature aided him in selecting juries, as well as working with fellow Alaskans in the political arena. His natural response to problems and challenges was always to figure a way "to make things work out." He exemplified this very Alaskan virtue in every aspect of his life, his family said.

The Governor and his wife were actively involved with the Catholic Schools of Fairbanks and in 1970 were the founding chairmen of the annual HIPOW auction event (Happiness Is Paying Our Own Way), which has become a primary source of support for the schools. Stepovich also volunteered as legal counsel to the Diocese of Fairbanks and St. Joseph's Hospital in the early years.



Stepovich was always athletic and he passed this trait on to his family. Avid participation segued into coaching collegiate potential with the Goldpanners and closely following sons and daughters and grandsons and grand daughters as they played sport at every academic level. He excelled in baseball, handball, and golf and played these sports throughout his life.

After 30-odd winters in the Interior, Mike and Matilda Stepovich established a second home in Medford, OR in 1978, but maintained their residence in Fairbanks, and returned to Alaska frequently in the summer to visit friends and family.

In his later years Stepovich traveled the country to be with his sons and daughters and their families. It was during one of these visits in San Diego that he suffered a severe head injury when he fell; the accident claimed his life several days later.

The University of Alaska Fairbanks awarded him an honorary doctorate degree in 2009. Interviewed in the *Anchorage Daily News* then, Stepovich commented, "Fundamentally I think Alaska politics are still probably the same. It's just larger, and more complex. When I was governor, it was like Orville Wright and his plane, and now it's a 747 jet with 600 people on board. Larger, and more complex."

Stepovich was married for 55 years to Matilda, who preceded him in death in 2003. They were parents to 13 children: Antonia, Maria, Michael, Peter, Christopher, Dominic, Theodore, Nicholas, James, Laura, Nada, Andrea, and Melissa, all of whom were with their father at his death. The Governor is also survived by 37 grandchildren and 10 great grandchildren. Stepovich also has two half brothers and two half sisters. "The pillars of Gov. Stepovich's long life were Alaska, his family, and his faith. The many achievements and accomplishments of his active life revolved around these cardinal elements," said his family.

A Mass of Christian Burial was to be held on Feb. 28 at 11:00 a.m. at Sacred Heart Cathedral, in Fairbanks. The Rosary and viewing was to be held the previous evening at Immaculate Conception Church. Donations can be made to the Monroe Foundation, 615 Monroe Street, Fairbanks AK, 99701.

Peter Allen Lekisch

Peter Allen Lekisch, of Anchorage, died on Dec. 27 due to complications from surgery.


Lekisch

Born born in Midland, Texas on Jan. 7, 1941, he enjoyed all sports activities including track and every team sport at school and at a summer camp in Colorado run by the Midland High School coach Tugboat Jones.

During the summer of 1959, Peter went with The Experiment In International Living to Sens on the Yonne, France, where he lived with a French family, who were still manufacturing corset stays from the keratinous material of baleen whales. Since no one in the family spoke English, Peter greatly improved his ability to speak French. Just before the 30 American students left for home, their French brothers and sisters held an election. They voted Peter the most all-American of his fellow students.

Peter enjoyed playing football at Midland High School during his freshman and sophomore years, for two years at Pomfret School, Pomfret, Connecticut, and three years at Ohio Wesleyan University, Delaware, Ohio.

After college graduation in 1963, he traveled to India where his parents were living and assisting in a tuberculosis prevention project. Upon return he attended Cornell University, followed by law school at the University of Texas, Austin, where he specialized in petroleum and business law, and graduated in 1967, and began his professional career in Anchorage that year.

The great attractions for him were the Alaskan countryside and athletic endeavors of many sorts. Peter ran the Boston Marathon, helped to organize the building of the Anchorage Tennis Club indoor courts, and won many sports championships in tennis, cross-country ski racing, machine rowing, and bicycling. The Lekisch family enjoyed many sports activities together, including swimming and bicycling. Peter and his wife, Ellen traversed the southwestern states on a tandem bicycle in a sequence of trips.

Some years later Peter was the first person 60 years and older to complete the Race Across America, riding a bicycle from Portland, Oregon to Pensacola, Florida in 12 days. Together with his friend and fellow athlete George C. Stransky, M.D., Peter organized The Fireweed, an annual Alaskan bicycle race/tour.

For the last 20 years Peter also enjoyed fly-fishing and nature photography. By attending photo workshops and pure diligence, Peter developed a keen and artistic eye, much to the great satisfaction of his artist mother, and achieved a level of excellence for which he was awarded recognition and acclaim. In 2013, together with fellow Alaskan photographer and friend George King, Peter traveled to the Galapagos Islands and Machu Picchu, capturing innumerable, stunning photographic images.

Through the experiences of fly-fishing and nature photography, Peter came to value and appreciate the irreplaceable natural beauty of undisturbed and protected landscapes, streams, rivers, flora, and fauna.

He is survived by his wife, Ellen Lekisch; his daughter, Jennifer Lynn Lekisch, Seattle, WA; his sister, Barbara E. Lekisch, San Rafael, CA; his niece, Hallie Webster, San Luis Obispo, CA; and hundreds of friends who value having known him, and who will treasure always their memories of this most kind and remarkable person. A memorial service was planned for January 2014 in Anchorage. In place of flowers, donations may be made to the Nordic Skiing Association of Anchorage for the Peter Lekisch Project; Nordic Skiing Association of Anchorage, 203 W 15th Ave #204, Anchorage, AK 99501.

Patrick B. Cole


Cole

Patrick Brendan Cole died Nov. 21, 2013, due to complications following a heart transplant operation in Seattle.

Pat was born May 26, 1950, and adopted by Bill and Anne Cole, of Quakertown, Pa. Upon the death of his mother in 1962, he assumed a great deal of responsibility for his younger siblings. Along with his beloved aunt Peggy, a Carmelite nun who became a surrogate mother, he was instrumental in helping to hold the family together.

Pat was a model student at the Catholic school that he attended, and he frequently had the "honor" of getting out of class to sweep out and stoke up the coal-fired furnace at the school. He also worked weekends at the local farmers' market. Later, he was employed briefly at a tile factory and for a couple seasons with the local road crew.

Pat began his college education in 1968 at Temple University in Philadelphia and transferred to the University of Alaska in 1970. It was then that he first met his future wife, Judy Norrgard, in the Speech, Drama & Radio Department. As a student, he worked at the now historic Fairbanks Public Library as a librarian and drove the bookmobile. Pat graduated from the University of Alaska in 1972 with a bachelor's

Continued on page 15

In Memoriam

Continued from page 14

degree in speech communications. He went on to complete a law degree at the University of Idaho in 1978.

Pat returned to Fairbanks to begin his law career in private practice where he established many life-long friendships statewide. Later, he worked as an attorney and chief of staff for both the City of Fairbanks and the Fairbanks North Star Borough.

In 2004, on their first date together more than 30 years after first meeting, Pat and Judy returned to the UAF Theatre for a performance of "Singing in the Rain." In 2008, Pat and Judy were married. Pat and Judy cherished their years together, especially their winter vacations in Cabo San Lucas, where Pat would stay in daily contact with the city to keep current and provide valuable input. Pat also immensely enjoyed trailer camping throughout Alaska and compiling music for his volunteer shows at KUAC.

In 2012, he was surprised and honored to have received the Statewide Vic Fischer Leadership Award for his contributions to local government.

In spring 2013, Pat was taken ill with congenital heart disease, and in late June, he was medevaced to Seattle. As he battled heart problems in the final months of his life, Judy was always at his side. While waiting in Seattle for a transplant, he continued to do the work he loved with the city via the Internet. Even on the morning of his transplant operation, he quickly finished an important contract.

Pat was honored to read the lovely wishes for his recovery sent by so many people during his stay in Seattle. He truly had no idea how widely he was loved and respected.

Patrick is survived by his wife, Judy Cole; stepson, Alex Krize; his daughter, Madeline Webb Cole; his son, Liam Webb Cole; brothers, Kevin (Barbara), Dermot (Debbie), Terrence (Gay), and Owen; sisters, Maureen Whitehead (Raymond) and Sheila Filteau (Mark); three grandsons; and 13 nieces and nephews.

A celebration of life was held Jan. 16 2 at the Fairbanks City Hall. In lieu of flowers donations may be made to either the Cole Family Scholarship at UAF, or FNSB Noel Wien Library.

Richard Kibby

Former Anchorage Municipal Attorney Richard "Dick" Kibby passed away on Thanksgiving Day in Laguna Woods, CA. Dick spent most of his professional life in Anchorage and had many friends and acquaintances.

Born in 1942, Dick grew up in California, where his father was a high school teacher and principal. As a result of being a principal, the family moved every few years to a new community. Dick spoke of his youth in Needles, renowned for its furnace-like summer temperatures, before the use of home air conditioning. The kids in his neighborhood played outdoors at night. He recalled that in Needles at that time no two families had the same ethnic or cultural backgrounds. This was perhaps the basis for Dick's lifelong tolerance for diversity and his willingness to represent the most downtrodden.

Dick was 26 years old in 1968 when he graduated from the University of California's Hastings College of Law in San Francisco. Faced with the prospect of being drafted and sent as a grunt to Vietnam, he enlisted in the United States Marine Corps as a Captain. The Marines desperately needed lawyers at that time, because its practice of holding courts-martial without providing legal representation had just been struck down. Dick's former high school buddy persuaded Dick he would receive superior training as a Marine.

His service as a Marine Judge Advocate opened the door to his joining the U.S. Department of Justice. Like many attorneys, Dick's biggest case came early in his career. He prosecuted a defense industry fraud case against a prominent and powerful Mississippi-based military contractor. After months and months of meticulous investigation, Dick drafted a damning criminal complaint. Dick delighted in telling the story of the charging meeting with his boss at Main Justice. He was told to follow the money and to not hold back. The meeting left Dick with an enduring reverence for the integrity of his country and a deepened respect for the role of law and lawyers.

Dick came to Alaska to work in the U.S. Attorney's Office where he made many close friends. With the local economy booming in the early 1980's Dan Dennis, Milt Moss, and Dick left the U.S. Attorney's office to start a law practice. The partners built a hideaway cabin at remote Donkey Lake. One spring the cabin collapsed under the weight of the snow, and the law practice suffered a similar fate from the weight of a downturn in Alaska's economy. Later, Dick viewed leaving the U.S. Attorney's Office as the worst financial decision of his life.

Later, Dick became Anchorage Municipal Attorney in the administration of Mayor Tom Fink. Dick was a good fit for the job because he was both practical and non-ideological. He often gave advice the city fathers preferred not to hear. Also, calling on his Justice Department experience, Dick implicitly supported his assistant municipal attorneys, who repaid him with their loyalty. Sally Kibby, Dick's wife of 47 years, was the better politician. She successfully backed several succeeding Anchorage mayors, but Dick's personality would never allow him to capitalize on what he regarded as friendships.

Dick finished out his legal career as a solo practitioner taking on a number of cases that were effectively "pro bono." He could never say "no" to a deserving, non-pecuniary client. The audio devices now used in Alaska courts to assist the hearing-impaired are there in part because of a Dick Kibby lawsuit. Dick settled the case with the court system and got no fee. His view, now regarded as old-fashioned, was that a lawyer's duty was to help people, with or without compensation.

Dick loved Alaska, especially fishing, and spent many days on the Kenai at Dan Dennis's cabin. He liked old guns, even if they resisted shooting straight, and was constantly with Mack, his English Springer Spaniel. Dick is survived by his wife Sally, his son Bryson, his daughter Marna Bright, and grandson Ryder Bright.

--From friends and associates of Dick Kibby

Memoriam donation

The Anchorage Bar Association's President, Lynn Allingham (at right), presented Bean's Café Executive Director Lisa Sauder with a check for $1,000 in memory of the attorneys who passed away during 2013. Those attorneys were: Robert F. Meachum, Martin A. Farrell, Eugene R. Belland, Bernard Kelly, Jerry Logan Coe, Esther Wunnicke, Kathryn King, Allen R. Cheek, John A.Reeder, Jr., Peter G. Ashman, Eugene P. Murphy, Richard L. Waller, Shirley F. Kohs, William T. Council, Robert N. Opland, Arthur L. Robson, James D. Rhodes, William Ruddy, James A. von der Heydt, Robert "Bob" Baker, Patrick Cole, Peter Lekisch, William Cantrell, and Richard Kibby.

Robert Baker

Baker

Former Alaskan Robert "Bob" Baker of Sisters, OR passed away at his Rimrock Ranch home on December 7.

Born Robert Burton Baker in Duncanville, TX, on Oct. 12, 1938, Bob attended Duncanville High and graduated from East Texas State University. Following graduation, he was commissioned in the U.S. Marine Corps before attending Tulane University School of Law. Upon receiving his J.D. in 1964, Bob served as Series Commander, Recruit Depot San Diego before deploying to Iwakuni, Japan, as a judge advocate.

While in Asia, he made major before resigning and moving his family to Juneau, Alaska in 1969.

Over the next 30 years, Bob built a successful aviation defense practice in Alaska. He was a senior partner with Robertson-Monagle, the state's oldest firm, opening their Anchorage office in 1974. A noted litigator, he argued before the state Supreme Court and was inducted into the American College of Trial Attorneys.

In 1988, Bob purchased the Rimrock property with the dream of eventually settling there. He moved to Sisters in 2001, joining his wife, Gayle, who had purchased a small herd of Red Angus cattle. Over the next 10 years, the Bakers developed a productive cow-calf operation investing in breeding bulls and becoming Red Angus cooperators. A highlight each year was consigning a heifer to the "Bet on Red" Sale in Reno and socializing with other breeders. Having a wide range of interests, Bob enjoyed keeping bees, growing an orchard and raising heritage birds. He was passionate about land conservation and watershed restoration, dedicating time and resources to both.

He served on the board of the Upper Deschutes Watershed Council, worked to restore fish habitat and a steelhead run in Whychus Creek and secured a conservation easement on his property from the Deschutes Land Trust. Bob prized sharing his canyon with those he loved. He was happiest hosting the family campouts along Whychus Creek, trading stories around the fire and amazing all with his culinary skills.

Bob is survived by his wife, Gayle, of Sisters; sister Marilynn Taylor; children Bridget Baker Cerny, Miles Baker and Brett Baker, and their mother Mary Pignalberi; and grandchildren Becket, Britt and Rhett Cerny.

Dolley's Feast, Babette's Famine

The Geographic Center in a "Well Constructed Union"

By Peter J. Aschenbrenner

A woman of some parts approaches.

"I would consider it," Mrs. Jarley remarks my cranium with professional attention, "a privilege to measure you. May I introduce my phrenological companion?"

Governor P and I pause outside her 'celebrated waxworks.'

"Quilp is known to be mean," Mrs. Jarley pleads our custom.

The Quilp displays the apparatus of his trade.

"Before you measure my head," I bluster, "do you have any qualifications?"

"The celebrated General of the Army, Dwight D. Eisenhower, is on display. The assembly precedes you," he indicates the swelling progress.

"It's pretty dark in here," I gasp. "Couldn't we turn on the lights?"

"Allow me," Quilp offers, "to press this button."

A gramophone springs to life.

"Today January the Third, in the one hundred and eighty-second year of our Independence, I, Dwight D. Eisenhower, President of the United States of America, hereby sign the proclamation making Alaska the Forty-Ninth state of the Union."

Quilp presses the 'pause' button.

"You missed the funny part," Mrs. Jarley turns a spotlight to the 'Big World Map of the U.S.A.' "As is plain to see, the geographic center of the United States," Quilp pins Nebraska, "was sited at Lebanon."

"Before Alaska was admitted to the union," DDE intones, "I called upon John Foster Dulles to compute the geographic center of the United States, the omphalos, the navel, so to speak, of our new forty-nine state union. A recitation may be in order."

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"That's my cue," a new voice is heard.

"Euclid!" we chorus.

"Of course, I can't 'do' non-Euclidean geometry," the toga'd gent tugs at his twisted garb ('last time I hire a tailor named Möbius,' he growls), "but if you would add the longitudes, at the extreme westerly and easterly meridians, that is, those appearing at Eastport, Maine and along the International Date Line, west of Attu Island, divide by two, and then, perform the same procedure with the – what do you call them?"

"Baselines," I volunteer.

"It's a question of latitude," Governor P backs me up.

"Take Quoddy Head, Maine to the meridian west of Attu, Alaska, otherwise known as 'The Line.' Lemme see, that's 114 degrees plus 10 which comes to 124 degrees divided by 2 which equals 62 plus the 66 we started with equals 128 degrees west of Greenwich. Then Barrow, Alaska to Key West, Florida, that's 71 degrees all the way down to 24 degrees. So that's is 47 degrees of difference divided by 2, equals 23 degrees, plus the 24 we started with equals 47 degrees north latitude. Voilà. Or, as they say in Spenard, Ta-Da!"

Mrs. Jarley restarts the gramophone.

"By virtue of the authority vested in me by the Congress of the United States I, Dwight David Eisenhower, hereby declare that the geographic center of the United States is no longer at Lebanon, Nebraska, and is now located at, hmm, spin the globe, Mamie, 128 degrees west longitude and 47 degrees north latitude."

"Isn't the centre of the USA now in Canadian waters?" I ask. "Or close to it?"

"Congress moved the center of the United States into a nation," Governor Palin considers the facts in evidence, "that celebrates their victory in the War of 1812." She transfigures the assembly. "And you doubted me, one and all, when I said the Main Stream Media was to blame."

"We could tidy up the facts," Quilp suggests. "That's what Dickens did. It's the prerogative of novelists. Or so I've heard."

"Perhaps the world is square," Mrs. Jarley considers the possibilities. "We need more real estate," Dolley Madison declares.

"If only our invasion of Cuba – err, in 1906 and not 1961 – had been a success," I wail.

"Or the Aroostock war of '38-'39 had brought America the golden heart of New Brunswick," Governor Egan declares. "Of course, Daniel Webster carries most of the blame for the Treaty, since he was Secretary of State in the administration of – "

"John Tyler!" I curse. "That traitor to Whiggery!"

"You're all wrong," Euclid snaps. "You need to move Barrow north by a lot. Or Key West south, at least to some degree."

"That's the problem with the United States," Dolley clenches her fists. "My husband wrote Federalist No. 10 to convince everyone that size wasn't a problem. Now it turns out that Scotland should have been admitted to the union. The U.S. of A. is not big enough to hold its own center!"

She rings up the curtain on a repast of spectacular proportions.

"Who's the Scandinavian bombshell?" I ask.

"Karin, from Denmark. She's always wanted to enjoy Dolley's Feast," Governor P answers me.

"But the original was supposed to be held in Norway," Governor Eagan polishes his silverware with his trademark uniform.

"Alaska affords plenty of desolate landscapes for film-making," Governor Keith Miller, our most famous former Lt. Governor, declares.

"The rural skyscape is endless," Karin agrees, accepting the aperitif the Baron de Stoeckl offers her.

"I was referring to the location of my trailer court, which launched me from the mudflats of Turnagain Arm to high office," Governor M sniffs. "I had a life before politics."

"Not me!" the Baron speaks up. "I was born to deal. Now take Jimmy here. What inspired you to write Federalist No. 10? You argued that size mattered, viz, that bigger was better."

"Let's leave it to Euclid," Jimmy tucks into our first entree, *faux cailles de sacrophage avec* plenty of *truffles*.

"Who's doing the cooking?" I ask.

"C'est moi!" Dolley emerges from the kitchen. "I don't want the roast to go up in flames and put the whole house to the torch," she adds, with a 'lighten up' look at her husband.

"Is everyone getting on?" Karin asks. "Better than you were before? That's the whole point."

"Ah, the Café Anglais. It is my favorite meal," a distinguished guest in pontifical whites proclaims.

"I thought *Babette's Feast* was your favorite movie," Governor E compares the glow from his apothecarial whites.

""More vintage champagne," Francis calls out, "to erase our differences."

"When you constitutionalize the ever-tempting Rule of 4-6-3, by which 6 states might be induced to join a single renegade and block legislation in the House of Representatives, then dispersed communities may discover the value of communal action. Because of and despite their diversities."

"When you constitutionalize the ever-tempting Rule of 4-6-3, by which 6 states might be induced to join a single renegade and block legislation in the House of Representatives, then dispersed communities may discover the value of communal action. Because of and despite their diversities."

"Naturalmente," our pontifex maximus joins in.

"That's what inspired me!" the world-famous Danish novelist points out. "Of course, most people study my Bill of Fare – faux quail, mock turtle, Peccorino-Romano, and in double portions – and consider this a spiritual feast. Uno ricordo of meals, first and last, having gone before."

"That's what I thought!" the Prelate from Buenos Aires interjects.

"In fact, it's a metaphor for Euclid's long-lost *Geometric Logic of the Federal Republic*."

"Actually," he speaks up, "I found it."

"In that case, we've lost all interest," Baron de Stoeckl sniffs.

"But the flaw!" our Hellenic genius objects. "Congressional districts, to maximize or even fulfill the logic of dispersed communities must cross state lines. 'To break the violence of faction'," Euclid addresses James Madison. "It was a very felicitous phrase."

"The flaw merely adds spice to the meal," Karin adds. "Where do you get fresh fruit in Alaska this time of year?" she asks the early republic's most famous surviving First Lady, who has settled into Jimmy's lap.

"The greenhouses at Chenoa's End-of-the-Road Paradise," Dolley answers. "Fairbanks is Alaska's number one source of hot air."

'Lullaby of Birdland' saves bar exam

By Paul Peterson

It wasn't the towering stack of books, sleepless nights, or endless arcane, arbitrary, and useless logic problems that made me dread the bar exam. It was the prospect of spending more time than ever in the same library/torture chamber that had dominated my existence for the previous three years. I should have spent the last few months of law school preparing for an all-means-necessary approach to studying, but instead I obsessed about location. Stress is a strange mistress.

The 10 foot by 12 foot room my wife and I shared? No; divorce. The basement of our building? No; asbestos. The coffee shop across the street? No; after a week of listening to its snooty patrons mouth breathe and swipe their devices, I was sure to go postal. And if I was going to go postal, I might as well do it at the library.

By semester's end I was getting desperate. Did the summer camp I worked at 5 years ago fill all its cabins this summer? Just how big was the wheel-chair accessible closet at Grandma's assisted living home? Would they let me put a coffee maker in it? Chewing coffee beans would save time anyway.

Then, on hold while the E-Z Storage clerk talked to her supervisor, I got the email. "So glad to hear you and Maria got married. We'd love to have you two back at camp and we've got the perfect job for Maria-head of the wilderness department!" I hung up the phone immediately and gave one of the awkward yelps of muted excitement I had acquired in law school.

It is actually two camps on either side of a mountain in the southwest corner of North Carolina. One camp is all boys and the other is all girls. I would have to be extra careful not to go postal with so many children around, but they gave me a study hut far off in the woods just in case.

The hut was at girls camp though, and as one of six boys who grew up in a two bedroom house in an Alaskan rainforest, I have a tough time wrapping my head around the opposite sex and didn't want to accidentally scar some kid. I guess it's the whole emotions thing that I have trouble with. One time my wife asked me "just what do you think is so romantic about a candlelit dinner of beans?" "Easy," I replied, "the candlelight." I've been made to understand that was the wrong answer, though it still seems perfectly valid to me. I even used a red candle to accentuate the kidney beans' color. Apparently eating beans for dinner causes my wife emotions. Needless to say, law school made my emotion radar even worse.

Nonetheless, Maria was as thrilled by the prospect of being Adventure Master for a summer as I was of never entering that unholy den of squalor ever again. We drove to North Carolina the day after graduation.

I quickly settled into my all-day study schedule. There wouldn't be time to enjoy the outdoors, so to compensate I set up my study station under the awning of a large porch overlooking a ravine. At the bottom of the ravine was a real, honest-to-goodness, babbling brook. It would almost have been enchanting, except the bar exam deadens the enchantable part of one's soul.

Studying for the bar has always been awful, but previous generations didn't have the "progress bar." Invented a couple of years ago by the mad scientists at Barbri, it is an unassuming, but precisely unavoidable meter at the top of the screen comparing the work you have done with the much work you are supposed to have done. The problem is that you are expected to do 25 hours' worth of work every 24 hours. Did I go to the only law school in the country without a class in "Becoming a Human Robot"? Certainly the empty semantics I was learning could not be more inhuman.

Many years ago someone told me about a robotic friend they had in High School who managed to excel at every extracurricular activity while still getting the best grades in every class. What was his secret? Simple; he listened to one song over and over again while studying, then simply hummed the tune to himself as he flawlessly uploaded information onto the test. The second I remembered this story, I downloaded the song that happened to be playing on Pandora and put it on repeat. Sarah Vaughn's version of "Lullaby of Birdland." Me, Sarah, and that "weepy ol' willow" spent the rest of the summer together. Even now, they come for impromptu reunions every few nights, reunions cut short by my jolting out of bed in a cold sweat.

Three times per day I turned Sarah off and made my way to the dining hall involuntarily Cosby dancing to the scat-singing that reverberated in my head. I would overhear little girls chattering about horse riding, archery, guitar lessons, or whatever going about their blissfully ignorant lives untainted by cantankerous Supreme Court justices or the rule against perpetuities. "It doesn't matter how much you love horsies!" I wanted to warn them, "they cannot be the measuring life for the vestment of a conveyance of an interest in property." But my entreaties would have fallen on deaf ears.

A few weeks in, I noticed that if I slouched in just the right way and craned my neck slightly to the left, I had a perfect view of a robin's nest through a tunnel of leaves. I shifted my looking-for-inspiration pose from the cliché beard stroke to this crumpled, sometimes painful posture. I still stroked my beard though, it was longer than ever before and I couldn't resist. And the nest's contents truly were inspirational: pointy open mouths bobbing on top of two ludicrously thin necks, mother faithfully delivering worms and puffing up for battle each time a twig snapped. I watched two more chicks hatch and saw stubby white feather buds slowly cover their crinkly pink skin. Just before I gave up studying each night, I played "Lullaby of Birdland" once at full volume just for them.

Meanwhile, unbeknownst to me, campers were building up quite a bit of mythology around the lanky hollow-eyed man with a scraggly black beard who wandered out of the woods every so often to fill a pitcher with coffee and ram food down his throat. "He's Maria's poor decrepit law student husband" counselors would assure them; "he was a caving counselor many years ago." But they preferred to think of me as either Saint Francis or Rasputin, depending on which one you asked.

When I hit the half-way point, I was feeling pretty good. The half-way point in time, of course, not the half-way point on the "progress bar." I felt like I was actually absorbing most of what I was studying, which made keeping up momentum easier. Then it happened.

I was in the middle of a hearsay lecture one evening when I noticed the camp cat, a prissy, ultra-fat old scoundrel named Satchmo, playing in the distance. Satchmo barely had the agility to groom his bulbous backside, yet there he was leaping, pouncing, flinging something in the air and spinning in tight circles. I crumpled down into my inspirational posture; it was too dark to see the nest, so I went back to FRE 803. But 30 seconds later I was scrambling through the bushes attempting to sneak up on the Cretan. There was no need to sneak, as it turned out, because Satchmo is a complete stranger to shame, even while maliciously toying with a mangled corpse. He murdered whatever it was solely to play with it; he had no any intention of eating it. I ran for a flashlight and flooded the nest with light. It was empty. Broken. I stood motionless for a while as the scene soaked in. It caused me emotions.

The next day Maria decided it was time for me to go on a trip. After some convincing, I forsook the progress bar's judgmental sneer and agreed to go on a two-and-a-half day trip to the impressive Worley's cave, a place I had known well in my previous life as a counselor.

By the end of the 4 hour drive, I had transitioned, much to my surprise, from a shell-shocked Igor to a joke-telling, song-singing homo sapien. It helped that all the girls were filled with curiosity about me, which, of course, meant all of the boys on the co-ed trip had matching curiosity. I made up a story about a law student who was raised by wolves, told them about growing up in Alaska (also mostly made up), and taught them Count Von Count's endless ballad:

One bat hanging in the belfry.
One bat flies in through the door.
That makes two bats.
TwoOo baAats.
But wait! There's more!
Two bats hanging in the belfry..."

Worley's was even more amazing than I remembered it: the "chandeliers" of glittering interconnected stalactites, the flow stone bigger than a house, the pristine underground river.

By the time the trip was over, I had recovered from my bout of emotions and could once again buckle down. This time, I taped a piece of paper over the part of the computer screen that the progress bar occupied and shot Satchmo with a water gun whenever he even thought about rubbing on my leg.

The bat song spread through camp like a textbook virus. It was in every corner of camp within hours, enjoyed maybe half a week of popularity, and by the time I was preparing to fly up to Anchorage for the exam, it was utterly despised by all but a few hard-core advocates, most of whom had been on the trip.

On the last dinner before my departure, the hard-core advocates jumped up and attempted to get a rousing chorus of the bat song going in my honor. They tried very hard and for a very long time. Finally, someone shouted "IN THE LAKE!" and I watched in amusement as the girls were wrestled to the ground and drug out of the dining hall kicking and screaming.

My amusement ended when I noticed a menacing crowd of counselors walk toward my table. I fought them off for a few minutes, but once the male paddling counselors who happened to be in the courtyard joined the fray, I didn't have a chance. A huge swarm of people slowly dragged me from the dining hall and up toward the lake. I didn't scream, but I did want to make it as hard as possible for them and managed to shake a leg free. As I thrashed it around I heard a counselor shout "Scalia! Grab that leg!"

"Scalia?" I said poking my head up, "like... *the* Scalia?" A sheepish look flashed on a blonde twig of a girl's face as she dug her fingers into my ankle. She didn't look anything like her potato of a grandfather, but her eyes unquestionably answered "yes."

Before I could say anything else, icy mountain water cascaded over me. But I couldn't help think that getting thrown into a lake by a Scalia the week of the bar exam had to be lucky.

Right?

Paul Peterson works for the court system in Barrow. He graduated from the Catholic University of America Law School in May 2013 and did, in the end, pass the July bar exam.

FEDERAL PROBE

Ted Stevens and his high-priced warrior lawyers outgun prosecution

By Cliff Groh

Comparing the defense Ted Stevens had at his criminal trial to what you see every day in courtrooms around the country is like comparing a jet plane to a tricycle.

Ted Stevens had at least 11—and perhaps as many as 14—lawyers working for him at Washington, D.C.'s Williams & Connolly, probably the country's premier white-collar criminal defense law firm. Outgunning the prosecution in sheer number of attorneys, the defense squad was further bolstered by two paralegals and an information technology professional. As detailed in *Washington Lawyer* magazine, the Williams & Connolly team made a practice of meeting every day for lunch and dinner for the seven weeks before the trial, as well as during the five weeks in trial.

All these hours were expensive and helped make for some big paychecks. After the trial, Stevens owed Williams & Connolly almost $4 million for the defense, according to Kim Eisler's 2010 book *Masters of the Game*. This figure was consistent with a filing Stevens made with the U.S. Senate. A legal defense fund was established for Stevens, although the *Anchorage Daily News* reported that his departure from the Senate following a narrow defeat in his 2008 re-election campaign ended his responsibilities to disclose the amounts donated.

Brendan Sullivan, the quarterback of the defense team, billed at $1,000 per hour, helping to finance upkeep for his yacht *Confrontation*. (Eisler's book also noted that Sullivan has owned a boat called the Mistrial.) *Washingtonian* magazine reported in 2010 that legal recruiters estimated that Sullivan made $3-4 million per year.

Brendan Sullivan first achieved national fame as the lawyer for Oliver North during the Iran-Contra controversy in the 1980s. When a Senator tired of Sullivan's frequent interruptions during North's Congressional testimony and suggested that North speak for himself, Sullivan famously exploded: "I'm not a potted plant."

After defending North, Sullivan went on to represent former HUD Secretary Henry Cisneros in the late 1990s and the Duke lacrosse players charged in 2006 with sexual assault. Three things stand out about all those clients: The defendants were high-profile, they had big money to spend on defense attorneys, and—despite the serious legal jeopardy they faced—none of them spent a day in jail.

Sullivan prided himself for decades on the assertion that no client of his had ever served jail time. The attorney's no-jail record may only have started in the 1970s, and it definitely ended in 2006 at his last trial before the Stevens trial (when his client Walter Forbes, former Chairman of Cendant Corporation, was convicted and later sentenced to more than 12 years in prison). Still, Sullivan's record is one of the most impressive of any criminal defense attorney in American history.

Accolades have rolled in for Sullivan, now 71: "D.C.'s Toughest Lawyer"…"Best Counsel Available" in Washington…"The Leading Lawyer in White Collar Criminal Defense" in Washington …one of "America's One Hundred Most Influential Lawyers."

All this praise comes from various publications, and was reprinted on his firm's website at the time of the Stevens trial. That roundup somehow omits a more telling comment about his practice from Sullivan to *Washingtonian* magazine before the Stevens trial: "By the time somebody comes to see me, they are pretty far up the creek. The good thing is that they will pay almost anything."

That "paying almost anything" part is of course the rub, and this is why a 2002 magazine article said Sullivan was "the first choice of almost everyone in trouble--if you can get him."

Sullivan is a senior partner with Williams & Connolly, which bills itself on its website as "the firm to see." The law firm takes its moniker from that of its founding partner Edward Bennett Williams, whose biography by the author Evan Thomas published in 1991 is called *The Man to See*. The firm's client list in its litigation practice has included crooner Frank Sinatra, U.S. Senator Joe McCarthy, the *Washington Post*, Mafia boss Frank Costello, fixer Bobby Baker, U.S. Representative Adam Clayton Powell, fugitive financier Robert Vesco, junk bond king Michael Milken, Teamsters leader Jimmy Hoffa, Treasury Secretary John Connally, attempted presidential assassin John Hinckley, and President Bill Clinton in his impeachment proceedings.

The firm fielded a talented team in the Stevens trial. Along with Sullivan, the defense had Robert Cary, Alex Romain, Beth Stewart, and Joseph Terry speak in front of the jury.

Smooth and effective, Cary often made arguments to the court while Sullivan saved himself for the biggest moments like opening statement, closing argument, and cross-examination of key prosecution witness Bill Allen. Romain handled much of the arguments surrounding pre-trial discovery, as well as some cross-examinations, and his status as an African-American set to appear before a majority-black jury was noted in the press when he joined the Stevens defense team.

Perhaps the most surprising of the defense attorneys was Beth Stewart, who conducted some stylishly effective cross-examinations. Only three years out of Harvard Law School, Stewart also stood out in the courtroom as a striking presence who often appeared to be the tallest person there. A former two-time national intercollegiate debating champion, Joseph Terry examined a few of the less prominent witnesses. Craig Singer is a former U.S. Supreme Court clerk who appeared to spearhead the paper blizzard for the defense team, and his speaking in court was restricted to talking to the judge about jury instructions.

The prosecution team in court could seem like a nuclear-armed warship run by tri-captains worried about how the top brass will judge their performance. In contrast, the Williams & Connolly operation resembled a squad of commandos operating behind enemy lines —tough, ruthless, and decisive. The firm's attorneys liked their description in *Legal Times* as "the Green Berets of high-stakes litigation," and you could see something like *Saving Private Ryan* at the trial. Brendan Sullivan is the commanding officer, Rob Cary is the executive officer, Beth Stewart and Alex Romain are the weapons specialists, Joseph Terry is the most expendable newbie, and Craig Singer is the nerdy intelligence expert brought along for his foreign language skills. The vibe was different, too. The well-dressed younger attorneys and support staff made the defense bench look like Singles Night at the country club, while the federal agents on the prosecution side resembled people you might expect to run into at a suburban hardware store.

Williams & Connolly achieved its successes by employing sharp lawyers with excellent records, giving them interesting work, working them for insane hours, and—in the criminal defense realm—expecting them to engage often in all-out war with the government. The style of the firm is frequently that of its ultra-pugnacious founder Williams and expressed in the Latin phrase "Tu quoque"—"You're another" or "You, too." That is, relentlessly attack the attacker. As one former firm associate told the writer Eisler of Sullivan and one of his partners, "First they go over the ground with a fine-tooth comb. Then they scorch it." As Eisler observed, opponents called the Williams & Connolly way "the scorpion defense": "A prospective adversary knows if you attack them, you are the one who is going to get stung."

This approach worked, particularly for its most dedicated practitioner. Not only did Brendan Sullivan have a remarkable record in keeping criminal defendants out of prison, *Washingtonian* magazine even said of him in 2002 that "it is not a myth that his counterattacks against the government have put more prosecutors in jail than their indictments have put away his clients." The author of that article, Kim Eisler, later backed off that claim in his laudatory 2010 book on Williams & Connolly called *Masters of the Game*, but Mike Nifong would take cold comfort. Nifong was the District Attorney in Durham County, North Carolina, who brought the sexual assault charges against the clients of Brendan Sullivan who had played lacrosse at Duke. Nifong ended up disbarred and serving 24 hours in jail for criminal contempt of court following a judge's finding that the prosecutor had lied to the court about withholding exculpatory DNA evidence.

Next: Opening statements

Cliff Groh is an Anchorage lawyer and writer who has worked as both a prosecutor and a criminal defense attorney. He has blogged about the "POLAR PEN" federal probe into Alaska public corruption for years at www.alaskacorruption.blogspot.com, which in its entry for May 14, 2012 features an expanded and updated list of disclosures. Groh's analysis regarding the Ted Stevens case has appeared in media as diverse as C-SPAN, the Los Angeles Times, Alaska Dispatch, the Anchorage Daily News, and the AnchoragePress. The lifelong Alaskan covered the five-week Ted Stevens trial in person in Washington, D.C. in the fall of 2008. He welcomes your bouquets, brickbats, tips, and questions at cliff.groh@gmail.com.

ADR: American Arbitration Association publishes new Commercial Rules

By Gregory Fisher

The American Arbitration Association has published new rules and revisions to its Commercial Arbitration Rules. Eight new rules provide significant changes to current arbitration practice.

1. **Mediation:** [Rule 9]. A mediation step has been adopted in each case where a claim or counter claim exceeds $75,000. Either party may opt out. Mediation is concurrent with arbitration proceedings; that is, arbitration is not stayed pending mediation.

2. **Preliminary Hearing:** [Rule 21]. Greater emphasis has been placed on using preliminary hearing procedures to promote time and cost efficiency. The revised rule includes a checklist of items to be addressed.

3. **Pre-hearing Exchange of Information and Production of Information: [Rule 22].** This is a new rule promoting greater exchange of information between the parties subject to the arbitrator's discretion.

4. **Arbitrator's Enforcement Powers: [Rule 23].** This is a new rule clarifying the scope and extent of an arbitrator's enforcement powers to promote fair and efficient proceedings.

5. **Dispositive motions:** [Rule 33]. This is a new rule clarifying that an arbitrator may resolve claims or issues by dispositive motion practice upon a threshold showing that the movant is likely to succeed.

6. **Emergency Measures of Protection:** [Rule 38]. This is a new rule that will authorize parties to apply for emergency interim relief.

7. **Non-payment by a Party:** [Rule 57]. This is a new rule that authorizes arbitrators to take specific measures when a party has not paid its deposit or share of compensation for the arbitrator.

8. **Sanctions for objectionable or abusive conduct in arbitration:** [Rule 58]. This new rule authorizes arbitrators to order sanctions against parties that engage in objectionable or abusive conduct.

In addition to these significant changes or additions, the new rules include several additional revisions to current rules addressing a range of other issues. A review of these additional revisions is beyond the scope of this brief summary. For more information:

https://apps.adr.org/ecenter/neutralResources/Summary%20of%20Changes.pdf

FEDERAL BAR ASSOCIATION

Federal Bar plans ambitious year

Continued from page 1

Judge Ralph Beistline delivers his State of the Court address.

Judge Morgan Christen at the December FBA-Alaska meeting.

mittee, including Brewster Jamison, Marc June, Margaret Paton-Walsh, Richard Pomeroy, Lane Tucker, and Pam Richter. The goal of the committee is to eliminate unnecessary language and to streamline the rules and to help make them more user-friendly for civil litigants. The bar is invited to review proposed local rule changes and provide comments and suggestions to the Rules Committee. Please contact Judge Smith or any of the committee members for additional information.

Judge Gleason is also looking for members of the bar who might be interested in presenting a short (10 minute) talk at one of the many naturalization ceremonies held throughout the year. Judge Gleason said that naturalization ceremonies reminded her of adoptions and marriages from when she was a state court judge, because they are among the few judicial events where all of the participants are happy to be in court. Judge Beistline commented that one of his fondest memories was of a naturalization ceremony in Fairbanks conducted by none other than U.S. Supreme Court Justice John Roberts.

"The committee is looking into possible funding for a case manager for a pilot program involving 10 or 12 newly released inmates."

Both Judge Beistline and Judge Smith discussed the development of a re-entry program in federal court. The court has established a re-entry committee including the U.S. Attorney, the Federal Public Defender, and the U.S. Probation Office. The goal of the committee is to work with non-profit and community assistance organizations to help returning offenders with two of the most fundamental needs: Stable housing and employment. The committee hopes to begin a program later this year.

The committee is looking into possible funding for a case manager for a pilot program involving 10 or 12 newly released inmates. Similar to state court re-entry programs, the supervisees would be on a much more intensely monitored program. The program would include intervention and assistance at the first sign of difficulty, such as a positive drug test, rather than waiting to see if the issue resolves itself over time. Judge Smith then spoke about the benefits of a re-entry program, particularly with 1 in 28 children in the U.S. having a parent in custody. Judge Smith pointed out the success of a re-entry program in Oregon, which resulted in a 16% decrease in recidivism. Anyone interested in this program should contact Judge Smith or any of the following committee members: Federal Defender Rich Curtner, A.U.S.A. Kim Sayers-Fay, or U.S.P.O. Scott Waters.

For more information, or to join the Federal Bar Association, please contact Darrel Gardner or visit the Chapter website at www.fedbar.org, like us on Facebook at "Federal Bar Association – Alaska Chapter," and follow "Fed Bar Alaska" on Twitter at "@bar_fed."

--Darrel J. Gardner is president of the Federal Bar Association Alaska Chapter. (907) 646-3400, Darrel_Gardner@fd.org.

Tips for dealing with the media

By Cliff Groh

In honor of Ted Stevens' chief defense attorney Brendan Sullivan—who is famously tight-lipped with the media—I offer some thoughts on what lawyers should do when journalists call. These pointers come partly from my own history of being on both sides of the notepad/recorder and occasionally seeing some of my own unguarded comments memorialized in media reports. This list was also improved by my review of compilations of suggestions published by North Carolina Central University and the Leadership Conference on Civil and Human Rights.

1. Be familiar with the ethical rules. In Alaska, lawyers handling newsworthy cases should be familiar with Alaska Rule of Professional Conduct 3.6 (and if a prosecutor, Alaska Rule of Professional Conduct 3.8).

2. Know the deadline for the reporter. Lawyers should know that it is often advisable to ask a reporter "What sort of comment do you need, and when do you need it by?" It is often best to then break off the call, prepare a comment, and then call the reporter back with the prepared comment. This is often safer than offering a comment "on the fly." (One journalist once advised against ever trusting anyone on deadline.)

3. Don't be afraid to ask your own questions before answering any questions or agreeing to an interview. Lawyers should know that it is permissible—and always advisable—to ask a reporter "How do I fit into your story?"' and "How did you find me?"

4. If possible, write out your main points before speaking with the reporter. This is particularly valuable—and feasible—when appearing on television, where you often have some time to prepare before the interview starts and you are lucky to get a 10-second soundbite on the air from a 15-minute interview. More generally, lawyers should always be prepared to get their message in the story—even if that means insisting on answering a question the reporter did not ask.

5. Watch out for the possibility that you have been slotted into a pre-made place in the story that you don't want to be in.

6. Before giving anything more than a prepared statement, it is a good idea to establish ground rules. Particularly important to ascertain are the meaning of "off the record," "on background," or "deep background." Make sure you go off the record before you say things you want off the record as it is very difficult—and often impossible—to convince a reporter to allow you to put something off the record retroactively. Unless you know the reporter or his or her reputation and professionalism, be very careful even with those agreements. Particularly tricky are the situations in which you provide some information on the record but go off the record on a specific question or topic. The more risk-averse source would avoid ever going off the record.

7. Keep your comments simple unless the situation clearly calls for more nuance and complexity. Although this may not be requested—or needed—by the reporter, be ready to explain the issue carefully and patiently. In either case, short and direct sentences usually work best.

8. When asked a difficult question, think carefully before you answer. You might also try to give a positive statement. One example was when a legislator was asked about an opposing candidate's criticism that the legislator was inadequate in providing services to constituents. As opposed to saying "Any allegation that I am failing to provide sufficient constituent service is false," the legislator simply said "Constituent service is one of my strong points."

9. Don't react immediately to inflammatory questions or quotations.

10. Don't be afraid to let silences go on, and don't ramble. Some reporters use long periods of silence to try to get interviewees to blurt out something to break the silence.

11. Monitor your media, and demand quick corrections to misquotations. This story comes from longtime Anchorage prosecutor James Fayette, who provided several pointers for this list. While testifying in 2012 before the Alaska Legislature, Fayette stated that he was an experienced murder prosecutor "who speaks to *families* of homicide victims all the time…." Knowing that the story would run on-line, Fayette read the on-line newspaper article when it was web-published that evening and read to his horror that "Fayette told the legislators that he speaks with homicide victims all the time…." Fayette immediately called the reporter to explain that "I said I speak with the families, not the victims." The reporter quickly apologized, and corrected the story on-line within minutes, fortunately before the presses rolled later that night. To his relief, Fayette was spared the notoriety which would have come with a claim that he routinely conducted séances.

1**2. As in other aspects of life, don't beat yourself up too much if some foolish thing you say does get printed or aired.** It is sometimes true that you learn more from setbacks than successes.

Opinion

"Lassie, go get help!" *(Timmy's in the well, and I don't feel so good myself)*

By Gregory S. Fisher

In my life, and the neighborhood kids are pretty sure I battled marauding Neanderthals on my way to school, there has never been a more fabulously catastrophic flameout than the Patient Protection and Affordable Care Act (*aka* "Obamacare"). Bonfire of the Vanities? It is a super nova of unimagined and gathering destructive force. We are witnessing a Hindenburg of consequences fueled by hubris, arrogance, deceit, and naiveté. Can we make things right? I don't think so. I eulogize.

Obamacare's central goal was to extend health insurance coverage to uninsured or underinsured persons while preserving coverage for everyone else. Corollary goals were to improve coverage and reduce perceived or actual insurance abuses. Make no mistake—these are admirable goals. However, approximately 95 percent of all Americans secure health insurance through plans offered by their employers. Consequently, "uninsured individuals" is another way of saying "unemployed persons."

Rather than adopting policies to promote job growth, we came to that fork in the road and went . . . south, rather fabulously deep water south. However laudable Obamacare's goals were and are, hope is not a policy. Policies need hard facts competently analyzed in a transparent manner. Laws are built on consensus and compromise with back-breaking rigor. We lost sight of these truths.

In order to advance its goals, Obamacare specifies that "qualified health plans" must offer certain specified "essential health benefits." The plans must offer these essential health benefits even if the consumers purchasing those plans do not need or want those particular benefits. Policies that fail to offer essential health benefits are not in compliance with the law. The consequences of noncompliance include cancellation.

Obamacare's success depends on an equal allocation of costs and risks by all consumers. If some are allowed to keep plans that are not qualified health plans, or to not have plans at all, premiums will increase for others. It was always understood that some would wind up paying more and some would wind up paying less. However, the overall relative costs could only be contained if all shared the risk pool.

Obamacare's success also depends on the participation of the "young invincibles." Two younger Americans must purchase health insurance under qualified health plans for each three older Americans who purchase health insurance. In order to achieve these objectives, the law features two mandates, an employer mandate and an individual mandate. It's about carrots and sticks.

The employer mandate chiefly requires that employers with over 50 full-time equivalent (FTE) employees must offer health insurance (qualified health plans) that provide the essential health benefits mandated by law. A FTE employee is an employee working 30 hours or more each week (not the normal 40 hour/week standard). If covered employers fail to offer qualified health plans, they must pay an "employer shared responsibility payment" of $2,000 per employee (the first 30 employees are excluded). The plans must also be affordable, a concept defined by dense regulatory provisions beyond the scope of this brief summary. If at least one FTE employee receives a federal subsidy because coverage is either unaffordable or does not cover 60 percent of total costs, the employer must pay the lesser of $3,000 for each of those employees receiving a credit or the no coverage tax. The fee is a per month fee due annually on employer federal tax returns starting in 2015. There are additional taxes and penalties that apply (aren't there always?).

The individual mandate requires that all persons purchase health insurance by 2014 or pay a tax penalty. The penalty in 2014 is $95 per adult and $47.50 per child or 1% of your taxable income (up to $285 for a family), whichever is greater. The penalty increases each year to 2.5% of annual income in 2016.

When Obamacare was introduced, the prospect of mandated health insurance greatly alarmed members of Congress, economists, industry experts, and everyday consumers (voters). In order to allay concerns, President Obama repeatedly promised in 2009 and 2010 that "If you like your health insurance policy, you can keep it. Period." President Obama also promised that "If you like your doctor, you can keep your doctor."

In early July 2013, implementation of the employer mandate was postponed one year until January 2015 after the Administration recognized that employers were simply not ready to undertake the analyses necessary for the law's implementation. It remains unclear what actual legal authority the Administration could claim in delaying the law's implementation. However, a case can be made that this is no different than the signing statements that President Bush issued when signing enacted legislation (statements by which President Bush acknowledged that the law had been passed, but expressing his unwillingness to enforce the specific law for one reason or another). On Feb. 10, 2014, the mandate was further extended for large and small businesses.

While the technological glitches gripped our attention, millions of Americans in the individual market began receiving cancellation notices for their health insurance policies, notwithstanding the unequivocal promises that were previously made.

On Oct. 1, 2013, the exchanges opened for individuals to begin enrolling and purchasing coverage. Severe technological problems crippled the rollout. Only a fraction of those who needed to sign up and purchase insurance actually did so.

While the technological glitches gripped our attention, millions of Americans in the individual market began receiving cancellation notices for their health insurance policies, notwithstanding the unequivocal promises that were previously made. Policies were being cancelled because they did not comply with the law. For those in the individual market who did not have their policies cancelled, current estimates are that premiums will increase an average of 41%. In Alaska, the estimate is 29%. Of course, the individual market is a fraction of the overall health insurance market. Only around five percent (5%) of all consumers buy their health insurance on the individual market. But this translates into somewhere around 15 million people. Estimates vary, but roughly 5 million individuals have already had their policies cancelled.

Upon reports that policies in the individual market were being cancelled, President Obama's Press Secretary Jay Carney observed that, although policy cancellation was regrettable, the issue was confined to a small percentage of the overall market (the 5% in the individual market) and that, in many or most cases, those losing coverage would be able to secure better coverage with new policies. "Better" coverage was not explained, but presumably meant "better" as defined by the government.

President Obama himself promised to take steps to encourage insurers to suspend cancellations. He did so without first conferring with insurers. Insurers were and are game, but are frankly not sure whether they can rescind or suspend the cancellation notices. They must comply with rules and regulations enforced by state insurance commissioners or local exchanges. Rates are set in advance based on projected actuarial risks. On Nov. 21, 2013, regulators in the largest state, California, rejected President Obama's proposed fix.

Contrary to Jay Carney's assertion, the issue of policy cancellation for noncompliant insurance policies is not confined to the individual market. Employer plans have not yet crossed this hurdle because, as noted, the employer mandate was suspended for a year, and then pushed back another year.

However, on June 17, 2010 (yes, over three years ago), interim regulations for Obamacare were published in which the Administration estimated that somewhere around 66 percent of small employer plans and 45 percent of large employer plans (representing somewhere between 93 and 129 million Americans) would lose their grandfather status under Obamacare, leading to cancellations of those same policies. This was published in the *Federal Register*, Vol. 75, No. 116 (Thursday June 17, 2010) at page 34552.

Meanwhile, many are now discovering that they cannot, in fact, "keep their doctor" as previously promised. This is because, in order to contain costs, many health plans are offering a narrower range of health care providers. Larger research medical centers are being excluded. Consequently, for millions of Americans who "like their doctors," Obamacare requires they switch doctors.

The Congressional Budget Office is now reporting that somewhere around 2.5 million full-time jobs will be lost as a result of Obamacare. The law's complexity has resulted in insurers rejecting claims of AIDS patients because of confusion over source payments. Union multiemployer trust funds are suffering. We are under 50% of the targeted sign-up goal, and we do not even know how many of those who have signed up have actually paid a premium. And, for every heart-warming story of someone now covered by health insurance, there seem to be four of five stories of people whose plans were canceled and who were then denied coverage under Obamacare. http://washington.cbslocal.com/2014/01/23/family-with-disabilities-claims-they-were-denied-obamacare-coverage/

Obamacare is not viable. It's time to confess error, move forward, and find a workable solution.

Time and space do not allow a more comprehensive discussion of the gathering calamities now burning on the horizon. *Vive et imer ama.* It is time for an open, transparent, honest debate about how to take care of each other. I favor a single payer solution. But other options also exist (deregulated insurance, cost/price transparency, tax code reform, Medicare/Medicaid reform, and others).

Obamacare is not viable. It's time to confess error, move forward, and find a workable solution.

LEGAL SERVICES CORPORATION

Notice of Availability of Competitive Grant Funds for Calendar Year 2015

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 2015. A Request for Proposals (RFP) and other information pertaining to the LSC grants competition will be available from www.grants.lsc.gov during the week of April 7, 2014. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. To review the service areas for which competitive grants are available, by state, go to www.grants.lsc.gov/about-grants/where-we-fund and click on the name of the state. A full list of all service areas in competition will also be posted on that page. Applicants must file a Notice of Intent to Compete (NIC) through the online application system in order to participate in the competitive grants process. Information about LSC Grants funding, the application process, eligibility to apply for a grant, and how to file a NIC is available at www.grants.lsc.gov/about-grants. Complete instructions will be available in the Request for Proposals Narrative Instruction. Please refer to www.grants.lsc.gov for filing dates and submission requirements. Please email inquiries pertaining to the LSC competitive grants process to Competition@lsc.gov.

Bar People

Jeff Feldman has joined Summit Law Group and will maintain offices in Anchorage and Seattle. He also has been appointed to the faculty of the University of Washington School of Law.


Falsey

Sedor, Wendlant, Evans and Filippi LLC is pleased to announce that **William (Bill) D. Falsey** has joined its practice and become a member of the firm. Falsey recently returned to Anchorage from Washington, DC, where he worked in private practice and served as an Administration appointee in the Department of Interior's Bureau of Land Management. Prior to leaving Alaska, Falsey clerked for the Alaska Supreme Court and served on the boards of a number of civil organizations. His practice will focus on civil litigation, administrative proceedings, and regulatory matters. Falsey received his J.D. from Yale Law School, and is a graduate of Stanford University and Dimond High School.

Wohlforth, Brecht, Cartledge & Brooking, announces the addition of Attorney **William A. Earnhart** to the firm as a Senior Associate. Mr. Earnhart's practice focuses on labor and employment law, litigation and appeals, and municipal law.

Mr. Earnhart previously served as the Senior Labor and Employment Attorney for the Municipality of Anchorage where he advised the Mayor, the Assembly, and municipal departments in labor negotiations, arbitrations, trial practice, appellate matters, and advising in regard to state and federal employment issues, including wage and hour, discrimination, and family leave. He also drafted personnel regulations and labor agreements. Previously he was in private practice engaged in employment, commercial, and injury defense litigation with substantial trial experience. He is a former member of the Anchorage Planning and Zoning Commission, and former Chair of the Anchorage Zoning Board of Examiners and Appeals.

Jermain, Dunnagan & Owens, P.C. is pleased to announce **Khalial L. Withen** has joined the firm as an associate. Ms. Withen joined the firm after clerking for Chief Justice Dana Fabe of the Alaska Supreme Court. She also served as a law clerk for the Environmental Crimes Section of the U.S. Department of Justice and a law firm specializing in land use and municipal law. Her practice consists primarily of civil litigation.


Withen

Russell, Wagg, Gabbert & Budzinski announce that founding shareholder **Robin Jager Gabbert** was selected for inclusion in "Alaska Super Lawyers 2013" in the area of Workers' Compensation Law. The Super Lawyers list, published by Thompson Reuters Legal, identifies lawyers through an extensive research and survey process, starting with peer nominations. Only five percent of lawyers in Alaska are named to the list.

Nathaniel K. Peters and **Matthew C. Christian** were sworn in as a District Court judges in February. Peters will serve in Bethel, and Christian in Fairbanks.

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Dan Cooper wrote: **"Dan Cooper** has retired from the U.S. Attorney's Office, and is headed out on a six month motorcycle trip. Starting in Bremen, Germany, he is headed to Marrakech, Morocco, to pick up a bong left there by a prominent defense attorney, then off to Corsica and Sicily to visit "family" members of some prominent plaintiffs' attorneys.

"After Italy, the Adriatic, Greece, Constantinople, etc., he plans to visit Central Asia to check up on Bush's War, then through Russia to Mongolia to see some Dinosaur eggs.

"If time permits, Cooper will come home via Russia, Eastern Europe and so forth. He says he is grateful to Jeff Feldman for pushing through that humongous Bar Dues increase in 1990, which is no doubt the source for the very generous $25,000 grant given to him by the Board of Governors to fund this trip. Those few who are interested in following him, he will be blogging along at: OX-AK. blogspot.com"

2 celebrated in Fairbanks


Midnight Sun Council BSA Photo

Fairbanks attorneys Bob Groseclose and Barbara Schuhmann received the annual Distinguished Citizens Award in December, presented by the Midnight Sun Council of Boy Scouts America.

The husband and wife team has worked together for more than 30 years as partners in the law firm of Cook Schuhmann & Groseclose. They raised two daughters, Jane and Kathryn, and are active in many community organizations. In honor of the couple's service, the Boy Scouts also are building a 1-mile trail in the couple's honor at Lost Lake Boy Scout Camp.

The awards event was held in the Westmark Hotel, and featured a video produced by daughter Jane that recounted her parents' history; it can be found on UTube at http://youtu.be/gu2W4hMjX_0

Oesting and Reece named to 'Super Lawyers' list of top ten lawyers in Alaska

David Oesting and Joseph Reece, partners in the Anchorage office of Davis Wright Tremaine LLP, were named to the list of Top Ten Lawyers in Alaska by Super Lawyers, a publication of Thomson Reuters, in December.

Every year, Super Lawyers evaluates lawyers across the country for its annual list of top attorneys. Each candidate is measured against 12 indicators of peer recognition and professional achievement. Nominees from more than 70 practice areas are considered.

Super Lawyers describes the attorneys on its Top Lists as "the cream of the Super Lawyers crop." The attorneys have not only been selected to the Super Lawyers list, but have also received the highest point totals during the selection process.

Dave Oesting represents clients in commercial, bankruptcy and maritime litigation and transactions. He assists a wide variety of business and individual clients in complex and class action commercial contract and tort litigation. Dave also has extensive experience representing creditors in bankruptcy proceedings.

Joe Reece focuses on commercial, corporate and real estate law, including mergers and acquisitions and commercial litigation. His commercial law practice includes assisting clients with real estate transactions, business purchase and sale transactions, corporate advice, and financing transactions. His litigation practice includes commercial litigation and environmental compliance and related litigation. He is the partner-in-charge at Davis Wright's Anchorage office.

Davis Wright Tremaine LLP is a national law firm with approximately 500 lawyers representing clients based throughout the United States and around the world. For more information, visit www.dwt.com.

Kreger selected by Best Lawyers

Michael E. Kreger, a partner in Perkins Coie's Construction and Real Estate practice group, has been named by the Best Lawyers as Anchorage Construction Law "Lawyer of the Year" for 2014. "Lawyers of the Year" are selected based on particularly impressive voting averages received during the peer-review assessments. Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

In addition to the Lawyer of the Year award, Kreger was also listed in the 2014 Best Lawyers® in America for Litigation - Construction.

Kreger represents parties in complex construction claims and disputes, including state and federal litigation, and is on the American Arbitration Association's Panel of Construction Neutrals. He handles front-end project development matters, including public private partnerships, design-build contracting and public procurement issues. He joined Perkins Coie in 1984, following a federal clerkship in Anchorage.

Perkins Coie's Anchorage office opened in 1977. The firm's Construction and Government Contracts practice groups represent public and private owners, including Alaska Native corporations, contractors and design professionals in all aspects of public and private contracting.

Grovier appointed managing partner


Grovier

Stoel Rives LLP is pleased to announce that Tina Grovier has been appointed the new Office Managing Partner of the firm's Anchorage office, effective Jan. 1, 2014. Grovier will be responsible for the day-to-day administrative management of the Anchorage office, which includes more than 20 attorneys and staff. Practices in Anchorage include corporate, environmental and natural resources, real estate and development, tax, government contracting, labor and employment, complex commercial litigation, regulatory and white collar criminal defense matters.

Grovier is one of only three Alaska women currently serving as managing partner of the Alaska office of a national law firm.

"I am excited to lead such a skilled team of legal professionals," said Grovier. "Jim Torgerson, who led our office since its inception in 2008, established a very high bar indeed. I look forward to building on our reputation as a provider of superior client service here in Alaska."

Grovier is recognized as a leading natural resources lawyer. During her 19-year career she has helped secure federal and state permits for the first non-conditional state right-of-way for a North Slope natural gas pipeline, Alaska's first heap leach facility, Alaska's first third-party natural gas storage facility and Anchorage's first commercial-grade wind farm. An active member of the Anchorage business community, Grovier has been involved with the United Way as co-chair of the Tocqueville Society and with the YWCA, and has also volunteered her time with AWAIC Summer Solstice and served as a legal advisor for the Anchorage Youth Court.

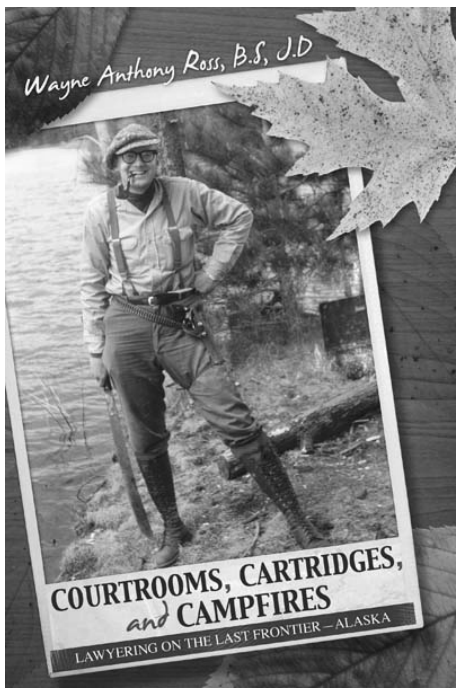
Grovier received a B.S. from Southwest Missouri State University in 1990, and a J.D. from Washington University School of Law in 1993. She is admitted to practice in Alaska.

Grovier succeeds Jim Torgerson, who is returning to full-time practice, concentrating primarily on commercial and environmental litigation on behalf of Alaska Native corporations and natural resource businesses.

Stoel Rives is a business law firm providing corporate and litigation services to a wide range of clients throughout the United States. The firm has nearly 400 attorneys operating out of 12 offices in seven states and the District of Columbia. Stoel Rives is a leader in corporate, energy, environmental, intellectual property, labor and employment, land use and

Book Review:

Courtrooms, Cartridges, and Campfires



By Gregory Fisher

Wayne Anthony Ross is a figure larger than life, some might say controversial, others perhaps polarizing. He's published an account of his personal and professional life that offers interesting glimpses into pre-pipeline Alaska. It is a personal account. It is also a bridge to an entirely different era. We came from there. How?

Although Mr. Ross's account is personal, most members of the Alaska Bar could relate with it. Specific experiences would be different (you probably did not grow up playing with Jeffrey Dahlmer's father). But for many of us Alaska has been an unfolding experiment. We came here not knowing many people and with uncertain prospects. We stumbled through our own adventures in and out of court. We stepped on toes. We made friends and enemies. Along the way we met a cast of characters. Your personal story is probably no more boring than mine or Mr. Ross's.

What commends Mr. Ross's story? Plenty, it turns out.

He speaks and thinks plainly, in plain terms, without affect or concern for content or tone. The result is both refreshing and, if one is honest, a little jarring. Growing up in a strong Roman Catholic family in the 1940s-1950s, Mr. Ross remembers a world where Dad worked, Mom stayed home, and Catholic parents did not let their kids play with non-Catholics, except maybe the occasional Lutheran. One bought American because foreign goods just couldn't be trusted. Coming from Milwaukee, Mr. Ross's first experience with segregation was when he rode a ferry from Newport News to Norfolk, Virginia as an 8 year old boy and realized that the back of the boat was "full of Negroes." We wince. "One Negro lady told me, most kindly, that the stern section of the boat was for Negroes and that since I was a White Boy, I needed to go back to the bow section." This is an authentic, if unedited, voice. We're richer for the experience. We are probably uncomfortable, too. Face it, our world is bleached of frank thought or expression.

Mr. Ross provides a colorful historical narrative. He seeks employment advice from a young John Havelock. He is hired by the State after he accosts then-Attorney General G. Kent Edwards for "flying around the country at taxpayer's expense, looking for attorneys to hire for your office" while Mr. Ross "was sitting in your Anchorage office ready to go to work." He loses his job after he fails the Alaska Bar on his first attempt, but falls into a better paying and more prestigious position as a Special Master in Family Court after losing a trial against Edgar Paul Boyko. He leaves that office when he is fired by Judge Moody for protecting files that Judge Butcher ordered locked away until he returned from a vacation, but is then rehired as a feud rages between the Family Court and Superior Court (which were then separate divisions). Drifting into private practice to be his own boss, Mr. Ross locks horns with Dave Thorsness, Ed Reasor, Edgar Paul Boyko, and some of the other giants who shaped the Alaska Bar—winning some, losing some, and learning lessons along the way.

Interspersed here and there are episodes recounting hunting and fishing trips in various parts of Alaska, monster pike, charging bear, the dangers of winter driving back in the early days of statehood, building a home, and the myriad adventures one experiences in a rough and tumble land. The account ends in 1978 with the birth of his daughter, Amy Katherine. "I had a wonderful wife, four lovely kids, and a new business to work in that I owned exclusively. Life was good, and I wondered what further adventures were in store for us here in the Last Frontier. Only time would tell. But so far, it had been a great ride!"

The abrupt ending disappoints. In what otherwise passes for a professional memoir, Mr. Ross omits a defining moment of his career. He authored an inflammatory letter that was published in the May-June 1993 issue of the *Alaska Bar Rag* in which he described gay people as "degenerates" engaging in "sexual perversion" and a "lifestyle [that] was a crime only a few years ago, and whose beliefs are certainly immoral in the eyes of anyone with some semblance of intelligence and moral character." The letter was part of a public debate on an Anchorage gay rights ordinance that was approved then rescinded in 1993. Sixteen years later, Mr. Ross's views torpedoed his 2009 nomination for the Attorney General's office—appropriately so, in this reviewer's opinion. The incident is left unaddressed. The omission is regrettable. It would have been interesting to hear from Mr. Ross on this central conflict of his professional life. One might deplore his opinion (to be fair, others might not, as seen in the latest *Duck Dynasty* furor). Mr. Ross would explain that his letter was misinterpreted, by which he means his intent in authoring the letter was misconstrued. The letter itself seems clear enough. But one wonders, have his views changed, evolved? What did he think of the 2009 nomination process? These and related questions are left unanswered.

However the scales are balanced, there are no grudges. Mr. Ross grinds no axes. There are victories over petty, small-minded Fish and Wildlife officers, and a client is exonerated after a police officer expressed uncertainty on which direction the sun rises. There is quiet pride when a respected colleague requests his representation. Drinks are shared with a jury that convicted his client of first degree murder. There are regrets when the Alaska Supreme Court "mucked things up" by deciding that "no kid could be locked up unless he or she had committed a delinquent act" and, again, when the Court concluded that a father claiming inability to pay child support had a right to a jury trial. But there's no rancor, no bitterness. The dominant mood is pure Alaskan—doggedly optimistic. Things will get better. Next file. Next case.

Mr. Ross's story is a candid, open-faced narrative. Unlike many personal memoirs, Mr. Ross does not live large in his own memory. With self-deprecatory good humor, he confesses that he was a poor student and bad athlete whose great good fortune was to marry a beautiful woman who could abide his many shortcomings. He's content with that, and wears it well. At 224 pages, it's a light, entertaining read carrying its own provocative sub-text.

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Courtrooms, Cartridges, and Campfires, by Wayne Anthony Ross (Publications Consultants 2012) ISBN 978-1-59433-298-2 available for $17.95 from Ross & Miner, 327 E. Fireweed Lane, Ste. 201, Anchorage, Alaska 99503 (907) 276-5307

The Alaska Law Review

Options for Vol. 31 in 2014

Starting with Volume 31, publication and access to the Alaska Law Review will be primarily through the freely available ALR website at Duke Law.

All Bar members with e-mail addresses listed with the Bar will receive e-mail notification with a link to the new online issues of the Alaska Law Review.

Alaska Law Review is freely available, printable and searchable including a complete Archive from Vol. 1 at: http://alr.duke.edu.

Hard copy subscriptions for Bar members available
$15/year

To subscribe to print copy use the form at:
http://tinyurl.com/mqagq26

For more general information contact Deborah O'Regan at oregan@alaskbar.org.

Do you know someone who needs help?

If you are aware of anyone within the Alaska legal community (lawyers, law office personnel, judges or courthouse employees) who suffers a sudden catastrophic loss due to an unexpected event, illness or injury, the Alaska Bar Association's SOLACE Program can likely assist that person is some meaningful way.

Contact one of the following coordinators when you learn of a tragedy occurring to some one in your local legal community:

Fairbanks: Aimee Oravec, aaolaw@gmail.com
Juneau: Karen Godnick, kgodnick@alsc-law.org
Mat-Su: Greg Parvin. gparvin@gparvinlaw.com

Through working with you and close friends of the family, the coordinator will help determine what would be the most appropriate expression of support. We do not solicit cash, but can assist with contributions of clothing, frequent flyer miles, transportation, medical community contacts and referrals, and a myriad of other possible solutions through the thousands of contacts through the Alaska Bar Association and its membership.

Amended FRCP 45 simplifies subpoena process as of Dec. 1, 2013

By Michelle Bussarakum


Bussarakum

For the first time in two decades, Federal Rule of Civil Procedure 45 has been significantly amended. Recognizing that Rule 45 had been subject to much confusion, as well as varied and often conflicting interpretations, these amendments are intended to simplify the subpoena process.

I. Issuance of Subpoenas

Rule 45(a)(2) states, "A subpoena must issue from the court where the action is pending."

Under the prior Rule 45, the location of the issuing court for a subpoena depended on the purpose of the subpoena, meaning that a deposition subpoena could be issued by a different court than a document subpoena issued in the same case. That distinction no longer exists.

II. Nationwide Service of Subpoenas

Rule 45(b) eliminates geographic limitations on service of subpoenas: "A subpoena may be served at any place within the United States."

III. Notice Of The Subpoena

Rule 45(a)(4) highlights the already existing, but often ignored, requirement of giving notice of the subpoena to the other parties before serving it on the person to whom the subpoena is directed. It also requires a copy of the subpoena be included with the notice.

IV. Geographical Limitations On Compliance Benefit Subpoenaed Party

Current Rule 45(c) provides different geographic limits based on the type of subpoena and the person subpoenaed. The Committee Note explains, "Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under Rule 45(c)."

A subpoena for attendance at **deposition, hearing, or trial** limits compliance of attendance to within 100 miles of where the person subpoenaed resides, is employed, or regularly conducts business in person. Rule 45(c)(1)(A). In two instances this geographic range is broadened to command attendance *anywhere in the state* in which the person resides, is employed, or regularly conducts business in person:

- If the person subpoenaed is a **party or party's officer**. Rule 45(c)(1)(B)(i). The Committee Note explains this resolves a court split in interpreting the prior rule.
- If the person is being subpoenaed to attend trial and would not incur "substantial expense" to attend. Rule 45(c)(1)(B)(ii). "Substantial expense" is undefined, but the Committee Note advises that the party serving the subpoena may pay the expense and the court can condition the subpoena's enforcement on such a payment.

The Committee Note states that "[w]hen an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)."

The 100 mile limitation also applies to subpoenas for **documents**. Rule 45(c)(2)(A). Subpoenas for inspection remain limited to the premises to be inspected. Rule 45(c)(2)(B). The subpoenaing party and subpoenaed person may circumvent these geographic limits, though, by stipulating to other arrangements, such as electronic production. As the Committee Note acknowledges, "Under the current rule, parties often agree that production, particularly of electronically stored information, be transmitted be electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements."

If a subpoena seeks to compel compliance beyond the geographic limits in subdivision (c), Rule 45(d)(3)(A)(ii) directs the court to quash that subpoena.

V. Disputes Concerning Subpoenas

The main forum to resolve motions related to the subpoena continues to be the court for the district where compliance is required. Rule 45(d). A significant change to Rule 45, however, is that the court is authorized by by subsection (f) to transfer a subpoena-related motion to the issuing court (i.e., where the action is pending) in two circumstances:

- If the person subject to the subpoena consents; or
- If the court finds "exceptional circumstances."

"Exceptional circumstances" is undefined, but the Committee Note suggests that this provision may be invoked infrequently:

> The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion.

If the motion is transferred, the Committee Note "encourage[s] [judges] to permit telecommunications methods to minimalize the burden … on nonparties, if it is necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending." Thus, as long as the attorney representing the subpoenaed person is authorized to practice in the court where the motion is made, that attorney may file papers and appear in the court where the action is pending—even though that attorney is not admitted in the court where the action is pending.

Finally, after the issuing court has heard the motion, to enforce its order, it may transfer the order back to the court where the motion was made.

VI. Contempt Power

Rule 45(g) permits either the court in the district where compliance is required or, after a motion is transferred, the issuing court, to hold a person in contempt for failing to obey the subpoena or a related order.

The author is an attorney with Davis Wright remaine, based in Los Angeles.

Bar History

The first five years

When Alaska became a state in 1959, it was assumed by the State Government and the State Legislature that Alaska would continue to function under the criminal justice system which had existed in Territorial days. The prosecution was undertaken by the United States Attorney and cases were tried in the United States District Court for the Territory of Alaska and Appeals were to the United States Court of Appeals for the Ninth Circuit.

However, in the case of Parker vs. McCeary, 268 F2d 907 (9th cir 1959) the Ninth Circuit Court Of Appeals, simply stated that there was no Jurisdiction for the United States Court of Appeals to continue to hear appeals from the new State of Alaska and thus the new State of Alaska had to immediately develop their own system.

The initial judges appointed in late 1959 were as follows:

Superior Court

Ketchican ..... Judge Walter Walsh
Juneau ..... Judge James Von der Heydt
Anchorage ..... Judge Edward Davis
Judge J. Earl Cooper
Judge James Fitzgerald
Fairbanks ..... Judge Everett Hepp
Judge Harry Arend
Nome ..... Judge Hugh Gilbert

Alaska Supreme Court

Chief Justice Buell Nesbett
Justice Walter Hodge
Justice John Dimond

The first Attorney General of Alaska, John Rader, appointed District Attorneys in early 1960 to conduct prosecution in the following areas:

Ketchican (1st District) ..... Howard Staley
Juneau (1st District) ..... Jack O'Hara Asher
Anchorage (3rd District) ..... George Hayes
Fairbanks (4th District) ..... Warren William Taylor
Nome (2nd District) ..... Robert C. Erwin

The Supervising Deputy Attorney General for Criminal Affairs was George Hayes and the Deputy Attorney General for Civil Affairs was Jay Rabinowitz. The District Attorney and staff oversaw both Civil and Criminal cases in their areas.

In March, April, and May of 1960, the first Criminal cases were tried in Nome before Judge Gilbert and then in Fairbanks in June and July of that year. Visiting Judge James Von der Heyt and Judge Walter Walsh were filling in for Judge Hepp due to the injuries he sustained in an aircraft accident.

Justice Walter Hodge resigned from the Alaska Supreme Court in mid 1960 to become the first United States District Court Judge for Alaska. Judge Harry Arend of Fairbanks was then appointed to his place on the Supreme Court and Jay Rabinowitz was appointed to the Fairbanks Superior Court in Judge Arend's place.

Judge J. Earl Cooper, of Anchorage, became ill and was forced to retire after only two years. He was replaced by Judge Ralph Moody. Judge Moody had replaced John Rader as Attorney General when John returned to the private practice of law in Anchorage. As often happens, there were substantial changes in the District Attorney's Office. These changes were as follows:

Ketchikan ..... Tom Fenton
Anchorage ..... James Merbs
Fairbanks ..... Robert C. Erwin
Nome ..... Virgil Vochosha

Many of the names are familiar for they pioneered the basic systems Alaska uses today. George Hayes became Attorney General, while William Taylor became a Superior Court Judge in Fairbanks. Justice Arend was defeated for retention. Superior Court Judge Jay Rabinowitz was appointed to the Alaska Supreme Court to fill that vacancy.

The numbers of Judges and District Attorneys have increased substantially from this beginning as the State has grown in population and economic activity. The Bar Association is more than ten (10) times greater than the 180 lawyers making up the Alaska Bar Association in 1959.

—Submitted by Robert Erwin

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