The Alaska BAR RAG

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ALSC reaches 40

pgs. 14-15

Board passes MCLE to Supreme Court

The Board of Governors voted 6-4 to send a proposed Mandatory CLE rule to the supreme court. The rule, which was published for member comment in the April – June *Bar Rag*, was voted on at the September 7 & 8, 2006 Board of Governors meeting in Anchorage.

The Board received mail and e-mail comments from the CLE Committee, the Anchorage Bar Association, the Anchorage Bar Young Lawyers Section, and 76 Alaska Bar members. All of these comments will be sent to the Alaska Supreme Court, along with Board of Governors subcommittee reports.

Obtaining medical records, the HIPAA privacy rule and the subpoena *duces tecum*

(Part I)

By Daniel B. Lord

A common practice for litigators is to obtain the medical records of a party by a subpoena *duces tecum*, or other discovery request, for the production of the documents. Under the Privacy Rule, 45 C.F.R. pts. 160, 164, of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936, issuance of the subpoena is no longer sufficient. The release of medical records that will identify the individual patient — or, more specifically under the Privacy Rule, the "disclosure" of "protected health information" ("PHI"), 45 C.F.R. § 160.103, — is now subject to new and additional procedural requirements.

Of course, there are options other than issuing a subpoena to obtain PHI during discovery from a "covered entity," or again more specifically under HIPAA regulations, from a health plan, a health care clearinghouse, or a health care provider "who transmits any health information in electronic form." See 45 C.F.R. § 160.103 (definitions).

It is widely recognized by practitioners that the preferred method for obtaining medical records is by an authorization from the individual who is the subject of the PHI. See, e.g., H. Philip Grossman & Anne K. Guillory, A Year in the Life of HIPAA: New Tips, Observations and Suggestions for Improvement, 1 GP/Solo Law Trends and News (Oct., 2004), available at www.abanet.org/ (the "fastest and easiest way"); Robert R. Harrison, Obtaining Medical Records after HIPAA: New Federal Privacy Protections Change the Rules for Attorneys, 16 Utah Bar J. 16, 18 (2003) (the "preferred approach"),

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AH, THE JOY OF A SECRET ZEEGAR

PG. 20

Law Library has a new state law librarian

Cynthia Fellows has retired from the court and Catherine Lemann, formerly Associate Director of the Law Library of Louisiana, has been hired as Alaska State Law Librarian.

Cynthia began her career with the Alaska State Court Law Library in 1978. She left the court in 1983 and started her own legal research and publishing business, Pleiades Research. Cynthia returned to the court as State Law Librarian in 1987, succeeding Aimee Ruzicka. Cynthia now lives in Oxford, England, and is an Associate Research Fellow at the Institute of Advanced Legal Studies, University of London.

Cathy Lemann has an active and distinguished career in law librarianship. She is a graduate of Carleton College (B.A.), Tulane University (J.D.) and Louisiana State University (M.L.S.) She has taken on many leadership roles in the national law library association, AALL

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Cynthia Fellows

Catherine Lemann

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PRESIDENT'S COLUMN

Being the president is not necessarily a joking matter

By John Tiemessen

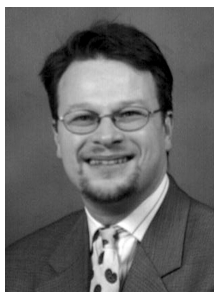
There is tremendous pressure in these articles to not just inform, but entertain the membership. While this article is certainly informative, it likely lacks entertaining content. For those of you looking for jokes, I will refer you to my partner's editorials or Steve O'Hara's Estate Planning Corner – always good for a giggle.

Sunset – When I looked at the possibilities for this year, one that I did not seriously consider was that I might preside over the sunset of the Bar. Although this is a distant possibility, we need to take the threat seriously and address it with the Legislature.

The Organized Bar Act was passed by the Territorial legislature in 1955. In the 1980's, the Legislature amended the act to provide for public members on the Board of Governors and to provide for the periodic sunset of the Bar. Other than that instance, they have left us alone.

The public members have been a tremendous asset to the Board. They provide technical expertise in areas that the board is often deficient. By way of example, public member Bill Granger, a banker, provides financial and accounting expertise that other members of the board do not share. Joe Faulhaber has prior experience on the Board of Realtors as well as on the Board of Governors. He also has served multiple terms and provides institutional memory to the Board – sort of like Strom Thurmond without the dementia. Mike Hurley has lobbying experience that has proved invaluable to negotiating our interaction with the legislature and the governor's office.

Sunset on the other hand, has been a more mixed bag. The positives are that we get a periodic legislative audit that has helped identify administrative improvements that the Bar could make. It also gives us a chance to realize that we are diligently executing our role of protecting the public, the members, and the profession.



" The other positive aspect of sunset is that it forces us to have a more active interaction with the legislature."

The other positive aspect of sunset is that it forces us to have a more active interaction with the legislature. As a Territorial instrumentality that morphed into a state instrumentality we are not under direct state oversight except, with respect to rule-making, admissions and discipline, by the Supreme Court. Accordingly, we tend to have little or no direct interaction with the administration or the Legislature. The effect unfortunately has been a misunderstanding about the Bar; interestingly, this misunderstanding seems to be most pronounced with legally-trained legislators.

One thing that we would like to change is to have annual meetings with the legislature, at least with the chairs of the House and Senate Judiciary committees and the leadership in order to address any concerns that they have for the upcoming session.

One thing that we would like to change is to have annual meetings with the legislature, at least with the chairs of the House and Senate Judiciary committees and the leadership in order to address any concerns that they have for the upcoming session. Getting together every four years (or if the audit recommendation is followed, eight years) does not seem to be working.

Last year, the Legislative Audit Report recommended that the Bar be extended for eight additional years. Instead, after almost no action for the entire session, the legislature extended us for one year during the closing days of the session. Thus, we are facing another second sunset in 2007. We will expend funds and staff resources on this issue again with the hope that a long, simple sunset bill will be passed.

Individual legislators have openly discussed getting involved in MCLE, dues structure, discipline, admissions, and Bar finances. As much as we may have differences within the Bar about individual issues, I think everyone agrees that a self-governing Bar is a far better alternative to becoming a state entity.

I have to admit that I was caught a little off-guard by the hostility that we faced in Juneau. I know it seems easy to take pot-shots at lawyers, the legal profession, and the Bar. Although certain sub-groups like the trial lawyers do have a presence, lawyers tend to keep a fairly low profile in Juneau; the Bar's profile is even lower. That needs to end.

This session we will ask all members to contact their legislators regarding sunset issues. This issue is important enough for all members to take a little time to get involved, even if it just means an e-mail or call to their legislator.

MCLE – By now you should have heard that the Board passed MCLE by a 6-4 vote. The split on the Board reflected the split among the membership. We received over 75 member comments. The decision, the proposed rule, as well as the member comments, will be forwarded to the Supreme Court. If the court adopts the rule, it is possible it would be effective in 2007 but more likely 2008.

LFCP – The Lawyers Fund For Client Protection is, to most attorneys, a forgotten little account that the Bar maintains for "bad" lawyers. Ten dollars a year from your dues goes to this account. Applications to the account are strictly controlled so that only individual clients who were injured through dishonest, uninsured conduct are compensated. There are also limits on individual and aggregate claims to the Fund. In most years, we may see a few thousand or tens of thousands of dollars in applications to the Fund.

For years we have watched the fund grow in anticipation of a rainy day; it is now raining. We anticipate applications regarding one individual attorney to approach but not exceed the $200,000 "per attorney" limit. Although these applications are not yet approved, if approved, they will

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EDITOR'S COLUMN

A touch of gray

By Thomas Van

Like most firms, when one of our attorneys (or staff) has a birthday there is usually some type of celebration. Inevitably, mixed with the joy of celebrating another year of life, there are comments revealing concern about getting older, or a joking reference to getting an AARP membership or Medicare eligibility. Once, in the midst of a much contested trial, my opposing counsel, several decades older than me, passed me in the hall and said "Hell of a way to make a living." He looked resigned, tired and ready to retire (and he did not long after that and after a long and successful career). But one day that will be all of us . . . if we are lucky.

Some say trial and litigation is a young person's game. Others note the levelheaded and more focused approach more senior lawyers have. At some point we will all need to step aside, but determining when that is, is not always easy. Like the former star quarterback who plays one too many seasons and ends up third or fourth in the depth chart, no one wants to quit the game much less to quit "on top." (I recall arguing a motion against Edgar Paul Boyko who, at that time, was wheelchair bound and clearly in declining health, but I also recall the vigor with which he still argued).

"...if our cogs are slipping a little, is it too much to ask for some forbearance, some deference, even some respect, before being shown the door?

Several years ago I was defending a case where the plaintiff was represented by one of our most senior lawyers. There was several defense counsel besides me, as there were three or four defendants. One of my co-counsel was a junior member of our bar, with less than 5 years membership. Our elder opponent failed to provide initial disclosures, even after some reminders. He failed to timely respond to discovery. Scheduling depositions was problematic at best. And, at the start of the deposition of his client, he disclosed for the first time that his client needed a translator and that the deposition would have to be postponed. All of this caused considerable frustration and caused my junior co-counsel to verbally attack him and vent her frustration. I spoke to her privately after that and indicated, essentially, to "go easy on him," he was, after all, an old man, and we will get the information we need in due time. I think my comments fell on deaf ears. Perhaps I was wrong for condoning his oversights, and trying to work on his schedule. But it felt right to do so.

Some say trial and litigation is a young person's game. Others note the levelheaded and more focused approach more senior lawyers have. At some point we will all need to step aside, but determining when that is, is not always easy.

In an article by Marsha King in the *Seattle Times* (April 2006), she reported on the "Graying of the Bar" — and addressed the large number

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The Alaska BAR RAG

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Board of Governors meeting dates
September 7 & 8, 2006
October 26 & 27, 2006
January 25 & 26, 2007
April 30 & May 1, 2007
May 2 - 4, 2007 Annual Convention - Fairbanks

Fourth Annual Color of Justice Program Expands

The full group gathers at the Color of Justice conference.

More than 100 high school students from around the state gathered in Anchorage June 29-30 for the fourth annual Color of Justice program, a series of workshops and activities to encourage young women and youth of color to pursue careers in the judiciary.

The students spent the first day on the University of Alaska Anchorage campus, where they received an introduction to campus life and attended several presentations on law-related themes. The second day was spent in the Anchorage courthouses, where students participated in mock trials and met with judges and other members of the legal and educational communities.

The event is sponsored by the National Association of Women Judges [NAWJ] in cooperation with the Alaska Court System, the University of Alaska Anchorage, Seattle University School of Law, Gonzaga University School of Law, University of Washington School of Law, the Alaska Bar Association, the Alaska Native Justice Center, the Law School Admission Council, and the Council on Legal Educational Opportunity.

Anchorage Superior Court Judge Stephanie Joannides chaired this year's Color of Justice program with assistance from Chief Justice Dana Fabe and Palmer Superior Court Beverly Cutler.

Student participants in a COJ session on the campus of the University of Alaska Anchorage.

L-R: Dr. Sandra Madrid, University of Washington School of Law; Judge Stephanie Joannides, Anchorage Superior Court; Chief Justice Dana Fabe.

L-R: Cassandra Sneed Ogden, CLEO; Judge Beverly Cutler, Palmer Superior Court; Prof. Lorraine Bannai, Seattle University School of Law; Shannon Dineen-Setzer, Gonzaga University School of Law; Monica Kane, UAA Office of the Provost; Michael Driscoll, Provost, University of Alaska Anchorage; Front Row: Professor Paul Ongtooguk, UAA College of Education

Photos Courtesy of the Alaska Court System

Letters to the Editor

Participants thanked

I want to publically thank members of our legal community who volunteered their time to participate in UAA's spring-semester Family Law Class - Janet Platt, Allison Mendel, Linda Limon, Katherine Alteneder, Judge Sharon Gleason, Judge Kay Howard, Master Suzanne Cole, Ryan Roley, GAL Kathleen Wilson, Karla Huntington and Judge John Reese. Thank you for "giving back."

— Joan Clover

Article available on website

Recently, I received the most recent *Bar Rag*. Unfortunately, the conclusion of my article involving the North Pole police officer's stop of the woman with her two children was not completed as promised in the prior issue of January through March, 2006, which stated "to be continued..." undoubtedly, my loyal readers are having conniptions being unable to finish such an important article.

If possible, might we please conclude the drama?

— William Satterberg

Editor' Note: *The article in its entirety is available for readers at the Bar website: Alaskabar.org in the Bar Rag section. We apologize to our readers for this inconvenience, but one of our editors who shall remain nameless prematurely pounced on Bill's retirement article in Issue 2 to go with another article on retirement, to make a nice little "news package."*

Touch of gray

Continued from page 2

of baby boom attorneys turning 60. She noted that "It's a highly sensitive issue in a profession that traditionally honors its elders for long careers." She reports that the head of the Washington State senior lawyers section, "told his colleagues: 'If I start to slip my cogs, be gentle, but show me the door.'" We all know people well into their 70's who are still sharp and capable. And we all hope to be such a person. But if not, and if our cogs are slipping a little, is it too much to ask for some forbearance, some deference, even some respect, before being shown the door?

Being the president

Continued from page 2

eat up about seven years worth of contributions.

Convention – Save the date; the 2007 Bar convention will be in Fairbanks May 2-5 at the Westmark. Based on Bar member requests and feedback, we are going to have a mix of speakers and topics that will appeal to both private and public members. Our keynote speaker will be Chief Justice John Roberts. If MCLE passes, this will be an opportunity to get all your credits and more in one shot.

Quote of the Month

"There is nothing wrong with America that the faith, love of freedom, intelligence and energy of her citizens cannot cure."

Dwight D. Eisenhower, US general & Republican politician (1890 - 1969)

GETTING TOGETHER

Arbitration redux: Editor resurrects column of the undead

By Drew Peterson

It is with trepidation that I take keyboard in hand to write another *Bar Rag* article.

The trepidation is multi-faceted. Some months ago, after years of serving as sleeping potion for my insomniac brethren, and cage fodder for their feathered friends, I announced that in the future I was going to only write on issues of real substance. One would think such a message would have been met with universal glee throughout the legal community, and some sort of award. Instead my name was quickly removed from the list of contributing writers to the *Bar Rag*, replaced with Ken "Ivy League" Kirk, who admittedly is much better at creating a controversy than I was in even my most provocative days.

It is also true that I live in California some of the time now, which is tantamount to death for some die-hard Alaskans. But I do still practice law and mediation here, and would like to think that people still think me alive as I approach 60.

My fear of obscurity is exacerbated by the fact that the point of view I now write to debate was set forth by our very own *Bar Rag* Editor, Thomas Van Flein (Editor's Column, April-June, 2006). Editor Van Flein's opinion presumably contributed to my new found obscurity in the first place.

It is finally ironic that I write to defend arbitration, after previously writing a column here referring to it as the "bastard child of ADR". Defend it I must, however, from Van Flein's attempt to subject arbitration to appellate review under circumstances when the absence of such review has been expressly and fairly negotiated between the parties.

On the same day that I read the Van Flein's column, the headline in the *Anchorage Daily News* was about the efforts of various parties to bring the Exxon case to a final end. The accompanying article noted that some 3,000 of the plaintiffs in the case, who were to share the $4.5 Billion award, are now dead. I think myself of a former young paralegal student of mine who was a "spillionaire" by virtue of the death of her grandfather. She is now a middle-aged spillionaire, without any benefit to herself (to say nothing of her grandparents) more than 17 years after the Exxon Valdez sprung a leak.

"My fear of obscurity is exacerbated by the fact that the point of view I now write to debate was set forth by our very own Bar Rag Editor, Thomas Van Flein."

We have all heard the aphorism that "justice delayed is justice denied," and it is true far beyond extreme cases like the Exxon suit. One of the primary things that people bargain for when they agree to arbitration is for finality. And in a great many cases finality is the most important thing that can be provided for parties to help them resolve their disputes. Finality is not something to be dismissive of, or to value lightly. Of course the law itself values finality through such concepts as res judicata, collateral estoppel, laches, and various statutes of limitation.

One of the primary things that people bargain for when they agree to arbitration is for finality.

It is granted that the finality of arbitration is only of value when it is freely and openly bargained for in the first place. In cases where one side is effectively coerced into an arbitration clause, finality may seem very unfair indeed, especially in view of the other potential flaws of the arbitration process. Such coerced cases need to be distinguished, however, from cases where finality was freely bargained for and yet someone is disgruntled with the end result and then complains about the unfairness of the situation after the decision has been rendered. Courts (even appellate courts) are familiar with this phenomenon of the disgruntled litigant, no matter how fair or unfair the initial decision seemed to be.

In my previous arbitration article, I complained about an Alaska Bar Association fee arbitration procedure, wherein I was found to have fully complied with all ethical and legal requirements and yet I was still punished for reasons which ignored both the facts and the law governing the proceeding. Since the arbitration was binding on me and not appealable, it did not feel very just. In retrospect, however, I was very glad about the finality of the decision, and would not have traded it for the ability to appeal, even though I was in the right on the legal merits of the case.

Which comes to the crux (and perhaps controversial conclusion) of the matter. I would assert that that the law and the legal system are not and they have never been about justice, except perhaps as a usually unattainable ideal. What our legal system does do very well is to make decisions. It also has a great deal of ability in many (though not all) cases to enforce the decisions that it makes. Beyond that is a sincere hope that such decisions and their enforcement will resolve disputes. It is noteworthy that alternate dispute resolution methods like arbitration and mediation can also resolve disputes. Arbitration can also make decisions, even final and binding ones. Mediation does not itself make decisions but helps parties to make their own decisions, which is usually the best way to resolve the underlying disputes.

Making and enforcing decisions when disputes cannot otherwise be resolved is critical to our society and to our nation. Such decision making should not be confused with justice, however. At best, justice may occasionally prevail. At worst, the law can actually be used as a tool to prevent justice. The legal system is actually fairly neutral when it comes to the entire concept of justice.

The civil rights movement is perhaps the best example of an area where the law and the legal system both prevented and subverted justice and helped to lead to a fairer and more just society.

The realization that that law is not about justice is a daunting one. I think I first realized that the law was not about justice when I was first introduced to Indian Law. Native Americans are routinely excluded from the protections of the United States Constitution and the Bill of Rights. For example, the provision that no person can be deprived of their property without just compensation and the due process of law has an exception when it comes to Native Americans. The leading decision on the question even comes from Alaska. Tee-Hit-Ton v. United States, 348 U.S. 272 (1955).

The civil rights movement is perhaps the best example of an area where the law and the legal system both prevented and subverted justice and helped to lead to a fairer and more just society. The old Jim Crow laws and the civil rights amendments and statutes were both utilized and interpreted by the same legal systems.

Justice after all is like beauty - it is in the eye of the beholder. If you are a member of the Klan, I guess justice is enforcing the Jim Crow laws. If you are an African American in the south, justice is declaring that separate is not equal. If you are against abortion, justice is overturning *Roe vs. Wade*. If you are Exxon Corporation, justice is keeping your money until every last possible avenue of appeal has been exhausted. If you are a criminal defendant, justice is about having your procedural rights protected. If you are a victim of a crime, justice is about being able to participate in the resulting court proceeding. If you are a parent getting divorced, justice is hopefully about maintaining a healthy and loving relationship with your children. And if you are someone stuck in a dispute, justice may well be about finality; about having the dispute resolved and over, regardless of the outcome.

In sum, Dear Editor, and the rest of you so inclined, lighten up in your search for pure justice and the American way of life. If parties can mutually agreed about it in advance, without coercion, and without violating certain minimal standards of civilized society, let them define justice however they want. And if they pick the finality of arbitration, so be it, regardless of how poorly the process might proceed thereafter.

(Editor's Note: Thank you for your thoughtful comments discussing the balance between fairness and finality.)

In Memoriam

Bill Bryson

We lawyers are members of a strange profession - strange in that the challenges presented by the practice are so varied and complex that they often seem almost unrelated, although they all fall under the heading of the legal profession. The people called upon to meet and address these challenges are no less diverse.

Gathered under our aegis are found some people, generally described as the more intellectually able among us, who perform the detailed and intricate tasks necessary to carry out commercial transactions involving millions of dollars. These transactions may require the preparation of hundreds of documents, each of which must be integrated into a Byzantine whole after being considered individually on its own merits as well. The painstaking detail requires laborious attention, generally performed over whatever period of time is necessary to insure a correct result. These lawyers are compensated at a high level, probably because, in addition to the professional skill involved, the amount of money involved and the commensurate professional risk is staggering and justifies such fees.

Elsewhere in our profession are lawyers who make their professional home in a courtroom. In addition to being entrusted with the wealth of our citizens, they often practice in the criminal arena where generally great amounts of money are not involved, but liberty and even life may be at stake. They are generally not as well compensated, often representing accused citizens from those strata of our society that cannot afford to pay the kind of fees that are generated by a corporate merger.

The compensation may be of a different kind, however. They may derive satisfaction from simply being there as watchdogs to keep the system honest and compatible with a free society. Every so often, they may even see an innocent citizen set free. That such a small percentage of criminal prosecutions are unsuccessful is, in an odd way, a tribute to their skills and dedication.

Their daily lives are played out in a fascinating world of real good and evil complete with real heroes and villains and characters of many stripes drawn in brighter colors than even those found in the "penny dreadfuls" of long ago. For some, being involved in such a world and not going to an office that their peculiar personalities would find boring and confining is compensation in and of itself.

Because criminal law is easy grist for the media mill, some of these practitioners find satisfaction in the public spotlight when its fickle beam may focus upon them for a moment or two. One only need tune in to the evening cable news shows to see that successful practitioners of the criminal defense arts are in constant demand as commentators, and it's obvious they love it. One also can see that the sartorial standards set are generally quite high, and few appear willing to risk a bad tailor. No one ever saw Bill in a tasteless suit or saw him refuse to talk to a reporter to my knowledge.

In our profession, an ounce of diligence is worth a pound of brilliance. This is true in criminal law as well, but there is another element involved in a courtroom upon which all may depend. It is the ability to hold in one's hand and head an awareness of everything that is going on in that small world, the exact state of mind and emotion of the witness, the judge, the other attorney, and each citizen in the box. Defense counsel must then integrate this constantly changing pattern of information in a reasoned and directed effort to extract from the witness the information necessary, and then convey to the jury the truth critical, to his client's defense. It is equal part craft and equal part Zen. Many great lawyers don't have it. All great trial lawyers do. There may arise a moment in a particular trial where, if instinct or courage fail, all is lost, and the great trial practitioner must be prepared at all times to recognize and stand up to that challenge.

Most trials have few contested issues of fact, and more often than not, it is the inferences to be drawn from those facts by the jury or judge that will decide the day. At the end of the trial, defense counsel must know which facts to admit and which to contest, what inferences will be accepted as reasonable by the jury and which won't. He must understand how far he can go in attacking the credibility of a particular witness, and a myriad of other things that can't be taught out of a textbook.

In the absence of these extraordinary skills, a diligent lawyer may do a workmanlike job in a courtroom, presenting a credible defense for an accused citizen in a manner which will generally insure that justice is done in the ordinary case. In some extraordinary cases, however, justice may depend on the skills of those special few, the great trial lawyers among us. Some would say that they produce unwarranted acquittals and do injustice in particular cases. That is true, but it is only true when either the judge or the prosecutor or both are not up to the task.

It is also true, I think, that no one is a great trial lawyer all the time. Many trial lawyers will have moments when it all comes together for them, and, in a particular trial, or even in a particular moment in a particular trial, they find these skills within them, and, for that time, they stand at the pinnacle of their chosen branch of the profession.

Anyone who has kicked around the courtrooms of Alaska for the past few decades knew Bill Bryson. I did, and I liked him. He was one of us. We labored in the same fields. I dare say almost everyone else who knew him would say the same. We saw him from time to time do the job as well as it can be done. I would never say that Bill did not have flaws. I don't think he would have said so either. They bring us here today. They, like much about Bill, were spectacular, and, in a peculiar way, highlighted the extraordinary professional skills which he possessed and demonstrated for us all in particular causes.

I think Bill, if he wanted to be remembered for anything, would like to be remembered for standing above us all from time to time and being at those moments as good as a trial lawyer can be. I think he would probably also be satisfied with the epitaph which appears, and will continue to appear in scattered court documents and law reports for about as long as anything mortally created can. It will remind us that in life "William P. Bryson, appeared for the defense."

— *Mark C. Rowland*

The new service members civil relief act: A major revision

By Mark E. Sullivan

Introduction

On December 19, 2003, President Bush signed into law the "Servicemembers Civil Relief Act" (SCRA), a complete revision of the statute known as "The Soldiers' and Sailors' Civil Relief Act," or SSCRA. Even for lawyers with no military base nearby, this federal statute is important. There are over 160,000 National Guard and Reserve personnel at present who have been called up to active duty, and over 40% of the armed forces serving in Iraq are Reserve/Guard servicemembers. These Reserve Component (RC) military members often come from the big cities and small towns of America, and lawyers need to know their way around the basic federal statute that protects those on active duty. Although previously there was limited coverage by the SSCRA for Guard members, the new Act extends protections to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense. 50 U.S.C. App. § 511(2)(A)(ii).

There are over 160,000 National Guard and Reserve personnel at present who have been called up to active duty, and over 40% of the armed forces serving in Iraq are Reserve/Guard servicemembers.

Up until the passage of the SCRA, the basic protections of the SSCRA for the servicemember (SM) included:

1. Postponement of civil court hearings when military duties materially affected the ability of a SM to prepare for or be present for civil litigation;

2. Reducing the interest rate to 6% on pre-service loans and obligations;

3. Barring eviction of a SM's family for nonpayment of rent without a court order for monthly rent of $1,200 or less;

4. Termination of a pre-service residential lease; and

5. Allowing SMs to maintain their state of residence for tax purposes despite military reassignment to other states.

The SSCRA, enacted in 1940 and updated after the Gulf War in 1991, was still largely unchanged as of 2003. Congress wrote the SCRA to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA and to update the SSCRA to reflect new developments in American life since 1940. Since many of the Act's provisions are particularly useful (and potentially dangerous) in domestic litigation, the family law attorney should have a good working knowledge of them. Here's an overview of what the SCRA does.

Stays and delays

The SCRA expands the application of a SM's right to stay court hearings to include administrative hearings. Previously only civil courts were included, and this caused problems in cases involving administrative child support determinations as well as other agency determinations which impacted servicemembers. Criminal matters are still excluded. 50 U.S.C. App. § 511-512. There are several provisions regarding the ability of a court or administrative agency to enter an order staying, or delaying, proceedings. This is one of the central points in the SSCRA and now in the SCRA – the granting of a continuance which halts legal proceedings.

In a case where the SM lacks notice of the proceedings, the SCRA requires a court or administrative agency to grant a stay (or continuance) of at least 90 days when the defendant is in military service and –

• the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant's absence, or

• with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

In a situation where the military member has notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon the request of the SM, so long as the application for a stay includes two things. The first is a letter or other communication that 1) states the manner in which current military duty requirements materially affect the SM's ability to appear, and 2) gives a date when the SM will be available to appear. The second is a letter or other communication from the SM's commanding officer stating that 1) the SM's current military duty prevents appearance, and 2) that military leave is not now authorized for the SM. 50 U.S.C. App. § 522. Of course, these two communications may be consolidated into one if it is from the SM's commander.

Family law sidebar

Pause for a moment to think through the potential impact of this stay provision on the family lawyer and her client. How would this affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida? How are you going to get the child back when mom's lawyer interposes a stay request to stop the litigation dead in its tracks? If mom has executed a Family Care Plan (FCP), which is required by military regulations, leaving custody with the maternal grandmother, will that document – executed by mom, approved by her commanding officer and accompanied by a custodial power of attorney – displace or overcome a court order transferring custody to dad? Can the court even enter such a custody order given the stay and default provisions of the SCRA? To see how the battle is being joined in this area, take a look at Lenser v. McGowan, 2004 Ark. LEXIS 490 (upholding the judge's grant of custody to the mother when the mobilized father requested a stay of proceedings to keep physical custody with his own mother) and In re Marriage of Grantham, 698 N.W.2d 140 (Iowa 2005) (reversing a judge's order that stayed the mother's custody petition when father was mobilized and had given custody via his FCP to his mother).

On another front, think about support. How does this stay provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve? When she leaves behind her "day job," her pay stops and so does the monthly wage garnishment for support of their children. How can dad get the garnishment restarted while she's in uniform on active duty? Will the reduction in pay she probably gets result in less child support? Or will her reduced cost of living in the military (how much does it cost to live in a tent outside Bagram Air Base in Afghanistan?) have the opposite result? How can dad move the case forward to establish a new garnishment when he cannot locate her, he might not be able to serve her (if he can locate her), and she probably will have a bullet-proof motion for stay of proceedings if dad ever gets the case to court?

Additional stays

An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

When the court is considering the entry of a default judgment or order, one tool that is specifically recognized by the SCRA is the posting of a bond.

Once again, give this some thought. What is the attorney supposed to do – tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way?

And, by the way, who pays for this? There is no provision for compensation in the SCRA. How would you respond if her honor beckons you to the bench next Monday and says, "Counselor, I am appointing you as the attorney for Sergeant Sandra Blake, the absent defendant in this case. I understand that she's in the Army, or maybe the Army Reserve or National Guard. Whatever. Please report back to the court in two weeks and be ready to try this case."?

Dangers and defaults

Does a stay request expose a SM to any risks? The SCRA states that an application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c) eliminates the previous concern that a stay motion would constitute a general appearance, exposing the SM to the jurisdiction of the court. This new provision makes it clear that a stay request "does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense."

How would you respond if her honor beckons you to the bench next Monday and says, "Counselor, I am appointing you as the attorney for Sergeant Sandra Blake, the absent defendant in this case.

Can you obtain a default judgment against a SM? Broadly construing "default judgment" as any adverse order or ruling against the SM's interest, the SCRA clarifies how to proceed in a case where the other side seeks a default judgment (that is, one in which the SM has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine if the defendant is in military service.

A default judgment may not be lawfully entered against a SM in his absence unless the court follows the procedures set out in the SCRA. When the SM has not made an appearance, 50 U.S.C. App. § 521 governs. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the plaintiff), the movant must file an affidavit stating "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." Criminal penalties are provided for filing a knowingly false affidavit. 50 U.S.C. App. § 521(c).

When the court is considering the entry of a default judgment or order, one tool that is specifically recognized by the SCRA is the posting of a bond. If the court cannot determine whether the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmovant later be found to be a SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside). 50 U.S.C. App. § 521(b)(3).

When the filed affidavit states that the party against whom the default order or judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent SM.

> If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.
>
> 50 U.S.C. App. § 521(b)(2).

If the court fails to appoint an attorney then the judgment or decree is voidable.

Attorney for "the absent"

The role of the appointed attorney is to "represent the defendant." The statute does not say what happens if the SM is, in fact, the plaintiff in a particular domestic case, but undoubtedly this wording is careless drafting. Particularly in domestic cases, it is as likely that the SM would be the plaintiff as the defendant, the petitioner as the respondent, and default decrees are sought against both sides, not just defendants.

The statute does not say what tasks are to be undertaken by the

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The new service members civil relief act

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appointed attorney, but the probable duties are to protect the interests of the absent member, much as a guardian ad litem protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. Counsel for the SM should always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the client's participation.

The statute also leaves one in the dark about the limitations of the appointed attorney. Her actions may not waive any defense of the SM or bind the SM. What is she supposed to do? How can she operate effectively before the court with these restrictions? Can she, for example, stipulate to the income of her client or of the other party? Can she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the Act could mean that she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

Without elaboration in this area, the Act could mean that she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA.

Default protections

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments entered against them without their knowledge and without a chance to defend themselves. The SCRA allows a member who has not received notice of the proceeding to move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order. In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g). Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment. 50 U.S.C. App. 521(h).

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections.

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service. In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial effort and resources in opening default judgments in cases where servicemembers have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

Interest rates

The Act clarifies the rules on the 6% interest rate cap on pre-service loans and obligations by specifying that interest in excess of 6% per year must be forgiven. 50 U.S.C. App. § 527(a)(2). The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of 6% is merely deferred.

It also specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected his or her ability to pay. 50 U.S.C. App. § 527(c).

Leases, liens and more

The SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is $1200 or less. 50 U.S.C. App. § 531(a) modifies the eviction protection section by barring evictions from premises occupied by SMs for which the monthly rent does not exceed $2,400 for the year 2003. The new Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2005 monthly rent ceiling is $2,615.16.

A substantial change is found in 50 U.S.C. App. § 534. Previously the statute allowed a servicemember to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents. It did not provide help for the SM on active duty who is required to move due to military orders. The SCRA remedies these problems. Under the old statute, a lease covering property used for dwelling, professional, business, agricultural or similar purposes could be terminated by a SM if two conditions were met:

a. The lease/rental agreement was signed before the member entered active duty; and

b. The leased premises have been occupied for the above purposes by the member or his or her dependents.

The new Act still applies to leases entered into prior to entry on active duty. It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a "permanent change of station" (PCS) or a deployment for a period of 90 days or more.

It also adds a new provision allowing the termination of automobile leases (for business or personal use) by SMs and their dependents. Pre-service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more. 50 U.S.C. App. § 535.

Conclusion

The family law attorney, perhaps even more than the general practitioner, needs to know and understand the SCRA for those occasions when a military member is one of the parties to the litigation. Mobilizations and deployments affect mothers and fathers, wives and husbands, and separated partners who are in the Reserves, on active duty and in the National Guard. They will have an impact on income, visitation, family expenses, custodial care for children, mortgage foreclosures, garnishments, and many other domestic issues.

Mobilizations and deployments affect mothers and fathers, wives and husbands, and separated partners who are in the Reserves, on active duty and in the National Guard.

The best source of quick information on the SCRA is "A Judge's Guide to the Servicemembers Civil Relief Act," found at the website of the Military Committee of the ABA Family Law Section, www.abanet.org/family/military. An extended treatment of the SCRA and family law issues may be found in Sullivan, "Family Law and the Servicemembers Civil Relief Act," "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," Divorce Litigation, Vol.16/Number 3, March 2004. Also see Sullivan, "The Servicemembers Civil Relief Act: A Guide for Family Law Attorneys," in Brown and Morgan, 2005 Family Law Update, pp. 23-54 (Aspen Publishers 2005). The Army JAG School's SCRA guide will be published and posted on-line shortly, taking the place of the SSCRA guide which is presently available (and still quite useful in understanding and interpreting the statute). This can be found at the School's website, www.jagcnet.army.mil/tjaglcs. Click on TJAGLCS Publications, then scroll down to Legal Assistance, and then look for the publication, which is JA 260.

[The author is a retired Army Reserve JAG colonel who practices in Raleigh, NC.]

Getting military health and education records

By Mark E. Sullivan

In custody cases involving one or both parents who are in the armed forces, it sometimes is necessary to obtain school and medical records of the children involved. Far from being a minefield, as most civilian practitioners suspect, the procedures for access to military educational and health records are simple and straightforward.

Voluntary release of records and medical information from an armed forces medical treatment facility (MTF) is governed by the same federal law, the Health Insurance Portability and Accountability Act (HIPAA), as civilian health facilities. The primary legal references pertaining to the release of medical information are the following:

1. Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. Sections 1320d - 1320d-8 (2004).

2. DoD REG 6025.18-R, DOD Health Information Privacy Regulation (2003) and DoD Directive 5405.2.

3. AR (Army Regulation) 40-400, Patient Administration.

4. AR 40-66, Medical Record Administration and Health Care Administration.

5. AR 27-40, Litigation.

The latter three are for cases involving U.S. Army records.

Perry Wadsworth, a hospital attorney for Womack Army Medical Center at Ft. Bragg, NC and an Army Reserve JAG major, describes the records access issues as follows:

The old analysis of "Privacy Act vs. FOIA (Freedom of Information Act)" used to be one of our standards, but HIPAA is now the controlling Federal legal authority on medical information. The law was not written for the military per se; this has caused some confusion in its application, particularly because military functions and command authority are fairly broad-based in comparison to civilian institutions.

Requesting records from an MTF can be both easy and hard. The request is easy but getting the records is sometimes hard. The spectrum, from easy to hard, is summarized as follows:

1. Easy. If the patient is requesting his own records or completes a HIPAA release form giving authority to someone else to get his records, then the request is straightforward. The MTF will release copies of the records in the normal course of business. This is the preferred method. If an attorney is representing a client whose records are needed, then he can simply have the client complete the appropriate release form with the HIPAA language. The attorney then mails the request and release form to "Medical Correspondence,

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Patient Administration Division" of the appropriate MTF. It may behoove the attorney to state the purpose of the request, such as "this case involves a custody lawsuit," or "this case involves a potential federal tort claim." If the government has an interest in the case, whether it is the opportunity to recover money for treatment provided or its exposure to damages in a tort suit, then the case can flow more smoothly by explaining that the government. If you know someone in the JAG claims office handling the tort claim, he or she can usually assist you in getting the records in these cases because the JAG office has an interest in obtaining the records as well.

2. Moderately Easy. When litigation is involved and the judge signs an order or a subpoena for the release of records, the release process is relatively easy. Attorneys for the patient or opposing party often make it difficult by not getting a judge's signature on the subpoena or order. They frequently issue subpoenas in their own names. This makes it more difficult and delays the whole process, because the MTF will contact its servicing JAG office and the request for records will be denied. This occurs more frequently in civil cases, particularly domestic ones, than you might imagine. The other factor that most commonly causes a denial or delay of the release, is the failure to make a timely request. An Army facility needs to get the judge's order or subpoena at least 14 days in advance of the date the materials are due. AR 27-40 details this from the Army's perspective.

3. Hard. Whether litigation is involved or not, when there is no judge's order and no release authorization signed by a proper representative, the analysis becomes more nuanced. We then have to look to exceptions under HIPAA and implementing agency regulations for release of medical information. Child custody disputes seem to bring out the worst case scenarios. Other common examples include criminal investigations, social service involvement (e.g., child abuse), and command-directed mental health evaluations. The main reason these types of cases can be more complicated is because often there is one party who does not want the records released, yet the requesting party argues that some other interest is more compelling than the individual's right to privacy, such as the best interests of a child, a government investigation, the need for justice, etc.

The constraints on release of medical information also apply to conversations or testimony of health care providers, not just the release of medical records. Some attorneys would like to get information directly from the physicians as a back-door approach to avoid requesting the records. Unfortunately, this can ultimately backfire on the attorneys. If or when the physician mentions it to his legal counsel (the JAG officer or civilian federal attorney representing the MTF, for example), he or she will be reminded of the rules of release and may be hesitant to cooperate in the future. AR 27-40 provides a great deal of leeway in allowing a military command (through its attorney) to determine whether a physician can provide testimony and, if so, what the limits of that testimony will be. Overall, it is better for attorneys and patients to be candid and honest about their intentions in a case. Most of them are, but there are of course exceptions; this leaves a bad taste in one's mouth and decreases the spirit of cooperation that might otherwise prevail. For example, I've seen doctors who, although they were technically "not reasonably available to testify" or did not receive at least 14 days' notice of the scheduled testimonial appearance, were still willing to bend over backwards just a few days before their deployment or PCS or discharge to provide testimony or talk to an attorney about the patient. If they had felt they were being tricked or mislead by the patient or his attorney, then they just would not have provided assistance and testimony.

Overall, it is better for attorneys and patients to be candid and honest about their intentions in a case. Most of them are, but there are of course exceptions; this leaves a bad taste in one's mouth and decreases the spirit of cooperation that might otherwise prevail.

The following are some tips that may helpful in trying to obtain records:

1. Learn the name of a proper point of contact in the Medical Correspondence office, such as the office chief. Then send the request for records by certified mail to that person's attention at her work address. This is not a guarantee that you will get records faster, but it does provide a record of your request.

2. Be as specific in your request as you can if time is of the essence. If you need to dot every 'i' and cross every 't' by requesting every single record, lab and radiograph from every single clinic for the past 50 years, then by all means request them. Otherwise, narrow your request to those records you really want. If you are only concerned about the inpatient admission of February 14-22, then say so. If you only want specific treatment notes or radiology results, then say so. Few things bog down a request like overstating the amount of records one wants.

3. Know which clinic and/or institution has possession of the records. This is the corollary to being specific. If you need a person's outpatient records, then the hard copies will almost always be located at the clinic of the installation to which he and his family are currently assigned. For example, a spouse might have gotten treatment at Fort Bragg, NC, but when she moved with her military spouse to Fort Lewis, WA, the outpatient records should have moved with her. On the other hand, inpatient records remain with the facility where the admission occurred. A caveat to this is that inpatient records are retired to the National Personnel Records Center, St. Louis, Missouri after a certain period of time (usually five years after date of treatment). Electronic records also remain in database storage at the facility where they originated.

4. Know that some clinic records are maintained separately from the main medical record. If you want these, mention them specifically: behavioral health, (e.g. Psychotherapy) records, social work services, Early Development Intervention Services (for minors), disability evaluations, and (sometimes) physical therapy and occupational health. Also, certain electronic records may not appear in the medical record jacket B things like lab results, radiology reports, telephone consults, autopsy reports. These items usually are printed off and placed in the records jacket, but it is worth asking for them, even if you have to do so in a subsequent records request.

5. Show some grace if your request takes longer than you think it should. Remember that administrative staff members are often busy trying to maintain records and perform their various duties. Those who copy records are doing so for many agencies, including patients, health care providers, government agencies, insurance companies, and other attorneys. They also have to gather the records from a number of sources, including outlying clinics, radiology, social work, etc. It goes without saying that being cordial and professional in your conversations with staff can only help your cause. If you ever have to complain, you can always use the chain of command to express any concerns.

For Army cases, it is helpful to have a copy of 32 C.F.R. part 516.40-46 for information on Army litigation policies regarding the release of information. Briefly summarized, this regulation provides that:

• Except as provided in this regulation, DA (Department of the Army) personnel will not disclose official information in response to subpoenas, court orders or requests.

• The appropriate legal authority (e.g., staff judge advocate or hospital legal advisor) must approve in writing the release of information.

• If DA personnel receive a subpoena, court order or request for attendance at a trial, deposition or interview which reasonably might require disclosure of official information, they should immediately contact the appropriate legal authority, who will attempt to satisfy the subpoena, order or request informally under this regulation or else will consult with the Litigation Division, Headquarters, Department of the Army.

• Those who seek official information must submit, at least 14 days before the desired date of production, a specific written request setting out the nature and relevance of the official information sought, and DA personnel may only disclose those matters specified in writing and approved by the appropriate legal authority.

• DA personnel will not release originals; only authenticated copies will be provided when disclosure is authorized.

• AR 37-60 provides a schedule of fees and charges for searching, copying and certifying Army records for release in response to litigation-related requests.

• If the request complies with this regulation, it is DA policy to make the information available for use in court unless the information is classified, privileged or otherwise restricted from public disclosure.

• There are a number of factors which must be considered in determining whether to release information; they are found at 32 C.F.R. part 516.44(b).

• If the deciding official determines that all or part of the requested documents or information shall not be disclosed, then he will promptly communicate directly with the attorney who requested the documents or information to attempt to resolve the matter informally. If the order or subpoena is invalid, the reasons should be explained to the attorney. An explanation is also warranted when the records are deemed to be privileged. The military attorney should try to obtain the attorney's agreement to withdraw or modify the subpoena, order or request.

• A subpoena duces tecum or other legal process signed by an attorney or a clerk for DA records protected by the Privacy Act, 5 U.S.C. ' 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Act precludes the release of such records without the written consent of the individual involved or 'pursuant to the order of a court of competent jurisdiction.' Such an order is one signed by a judge or magistrate.

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INVITATION FOR PUBLIC COMMENT
FEDERAL PUBLIC DEFENDER
District of Alaska - Mr. Richard Curtner

The United States Court of Appeals for the Ninth Circuit is conducting an evaluation of the performance of the Federal Public Defender (FPD) for the District of Alaska, Mr. Richard (Rich) Curtner. The Court conducts these evaluations in order to determine if the incumbent FPD should be appointed to an additional four year term without a competitive recruitment. Any persons having knowledge of the performance of Mr. Curtner and/or his respective staff are invited to submit comments. Anonymous responses will not be accepted. However, the identity of all respondents will be kept confidential except to those with a need to know.

All comments must be received no later than Tuesday, October 31, 2006 in order to be considered. Comments may be submitted via mail or fax to the following address:

Office of the Circuit Executive
Evaluation---FPD, District of Alaska
U.S. Courts for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939
Fax: (415) 556-6179

ECLECTIC BLUES

Joining the Germans on the Cassiar

By Dan Branch

Sometime during the last decade Canada must have ceded control over Northern British Columbia to Germany. There are more Germanic speakers driving north of the Yellowhead Highway than native born Canadians and you can buy good mustard in the grocery stores.

The Cassiar Highway bisects this new Germany as it carries traffic from Kitwanga British Columbia to Watson Lake, Yukon Territory. The land is lean in creature comforts. The few open restaurants sport For Sale signs and even gas stations are hard to find. A small group of travel-trailer owners can create one of the area's 10 largest communities by parking together for the night, and the first crossing of the Cassiar over the Bell Irving River rates a designation on the B.C Highway map as Bell I.

There is great natural beauty here which, when combined with the area's small population, must make the area irresistible to people raised in the dense lands of Central Europe. This summer the area's beauty drew a friend and I to the Cassiar country where we spent more than a week touring on bicycles.

We took the train from Prince Rupert to Kitwanga to start our journey. Nothing on the train prepared us for New Germany. Our ticket was printed in English and French. Australian English filled the air in the train car as we rode along the banks of the Skeena River. No one with a German accent welcomed us at the crossroads in Kitwanga where we detrained. A sign on the Skeena Trading post advertised fireworks, soda pop and candy.

For two days we pedaled our heavily laden touring bicycles up the Cassiar. Forests full of fall color lined the road. Sometimes we had to stop to let well-fed black bears cross the road. A sow and her two cubs passed in front of us just after we rode over the spectacular Nass River Bridge. It was sunny and hot--- a welcome change from Juneau rain.

After 157 kilometers we reached Meziadin Lake. The B.C. Highway map promised that we would find a restaurant, grocery store and camp ground here. There was no store and the restaurant would be closed for the next four days. The campground was as promised with toilets, tables, a water pump and bear-proof storage for our food. Secured food storage was necessary because salmon were already flooding into the lake to spawn and brown bears were hammering sockeye in a nearby stream.

The campground signs provided information in two languages. Being frequent visitors to Canada we had seen lots of examples of the country's bilingual requirement, which requires that signs provide information in French and English. In apparent violation of this requirement, the Meziadin campground signs were in English and German.

"There is great natural beauty here which, when combined with the area's small population, must make the area irresistible to people raised in the dense lands of Central Europe."

Conversations in German floated through the campground as we prepared dinner over an old Svea stove. Our campsite was a small fabric island in a sea of Winnebegos and Bigfoot Campers. The vehicles were filled with our brothers and sisters from the Rhine. Some sat in comfortable chairs next to a roaring fire and stared across the lake. Others never ventured from their recreational vehicles. These folks must have taken the time to read the German "Beware of Bears" signs.

Once a lone German approached the lake shore with a 10-foot spinning rod and tossed a hammered spoon far out into the lake. He hooked and landed a small silver salmon. Kneeling with a kind of reverence, he gently released the fish and walked back to his camper with the smallest smile on his face. I'd witnessed the birth of a family legend and felt honored. With each telling, the fish would grow in size and the wildness of the area would increase.

The next morning we dug through our panniers to confirm that we needed more provisions. With no store at Meziadin Lake we had to ride 65 kilometers into Stewart to buy more groceries. The perverse road to Stewart climbs up an 8% grade before dropping quickly to sea level and the communities of Steward, B.C. and Hyder Alaska. Bears rushed off the road and crashed through the brush as we plummeted through avalanche zones and steep walled canyons.

Germans driving RVs passed us on the way. They were sharing large tables in the Stewart restaurants when we arrived in town. They were also waiting for us at the Hyder bear watching area when we rode over there the next day. Always independent, the citizens of Hyder displayed English-only signs on their tourist shops.

After filing our stomachs and bike panniers in Stewart we climbed the 65 klicks back to Meziadin Lake where we were greeted with rain. We hunkered down there for two nights waiting for the storm to rain itself out while the area around the local gas station was filled up with Winnebegos forced off the road by the rain.

During our forced stay at the campground we met several naturalized Canadians who had moved from their native Germany 30 or 40 years before. They were good folks with an honest love of the land in their eyes. Looking at our bicycles they expressed envy that we could travel the country in a more intimate way. Like the German citizens we shared the campground with, these Canadians had a special appreciation for the wild Cassiar country because there is so little natural wildness in the land of their birth. Ironically, Alaskans appreciate the Cassiar lands because we are exposed to so much wildness in our backyards.

Getting military health and education records

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• If the records are unclassified and are otherwise privileged from release under 5 U.S.C. 552a, they may be released to the court if there is an order signed by a judge or magistrate directing the person to whom the records pertain to release the specific records, or that orders copies of the records to be delivered to the clerk of court and indicates that the court has determined the materiality of the records and the nonavailability of a claim of privilege. The clerk must be empowered to receive the records under seal, subject to request that they be withheld from the parties until the court determines whether they are material to the issues and until any question of privilege is resolved.

• A subpoena or court order for alcohol abuse or drug abuse treatment records shall be processed under 42 U.S.C. 290dd-3 and 290ee-3, and Public Health Service regulations published at 42 C.F.R. 2.1-2.67.

The final rule on Standards for Privacy of Individually Identifiable Health Information, published by the Department of Health and Human Services, is found at 45 C.F.R. Parts 1160 and 164. The Military Health System Notice of Privacy Practices, effective April 14, 2003, also provides useful information on what records and data are confidential and how they may be disclosed.

Getting children's educational records

Parents or legal guardians of a student may be given access to the student's academic records, disciplinary files, and other student information without regard to who has custody of the child, unless the divorce decree or court-approved parenting plan states that such access should be denied or indicates that the non-custodial parent is denied access to the child. State law is generally the key to release of educational records from local public and private schools. North Carolina law, for example, specifies these rights at N.C. Gen. Stat. ' 50-13.2(b). It's another story for schools run by the Department of Defense (DoD).

Many on-base primary and secondary schools for military dependent children are run by the Department of Defense Education Activity (DoDEA). Children's school records are available to a parent or legal guardian of the children (including academic records, disciplinary files and other student information) without regard to who has custody of the child, unless the decree of divorce or dissolution or the court-approved parenting plan (including a custody order) requires that records access should be denied or states that the non-custodial parent is denied access to the child.

The request to a DoDEA school should comply with the Privacy Act, and citations to the system notices for educational records are found below. The Department of Defense Dependent Schools system notice which covers all DoD-operated overseas dependent schools is known as DODDS 22. Covering selected domestic schools (e.g., Ft. Bragg, Ft. Rucker, U.S. Military Academy) is DODDS 26 ; DoDEA has not yet published a system notice for all domestic dependent schools. Further information on requesting student records and transcripts can be found at the DoDEA website, www.odedodea.edu under 'Student Records and Transcript Request Procedures.' General information on the interrelationship between FOIA (the Freedom of Information Act) and the Privacy Act can be found at 'FOIA/PA in DoDEA' at the DoDEA website.

If a child is presently in a non-DoDEA school (e.g., private school, charter school or public school), the records from previous DoDEA schools will not be in the child's educational records folder unless a parent copied the records and brought them to the non-DoDEA school or else that school, with the consent of a parent, requested the DoDEA records from a previous DoDEA school. A non-DoDEA school cannot simply request the previous military school records; due to the Privacy Act, a parental consent form must accompany the school's request. Conversely, on-base schools may and usually do require previous non-DoDEA schools to copy and produce the child's records for inclusion in the child's DoDEA educational records folder. The best course of action for the requesting party is to contact the particular school involved, speak to the school administrator and provide the following information:

Request for education records - DoDEA

Full name of student:
Name used during school attendance:
Date of birth: Dates of attendance:
Identity and location of school:
Name of requesting party:
Address of requesting party:
Signature of requesting party:

Getting access to school and medical records may initially appear to be a daunting task. By following these procedures, the attorney will find it much easier to obtain data and records from these sources for litigation, discovery, or settlement.

Mr. Sullivan, a retired Army Reserve JAG colonel, is Chair of the Military Committee of the Family Law Section, American Bar Association. Practicing with Sullivan & Grace, P.A. in Raleigh, North Carolina, he is a Fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989. He is the author of The Military Divorce Handbook (American Bar Association, May 2006), from which this article is adapted. Ordering information can be found at: www.abanet.org/abastore (Product Code: 5130135).]

Alaska attorneys sworn for U.S. Supreme Court practice

Photo by Kara Bridge

Thirty-three Alaska attorneys were sworn in on July 19 for practice before the U.S. Supreme Court.

Bill Suter, Clerk of the Supreme Court of the United States, swore in the Alaska attorneys at a special ceremony in the Alaska State Supreme Courtroom.

Left to right seated on the bench: Chief Judge Mary Schroeder, 9th Circuit Court of Appeals; Chief Justice Dana Fabe, Alaska Supreme Court; Judge Richard Tallman, 9th Circuit Court of Appeals; and Justice Walter Carpeneti, Alaska Supreme Court. U.S. Supreme Court Clerk Suter is standing in back row just below the right edge of the seal of Alaska. Those sworn (listed in alphabetical order) were photographed after the ceremony and include:

Kathryn A. Black
Carol L. Childress
George Mac Gregor Cruickshank III
William S. Cummings
John William Erickson, Jr.
Mark A. Ertischek
Roberta C. Erwin
Matthew Todd Findley
H. Ryan Fortson
Elizabeth Deborah Friedman
Peter C. Gamache
Sharon A. S. Illsley
Dennis Patrick James
Joyce Weaver Johnson
Darrel Victor Kester
Linda L. Kesterson
William Frederick Large
Rebecca Lillene Maxey
Thomas M. McDermott
Stephanie Galbraith Moore
Mark D. Osterman
Robert P. Owens
Mary B. Pinkel
Michael R. Stahl
Anna Cristina Weidner Tafs
Sue Ellen Tatter
Rhonda Fehlen Westover
Erin Elizabeth White
Taylor Elizabeth Winston

Not available to attend ceremony:
Jamilia Ann George
Heather H. Grahame
Diana Lea Johnson
Sarah Elizabeth Josephson

Clerks of Courts attend the swearing-in ceremony. (L to R: U.S. District Court Clerk for Alaska Ida Romack, Alaska Appellate Courts Clerk Marilyn May, 9th Circuit Court of Appeals Clerk Cathy Catterson; and U.S. Supreme Court Clerk Bill Suter posed after the swearing-in ceremony. Photo by Kara Bridge

Other court officials also attended the ceremony. (Front row L to R) Chief Judge Mary Schroeder, 9th Circuit Court of Appeals; Marilyn May, Clerk of the Alaska Appellate Courts; Cheryl Jones, Administrative Assistant to Alaska Appellate Courts Clerk; and Chief Justice Dana Fabe, Alaska Supreme Court. (Back row L to R) Judge Richard Tallman, 9th Circuit Court of Appeals; Bill Suter, U.S. Supreme Court Clerk; and Justice Walter Carpeneti, Alaska Supreme Court. Photo by Krista Scully

DID YOU KNOW…

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

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

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

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

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

SINCE 1896
ALASKA BAR ASSOCIATION

Vanessa H. White, Chair
(Anchorage).
278-2386 (work)
278-2335 (private line)
258-1744 (home)
250-4301 (cell)
vwhite@alaska.net

John Reese (Anchorage).
345-0275(work)
345-0625 (home)

Michelle Hall (Barrow).
852-2521

John McConnaughy III
(Anchorage). 343-6445 (private line)

Gregg M. Olson (Sitka). 250-1975
gregg_olson@law.state.ak.us

Nancy Shaw (Anchorage).
276-7776

Clark Stump (Ketchikan).
225-9818

Jay Trumble (Vancouver, WA).
360-576-5139

NEWS FROM THE BAR

Rule for comment: Bar has moved; taking the bar; and Robert's Rules

The Board of Governors invites member comments concerning the following proposals regarding the Alaska Bar Rules and Bylaws. Additions are italicized while deletions have strikethroughs.

Alaska Bar Rule 39(a). This amendment would correct the Bar Association address in the rule.

Rule 39. Notice of Right to Arbitration; Stay of Proceedings; Waiver by Client.

(a) Notice Requirement by Attorney to Client.

At the time of service of a summons in a civil action against his or her client for the recovery of fees for professional services rendered, an attorney will serve upon the client a written "notice of client's right to arbitrate or mediate," which will state:

You are notified that you have a right to file a Petition for Arbitration of Fee Dispute or a Request for Mediation and stay this civil action. Forms and instructions for filing a Petition for Arbitration of Fee Dispute or a Request for Mediation and a motion for stay are available from the Alaska Bar Association, ~~510 L Street, Suite 602~~ *P.O. Box 100279*, Anchorage, AK 99501-195810-0279, *or contact* (907) 272-7469 *for the Alaska Bar Association's street address*. If you do not file the Petition for Arbitration of Fee Dispute or a Request for Mediation within twenty (20) days after your receipt of this notice, you will waive your right to arbitration or mediation.

Failure to give this notice will be grounds for dismissal of the civil action.

Alaska Bar Rule 40. This amendment would add citations to the revised Uniform Arbitration Act.

Rule 40. Procedure.

...

(a) Petition for Arbitration of Fee Disputes.

Fee arbitration proceedings will be initiated by a client by filing a petition with the Bar Counsel on a form provided by the Bar. The petition will be in writing, signed by the client (hereinafter "petitioner"), seeking resolution of the fee dispute with his or her attorney (hereinafter "respondent"), and will contain the following:

...

(2) a statement by the petitioner that (s)he understands in filing the petition that the determination of the arbitrator or panel is binding upon the parties; that the determination may be reviewed by a superior court only for the reasons set forth in AS 09.43.120 through AS 09.43.180 *or AS 09.43.500 through AS 09.43.595*; and that the determination may be reduced to judgment; and

...

(t) Confirmation of an Award.

Upon application of a party, and in accordance with the provisions of AS 09.43.110 and AS 09.43.140 *or AS 09.43.490 and AS 09.43.520*, the court will confirm an award, reducing it to a judgment, unless within ninety days either party seeks through the superior court to vacate, modify or correct the award in accordance with the provisions of AS 09.43.120 through 140 or *AS 09.43.500 through 520*.

(u) Appeal.

Should either party appeal the decision of the court concerning an arbitration award under the provisions of AS 09.43.160 or *09.43.550,* the party must serve a copy of the notice of appeal upon bar counsel. If a matter on appeal is remanded to the arbitrator or panel, a decision on remand will be issued within thirty (30) days after remand or further hearing.

Alaska Bar Rule 3. This amendment would change the reapplication deadline for the July examination to June 15th.

Rule 3. Applications.

...

Section 6. An applicant who has failed to pass a bar examination required by Rule 2 may reapply for admission to take a subsequent bar examination.

Reapplications shall be made by filing a reapplication form as required by the Board by January 15 for the February bar examination and by ~~July 1~~ *June 15* for the July bar examination.

Applicants for reexamination shall be required to pay the reapplication fee fixed by the Board. An applicant who does not comply with this Section must reapply pursuant to Sections 1 through 5 of this Rule.

Article VIII, Section 3. This amendment would adopt the version of Robert's Rules of Orders that is updated regularly.

ARTICLE VIII. ASSOCIATION MEETINGS

Section 3. Parliamentary Rules.

Proceedings at any meeting of the Alaska Bar Association shall be governed by the most recent edition of "Robert's Rules of Order, *Newly* Revised".

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by October 25, 2006.

Board of Governors Action Items September 7 & 8, 2006

• Voted to retain a lobbyist again for the Board sunset bill.

• Voted to send the MCLE rule to the supreme court.

• Tabled the issue of MCLE credit for pro bono work until the court passes an MCLE rule.

• Voted to accept, deny or remand numerous Lawyers' Fund for Client Protection claims which were recommended by the committee.

• Voted to send Bar Rule 5 to the supreme court; this adds the Bar Rule 64 affidavit to the requirement to file membership acceptance forms.

• Voted to publish an amendment to Bar Rule 3 (6) which would change the reapplicant deadline for the July exam to June 15.

• Voted to publish an amendment to the Bylaws stating the Board follows Robert's Rules of Order Newly Revised."

• Amended the Standing Policies of the Board of Governors to set the due date of the annual report at April 15.

• Voted to send to the supreme court a proposed amendment to Bar Rule 61 correcting the name of the Child Support Services Division.

• Voted to send a proposed amendment to the supreme court which would provide for electronic notification of Board meetings on the State's public meeting notice website and delete the requirement for publication in the newspapers.

• Voted to publish an amendment to Bar Rule 39(a) correcting the Bar Association's address.

• Voted to send to the supreme court a proposed amendment to Bar Rules 22(a) and 61(e) providing for administrative suspension for failure to respond to a grievance.

• Voted to publish amendments to Bar Rule 40 correcting citations to the Uniform Arbitration Act.

• Tabled an addition to Bar Rule 15 requiring lawyers to have their trust accounts at institutions that provide trust account overdraft notification.

• Voted to send to the supreme court an amendment to Bar Rule 43.2 permitting pro bono practice by Emeritus Attorneys (Retired and Inactive) for qualified legal services organizations.

• Tabled Bar Rule 44 amendments regarding Legal Interns to see another draft.

• Voted to add back in the deleted language in ARPC 1.1 regarding conflicts.

• Voted to send the Ethics 2000 Amendments to the Alaska Rules of Professional Conduct with that amendment to the supreme court.

• Voted to impose the reciprocal discipline of a private reprimand on an attorney.

• Voted to impose the reciprocal discipline from Oregon of a public reprimand on Calvin Vance.

• Voted to pay Charles Dunnagan and firm $32,972 from the Lawyers' Fund for Client Protection for their work as Trustee Counsel in the Matter of William Bryson.

• Voted to approve 12 reciprocity applicants to the supreme court for admission.

• Voted to approve the minutes of the Board meetings.

• Voted to create a Judge Nora Guinn Award, and to have the Historians Committee make the selection.

• Voted to table the Application of Applicant No. 4059.

Online guide IDs law school public service programs

Newsweek.com and Equal Justice Works have launched "The E-Guide to Public Service at America's Law Schools," a new online resource for law school applicants, law students, attorneys, professors and others seeking a broad range of free information about public interest programs and curricula at law schools. The E-Guide picks up where existing commercial publications leave off by providing information not compiled elsewhere about the culture of public service at law schools, said Equal Justice Works.

Without rankings or ratings, The E-Guide highlights public service programs and curricula at more than 115 law schools. It shows students where they can get hands-on legal experience while still in school and how some law schools are helping with educational debt. By presenting data in an easy-to-digest, accessible format, The E-Guide helps applicants to make more informed choices about which law school to attend. Newsweek is hosting the site.

The E-Guide is at http://ejw.newsweek.com.

ATTORNEY DISCIPLINE

SUPREME COURT SUSPENDS LAWYER'S LICENSE SIX MONTHS

The Alaska Supreme Court suspended Anchorage attorney Eugene B. Cyrus from the practice of law for six months, effective May 3, 2006 and publicly censured him for conduct involving both neglect and lack of candor with the court.

Mr. Cyrus entered a stipulation with the Alaska Bar Association in which he acknowledged that he had a history of ongoing problems with the court that involved such infractions as being late to hearings, scheduling simultaneous hearings in Anchorage and Palmer, missing deadlines and causing disruptions with his cell phone. Mr. Cyrus agreed that a pattern of neglect and failure to communicate occurred in part due to failures in law practice management.

Mr. Cyrus violated Alaska Rule of Professional Conduct 3.3(a)(3) when he failed to alert the court of appeals to a state supreme court decision that the court considered directly adverse to the proposition of law that he was advancing in pleadings that he filed with the court. The court noted that an attorney has an obligation to bring a case to the court's attention even if the attorney could reasonably argue that the decision could be distinguished.

In another instance Mr. Cyrus filed a series of affidavits that were inconsistent about delays in obtaining transcripts designated for appeal. The court held that Mr. Cyrus violated Civil Rule 11 by making an objectively misleading statement in a notarized pleading to the court.

HI-TECH IN THE LAW OFFICE

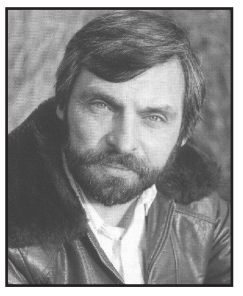
Evaluating digital cameras for your law practice

By Joe Kashi

I have previously discussed some basic considerations when buying digital cameras and color printers and reviewed some products that merited your attention. This month, let's first examine the actual optical quality of some selected digital cameras compared to their purchase price, consider the evidentiary and general quality benefits and drawbacks of various digital photography file formats, and then offer some tips on how to use digital photography to best advantage in your law practice.

Optical Performance:

Although optical performance is the single most important consideration in evaluating a digital camera, many other factors, including ease of use, quick performance, and good ergonomics, are comparably important. However, while you can readily judge, after actually handling a camera for ten minutes, whether a particular model's ergonomics and ease of use personally suit you, objectively judging relative optical quality can be elusive. After all, nearly all promotional and advertising materials seem to insist that their particular camera, no matter how simple or inexpensive, is an optical breakthrough. Cutting through the hype, how well do some higher end cameras actually perform?



"Some tips on how to use digital photography to best advantage in your law practice."

Optical performance is a combination of low digital sensor "noise" and high "sharpness". Although sharpness and low graininess (equivalent to low digital sensor noise) can be simultaneously achieved by using very slow, high resolution traditional 35 mm film, the equation is not that simple in the digital photography world where low sensor noise and ultimate sharpness are often be opposite poles that must be balanced against each other.

In order to more quantitatively evaluate the sharpness and noise of several mid-range to high end cameras, I examined identical photographs made by each of these cameras under identical conditions. To find a rough approximation of digital image sensor noise levels, I used the automatic noise profiling tool contained in **NoiseNinja**, a new and well-regarded noise reduction post-processing program. I sharpened and reduced the noise of a copy of each camera's JPEG image in small increments until I reached the point where noise was either not further reduced or where sharpness and noise levels actually began to deteriorate as a result of over-processing. The noise values used in the chart below are the lowest and best values that I obtained from NoiseNinja's profiling tool. I then plotted these numbers in connection with the lowest price for a particular camera from reputable dealers.

Video clip capabilities are very useful for a law office, especially one that works in the personal injury area. Of the cameras tested here, the **Sony DSC-R1** and digital SLR cameras, such as the Nikon D50 and **Canon Rebel XT**, do not have any video clip capability, making these cameras best suited for an office which already has video capability. Except for the Fuji F-10, all cameras tested here include a zooming optical viewfinder, which I strongly prefer.

I tested images made with the following mid-range to upper end cameras:

Olympus SP-350. This is a new 8 megapixel (8 MP) camera from Olympus that includes a reasonable zoom lens, small size, nice ergonomics and at a low $250 to $300 street price. It performed better than many more expensive cameras. This is the least expensive camera that can shoot in a RAW image format. I really like this camera, especially in view of its low street price.

Fuji F-10. A 6.3 MP compact camera. Fuji's low noise levels reflect its excellent sensors, which are well-regarded. The F30 is the successor model.

Sony DSC-V3. I personally purchased one of these 7 MP cameras some months ago. It takes very high quality photos but the Sony V3's overall design approach and ergonomics initially frustrated me because I found it uncomfortable to hold. The V-3 has a very good RAW file format option and can produce excellent photographs if used carefully.

Fuji E900. A compact 9 MP camera with image sharpness comparable to other cameras in the 8 MP to 10 MP range. Again, the low noise levels of this camera and the SLR-like S9000, which also uses the same sensor, reflect Fuji's good reputation for low noise sensors. This camera includes a somewhat useful RAW file format option but the included RAW processing software is not on par with Sony's.

Canon A620. A good 7 MP enthusiast camera without RAW file format options but easy to use and with good design and ergonomics. Picture quality is quite good and this model is rightly very popular. It would be a good all-around law office camera.

Canon S80. One of Canon's top of the line non-SLR cameras, with an 8 MP sensor. The S80 is compact, with good ergonomics, ease of use, and excellent image quality. For some odd reason, Canon dropped the RAW file option of the S70, predecessor to this model, even as RAW processing becomes more popular and useful. The zoom lens includes both wide angle and short telephoto capabilities. Definitely recommended, especially at the lower $408 price that I found on www.zipzoomfly.com

Kodak P880. Kodak's top non-professional 8 MP camera. Good picture quality, comfortable ergonomics, very easy to use and with many professional grade capabilities. The P880 has a RAW option. I have already recommended this camera, whose zoom lens ranges from very wide angle through moderate telephoto, as one of the best choices for most law offices.

Nikon D50. Nikon's least expensive 6 MP large sensor SLR camera with interchangable lenses. This is a good near-pro camera with a RAW file option but the entry level lens is not as sharp as some of the fixed lens cameras tested here.

Sony DSC-R1. Sony's large sensor 10.3 MP camera with a top of the line fixed Zeiss very wide angle through short telephoto lens. This camera had the top score for sharpness. It is quite large physically but does not feel awkward in my hands. The RAW file option is the best that I have personally used. The more that I use this camera, the more I like it.

Canon Rebel XT. This 8 MP digital SLR camera is considered one of the best buys as an entry level large sensor 8 MP interchangable lens SLR camera. It has a good RAW file option.

I also tested, but declined to list, **Nikon's D200** digital SLR as too

Continued on page 14

HUMOR

Additional forms of Alternative Dispute Resolution

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AVISTA MANAGEMENT, INC.,
d/b/a Avista Plex, Inc.,

Plaintiff,

-vs-

Case No. 6:05-cv-1430-Orl-31JGG
(Consolidated)

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

ORDER

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 6, 2006.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

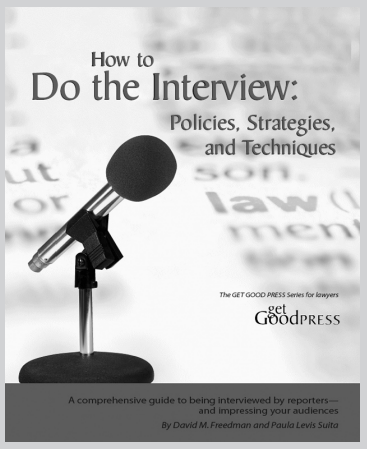
Copies furnished to:

Counsel of Record
Unrepresented Party

Get interviewed, quoted, and featured in the media

Eminent Publishing Company has released the first two in a series of six media relations handbooks specifically targeted to lawyers, law firm marketing directors, and other legal marketing professionals.

Unlike most law-oriented public relations literature, which tends to be big-picture, theoretical, and lacking in tactical details, the GET GOOD PRESS handbooks provide comprehensive, practical how-to information with useful, real-life examples, case studies, and success stories, says the publisher. The authors, who have each won awards for media relations work they did for law firms, wrote the series from their own experience as media relations consultants and from interviews with lawyers, legal marketers, journalists, and PR professionals across the country.



The first two handbooks described below, are available from www.getgoodpress.com in both PDF ($24.95) and printed($34.95) versions.

"How to Get Quoted and Featured in the Media" advises legal professionals on how to become a highly quotable source, and pitch great story ideas that win media coverage

"How to Do the Interview" is a guide to being interviewed by reporters—and impressing your audiences.

"When it comes to meeting the press, lawyers tend to be the most cautious of all interview subjects," said co-author David M. Freedman, a Chicago-based legal and financial journalist since 1978. "Often their caution is justified. Journalists ask probing questions about very sensitive and controversial legal matters, some of which stir the passions of the public.

"If lawyers are not prepared to respond articulately and diplomatically to media inquiries, they can plunge themselves – and possibly their clients – into hot water," he said.

"But avoiding the press entirely is rarely the best option for lawyers," says Paula Levis Suita, principal at Smith & Suita Inc., a Boston-based PR and marketing firm, and co-author of the series. "In some instances, they have a duty to present a fair and accurate picture of issues that otherwise might be misunderstood by the press, the public, and the potential jury pool. Additional benefits of talking to the press include exposure in the marketplace, and third-party credibility (an implied endorsement of a professional's expertise)."

Competition among law firms has increased dramatically in the past three decades as the number of attorneys (about 74 percent of whom are in private practice) per capita in the U.S. has doubled, and marketing budgets and public relations staff within midsize and large firms have increased. Media relations has become an essential element in legal marketing, as evidenced by the 2002 formation of the Law Firm Media Professionals organization(www.lfmp.org).

Authenticating digital photographs as evidence

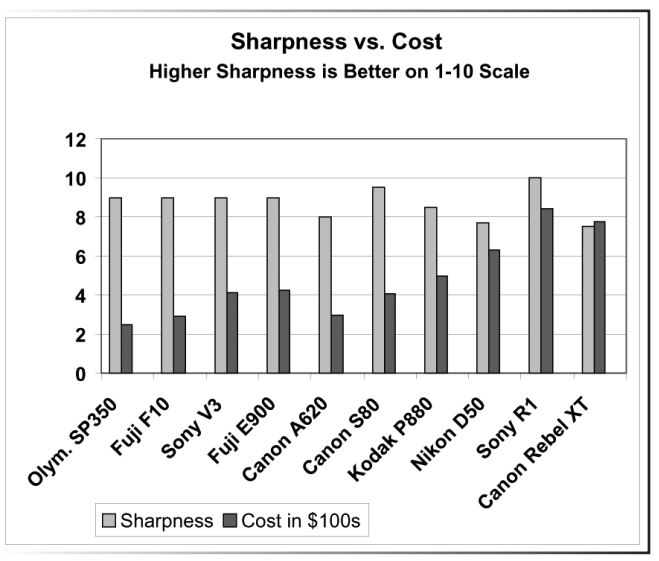
Continued from page 13

expensive (it costs over $2,000 with interchangable lens although it's no sharper than the Sony DSC-R1), **Kodak's 5 MP P850** (whose noisy images were not very good and which I recommend that you avoid), nor the **Panasonic DMC-LX1** and **DMC-FZ30** (whose images were also very noisy). I thought that some of the other models mentioned here made more sense for the average law office, particularly on a cost-effectiveness basis.

Generally, lower noise images produce better looking final prints, especially when enlarged beyond 8.5" x 11". Remember that the noise value for each of the cameras listed here is the best value that I could obtain with careful post-processing. The initial noise values for every camera were significantly higher. However, it's the final result that counts and, really, the noise and sharpness levels for each of the listed cameras are more than acceptable unless you plan to make really big enlargements to use as jury exhibits, in which case my recommendations are the **Sony DSC-R1** or one of the mid-range to upper-end Nikon or Canon digital SLR cameras. These will produce more detailed images that can tolerate the greatest degree of enlargement before serious image quality problems become evident.

Evaluating sharpness is somewhat more subjective. I examined each JPEG file before sharpening and again after basic sharpening with NoiseNinja's default settings, choosing the sharpest camera (Sony's DSC-R1) as an arbitrary "10". I then greatly enlarged and compared the same multiple sections of the various photographs and rated them against the Sony R-1's overall sense of sharpness.

As you can see, all of the listed cameras perform well on both sharpness and sensor noise tests. Balancing optical quality, price, features, and ease of use in this mid to upper end range, I particularly like the Canon S80, the Olympus SP-350, the Fuji F10, and the Kodak P880. Note that some of these better-performing cameras are rated as low as 6 MP (Fuji F10) or 7 MP (Sony V3) and yet perform on par with many 8 MP and 9 MP cameras. Raw megapixel ratings are not very meaningful in isolation.



More on post-processing:

All cameras internally process images to some extent when a photo is first taken and the extent and quality of the in-camera processing can have a major effect upon the final image. The image must be stored in a computer-readable file format and, depending upon your setting, the camera may attempt to reduce sensor noise or sharpen the image immediately. Some cameras, by default, tend to reduce noise too much, resulting in lost fine detail, or oversharpen an image, which can cause high noise levels or in unpleasant looking photos. Other cameras, such as the Sony DSC-R1 and even the $200 **Kodak z760**, allow you to set internal noise reduction and in-camera sharpening to low in-camera levels so that as much detail as possible is preserved for later, more effective and controllable post-processing on your computer using a program such as Adobe Photoshop. Where possible, experiment with reducing or increasing the camera's internal noise reduction and sharpness settings so that you can find the point that works best for you overall, taking into account what you can do afterwards with Photoshop or similar programs.

There are several excellent dedicated noise-reduction and sharpness-enhancing photographic programs on the market. I use **NoiseNinja** (www.picturecode.com), a product that you can purchase and download over the Net. NoiseNinja does an excellent job of both reducing photo noise and enhancing sharpness. Be aware, though, that you can definitely overdue the noise reduction and sharpness. Some instances of excessive post-processing merely look harsh, unnatural and unpleasant. In my experience, some photos, unpredictably, actually look noisier and less sharp after excessive post-processing, so you should separately evaluate each image, incrementally sharpen a copy of the original file and incrementally reduce its image noise until you reach the best balance. NoiseNinja comes in two flavors: a stand-alone program or as an add-on "plug-in" for Adobe's flagship **Photoshop CS2** photographic editing program and for Photoshop's junior sibling, **Photoshop Elements 4**.

If you can afford Photoshop CS2's several hundred dollar cost, then it is certainly worthwhile. It is the industry standard for working with digital photographic images in much the same way that Adobe Acrobat Professional 7 is the industry standard for working with general document imaging and exchange. One of Photoshop's prime advantages is its ability to work with RAW format files from many of the most popular high-end cameras using a free Adobe download, **Adobe Camera RAW (ACR)**, which directly integrates as a "plug-in" into both PhotoShop CS2 and into Photoshop Elements 4. ACR version 3.3 natively supports the RAW files produced by all of the RAW-capable cameras that we have discussed in this article and is the preferred approach to processing RAW files.

There are several other excellent programs, typically aimed at the more knowledgeable photographer, that are designed process RAW format photographic files. Two I have used with good success are Picture Window Pro 4.0 (www.dl-c.com) and Bibble Pro (www.bibblelabs.com). Adobe Camera RAW generally supports the largest number of cameras but does not have quite the same degree of RAW processing power.

ALSC President's Column

Alaska Legal Services celebrates its 40th birthday

By Vance Sanders

September 15, 2006 marks Alaska Legal Services Corporation's (ALSC) 40th birthday. ALSC first came on the scene in Alaska under the auspices of RurAL CAP, which had its start in the Johnson administration initiative known as the War on Poverty and the signing of the Equal Opportunity Act of 1964. RurAL CAP was barely a year old when it created Alaska Legal Services Corporation "for the purpose of developing, conducting and administering a program for providing legal assistance to all citizens of Alaska who lack the economic resources to obtain private legal representation." Incorporated on September 15, 1966, ALSC was funded through the Office of Equal Opportunity until 1974, when Congress created the Legal Services Corporation during the Nixon administration as a private, non-profit corporation to seek to ensure equal access to justice under the law for all Americans by providing civil legal assistance to those otherwise unable to afford it.

ALSC's rich history transcends names, faces, cases, and places.

ALSC's rich history transcends names, faces, cases, and places. Over the years, ALSC has maintained as many as 17 offices (many of which were staffed by VISTA attorneys in the 1970's) and as few as 6 offices during the bleak days following severe federal funding cuts in 1996. Staffing levels have varied from well over 80 in the late 1970's to the current 38. Board and staff members have come and gone – some are judges, some are legislators, some work for the State, some are in private practice, and sadly some have passed away – but all have contributed to ALSC's fundamental goal of providing access to justice for needy Alaskans.

ALSC and its supporters will be celebrating its anniversary with a series of events in mid to late September 2006. The Anchorage, Fairbanks, and Juneau offices have planned open houses, receptions, or other celebratory events to take place between September 14 and 20. If you have an opportunity to attend, I encourage you to do so. Come and spend time with current staff, friends, alumni, and supporters who believe – as I do – that equal access to the civil justice system is an attainable goal and one well worth pursuing.

Below is an ALSC historical timeline marking significant events in ALSC's 40-year history. I'd like to add to that by paying tribute here to ALSC's staff members who have dedicated many years of their professional careers to ALSC. Staff members with 25 years of service or more with ALSC include accounting technician Kimberly Johnson, Fairbanks office manager Angela Aragon, and controller Michael Sturm. Close behind them, at 24 years, are executive director Andy Harrington and administrative and technology coordinator Beth Heuer. Staff members with between 15 and 20 years of service include Anchorage attorney Greg Peters, Bethel supervising attorney Mark Regan, Anchorage paralegal Terri Floyd, Anchorage legal secretary Joanie Meister, and assistant to the controller Tracey Janssen. With between 10 and 15 years of ALSC service are Anchorage attorney Jody Davis and statewide litigation attorney Jim Davis. And, with between 5 and 10 years of ALSC service, we have Anchorage supervising attorney Nikole Nelson, allotment unit supervising attorney Carol Yeatman, Anchorage attorney Gorune Dudukgian, Fairbanks attorney Judy DeMarsh, Fairbanks paralegal Inez Wright, Juneau supervising attorney Kate Burkhart, Kotzebue supervising attorney Russ LaVigne, and Kotzebue office manager Lottie Jones. Congratulations – and Happy 40th Anniversary, ALSC – to all of the men and women who work to support ALSC's efforts throughout the state.

State funding through legislative appropriation has dwindled

As you read my columns, you can't help but notice that I write a lot about funding for Alaska Legal Services Corporation. A quick trip down memory lane led me to the August 1968 issue of the Alaska Law Journal, which reports that during the July 12, 1968 ALSC board meeting ALSC's executive director, Bill Jacobs, was authorized by the board to request from the Office of Economic Opportunity a new annual budget in excess of $600,000. The Law Journal goes on to note "The executive director reported that he was hopeful that the present budget would not be cut." Notwithstanding the eternal wish of executive directors that budgets not be cut, if we were to factor inflation into the $600,000 in federal funding that supported ALSC in 1968, ALSC's current federal funding would need to be $3,510,567 to provide the same level of financial support that was provided to the program in its formative

Continued on page 15

ALSC History Timeline

1966 ALSC Articles of Incorporation filed September 15, 1966.

1967 William Jacobs hired as ALSC's first executive director.

Dickerson Regan, father of current Bethel ALSC supervising attorney Mark Regan, hired as first ALSC staff attorney in Juneau office.

1970 ALSC attorney David Wolf succeeds in getting a preliminary injunction against pipeline permit issuance based on Native land claims in *Allakaket v. Hickel*, paving the way for ANCSA.

First Alaska Supreme Court decision with an ALSC attorney; Irwin Raven of ALSC's Ketchikan office represents the appellant in *Cadzow v. State*, a criminal appeal. ALSC's client loses. (But ALSC goes on to win the next seven Alaska Supreme Court decisions for its clients).

Richard Buckley replaces William Jacobs as executive director but only lasts two months because wife won't leave San Francisco.

Phil Byrne becomes executive director.

1971

ALSC attorneys John Hedland and Chris Cooke establish invalidity of racially imbalanced juries in *Alvarado v. State*.

Phil Byrne prevails in *Alexander v. Anchorage*, establishing right to counsel for loitering charge.

David Wolf becomes executive director.

1972 ALSC attorneys Spike Stein and Frank Flavin establish invalidity of Alaska's attachment procedures in *Etheridge v. Bradley*.

ALSC attorneys Hugh Fleischer and Michael Adams prevail in *Carle v. Carle*, overturning custody award based on invalid cultural assumptions.

Jewell Hall joins staff of ALSC's Anchorage office.

1973 Frank Flavin becomes executive director.

1974 Legal Services Corporation established by Congress as private, non-profit corporation.

ALSC attorneys Chris Cooke and Brock Shamberg establish invalidity of small claims summonses in rural Alaska in *Aguchak v. Montgomery Ward*.

Art Peterson is elected to ALSC board of directors.

1975

ALSC attorney John Reese unsuccessful in establishing constitutional right to school in community of residence in *Hootch v. Alaska School System*; however, litigation leads to legislative settlement of issue.

Upon departure of Frank Flavin (to be Ombudsman), Loyette Goodell becomes executive director

1977 Upon departure of Loyette Goodell (to be executive director of Bar Association), Jim Grandjean becomes executive director

1979

Flores v. Flores finds right to appointed attorney for indigent parent when ALSC represents other parent.

Gordon Jackson becomes executive director.

Brad Brinkman of Juneau represents applicant in first CFECcase (of an eventual 55) to be decided by Alaska Supreme Court, *CFEC v. Templeton*.

1980 Ralph Knoohuizen hired as executive director.

1981 Robert Hickerson joins ALSC as chief counsel.

1982 Inauguration of President Reagan, who proposes to abolish the Legal Services Corporation.

Andy Harrington hired as staff attorney under 2-month contract.

Suzanne Weller wins *Morel v. Morel*; court holds mother's psychiatric problems not shown to have significant impact on child.

Jim Kentch and Suzanne Weller prevail in first case where Alaska Supreme Court applies ICWA.

1983 Newly-hired pro bono coordinator David Gaffney formally opens ALSC's Alaska Pro Bono Program on January 16, 1983, at the Juneau bar luncheon by handing the first case to Theresa Hillhouse and referring three more cases by the end of the luncheon.

1984 Executive Director Ralph Knoohuizen passes away. Robert Hickerson becomes executive director. Seth Eames becomes Pro Bono Coordinator.

1986 Carla Grosch and Joe O'Connell win *Moore v. Beirne*, upholding right to Interim Assistance. Judy Bush files the Venetie adoption case.

1987 The Alaska Bar Association establishes a voluntary IOLTA program, effective March 15. On a national level, the Legal Services Corporation struggles. LSC's Board Chair Clark Durant gives a speech in February to the American Bar Association calling for the abolition of LSC, for non-lawyers to represent the poor, and for the complete deregulation of the practice of law. LSC's President Thomas Wentzel tries to use his position to persuade a Magruder's store clerk out of charging him with shoplifting a can of succotash.

1988

ALSC's Anchorage office moves to its current location at 6th and K Streets. Nationally, yet another controversy rocks LSC as it is disclosed that its administration has used LSC funds (which cannot be used for lobbying) to hire law firms to lobby Congress to cut the LSC budget.

1991 Board Member Maryann Foley spearheads ALSC's first annual private bar fundraising campaign.

1992 ALSC's Pro Bono Program receives LSC's Private Attorney Involvement Program award, and the first LSC Rural Pro Bono Attorney Award goes to James Fisher of Juneau.

1995 Joe Johnson, ALSC statewide litigation attorney, passes away at age 43

1996 Legal Services Corporation suffers a roughly 1/3 budget reduction and eliminates the cost of service delivery allocation adjustment for Alaska; ALSC funding from LSC falls from $1.7 million to $940,000.

ALSC

Continued from page 14

years. ALSC's current federal funding from the Legal Services Corporation is only $1.1 million. State funding through legislative appropriation has dwindled from a remarkable $1.2 million in 1982 to zero in 2005 and 2006. The resulting gap is filled in some part by creative grantwriting and fundraising work on the part of ALSC board and staff members. However, project-specific grant funding is restricted in its application and often cannot be used to support ALSC's general operations in the areas of the state where funds are most needed. This lack of general funding severely limits service delivery: ALSC's Nome office has been unstaffed for a year; its Bethel and Juneau offices are operating with one attorney – down from a streamlined two attorneys and far short of the three of four needed in each of these locales.

So here's where you come in. As ALSC celebrates its 40th birthday, at open houses and events throughout the state, you will have an opportunity to make a pledge to the 2006-07 Robert Hickerson Partners in Justice Campaign. In mid-September you will be receiving a campaign letter and pledge envelope on behalf of co-chairs Dan Bruce and Mike Lessmeier in the 1st District, H. Conner Thomas in the 2nd District, the team of Walter Featherly, Saul Friedman, Joan Rohlf, Ethan Schutt, and Jim Torgerson in the 3rd District, and Charlie Cole and Bob Groseclose in the 4th District. I hope you'll join me in contributing to the new campaign and making ALSC's 40th year its best year yet.

I hope you'll join me in contributing to the new campaign and making ALSC's 40th year its best year yet.

Goodbye to a dear ALSC friend

On a somber note, I wish to mark the passing of ALSC board member and supporter Jonathon Solomon of Fort Yukon. Jonathon, who passed away on July 13, 2006, had served first as an alternate member and then as a full member on ALSC's board since 1986. Having an impatience for long-winded attorneys and board discussion that, in his view, tended to go on far too long, Jonathon was a man of few words. But when he spoke, the room fell silent. I recall the several times that Jonathon told the story of how Fort Yukon ran the VISTA lawyers out of town because they were "divorcing everybody, and that wasn't our way." Nevertheless, Jonathon was a staunch supporter of legal services to low-income Alaskans, was a respected and revered leader in rural Alaska, and will be missed.

ALSC History Timeline (cont'd)

The 1996 Appropriations Act becomes effective, imposing new restrictions on recipients, including class actions and attorney fees.

ALSC closes its offices in Dillingham, Kodiak, Kotzebue, and Nome.

1997 ALSC and other programs file Legal Aid Society of *Hawaii v. Legal Services Corporation* (LASH) suit against the Legal Services Corporation, attacking the 1996 restrictions. Court grants preliminary injunction against LSC, and

LSC changes its regulations in response to LASH injunction.

1998 Dillingham office re-established with financial support from Bristol Bay Native Association; Nome office re-established with financial support from Kawerak. ALSC establishes endowment, funded with $30,000 in start-up money from the Anchorage Bar Association. Revised LSC regulations are upheld by the Ninth Circuit in LASH appeal, and cert is denied; ALSC starts planning to create independent pro bono organization

1999

ALSC prevails in *John v. Baker,* affirming status of Alaska Native Villages as tribes and their jurisdiction over internal domestic relations.

2000 After lengthy planning, ALSC spins off Alaska Pro Bono Program, Inc. as a separate organization. Kotzebue office re-established with financial support from Maniilaq.

2001 U.S. Supreme Court strikes down one LSC restriction (the prohibition against anti-welfare-reform litigation) in *LSC v. Valazquez*.

Passing of Robert Hickerson at age 50, of which 20 years were spent at ALSC (17 as executive director)

2002 Andy Harrington becomes executive director

Most pro bono work comes back in-house to ALSC, as IOLTA funding plummets.

ALSC closes its Barrow office.

Longest-tenured ALSC employee Jewell Hall retires after over 30 years of service.

2003 ALSC attorney Nikole Nelson wins *Garner v. State Medicaid* case

2004 Governor Murkowski vetoes ALSC legislative appropriation

Tatum v. Barnhart holds that LSC restrictions do not bar fee award to former ALSC client seeking fees through non-ALSC attorney

2005 Senator Seekins files SB19, and Rep. McGuire files HB 175, to create a civil legal services fund.

Art Peterson steps down from ALSC board after 30 years of service.

Maggie Humm and Jim Davis prevail in *Elton H. v. Naomi R*

2006 HB 175 passes House 33-2-5, but ends session in Senate Finance without a hearing. ALSC celebrates "39th-and-a-halfth" birthday at Bar Convention in Anchorage. Beth Heuer promises that ALSC will submit a 40th birthday timeline to the *Bar Rag* and then leaves town so Andy Harrington has to finish it.

Happy 40th Anniversary!

STATE OF ALASKA

Executive Proclamation
by
Frank H. Murkowski, Governor

In 1966, the Alaska Legal Services Corporation was formed for the purpose of developing, conducting, and administering a program for providing legal assistance to all citizens of Alaska who lack the economic resources to obtain private legal representation.

The agency has assisted thousands of low-income persons through free consultations, representation, and public education workshops, through staff attorneys, specialized paralegals, and through its pro bono program established in 1983.

Its pro bono program, Volunteer Attorney Support, has assisted hundreds of low-income Alaskans through the generosity of members of the Alaska Bar Association.

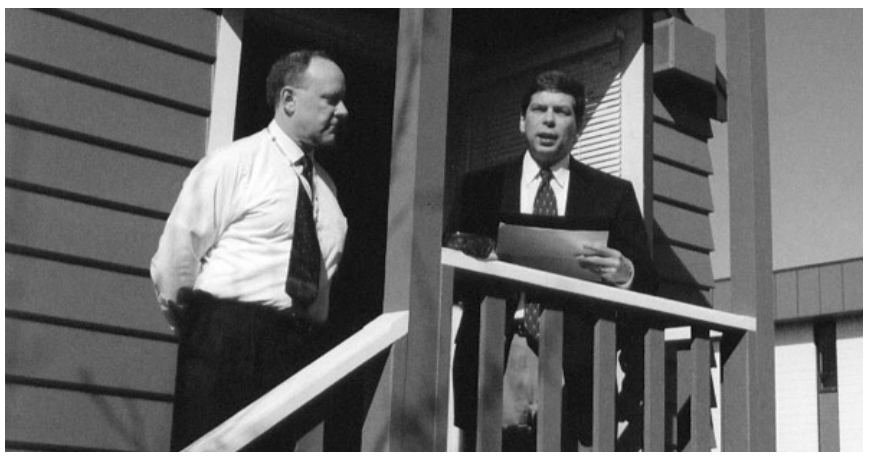
NOW, THEREFORE, I, Frank H. Murkowski, Governor of the State of Alaska, do hereby proclaim September 15, 2006, as:

Alaska Legal Services Day

and urge all members of the community to support Equal Access to Justice.

Dated: August 30, 2006

Frank H. Murkowski, Governor who has also authorized the seal of the State of Alaska to be affixed to this proclamation.



Executive Director Andy Harrington accepts an ALSC anniversary proclamation from Anchorage Mayor Mark Begich during the Bar Convention in May (when ALSC friends and alums gathered to celebrate "39-and-a-half").

NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,
entered June 2, 2006

WILLIAM T. FORD
Member No. 7906017
Anchorage, Alaska

is reinstated
to the practice of law
effective June 2, 2006

Published by the Alaska Bar Association,
P. O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules.

Because justice has a price.

The staff and board of Alaska Legal Services Corporation extend our sincere thanks

to the individuals, firms, corporate sponsors, and friends of legal services who contributed to the 2005-2006 Robert Hickerson Partners in Justice campaign. We are especially grateful to Ann Gifford and Janell Hafner (1st Judicial District), Charlie Cole (combined 2nd and 4th Judicial Districts), and Walter Featherly and Jim Torgerson (3rd Judicial District) for their service as campaign chairs. Special thanks go to the law firm of Guess & Rudd for issuing the law firm challenge and to the firms and individuals who helped to meet and exceed the challenge goal.

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Thank you, one and all, for your generous support.

ROBERT HICKERSON Partners in JUSTICE

The Annual Campaign for Alaska Legal Services Corporation -- Access to Justice for Alaskans in Need

Our 2006-2007 Robert Hickerson Partners in Justice campaign will begin in September. If you would like to join your colleagues in supporting this worthwhile cause, please send your tax-deductible contribution to:

Alaska Legal Services Corporation
9170 Jewel Lake Road #100
Anchorage, Alaska 99502

For information or to request a pledge form, e-mail us at donor@alsc-law.org.
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ESTATE PLANNING CORNER

Defining a gift for tax purposes (it's here to stay)

By Steven T. O'Hara

Our current federal gift-tax system was created in 1932. The gift tax was perceived necessary as long as there is an estate tax because, otherwise, there would be a giant loophole from estate tax. To avoid estate tax, individuals could give away all their property before death. This loophole exists but has been limited, in general, to $12,000 per donee per year plus certain gifts for tuition or medical care under the gift-tax system (IRC Sec. 2503(b) and (e).

In recent history, with the possible repeal of the estate tax, the federal government believes the gift tax is necessary as a backstop to the income tax. Apparently the fear is if wealthy individuals could transfer assets without incurring gift tax, they might try to avoid income tax by transferring low-basis highly-appreciated assets to individuals in a low tax bracket or who have offsetting losses. The donees might then sell the property, pay little or no income tax, and then perhaps transfer the proceeds back to (or for the benefit of) the donor or the donor's family.

"In recent history, with the possible repeal of the estate tax, the federal government believes the gift tax is necessary as a backstop to the income tax."

For one reason or another, the gift tax is here to stay. Thus it is important to know what a gift is for tax purposes.

Taxpayers could be whipsawed in this area because the meaning of a gift for gift-tax purposes is different from, and quite opposite, the meaning of a gift for income-tax purposes. The meaning that has been adopted is, in both instances, in favor of the U.S. Treasury.

For gift-tax purposes, a gift is a voluntary transfer of property by one to another without consideration (IRC Sec. 2501(a)(1) and 2512(b)). The transferor's motivation is irrelevant (Treas. Reg. Sec. 25.2511-1(g)(1)). The analysis of whether a gift has been made is based strictly on the objective facts of whether a transfer has occurred for less than full and adequate consideration (*Id.*).

By contrast, a gift for income-tax purposes is very much dependent on the subjective motives of the transferor (*Commissioner v. Duberstein*, 363 U.S. 278, 285-86 (1960)).

A gift must be defined for income-tax purposes because the Internal Revenue Code specifically excludes gifts from gross income, along with bequests, devises, and inheritances (IRC Sec. 102(a)). (On the constitutionality of taxing gifts, should the statutory exclusion ever be repealed, see O'Hara, I*n Search of the Meaning of Income, 127 Trusts & Estates* 50, 51 (July 1988).)

For income-tax purposes, a transfer without consideration is not necessarily a gift (*Duberstein*, supra, at 2850). For income-tax purposes, in order for a transfer to be a gift the transferor's primary motivation must be "detached and disinterested generosity" (*Id.*). Examples of detached and disinterested generosity are transfers that arise out of affection, respect, admiration, charity, or like impulses (*Id.*).

The U.S. Supreme Court has expressly said that if the transferor's primary motive is to satisfy a moral obligation, the transfer is not a gift for income-tax purposes (*Id.*). The Court has also said that if the transferor expects an economic benefit from the transfer, and if that expectation is the primary motive, the transfer is not a gift for income-tax purposes (*Id.*).

As a practical matter, determining dominant versus subordinate motives is often impossible, even for the transferor. Moreover, the gift-as-income issue generally arises only when a transfer has been made in a context with business overtones, such as an employer making a transfer to a retiring employee (*Id.*).

At least in theory, however, the IRS could take the position that a certain transfer is a gift for gift-tax purposes, resulting in a gift-tax liability, but that the transfer is not a gift for income-tax purposes, resulting in an income-tax liability. If the IRS prevailed, one can only imagine the effective tax rate incurred by the time the whipsawing was over.

First case to apply implied insurance doctrine

Continental Insurance settles U.S. claim for $5 million

Acting U.S. Attorney Deborah M. Smith (District of Alaska) announced Aug. 4 that Continental Insurance Company and Continental Casualty Company paid the United States $5.5 million, to settle a civil lawsuit the United States brought against the insurance company alleging that the company acted in bad faith by failing to defend the United States against a claim covered by an insurance policy.

The U.S. government sued Continental Insurance Company and Continental Casualty Company (Continental) in 1998 for failure to defend the United States in a 1994 civil action alleging personal injury at the tribal alcohol abuse facility operated by the Bristol Bay Area Health Corporation (Bristol Bay) in Dillingham. The facility was operated pursuant to Bristol Bay's contract with the federal government's Indian Health Service.

Continental wrote a commercial general liability policy to provide liability coverage for Bristol Bay for risks that were covered under the Federal Tort Claims Act and for which the United States would defend Bristol Bay. "This case is a significant success for the United States. It is the first case in the country to apply the doctrine of implied insurance to a general liability insurance policy. It is also the first case in the country to grant the United States indemnification as an implied-at-law insured for payments it made under the Federal Torts Claims Act," Smith said.

In Alaska, the "implied insurance doctrine" permits an unnamed party, in this case the United States, to claim rights as an implied beneficiary of an insurance contract where the risk to the insurer is unchanged, and where the third party is within the class intended to be benefitted by the policy. The doctrine, as explained by the Alaska Supreme Court, is based in part on the equitable principle that when an insurance policy is ultimately paid for by a party not specifically named as a beneficiary in the policy, that party should be able to benefit from its payment for the policy unless the party has clearly bargained away that benefit. This is because a party that pays for an insurance policy naturally expects to benefit from what they purchased.

In the United States' lawsuit against Continental, the government successfully asserted that it was an implied additional insured entitled to the benefits of the insurance policy issued by Continental to Bristol Bay, and that Continental acted in bad faith when it denied coverage and refused to defend or indemnify the United States in connection with the 1994 personal injury case brought against Bristol Bay stemming from Bristol Bay's operation of the tribal alcohol abuse facility in Dillingham.

The Federal Tort Claims Act is the legislative scheme by which the US has waived its sovereign immunity to allow civil suits for actions arising out of negligent acts by agents of the United States. Bristol Bay's insurance policy through Continental was for $1 million. The United States obtained a summary judgment ruling in its favor from the District Court holding that the government was an additional implied insurer on the $1 million insurance policy that Continental had issued to Bristol Bay. In addition, the Court found that Continental had committed bad faith by repeatedly denying United States' tenders without adequate evaluation, failing to advise the government of a second policy, and adopting contradictory positions.

Later, the Court held that under Alaska law the United States was entitled to recover the full amount of its damages, including those in excess of the policy limits. The District Court held that Continental's bad faith failure to defend the insured government in the underlying action made the insurer liable for the full amount of settlement paid by insured, including any amount outside the policy limits. This case was litigated on behalf of the United States by Trial Attorney Richard Stone, Torts Branch, Civil Division, Department of Justice and Assistant U.S. Attorney Richard L. Pomeroy, U.S. Attorney's Office, District of Alaska.

Obtaining HIPAA medical records

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Robert B. Miller & Jeff Robertson, HIPAA? Huh?: Discovering Medical Records in Oregon after HIPAA, 64 Or. St. Bar Bull. 31 (2004) (the "easiest and safest way"). See also Elizabeth Robinson, HIPAA for Litigators, Hawaii Bar J. 5, 6 (Nov. 2004) ("a quicker and easier method. . . than other HIPAA options, which require use of the judicial process").

Authorizations appear to be the most successfully implemented of the procedural requirements under the Privacy Rule. Model authorization forms abound on the Internet, and these "HIPAA-compliant authorizations actually make it easier to gather out of state records because the federal regulations are so uniform." Grossman & Guillory, op cit. It is also recognized, however, that requirements for an authorization are "particularized, and different from customary practice." Ashley B. Abel & Robert M. Wood, Jumping the Hurdles of the HIPAA Privacy Rule, 14 S. Carolina Lawyer 34, 37 (2003).

These requirements include the authorization containing the following six "core elements": (1) a specific and meaningful description of the PHI to be used or disclosed; (2) the identity of the individual or class of individuals authorizing release of the PHI requested; (3) the identity of the individual or the class of persons authorized to receive the records requested; (4) a description of the purpose or use of disclosure, or a statement that disclosure is "at the request of the individual" when the individual is the requestor and does not, or elects not to, provide a statement of the purpose; (5) an expiration date or event that will terminate effectiveness of the authorization; and (6) the date and signature of the individual making the request (special rules apply where an individual's authorized legal representative makes the request). 45 C.F.R. § 164.508(c)(1). Similarly in "plain language," id. § 164.508(c)(3), the authorization must include the following "required statements": one that puts the individual on notice that he or she has a right to revoke the authorization, in writing, and describes (a) the exceptions to the right to revoke and how the individual may revoke the authorization or (b) a reference to the covered entity's notice; and another statement that puts the individual on notice that the medical records may be subject to re-disclosure by the recipient, at which point the PHI will no longer be protected by HIPAA. Id. § 164.508(c)(2). This is a far cry from what had been referred to in the past as the boiler-plate "release of the medical records."

Authorizations can present potential problems in litigation. See Craig D. Tindall, HIPAA and Medical Records: A Primer for the Personal Injury Lawyer, 40 Az. Attorney 32, 36-7 (2003) (describing some problem areas); see also Miller & Robertson, op cit. (noting that authorizations can be "cumbersome and strategically difficult" in litigation). These difficulties are aside from those in the form of delays by opposing counsel or a disagreement over whether what is sought is discoverable.

One area of difficulty is in determining the length of time the release should be valid. Instead of using a date set by the court or pretrial order for the end of discovery, it is advised, because of the vagaries in litigation, that the less certain event of "ultimate dismissal of the action" be used to meet the date of expiration core requirement. Tindall, op cit. at 106. Among the litigation vagaries is the testimony of health care providers. Thus, it is also suggested that an authorization include language "to ensure such PHI an be used at trial, for purposes of depositions or in support of summary judgment motions," Abel & Wood, op cit., at 38, and that the description of the classes of individuals to receive the PHI "specifically contemplates disclosure to the court, to experts and other witnesses, to representatives of the party . . . engaged in preparation and prosecution of the litigation, as well as the party's attorney and support staff," and that the information authorized "encompass . . . permission for oral disclosures, including, but not limited to, expert testimony." Abel & Wood, op cit.

Another difficulty can arise from covered entities fulfilling their obligation under the Privacy Rule to limit the disclosure of PHI to that which is the "minimum necessary to accomplish the intended purpose," 45 C.F.R. § 164.502(b), and avoiding the civil and criminal penalties provided in the federal law for willful disclosure of PHI. See 42 U.S.C. § 1320d-5, 6. Cf. John F. Olinde & Hal McCard, Understanding the Boundaries of the HIPAA Preemption Analysis, 17 Def. Counsel J. 158, 164 (2005) (reflecting on whether Privacy Rule will create new 'minimum standards' for production of medical records in state and federal court, and whether there is any 'interplay' between standards and any state physician-patient privilege). Medical records administrators, in relying on the "minimum necessary" standard (and out of the fear of being fined or even imprisoned for violating HIPAA), "might unilaterally decide that only certain records are all that are needed" to meet some specific authorization. Tindall, op cit. at 36-7. Practitioners report, in fact, that authorizations, even if seemingly valid, are sometimes rejected out of hand by the health care providers. See, e.g., Katherine L. Dzik, Discovery of Medical Information after HIPAA: A Litigator's Guide, 91 Ill. Bar J. 554, 556 (2003) (reporting that health care providers "sometimes refuse such an authorization and insist that the patient sign the provider's own form authorization"); Keith E. Emmons, Survey of Illinois Law: HIPAA Restrictions on Health Information Release in Judicial and Administrative Proceedings, 29 So. Ill. U. L.J. 713, 714 (2005) (observing that health care providers can be "very sensitive (perhaps hyper-sensitive) to HIPAA requirements"); Grossman & Guillory, op cit. (also noting that covered entities may "still refuse to provide records unless their own authorization is executed (i.e., provider-specific authorization)"); Cf. Tindall, op cit. at 34 ("inevitable are inappropriate denials of valid requests due to misinformed administrators exercising excessive small doses of good judgment"). In the latter situations, a requesting party will know that medical records are not immediately forthcoming, while in the former, the party may never know that some of the medical records have been withheld.

In addition to anticipating such practices of some medical records administrators, litigators can combat them. One recommendation for ensuring that an authorization will be accepted is to include a cover letter, one replete with assurances. See Abel & Wood, op cit. (suggesting that attorneys "draft a cover letter explaining that an authorization is enclosed that meets both the federal and state requirements"); Grossman & Guillory, op cit. (advising "a cover letter with the authorization that ticks off the requirements nearly verbatim from the regulation"). Suggestions for addressing the problem of restrictions by a medical records administrator on a request include asking the administrator "to identify any record withheld with sufficient particularity to secure full disclosure," if necessary, or "to warrant under oath that all requested records have been fully disclosed or identified as withheld," although admittedly the requests could be ignored with impunity. Tindall, op cit. at 37; see id. (mentioning that "only way" to be assured that all medical records were disclosed is to ask health care provider to produce file during a deposition).

In every instance, authorizations require the cooperation of the individual, and "counsel may not always have that," — and authorizations are subject to revocation at any time. Harrison, op cit. What about the situation where the individual refuses to sign an authorization, or revokes it, or is unavailable to give an authorization?

The Privacy Rule provides that PHI may be disclosed in judicial or administrative proceedings without the written authorization of the individual who is the subject of the PHI. 45 C.F.R. § 164.512(e); cf. Bayne v. Provost, 359 F. Supp.2d 234, 237 (N.D.N.Y. 2005) (citing § 164.512(e)(1)(ii) in support of proposition "that a purpose of HIPAA was that protected information, that may evidentially be used in litigation or court proceedings, should be made available during the discovery phase"). The regulations set forth standards under which a health care provider or other covered entity is permitted to disclose PHI during legal proceedings. Id. § 164.512(e)(1). Subject to these procedural requirements, a litigator may obtain medical records by basically three methods: a court order, a subpoena with a qualified protective order, or a subpoena with notice.

There are at least a couple of points that should be emphasized in connection with disclosure of PHI under 45 C.F.R. § 164.512(e)(1). One is that the U.S. Department of Health and Human Services ("DHHS"), Office of Civil Rights ("OCR"), as the agency charged with responsibility to enforce the Privacy Rule, 65 Fed. Reg. 82,381 (Dec. 28, 200), determined that the procedural requirements permitting disclosure under 45 C.F.R. § 164.512(e) apply to covered entities that are non-parties to litigation. OCR, Answer ID 704 to Frequently Answered Questions ("FAQ"), available at www.hhs.gov/ocr/hipaa. If the covered entity is a party, then it may disclose the medical records containing PHI for purposes of the litigation as part of its health care operations. Id.; see 45 C.F.R. § 160.501 (defining "health care operations").

Another point is that the Privacy Rule preempts any contrary provision of state law, unless that law "relates to the privacy of individually identified health information" and is "more stringent" than the HIPAA regulations. 45 C.F.R. § 164.203(b); see also Law v. Zuckerman, 307 F. Supp.2d 705, 709, 711 (D. Md. 2004) (interpreting "more stringent" as "laws that afford patients more control over their medical records," and that "if a state law can force disclosure without a court order, or the patient's consent, it is not 'more stringent' than the HIPAA regulations"). There are a growing number of court decisions analyzing whether state laws add protections to those under the Privacy Rule in judicial and administrative proceedings. See Patricia Arzuaga, HIPAA Privacy Rules: Protecting Patient Information Requested through Discovery, Subpoenas and Court Orders, 29 Empl. Benefits J. 28, 30 (2004) (citing decisions on whether § 164.512(e)(1) preempts statutory rules of evidence, civil practice and procedure, statutory privilege of protecting medical records, and state case law); Judith A. Langer, The HIPAA Privacy Rules: Disclosures of Protected Health Information in Legal Proceedings, 78 Wis. Lawyer 14, 58-9 (2005) (presenting "partial" listing); Olinde & McCard, op cit., at 167-69. There are at present no reported Alaska court decisions performing such an analysis. Cf. State of Alaska Office of the Attorney General., "Alaska State Comparative Health Law Matrix",," available at health.hss.state.ak.us/is/hipaa/legal.htm (undated) (comparing permitted disclosures of PHI under § 164.512 with Alaska privacy statutes and Alaska Administrative Code confidentiality regulations).

To return to methods for permitting disclosure under 45 C.F.R. § 164.512(e)(1): the Privacy Rule provides that a covered entity may disclose PHI to comply with a court order, including an order of an administrative tribunal, 45 C.F.R. § 164.512(e)(1)(i), with the requirement that the health care provider limit disclosure to that "expressly authorized by such an order." Id.; OCR, Answer ID 703 to FAQ.

A court order compelling disclosure is considered the "most effective way" for litigants to obtain PHI under 45 C.F.R. § 164.512(e)(1). Scott D. Stein, What Litigants Need to Know About HIPAA, 36 J. Health L. 433, 437 (2003). As explained by an expert practitioner, this is because a "court order," being essentially a subpoena issued by the court, indicates a judicial determination that the PHI requested is necessary and relevant to the pro-

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New State Law Librarian

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(the American Association of Law Libraries). In 2001, she received the prestigious Spirit of Law Librarianship Award, an award presented to those who have used their law librarianship skills to make meaningful contributions to social causes. Cathy Lemann becomes the eighth State Law Librarian since the inception of the Alaska State Court Law Library in 1960.

New Alaska State Law Librarian Catherine Lemann, L, visits with her predecessor Cynthia Fellows, R, at a retirement reception honoring Fellows in late August. Lemann has moved to Alaska from New Orleans, where she served as Associate Director of the Law Library of Louisiana.

Cynthia Fellows, recently retired from the Alaska Court System after serving as State Law Librarian for nearly two decades. Fellows first started working for the court as a reference librarian in the 1970's. She later established a legal research and publishing business for Alaskan attorneys, then returned to the court as director of the law library in 1987. Since that time, she has been a pioneer in advancing online legal information services, overseeing a period of tremendous growth and change in how legal research is conducted. She was instrumental in making Westlaw available free of charge to attorneys and the public at court library locations in the state. Recently, she has served as a Visiting Fellow in Law Librarianship at the Institute of Advanced Legal Studies, University of London. She returned to England in early September, where she plans to reside for the next several years. Here she displays a gift from her colleagues at her recent farewell reception at the Anchorage Law Library.

Obtaining HIPAA medical records

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ceedings, while a subpoena issued by an attorney does not. Id. (citing 65 Fed. Reg. 82,529-30; United States v. Sutherland, 143 F. Supp.2d 609, 612 n.12 (W.D. Va. 2001)); but see John D. Buchanan, Jr., Subpoenas *Duces tecum* vs. HIPAA: Which Wins?, 79 Fla. Bar J. 39, 42, 44 (2005) (arguing that "[a]ny subpoena validly issued by inference is an order of the court," and that "subpoena *duces tecum* issued by an attorney meet[s] the requirements of a judicial proceeding" under 45 C.F.R. § 164.512(e)). There are also a number of "standard" HIPAA court order forms available. See, e.g., Ad Hoc Committee of the Tenth Judicial District, Standard HIPAA Orders in Civil Actions, 65 Ala. Law. 332 (2006).

But as with authorizations the court order option for release of medical records containing PHI is not problem-free. There is the very real potential of delay in acquiring a signed court order. Harrison, op cit. at 17; see also Tindall, op cit. ("The procedural aspects and unavoidable delays involved make this option unattractive."). Cf. Grossman & Guillory, op cit. (contending that orders in one state cannot be enforced in another without first being domesticated, and domestication process "can take months"). Before complying with a court order, the covered entity "may need to consider whether state law or local rules add additional procedural requirements," Arzuaga, op cit. at 32, and court orders may not even be "available in prelitigation proceedings in medical malpractice actions as there is no court of competent jurisdiction to issue the order," Harrison, op cit.; but see Robinson, op cit. at n.25 (affirming that special proceedings may be filed to seek such jurisdiction),

Moreover, for actions in either state or federal court, the method of a court order "ignores the fact that judges abhor discovery motions generally and, predictably, would not be excited about receiving hundreds of requests for HIPAA-compliant orders for medical records." Miller & Robertson, op cit. The information from the order, even if forthcoming, is limited in scope. While a covered entity presented with a court order is "not required to second-guess the scope or purpose of the order," 65 Fed. Reg 62,530 (Dec. 28, 2000), it may produce only the PHI "expressly authorized by such order." 45 C.F.R. § 164.512(e)(1)(i).

For these reasons, when comparing an authorization, subpoena, and court order, some practitioners also consider the court order option a "practical matter of last resort," one to be attempted only after the other two, Miller & Robertson, op cit., -- though an order of a court or administrative tribunal is first among methods enumerated under 45 C.F.R. § 164.512(e)(1) for disclosing PHI in the course of judicial or administrative proceedings, and such an order is not subject to the "satisfactory assurances" connected with a qualified protective order sought or the notice and opportunity to object required of the subpoena options under 45 C.F.R. § 164.512(e)(1)(ii).

Territorial Lawyers exchange stories

Tucked away in an alcove over one table at the Petroleum Club, three pages of the *Anchorage Daily Times* adorn the wall. The headlines, trumpeting Richfield hitting oil, oil strikes on the Arctic slope, and the June 30, 1958, Statehood vote in the U.S. Senate befit the Club.

But on June 13, the Club was the site of the Alaska Bar Association Senior Lawyers Annual Dinner and hosted dozens of messengers to the present bringing stories from Alaska's lawyerly past—animated pages of history. And animated they were, despite being admitted to the bar for four decades or more.

The dinner is open to anyone admitted to practice in Alaska over 40 years ago and the group meets each year to commemorate and enjoy themselves. Fueled by pasta and wine, the attendees reminisced in full force. They exchanged stories about traveling to Alaska, finding opportunity and love, losing homes in earthquakes and floods, winning and losing cases and political struggles, and savoring retirement. The more scandalous the story, the more likely it was to have taken place in Nome.

Many of the lawyers and spouses relish their role in making and telling Alaska's history.

Judge James von der Heydt spoke about working on the Alcan Highway, being in Alaska's first slate of superior court judges, and writing his fictionalized accounts of Alaska history in Mother Sawtooth's Nome and Alaska, The Short and Long of It.

Jamie Fisher, who passed the Alaska bar in 1956 and was elected to Alaska's first House of Representatives just a few years later, gives his time to the Soldotna historical society. Not satisfied with being a mere tour guide, Fischer proudly states, "I volunteer as an artifact!"

Some told stories of their eponymous selves, colleagues, and predecessors. Alaska-born Jim Delaney recounted selling newspapers for Robert Atwood and how George McLaughlin helped Delaney land his first job as a lawyer. Others told stories of finding or bringing brides up North.

Jim Powell saw a family slideshow of Alaska at a PTA meeting in Ashtabula that featured the photographer's daughter in picture after picture. He found out everything he could about her before asking her to dance the next year in the 10th grade; eventually, he brought her as a bride back to the setting in which he first saw her.

Those absent in person were certainly not absent in spirit or in memory; some were remembered in conversation and some wrote letters to be read at the dinner. While nearly every attendee had some advice for this young lawyer, it was those absent from the dinner who gave advice to the whole group. Allen Jewel, writing from Washington after a lifetime of hard work in Alaska, exhorted to the group, "To those still working, I highly recommend you retire."

—Mike Schwaiger

Ode to the TVBA

By Lewis Rhodes

This Bar Association
is really unlike any in the nation;
It is full of wackos, nuts and flakes,
but to live in Fairbanks, that's what it takes;
It starts at the top with its fearless leader,
Jason Whiner, er, I mean, Weiner;
Then, of course, there's Terry Hall,
who will prattle about his grandkids while pinning you to the wall;
And Bob Noreen, who's slightly daft and a little mad,
but I never expect much from a West Point grad;
I'll never forget Ken Covell and his govt. conspiracy of the week,
He definitely puts the Lib in the group's Libertarian streak;
As for the various judges, I would have plenty to say,
But hey, I might appear before you some day.
The rest of you are equally crazy,
And I would say more but I'm kinda lazy;
One more thing before you tell me to go to hell,
Thanks for the experience, Judge Kleinfeld.

TALES FROM THE INTERIOR

Beware of clients bearing gifts, (especially contraband)

By William Satterberg

As I studied to take the Washington State Bar ethics exam, I came across an interesting ethical provision which I previously had not considered seriously. It is a provision which states that an attorney should not accept gifts or bequests from a client.

Needless to say, such a provision strikes fear into the hearts of most avaricious attorneys. Fortunately, the prohibition apparently is not absolute. As explained by the commentators, the "no gifts" provision primary relates to practioners who accept large financial gifts from clients, most notably in the area of preparing trusts and estates, and write themselves into the wills and trusts as beneficiaries.

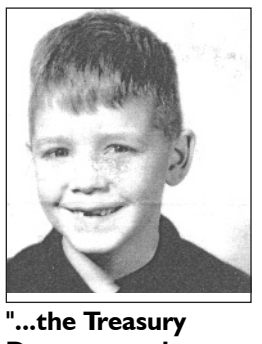
Accordingly, although I was initially ready to report myself for having received various Christmas gifts, I was told that I need not overreact. So I didn't. Still, I certainly recognize that, when clients give attorneys gifts, conflicts can arise, especially if the client later tries to ask for a gift in return. After all, attorneys are supposed to receive gifts, not give them. Besides, the idea of attorneys giving clients gifts is not practical. This is probably because attorneys are not known for giving their clients much of anything, let alone gifts. Just bills.

I certainly recognize that, when clients give attorneys gifts, conflicts can arise, especially if the client later tries to ask for a gift in return.

Reassured that I had nothing to fear, I thought nothing of the dire warnings until just recently when I learned, first hand, the unintended complications that client gift- giving can create.

I have represented one client for several years. In fact, in terms of client longevity, he is, in fact, the longest. His file number is number 2. My client's name is Al Vezey. A staunch conservative, Al is a construction contractor who served in the Alaska State Legislature for several years. Al was able to successfully run for office after receiving a large settlement from the State of Alaska in one of his cases. As such, Al's political career was directly the state's fault. While in the legislature, Al did much to distinguish himself. For example, Al developed quite a reputation for his support, or alleged lack thereof, of "the arts." Although an elected representative, Al could never overcome his personal belief that state money should be spent on construction projects, and not upon abstract concepts of artistic beauty.

Despite Al's sometimes controversial stands on issues, over those years, Al and his wife, Jean, still became good friends of myself and my wife, Brenda. In fact, one summer, we even traveled to Europe together. For 10 days, Al and I enjoyed hearty German beer and sauerkraut, savored the fresh mountain air, and shared both the good and the bad times. Meanwhile, Brenda and Jean tolerated us. Over the years, we have also watched our children grow, and have learned to appreciate each other. In this regard, Al and I have regularly engaged in reciprocal creative gift-giving, even though, as indicated, I am generally not that inclined.



"...the Treasury Department has an established policy of burning all forfeited Cuban cigars: 'Very slowly.'"

In enjoying our friendship, Al and I have cultivated a personal affinity for stout beer, fine wine and good cigars. To expand our tastes, during our trips to Europe, we have enjoyed not only some of the best beer and wine that France and Germany offer, within our price range, of course, but also some rather tasty cigars considered prohibited in the United States: Cubans.

As one United States Customs officer once remarked when discussing such contraband, the Treasury Department has an established policy of burning all forfeited Cuban cigars: "Very slowly." Rumor has it that both Al and I have occasionally brought back by accident one or two of such strictly prohibited products, undoubtedly seriously jeopardizing national security in the process. Needless to say, I have always been quite surprised when I have found such items inadvertently hidden in my luggage. Whether that surprise is because the suspicious stogies are still there, or because I accidentally left them behind, can never be said.

April 1 is my birthday. One year on April 1, Al uncharacteristically chose to give me a very special birthday gift. It consisted of a box of Cuban cigars. Not just one or two cigars, but a whole box. Extravagance extraordinaire. Even better, it was not just any ordinary box of Cuban cigars such as Romeo-y-Juliets or Partagas. No, Al gave me a full box of Cohiba Cuban Cigars.

It is reputed that Cohibas are to cigars what Dom Perignon is to champagne. To my surprise, Al had splurged and bestowed me with 25 of the classic cheroots. And, not just ordinary Cohiba Cuban Cigars, but those of the Churchill size. Churchill-sized cigars are well known amongst cigar aficionados to be the "El Primo" of all cigars. Where many cigars will last for only 10 to 20 minutes, a good, slow burning Churchill is justifiably expected to last for up to an hour, reducing the visibility of any living room to nearly zero.

To further attest to their credit, Cohiba Churchills were the favorite smoke of Fidel Castro. It is said by some that President Bill Clinton also likes the taste of exotic cigars on occasion and probably tried a Cohiba himself once, but in the privacy of the Oval Office.

Without doubt, Cohibas are the equivalent of gold. Cohibas are like Coors beer to a 60s college student. Even the mention of a Cohiba Cigar, let alone a Churchill Cohiba, to a true cigar connoisseur, will invariably stimulate wistful conversations which will last well into the early morning hours.

Imagine, therefore, how touched I was when I received a full box of 25 Cohiba Churchill cigars from my very good, closest, most dear, to-die-for-friend, Al Vezey. As I profusely thanked Al through my tearful eyes, little did I remember that Al had also been a politician. Nor did I recall that Al had also developed somewhat of a reputation of being a Juneau troublemaker--a thorn in the side of those with culture, limited as that commodity may be in Alaska.

Understandably, I treated the Cohibas with all the respect and attention which they deserved. Not wanting to watch the wands wither, I vacated a drawer in my office cigar humidor and dedicated the entire compartment to only my Cohibas. Before reloading the cabinet, I took painstaking attempts to make sure that all the moisturizers were once again fully hydrated. Any lesser-quality cigars which even began to appear to be of questionable quality were appropriately discarded by cremation to make space for my most rare gift.

Needless to say, I wanted to keep my cigars a secret. I have never been good at sharing. As such, I only told my friends and those people that I thought I could impress about my hidden cache. Before long, I had more friends than I ever expected. After all, I tend to be loquacious.

Admittedly, the cigars were not my first Cuban cigars. Several years earlier, at a moment of weakness, someone else gave me a Cuban Partaga. As expected, I treasured it. It was small, but beautiful. In fact, I treasured the little cigar so much that it eventually dried out. In time, it became a fire hazard.

I treasured the little cigar so much that it eventually dried out. In time, it became a fire hazard.

One day, I showed my little cigar to Al, who immediately criticized its condition. Sensing my depression, Al kindly volunteered that he still could solve the problem. Abandoning what he was doing to address my cigar emergency, Al introduced me to a ritual known only to truly dedicated cigar smokers- cigar resuscitation. Clearly, cigar resuscitation was not for the novice, as I would soon learn.

The ceremony began. Meticulously laying out several paper towels most carefully upon my desk, Al dampened the paper towels by soaking the various layers with just the right amount of distilled water. Each time, Al made sure that the paper towels possessed the requisite amount of dampness, checking and double-checking his work. Finally satisfied with his preparation, Al then gingerly laid the pathetic little cigar to rest on top of the paper towels, as if he were laying his favorite pet into its grave. The paper towels with the cigars were then gently placed inside a small humidor which Al said would serve especially well for the purpose of rehydrating errant cigars.

As Al was leaving, he gave me specific instructions not to open the humidor for exactly five and one half days. No more. No less. According to Al, at the conclusion of the prescribed period, much like Lazarus awakening from the dead, my cigar would once again live. Al cautioned me that, if I didn't follow his directions scrupulously, the results could be worse than breaking one of my sister's regular chain letters, which I never ever would think of doing. Until the appointed hour, the humidor was to be kept in a cool, dark place, well away from all vibration. From all appearances, nitroglycerin was less sensitive.

On exactly the designated day, not a minute too soon, nor a minute too late, I retrieved the humidor from its most secret location. Holding my breath in anticipation, I opened the crypt, remembering Al's first prophetic words of, "Nice cigar Bill. A little bit dry-but I can fix it." Still, I felt no fear. After all, Al was a self-professed master at cigar resuscitation. As I opened up the little humidor, I fully expected resurrection. In fact, not only did I expect resurrection, I deserved it. But, what I saw defied words.

I was aghast. My little Cuban cigar was no longer a proud symbol of Castro's economic success. Instead, the prize resembled what could best be described as a feces which had been abandoned in a backwoods service station toilet bowl far too long. Somewhere between dry and damp, the refugee had assumed a life of its own. It had become, by all appearances, an oversaturated water filter, resembling a roll of toilet paper that had been accidentally dropped into the commode. It was a tragedy, the image of which still haunts me on lonely nights. As a memorial, I had the little stogie mounted on a plaque, which still adorns my office as a tribute to Al's self-assurance.

Given this past history with fragile cigars, I took special care with the Cohiba cigars. Whether these classic cigars were being given to me by Al as a birthday gift from a true friend, or to atone for his prior failure to salvage my first Cuban cigar, was uncertain. What I did know was that these Cohibas certainly deserved the utmost in special attention and loving

Continued on page 21

TALES FROM THE INTERIOR

Beware the suspect stogie

Continued from page 20

treatment. I could not risk another disaster. Nor could I risk Al coming to the rescue again.

It is said that the gift of a Cuban cigar signifies deep friendship and unqualified trust. It symbolizes one man's love for another, but not in a Biblical sense. It is also expected that the recipient of such a gift will respond in kind. As a sacrifice, I gave away my lesser quality Cuban cigars carefully, but constructively, always mindful of their ability to create profound indebtedness to me. Without doubt, my Cohibas were most special. As such, when an individual would beg me for a Cuban cigar, or on the rare occasion when I felt an uncharacteristic urge to share, I would give away one of my older Cuban cigars which I had hoarded over the years. I had no shame. Despite their age, my "other Cubans" were still quite respectable and well-preserved. Little did I let on that I had a highly secret stash of Cohiba Churchills. Those secret Cohibas were most sparingly given away to only the very best of close friends, to bouncers as bribes, or as special rewards for truly exceptional work.

It is said that the gift of a Cuban cigar signifies deep friendship and unqualified trust.

Tom Temple, a.k.a. "Mini-Me," my associate, is also an avid cigar fanatic. Tom has been described as "a religious man with many vices." Tom's publicly acknowledged vices include cigars and brandy. But, Tom deserves to have some vices. Tom is a combat veteran of Desert Storm. A man's man. Still, despite all of his machismo, Tom once virtually begged for one of my Cohibas. After teasing Tom to the limits of what I felt he could endure, recognizing that, as a combat veteran and a former Barrow District Attorney, Tom is likely quite mentally instable, I reluctantly gave Tom a Cuban Cohiba, having him recite an oath of secrecy upon receipt. The long-awaited gift was well received. Tom was like a kid at Christmas as he giggled his way out of my office. Tom was touched, to say the least. And, not just mentally, either, for once.

In time, I had given away all of my lesser quality Cuban cigars which had somehow accidentally arrived into the United States. My Cohibas, meanwhile, rested safely in my humidor on a hidden lower shelf. Only on the most rare of occasions would I ignite one. Each time was a treasured moment.

Several months later, Al and I went out one evening to share some wine. It was a pleasant time. It was during the camaraderie of the moment that, for some strange reason after several glasses of inexpensive wine, Al confided to me that the Cuban Cohibas that he had bestowed upon me were not, in reality, Cuban Cohibas. I laughed. I chalked Al's confession up to the wine. To my surprise, Al persisted in his declaration. I began to argue with Al. I accused Al of pulling my leg. In response, Al continued to steadfastly insist that my cherished Cohibas were counterfeit. At the time, little did I remember Russian author Dostoyevsky's prediction in his famous novel, Crime and Punishment, that every criminal has a primal urge to confess. The conversation continued late into the night.

To counter Al's disclosure, I revealed that the cigars were a most enjoyable smoke. In response, Al reminded me that this delightful mellowness is actually the trademark of a traditional non-Cuban cigar. According to Al, and in fact, many other cigar aficionados, the final third of a Cuban cigar is usually noticeably harsh and rather distasteful. This was news to me, since my Cuban Cohibas did not suffer from such a taste defect. I continued to disagree. After all, what did these self proclaimed experts really know? Virtually anyone can be an expert, especially under the Alaska Rules of Evidence.

Trying another tactic, I explained to Al that it was a cute bluff that he was attempting to run on me. It was obvious that Al was trying to trick me into returning the Cohibas, having likely smoked up all of his own. But, I was smarter than Al. Al's simple ruse would not work. I was resolute. As the night progressed, and the more I denied the ploy, the more Al insisted that he had duped me. It was as if Al's integrity was being challenged. Still, I was not to be toyed with, nor would I succumb to such obvious duplicity by a trusted friend.

It was then that Al muttered the curse that convinced me that the Cohibas that he had given me were unquestionably counterfeit.

"Bill, do you really think that I would really spend that much money on you for your birthday?" Al asked.

I thought about it for a second. I came to grips with the truth. I was stunned. I realized that, having known Al for years, he was entirely correct. Al may have been deceptive, but he certainly wasn't into lying to his best friend, was he? Reflecting upon Al's reputation for generosity, I recognized that the concept of buying even one genuine Cuban cigar was probably distasteful to Al, especially if he were to simply give it to me. To the same degree, I reluctantly recognized that Al's giving away an entire box of Cuban Churchill Cohibas was definitely out of character. I clearly had been punked.

When I had regained my composure, I asked Al how much the box of counterfeit cigars had cost. At first, Al didn't want to tell me. It was obvious that my low self-esteem had been dealt another severe body blow. But, like the opening villain in Dirty Harry, I had to know. Trying to soothe my grief, Al finally consoled me during breaks in his hysterical laughter that they were "probably pretty damn good Dominican cigars," and that he had paid "about $40 for the whole box." Not that it was much of a consolation. Still, I knew the truth.

After I recovered from the shock and denial, I confessed to Al that I had readily given away my "real" Cuban cigars in order to savor the delights of my rare Cuban Cohibas. Al's jaw dropped. Then, rather than sympathizing with my loss, Al exploded again into a series of uncontrolled, hysterical guffaws. It truly was a cruel, compounded joke. I had discarded the good, only to keep the bad. Things were going to get ugly.

I decided to get even. After all, it was the right thing to do. Al needed to learn a lesson. Forgiveness was out of the question when it came to cigars.

Several days later, while I was visiting with Al over the speakerphone in my office, Tom Temple entered the room. Wanting to share my pain, I had already told Tom previously that I had been brutally bamboozled by my latest ex-best friend over some cheap cigars. Although he first began to laugh, I sensed that Tom was also in deep denial about my loss as well. After all, for quite a period of time, Tom had been happily smoking my non-Cuban Cohibas, but thinking that they were the real thing. After I explained Al's duplicity to Tom, Tom also reconsidered his position and rapidly realized that I also was probably not the type of person that would give away a real Cuban Cohiba cigar, either. Perhaps that is why Tom had reportedly been helping himself to my stash as compensation for watching the office when I was away on trips.

With Al listening on the speakerphone, Tom announced, "Al, I personally want to thank you very much for those very fine Cuban cigars that you gave to Bill. They were excellent." Tom then went on to state that "Al, I am actually considered to be quite an expert on fine cigars, as you probably know. These cigars are absolutely fantastic. In fact, I want to tell you that I liked them so much that, when Bill recently offered me a bonus, I took $500 worth of his Cohibas, instead." Tom then told Al that he valued each cigar at $60 to $70 minimum per cigar, which is how he computed his bonus.

The phone went silent. Tom and I waited for a reaction. Obviously, Al was having a crisis of conscience. Either that, or Al had wisely silenced the speaker while he fought to control his laughter. In time, Al's only response was "You're quite welcome, Tom."

The following evening, Al and I rendezvoused for dinner. After the meal, Al complimented me upon my "gift" to Tom. Al was quite proud of my deception. Without doubt, I had definite potential as a legislator. In short order, Al was in an uproar over Tom's acceptance of the fake Cohibas as a bonus. As far as Al was concerned, it was the best of jokes. Al encouraged me to continue the ploy for another week or two and then to tell Tom the truth. With any luck, and Tom's help, I might even get the secretaries to start smoking the bogus blunts. I protested. I explained to Al that Tom actually found the cigars to be quite enjoyable. I told Al that I was not about to tell Tom that the Cohibas were counterfeit. It was just too risky.

"Why not?" Al inquired.

I thought the answer was obvious, but Al apparently needed to have it explained. "Al, you have to think about this. Tom was a combat veteran in the first Iraq war. Tom worked with the Marines as a machine gunner and was involved in over four dozen firefights. Tom reputedly is anti-social and is proud of it. Tom actually liked Barrow. And, worse yet, Barrow liked Tom. Added to this, Tom fits in well at my office. Tom is a trained killer, is likely psychotic, and he doesn't dress very well either, at least according to some local jurists. Al, do you know what Tom will do to you if Tom ever finds out that either you or I lied to him about the Cohibas?"

Silence once again filled the air. It was a sobering thought. As hoped, Al's mood quickly changed. It was obvious that Al was concerned when he began to assess his rapidly-dwindling life expectancy.

For the rest of the evening, Al and I debated over who, if anyone, would or should ever tell Tom the truth. In the end, I told Al that the only way to solve the problem would be for Al to immediately deliver a real box of Churchill Cohiba Cuban cigars to my office. To protect Al's safety, I would accept delivery of the box and ensure that Tom was taken care of properly. As a longtime, trusted friend, I promised Al that he could trust me to handle this most sensitive task. I assured Al that, if he fully and promptly performed the assignment, I might actually be able to salvage his life.

Finally, I assured Al that, if he did accomplish such a difficult assignment, I would accept full responsibility to comply with all Customs Office requirements concerning the importation of Cuban tobacco into the United States. Subjectively, my plan to deal with the genuine Cuban Cohibas was actually quite simple. After all, by law, such contraband must be destroyed. A patriotic American, I personally would burn all of the genuine Cuban Cohibas – but very slowly, of course.

James Gilmore joins Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC, has welcomed James Gilmore as counsel in its Anchorage office.

Gilmore has practiced law in Alaska since 1967. He received his legal degree from Stanford Law School. His practice focuses on the defense of medical malpractice and criminal cases. He joins a team of lawyers who counsel clients, individual and institutional, across a range industries and agencies on legal matters including medical malpractice defense, product liability defense, employment law, and other disciplines.

Mark Your Calendars! Upcoming Alaska Bar CLEs!

Fall and Winter 2006 CLE Calendar

September 12	9 a.m. – Noon	21st Century Legal Technology: Going Digital in Your Law Office CLE#2006-025B 2.5 general CLE Credits	Anchorage Hotel Captain Cook
September 12	1:30 – 4:30 p.m.	Climbing the Digital Mountain – Managing Electronic Evidence in the Digital Era & Dealing with the New Federal Rules of Evidence CLE#2006-025C 2.5 general CLE Credits	Anchorage Hotel Captain Cook
September 13 (NV)	10:00 a.m. – Noon	Going Digital: A Primer CLE#2006-031 2.0 general CLE credits	Kenai Challenger Learning Center
~~September 14 (NV)~~ Cancelled due to low enrollment	~~8:00 – 11:15 a.m.~~	~~ALIABA Satellite Program Advanced Estate Planning~~ ~~CLE # 2006-028~~ ~~3.0 General CLE Credits~~	~~Anchorage~~ ~~KAKM APU Campus~~
September 20	8:30 a.m. – 5:00 p.m.	6th Biennial – Nonprofits in 2006: Current and Late Breaking Developments – Things You Really Need to Know! CLE #2006-008 6.75 general CLE credits	Anchorage Hotel Captain Cook
September 26	8:30 a.m. – 12:30 p.m.	Litigating Constitutional Issues: Equal Protection, Due Process, and Privacy - Substantive Law and Legal Strategies CLE #2006-006 3.75 general CLE credits	Anchorage Hotel Captain Cook
September 27 (NV)	12 noon – 2:00 p.m.	Law-Related Education in Africa: What It Is – Why It's Vital – Why Alaska Educators and Lawyers Should Be Involved CLE#2006-035 2.0 general CLE credits	Anchorage Atwood Bldg., Rm 1860
September 29	9:00 a.m. – Noon	Be a Lawyer – See the World: International Rule of Law Opportunities for Alaskan Lawyers CLE#2006-012 3.0 general CLE credits	Anchorage Marriott Downtown
October 10	8:30 a.m. – Noon	Advanced Legal Research – Carole Levitt & Mark Rosch CLE#2006-032B 3.25 general CLE credits	Anchorage Hilton
October 10	12:15 – 2:00 p.m.	LUNCH CLE Hot Internet Topics – Carole Levitt & Mark Rosch CLE#2006-032C 1.25 general CLE credits	Anchorage Hilton
October 13	10:30 – Noon	Ethics: Ten Tips for Trust Accounts (Webcast) CLE#2006-034 1.5 ethics credit	Webcast from Fairbanks Friends Community Church
October 31	8:30 – 10:30 a.m.	What to Do When the Media Calls – Mark Curriden CLE#2006-033 2.0 Ethics credit	Anchorage Downtown Marriott
November 1 (Section Mtg CLE)	Noon – 1:30 p.m.	You & Your Law Practice: Dealing with High Conflict Personalities – Bill Eddy CLE#2006-030 1.5 general CLE credits	Anchorage Snowden Training Center
November 3	8:30 a.m. – 12:30 p.m.	12th Annual Workers' Comp Update CLE# 2006-027 3.75 general CLE credits	Anchorage Downtown Marriott
November 8	9 a.m.-12:30 p.m.	Alaska's Special Estate Planning Techniques For You and Your Clients CLE #2006-018 3.25 general CLE credits	Anchorage Hotel Captain Cook
November 14	8:30-10:30 a.m.	*Quality of Life v. Substance Abuse*, Case No. ANxxx: Helping Yourself, Your Colleagues, and Your Clients CLE #2006-026 2.75 Ethics credits	Anchorage Hotel Captain Cook
December 5	9 a.m. – 12:30 p.m.	2006 HIPAA Update: The Top Issues You Need to Know CLE #2006-015A 3.25 general CLE Credits	Anchorage Downtown Marriott
December 6 (NV)	1 – 4:30 p.m.	2006HIPAA Update: The Top Issues You Need to Kno CLE #2006-015B 3.25 general CLE Credits	**Fairbanks Westmark Fairbanks Hotel**
December 13	8:30 – 10:30 a.m.	Ethics at the 11th Hour CLE #2006-010 2.0 Ethics Credits	Anchorage Hotel Captain Cook

Bar People

The Law Office of Baxter Bruce & Sullivan is pleased to announce that **Stanley P. Fields** has joined our firm as an Associate Attorney.

Mr. Fields received a Bachelor of Science, with honors, from Western New Mexico University, a Master of Science from Eastern New Mexico University, and earned his Juris Doctor and natural resources law certification from the University of New Mexico School of Law. Stan is admitted to practice in both the state and federal courts of Alaska. Stan has handled Commercial Fisheries Entry Commission appeals.

Mr. Fields previously worked for the Alaska Department of Law where he primarily practiced administrative and natural resources law. Stan also drafted legislation and regulations during his time with the Department of Law.

Stan practices in the areas of natural resources, environmental, real property transactions, accretion claims, litigation and business law.

C. Deming Cowles is now in central Florida, representing the state's only charter school system, running a community based family literacy program and consulting for the state's Department of Education. He is on the Hillcrest Heights Town Commission, Chairman of Florida Bipartisans Civic Affairs Group, Polk County Water Policy Advisory Committee and on several community boards. He misses Alaska and Alaskans, though. He can be reached at demingcowles@aol.com.

Dan Winfree (past Bar President), is closing his law office and taking the position of Executive Director and General Counsel of the Fairbanks Hospital Foundation as of July 1.

Will Schendel has opened his own office and **Corrine Vorenkamp** has taken the DA's office.

Former prosecutor **Mary Anne Henry** was appointed by the legislature as the Director of the Office of Victims' Rights. Former District Court Judge Suzanne Lombardi was hired as an associate attorney at the office. The office is located at 1007 W. 3rd in Anchorage. The e-mail address is officeofvictimsrights@legis.state.ak.us.

Margaret Stock graduated from the Army War College in July 2006 and was awarded a Master of Strategic Studies degree. She also has been re-appointed as Co-Chair of the American Bar Association Section of Litigation's Immigration Litigation Committee, and newly appointed Co-Chair of the Section of International Law's Immigration & Naturalization Law Committee.

Glenn Cravez has been recognized in the "Best Lawyers in America" publication, in the field of Alternative Dispute Resolution. Glenn has practiced law in Anchorage since 1981 and chairs the Alaska Bar Association's ADR Section. Since 1990, he has mediated close to 900 cases in Anchorage and elsewhere around Alaska.

Alaskans receive recognition in Chambers survey

Six attorneys in the Anchorage office of Dorsey & Whitney LLP have been selected as leading U.S. lawyers by independent legal research firm Chambers and Partners USA. Chambers also ranked six Dorsey Anchorage practice groups among the best in Alaska.

The Dorsey Anchorage attorneys ranked by Chambers include: ***Spencer Sneed, Richard Rosston, William Evans, Heather Grahame, Robert Bundy,*** and ***James Reeves***.

Along with those in Alaska, six other Dorsey offices earned top rankings from Chambers USA, with individual honors going to 38 Dorsey attorneys in eight different legal areas.

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In this fourth annual survey of the U.S. legal market ("America's Leading Lawyers for Business, 2006"), Chambers also recognized Davis Wright Tremaine LLP among attorneys practicing in Alaska.

The firm's Anchorage office earned the highest level recognition (Band 1) as a leading firm for its corporate/M&A and employment, mainly defendant, practices. In addition, bankruptcy and real estate were ranked second.

Firm-wide, 55 DWT attorneys were recognized as leaders in their fields, including seven of the firm's 11 Alaska attorneys: ***Jon S. Dawson, Parry Grover, James H. Juliussen, Barbara Simpson Kraft, David W. Oesting, Joseph Reece***, and ***Robert K. Stewart***.

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In addition, 11 lawyers from Lane Powell were selected in the Chambers USA. rankings guide, including Anchorage lawyer ***Brewster Jamieson*** for his general commercial practice.

For more information on the Chambers USA listings, visit www.chambersandpartners.com.

Brewster Jamieson

THE KIRK FILES

I, the Judicial Council: Fomenting a judicial revolution

By Kenneth Kirk

I couldn't believe the dame was in my office. That same dame who paid me to do research on women judges last year. I told my secretary not to schedule her another appointment, but the dame paid in cash, and my secretary didn't want her next paycheck to bounce.

"I can't believe we're using your sorry butt again, Steve," she started, "but we need some more intel on the other side". She was dressed a little severe this time, with a buttoned up blouse and a skirt that covered the knees, and an attitude that covered a whole lot more. "We have reason to suspect your friends over there on the right wing are planning something in regard to the judiciary".

"Whoa, sister," I interjected, "don't label me a right-winger. I'm really more of a quasi-libertarian anti-feminist faux-neo-con...."

"Whatever," she interrupted back, "you fascists are all the same to us. What we need is to figure out what they're scheming up on the other side. We know they're pretty steamed about *ACLU v. Anchorage*, and they have to be planning something."

I thought about that a second. "Yeah, a lot of people are steamed about the Supremes forcing gay partner benefits. It kinda felt like they were thumbing their noses at the constitutional amendment on marriage. But then, people were pretty steamed about *Valley Hospital* too. Forcing a hospital to accommodate abortions when it didn't want to? No court had ever gone that far. Nonetheless, nothing happened afterwards".

"Hardly anyone noticed *Valley Hospital* who wasn't already heavily committed on these issues anyway", she said. "*ACLU v. Anchorage* has gotten a lot wider play, and the news stories have continued beyond the initial decision. At this point we know something's being planned. We just don't know what".

"Well forget it, honey," I said firmly. "Even I have my standards. I'm a lawyer, not a spy. I'm not gonna go to meetings and then rat out their plans. Not even for cash."

"I'm tempted to test that statement," she said disdainfully, "with a couple of C-notes. But that's not what we want to hire you for. We want you to figure out what they could do. Not on this one issue, particularly, but in general. Could they mess with the Supreme Court? Or the judiciary in general? What are their options? You don't have to rat out anyone. Not that I doubt you would".

I was actually relieved, despite her contempt. I was pretty firm on principle on this one; I wasn't gonna take a spook job for less than a thousand bucks. But the legal options? Heck, that was what I actually went to school for.

The dame hadn't waited for my response; she knew I was gonna take the job. She got up, headed for the door, and then stopped. "Have an answer for us by next Thursday. You can spend up to eight hours. We don't need your conclusions in writing."

"My rate is $180 an hour" I said.

Her lip curled. "We already know it's $150. Do you think we don't have a file on you, you low-life piece of vermin?"

I smiled innocently. "Alright, just for you, $150. But I do have one question, sister. Why do you do this? Come over here to meet with me, I mean. You obviously can't stand me. You look like you want to throw up when you leave here. Your firm has other attorneys, and enough money to buy my time; you don't have to come over and flash your gams to get what I can give you. Somebody else in your firm could do it. So why do they send you?"

"I wasn't gonna take a spook job for less than a thousand bucks."

For once she looked a bit embarrassed. "My billable hours have been a little weak lately. I didn't have much bargaining power." And then she was gone, leaving just a trace of perfume. And a retainer and signed client agreement.

The following Thursday she was back. Ugly pantsuit this time, but at least her hair was down. Her guard wasn't. "What did you come up with?" without even a hello first.

"A few possibilities" I said. "Of course they're looking at changing the state constitution again, on this particular marriage issue, but you already knew that".

She looked unconcerned. "Whatever. We can creatively interpret it, or move on to the next issue. I'm concerned about broader attacks on the judiciary, not just this one issue."

I took a deep breath and then launched. "The consensus on the right is that we have a very liberal judiciary. The population leans to the right, elects an all-Republican congressional delegation, Republican governor, both houses of the legislature... and still the courts give us gay partner benefits, and abortion laws to the left of even what the Supremes in D.C. insist on. So they're starting to fix the blame on the judicial selection system. But I'm not telling you anything you don't already know, or suspect."

The dame tried to act cool but her eyes showed her interest. "They can't possibly change the Judicial Council system, though. They'd have to change the state constitution."

"And granted," I continued, "that wouldn't be easy. Two-thirds vote in each house of the legislature, then a majority vote of the people. Right now the Republicans have 12 votes in the Senate, 26 in the House. They'd need 14 and 28, respectively, and another 3 votes would be hard to get. Most of the districts with Democrat legislators" – I used the pejorative version just to get her goat– "are pretty secure for that party. And even if they did pick up the votes, they'd have to hold their entire coalition together on the issue; if one dissenter won't go along with it, forget about it. So even after the next election cycle, chances are the legislature can't amend the constitution to do something really big, like change the membership of the Judicial Council, or even move to electing judges."

"And that makes us safe," she said, "because the Judicial Council, including the system for appointing its members, is firmly ensconced in the constitution". She said it firmly, but I could almost hear the uncertainty. She knew I had something up my sleeve, and she was just waiting for it.

I decided to drag it out. "Your people like that system, too, I'll bet. Three members appointed by the Bar Association, three by the Governor, and the Chief Justice breaks the tie. Lawyers effectively control who can become a judge. And since lawyers lean well to the left...."

I thought she'd challenge that, and I had statistics ready to back me up. How lawyers vote, who they give their campaign contributions to. But to my disappointment, she accepted the premise without comment. "Alright, Steve, so that's our ace in the hole," she said, "we control the system for judicial appointments, and they can't touch it. And as long as we control the judiciary, we can get what we want in the long run."

"Not so fast, sister," I said, getting into it now, "I didn't say it couldn't be changed. I just said the legislature can't, realistically, change it. There's another way. The legislature can call for a constitutional convention. That's a simple majority vote. If a majority of the convention delegates recommend a change to the system, then the public votes on it. That's three majorities in a row, but at least not two-thirds of anything."

"We've already considered the constitutional convention possibility" she said thoughtfully. "We have some pretty good tactics we can use to scare people away from that one. After all, they can't limit the scope of the convention once they call it."

"No, but the public can always reject what they pass out if it's too extreme," I said. "But that's an argument we can have another time. You're right, though, mention a constitutional convention and some people act like you just proposed rewriting the Bible."

She leaned back with a self-satisfied look on her face. "So basically what you're telling us, Steve, is that the best they can come up with is a constitutional convention, and otherwise we're safe?"

I leaned back, too, for effect. I was enjoying the moment. "Well, there is one other possibility."

"What is it?" she asked, sounding like an irritated schoolmarm.

"They don't necessarily have to change the constitution to change the mix on the Judicial Council."

Now she looked confused. "Sure they do. It's right there in Article IV, section 8. Three non-attorneys appointed by the Governor, three attorneys appointed by the 'governing body of the state bar association', and then the Chief Justice, ex officio."

"Ah, but you can change the mix of the Board of Governors of the Bar Association. Or rather, the legislature can. Put a few more gubernatorial appointments on there, or appointments by the House and Senate leaders, or whatever you like. Or in your case, don't like. If the Board of Governors is more conservative, the appointments to the Judicial Council will be more conservative too."

Now she looked even more confused, and worried. "But the Supreme Court controls who can practice law. The legislature doesn't."

"Granted," I said, "the Supremes control who can be a lawyer. But the governance of the Bar Association is left to statute. Title 8, chapter 8 to be specific. The courts can say who's in the Bar, but not who's on the Board. And that's one way the legislature can influence the process, big time".

She looked like she'd been hit by a truck. "Anything else?" she said tenuously.

Well, that's all I've got for now. Of course the easiest way to influence the process, would be for the voters to throw a few of them out of office. It wouldn't take more than a couple of non-retentions to whip the gang in the black dresses into line. They take it for granted now that as long as they have the Judicial Council recommending a yes vote, they'll get another term. But a few of them get tossed out despite the Council, and other judges will be a lot more careful when they're tempted to use the constitution to push society to the left."

She sniffed. "As long as we control the majority of the Judicial Council, we don't have to worry. They can knock one off, but we'll replace her or him with another judicially correct candidate."

I just grinned. "Maybe. Or maybe not. Now that they've jacked up the pay to around a hundred-fifty G's, we can see how many judges are willing to take one for the team."

I guess the dame had heard enough, because she got up, spun on her heel, and left without a word. She obviously wasn't happy, but what the heck. At least my secretary was.

INTERESTED IN SUBMITTING AN ARTICLE TO THE ALASKA BAR RAG?

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

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

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

Ten tips for negotiating workplace conflicts

By Jeffrey Krivis

Can We Call a Truce? Ten Tips for Negotiating Workplace Conflicts.Whether two employees are fighting or a disgruntled client is on the verge of leaving, you--yes, you--can step in and help solve the problem. Here are some tricks of the trade.

Conflict happens. It happens in all areas of business. Disputes can arise between employees, between business partners, between a company and a client. And if such issues are not settled, bad things can happen. Good people quit. Profitable relationships dissolve. Great companies go under. This has always been true, of course. In a global economy the implications of conflict are more profound than ever before.

In a world where relationships matter more than ever, mediation skills matter more than ever. Companies can locate anywhere. People can work anywhere. Clients can stay with you or go with a competitor halfway around the globe. So whether you manage employees or clients or both, it's critical to learn the art of bringing harmony out of conflict.

I serve corporations and individuals from all walks of life, helping them settle disputes before they end up in the courtroom. My new book, which is packed with stories from my own career, reveals some ways other mediators and I have helped people stop beating their metaphorical heads against metaphorical brick walls and reach creative, mutually beneficial solutions.

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What, exactly, is negotiation? It's reframing a situation in order to get people to shift their positions in a way that makes a resolution possible. My own formula for negotiation is as follows:

Instinct + Information = IntuitionIntuition + Knowledge = Improvisation

In short, negotiation is part art and part science. You needn't become a certified mediator in order to settle a dispute at work or at home. You just need to understand some basics about human behavior, practice the fine art of paying attention, and offer yourself up as a neutral party who just wants to resolve the problem.

Here are ten insights and tricks of the trade I suggest you use:

• Let people tell their story. When a person is deeply upset about something, he really needs to get his story out. This is a basic principle of mediation, and one that's important to remember when trying to resolve a conflict with an angry employee, client, or other associate. Yes, allowing people to speak their minds can increase the level of conflict with which you must deal. That's okay. You have to get through the conflict phase to find the solution. Feeling that he has finally "been heard" can dramatically change an angry person's outlook. Plus, as he tells his story, new information may come to light that allows a solution to naturally emerge.

"Independence Day," a story in my book, illustrates this truth. Dan, a systems analyst who had been downsized after 10 years with his company, was suing his former employer for wrongful termination. When he was finally allowed to tell his story in mediation, everyone was stunned by the raw emotion that came pouring out. Dan had lost his parents as a child and had always spent Thanksgiving and Christmas with coworkers. He saw the company as family--literally--and thus felt hurt and betrayed by the lay-off. As it turned out, the company was ultimately able to re-employ Dan as a consultant. He got to start his own business and his old company got to continue benefiting from his services. But if Dan hadn't been allowed to tell his story, and tell it in front of his old boss, the answer would never have presented itself.

In every conflict, ask yourself What is the true motivating factor here? What is really keeping this person from agreeing to a solution?

• If someone refuses to budge, take the spotlight off her. Isolation tends to create movement. When you are mediating a multiparty conflict, you will often discover that there is one person who insists on taking a hard line approach. She refuses to compromise, shooting down every solution that's presented and holding out for what she wants. My suggestion? Take the attention off the "last woman (or man) standing" and begin settling around her (or him). It's amazing how well the isolation technique works. You'll find that the holdout starts to anxiously call and send e-mails, trying to get things going again. When her perceived power is neutralized, she quickly sees the value of compromise.

Think creatively about ways people can cooperate rather than clash. In every negotiation, there is a tension between the desire to compete and the desire to cooperate.

• When someone seems "locked up," dig for the emotion behind the stone face. I recently mediated a situation in which a famous television producer was on the verge of being sued for plagiarism. Essentially, the plaintiff claimed that the producer had "stolen" his idea for a successful situation comedy TV show. When anyone talked to him about his case, he gave short, robotic answers and showed no emotion. So I asked the plaintiff, "What is it you really want to achieve here?"

The plaintiff almost broke down. He said, "I never wanted to bring this case in the first place. I just want to break into television." So I returned to the producer and said, "Is there any way you can help this guy out?" And the producer said, "Sure, let me talk to him." So I got the plaintiff an audience with this extremely well respected producer, and the producer ended up offering him a development deal. By tapping into this person's repressed emotion, we were able to find a solution that made everyone happy.

• When people are picking flyspecks out of pepper, come in with a reality check. Often in a conflict, the various parties are so focused on minutiae that they lose sight of the big picture and all its implications. As the mediator, you need to bring people back to reality by wrenching their attention away from the grain of sand and having them focus on the whole beach. Doing so may help resolution arrive at a startling speed.

I was mediating a case in which a security officer was raped by a superior. Everyone was nitpicking the details, saying, "Well, we don't know if we can believe the officer, so-and-so is biased, she's asking for too much money, etc." I had to step in and say, "Let me paint the picture the way the jury is going to see it: the horrific crime of rape, a woman in distress, a thriving six-figure career cut short, and so forth. Now you go ahead and tell your story about the sand granule. By then the jury will have made its decision and you're going to wish you had that moment back." Once I gave them the reality check, they came to an agreement right away.

• Identify the true impediment. In every conflict, ask yourself What is the true motivating factor here? What is really keeping this person from agreeing to a solution? When you can identify the impediment, you can predict how the person will respond to certain ideas and you can shape negotiations accordingly. I worked on a case in which a man was suing an entertainment company for wrongful termination and we just could not resolve it. Finally, I happened to ask about the man's family and found out that one of his kids had cerebral palsy. Suddenly, it all made sense. The plaintiff had to win the lawsuit because they didn't have medical insurance to cover the child's very expensive treatments. So that's what was really driving the lawsuit. Armed with that knowledge, we got the company to agree to pay the man's insurance for five years.

• Learn to "read minds." Mind reading is not magic. It is a combination of observation and intuition, which is born of experience. You can learn a lot about how each party sees a dispute by paying attention to body language and listening closely not only to their words but also to the emotional tone behind their words. If you give them the opportunity, most people involved in a dispute will gladly talk about themselves, which gives you a chance to ask more questions and gain more information about their perspective. Once you see things from their point of view, you can stay one step ahead of them by anticipating how they might react and managing the negotiation accordingly.

• Think creatively about ways people can cooperate rather than clash. In every negotiation, there is a

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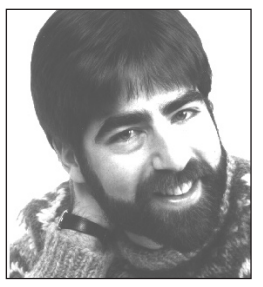
FAMILY LAW

More to know about legal resources for the family law lawyer

By Steven Pradell

Recently this column discussed numerous legal resources available for Alaska matrimonial lawyers, primarily those available on the internet. Despite the ease of use of these websites, taking a trip to the local law library is still worthwhile, as there are numerous resources which are not available on your computer.

After speaking with Cynthia Fellows, Alaska State Law Librarian, (recently retired) the following information is provided about law library resources for the family law lawyer – and a clarification about the free Alaska Case Law Service cited in the previous article, http://government.westlaw.com/akcases. This service is provided by the Alaska State Court Law Library in cooperation with Thomson West. There is a link to the database on the Alaska Court System website http://www.state.ak.us/courts. It includes opinions from the Alaska Court of Appeals as well as the Alaska Supreme Court. If you have used this website, you know that it does not include full Westlaw features such as key numbers and headnotes, KeyCite, and free access to citations within the cases via hypertext links. If your research would benefit from the features not available on this website, then a trip to the law library is in order. All court system law libraries have computers with free Westlaw for all jurisdictions. Specialized



"If you have difficulty locating information or documents on the web, the law library's reference librarians can help you via telephone and email."

family law databases are available including federal and state family case law, federal family law statues and regulations, and selected family law periodicals, forms and other materials. You can email documents to your home or office from the law library computers.

In addition to the law reviews and journals in Westlaw, law library computers in Anchorage, Fairbanks, Kenai, Ketchikan, and Juneau offer access to a much more comprehensive collection of legal periodicals via HeinOnline, a full-text searchable database. In Anchorage, Fairbanks, Juneau, and Ketchikan you can also access any electronic database in the BNA library, including the Family Law Reporter.

Cynthia also pointed out that the law library system offers a substantial collection of up-to-date family law related treatises. Members of the bar have check-out privileges. Any treatises that are not available in your local library can be delivered to you free of charge through interlibrary loan. If you have difficulty locating information or documents on the web, the law library's reference librarians can help you via telephone and email. For more information, visit the law library website at www.state.ak.us/courts/library.htm, call the reference desk at (907) 264-0585, or email library@courts.state.ak.us.

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

Ten tips for negotiating workplace conflicts

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tension between the desire to compete and the desire to cooperate. Be on the lookout for signals that support a cooperative environment. That's where the most creative solutions are born. Remember the consulting agreement that came out of the aforementioned "Independence Day" dispute? These kinds of "joint gains" are often born of conflict.

Another story in Improvisational Negotiation centers on Golden State Grocers and its objection to being billed for a three-week "training cruise" taken by its employees of its computer consulting firm Apex. Golden State felt ripped off by being charged for what looked like a vacation; Apex insisted that its employees worked intensively on Golden State's account during the cruise--and besides, "this is how it's done in consulting." The solution I helped them find involved forming a whole new company, Golden Apex Seminars, which offered training services to other retailers. Instead of spending my time divvying up the consulting bill, I spent it building up the relationship between the parties. Suddenly, the money dispute that had started the mediation became secondary to the created value of a new, mutually beneficial business venture.

People tend to get "stuck" in their positions because they are telling what happened from a narrow viewpoint and in a negative and hopeless tone.

• "Edit the script" to help people see their situation in a different light. People tend to get "stuck" in their positions because they are telling what happened from a narrow viewpoint and in a negative and hopeless tone. They've relayed their story over and over again and their perception has become their reality. They can't see the situation any other way unless you help them to do so.

As the mediator, you can take a larger view that looks not at one party or the other "winning" but at both parties working toward a mutual goal. One way to help them get to this goal is to edit their script—retell their story about the dispute as a positive, forward-looking construction. In this way you literally give them the words to see their options in a new light.

• Avoid the "winner's curse" by carefully pacing negotiation. Believe it or not, it is possible to reach a solution too quickly. We all have an inner clock that lets us know how long a negotiation should take. When a deal seems too easy, a kind of buyer's remorse can set in that leaves people with second thoughts about the outcome. One or both parties may be left with the feeling that if things had moved more slowly, they might have cut a better deal. Here's the bottom line: don't rush the dance or the negotiation will fail. Even when you know you can wrap things up quickly, it's to everyone's advantage to keep the negotiation proceeding normally, for a reasonable amount of time, before the inevitable settlement.

• Finally, realize that every conflict can't be solved. What if you've tried and tried to help two warring factions find a fair solution and you just can't? It may sound odd coming from a mediator, but some conflicts just aren't winnable. Not every negotiation is going to have a win-win outcome. Not everyone can live together in harmony. Look at Israel and Palestine. There are times you just have to accept that both parties are going to leave the table equally unhappy. When you've mediated enough conflicts, you will know in your gut when that time has arrived. Isolate the participants if possible and just move on.

Negotiation is all about going with the flow and seizing opportunities as they arise. You can familiarize yourself with the tools—indeed you must—but there's no substitute for jumping right in.

All this talk of well-paced dances, inner clocks, and gut feelings may seem alien to "just the facts" business types, but you'd better get comfortable with the idea that there are no hard and fast rules. Negotiation is all about going with the flow and seizing opportunities as they arise. You can familiarize yourself with the tools—indeed you must—but there's no substitute for jumping right in.

Improvisational negotiation is kind of like jazz. You have to know your chords, your scales, your patterns, your licks. But ultimately, these are building blocks, not formulas. The chords you use depend on the chords you hear from the other participants, and vice versa. It's a conversation. It's organic. There are no limits on what can come out of mediation, and that's what makes it such a powerful skill.

Jeffrey Krivis has been mediator for sixteen years and practices in California

Voluntary Continuing Legal Education (VCLE) Rule – Bar Rule 65
6th Reporting Period January 1, 2005 – December 31, 2005

Following is a list of active Alaska Bar members who voluntarily complied with the Alaska Supreme Court recommended guidelines of 12 hours (including 1 of ethics) of approved continuing legal education in the reporting period of 2005.

We regret any omissions or errors. If you name has been omitted from this list, please contact the Bar office at 907-272-7469 or e-mail us at cle@alaska-bar.org. We will publish a revised list as needed.

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Allee, Rita T.
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Allen, Richard K.
Allingham, Lynn
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Anderson, David B.
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Behr, Deborah E.
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Bond, Marc D.
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Boothby, Nelleene A.
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Borgeson, Cory R.
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Brooking, Cheryl Rawls
Brower, David L.
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Carpeneti, Walter L.
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Greene, Mary E.
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Jackson, Barry W.
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Juliussen, James H.
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Kauvar, Jane F.
Kay, Brian Phillip
Kehoe, Robert F.
Kenworthy, Mary Anne
Kerr, Sonja D.
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Kesterson, Linda L.
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King, Jennifer L.
Kirk, Kenneth C.
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Kissner, Barbara E.
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Levesque, Joseph N.
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Lewis, Eben T.
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Libbey, Daniel
Libbey, Robert M.
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Sorensen, Stephen F.
Spaulding, Franklin Eleazar
Spencer, John R.
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Spiropoulos, Carmen
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Stanley, Michael A. D.
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Stevens, Rebecca Wright
Steward, Andrea
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Van Flein, Thomas
Van Goor, Stephen J.
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Willard, Donna C.
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Winfree, Daniel E.
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Wirschem, Michael R.
Wittenbrader, Jill C.
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Zukauskas, Edie
Zwink, David L.

In the Supreme Court of the State of Alaska

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In The Disciplinary Matter Involving

Attorney X,

Respondent.

Supreme Court No. **S-12262**

Order
***Amended**

Date of Order: **6/14/06**

ABA File No. **2006D015**

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

On consideration of the order denying petition for rehearing dated 1/11/06, and the order imposing private reprimand dated 10/14/05, both of the Supreme Court of Guam, and the non-opposition to imposition of identical discipline filed by the Alaska Bar Association on 5/10/06, and no response having been received from Attorney X to the notice and order of this court dated 4/7/06,

IT IS ORDERED:

Reciprocal discipline under Alaska Bar Rule 27 is approved. This matter is referred to the Disciplinary Board of the Alaska Bar Association for the imposition of a private reprimand.

Entered by direction of the court.

Clerk of the Appellate Courts

Lori A. Wade, Chief Deputy Clerk

cc: Supreme Court Justices

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Attorney X
287 W. O'Brien Street
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In the Supreme Court of the State of Alaska

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In The Disciplinary Matter Involving:

Calvin P. Vance

Supreme Court No. **S-12337**

Order
Reciprocal Discipline

Date of Order: **8/31/06**

ABA Membership No. 8411143
ABA File No. 2006D066

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

On consideration of the Oregon Order of Public Discipline: Order Approving No Contest Plea, dated 5/2/06, and accompanying No Contest Plea, last dated 4/25/06, and the 6/26/06 response to the order to inform this court why identical discipline should not be imposed by the Alaska Bar Association,

IT IS ORDERED:

Reciprocal discipline under Alaska Bar Rule 27 is approved. This matter is referred to the Disciplinary Board of the Alaska Bar Association for the imposition of a public reprimand.

Entered by direction of the court.

Clerk of the Appellate Courts

Marilyn May

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In memory of Barbara, Larry and Rick: For golden friends I had

By Bev Cutler
Part II —

Moving on

The fun always ended but the stream of clients never did. Their problems were endless. Their families were tactless. Every one expected victory. Worse, they trusted us to pull it off. The phones never stopped jangling at us. The D.A.'s never stopped denying our motions. For these and other reasons, sooner of later most P.D.'s move on.

Many depart by going out strong – leaving after handling a big case. I think now its called burnout. Some attorneys, including Barbara and I, left less dramatically. We merely had new job offers.

I was swimming laps in the pool in the basement of the Captain Cook when the idea of applying for District Court came to me. It seemed time for a change. I was almost tired of Larry coming by on Friday afternoons to ridicule the cheap popcorn and store-bought onion dip. It was mid '77.

District Court Judge Dorothy Tyner had retired, leaving the Anchorage bench devoid of female verve. The agency seemed well supplied. We had Sue Ellen Tatter, Chris Schleuss, Mary Ellen Ashton, and Debbie Smith. Nancy Shaw had made a return. Mary Killorin and Colleen Ray also were there in body and spirit though not yet on the payroll.

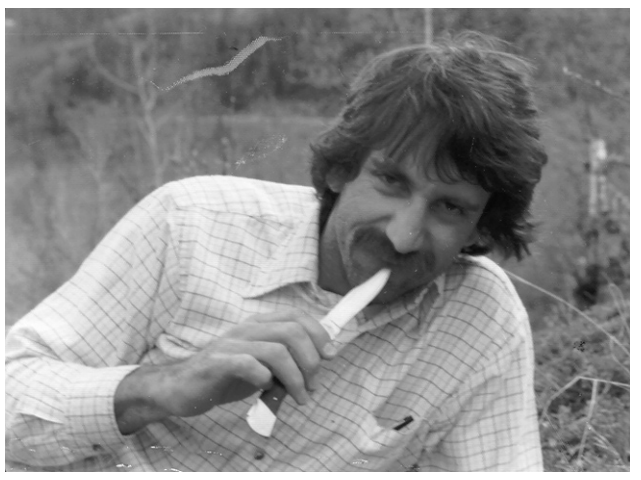
I got lucky. Thanks to the back-patting and stamp-licking of all of the above people, Governor Hammond was convinced that an ex-P.D. would not spring all the deadbeats from jail if appointed to the bench. Alex Bryner especially helped in this regard, by example.

Alex had been appointed to District Court by Hammond a few years earlier. Recently Alex had been called in the middle of the night to set bail on an armed robber. Groggily, he inquired of the police officer how much had been taken in the robbery. The officer thought it was $12.00. "Fine," said Alex, I'll set the bail at $12.00." "Excuse me?" said the officer. "You heard me -- $12.00!" bellowed Alex, and hung up the phone.

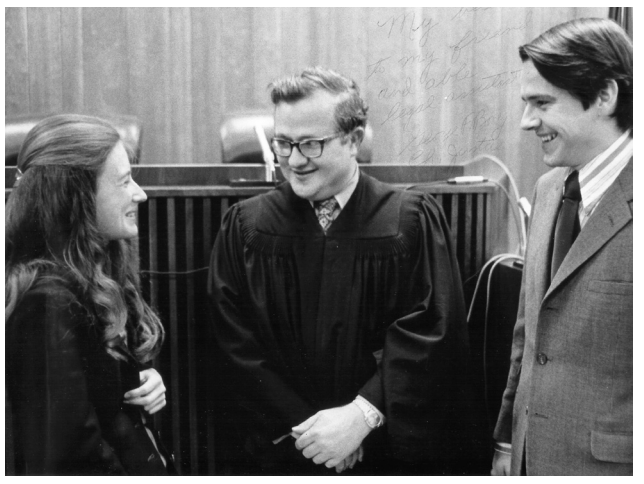
The defendant still was in jail at arraignment time the next day. Obviously it had been a reasonable bail.

It was hard to leave the agency. My last hearing was a Supreme Court argument I'd been waiting to do for six months. I was to be sworn in as a judge within a few days.

Fifteen minutes before the argument, I was staring at my office walls, fighting off the usual pre-argument jitters and trying to remember what the case was about. Barbara was giving me pointers. I received a sudden summons to the fifth floor. I thought this peculiar. It seemed a strange time to congratulate me and welcome me to the brethren of the judiciary. I now realize the Chief Justice likely hadn't read his calendar and may have had no idea I was about to appear before them.



Larry Kulik played with knives.



Justice George Boney swears in Barbara Miracle and R. Clark Wadlow into the Washington D.C. Bar. Miracle and Wadlow had both left D.C. prior to the bar exam results, so were sworn in Alaska.

Pride cometh before a fall

I was ushered into the Chief's office. He proceeded to point out that the criminal code had not yet been revised to eliminate cohabitation as a felony, and that I would have to make immediate adjustments in my living situation so as not to compromise the integrity of the judiciary. The shock was just what I needed to gather my wits. The argument went off without a hitch.

There still remained the "integrity" problem, however. Regardless of the obvious double standard, I was not up to a public battle. Moreover, at that stage of my career, it did not seem easy to ignore the directives of a chief justice.

I sought out Alex Bryner to cry on his shoulder. He was short on ideas, but did offer to waive the 3-day waiting period for a marriage license. I thought about it for at least a minute. Sue Ellen recently had married Larry, and she'd survived. What the heck. Alex issued us a formal certificate, declaring that "hardship circumstances" existed.

It was September. Mark was in the midst of leaving for Cordova, where he and Jay Warner, then juvenile intake officer, had scheduled some children's proceedings so they could go duck hunting. Mark had been waiting for a month to try out a new gun. He didn't see any reason to change his plans. I barely made the plane.

Mary Wentworth married us a few hours later, after the children's proceedings but before any hunting. It was later summed up by Tom Tatka in the following press release:

> "The groom wore hip boots over L.L. Bean insulated hunting pants, an L.L. Bean utility belt, and an L.L. Bean plaid shirt with a Cabela camouflage jacket. The ceremony terminated case CP414E, In the matter of Mark Weaver, A Child in Need of Supervision. Mr. Buckalew Weaver, a canine from Anchorage, served as best man.
>
> The bride, when asked to comment on the ceremony, stated that her campaign had begun many months earlier, with the assistance and urging of many friends and associates. "I am deeply grateful to the many women's groups in Alaska who supported my candidacy for this position and to the many attorneys and people who aided me in this effort." She told reporters.
>
> When reminded that this approach to wedding plans seemed somewhat unusual, she corrected her statement by saying that she had prepared her comments for the upcoming swearing in as District Court Judge, and must had gotten the ceremonies mixed up.
>
> The groom was quite outspoken about the merits of the day's events. I had six good wing shots this morning and Buck (the best man) performed admirably in the recovering through the grass and water. The low clouds and scattered rain were helpful in keeping the birds down, he said. The groom also was enthusiastic about future prospects for the union. "I find the full and modified to be the most effective when coupled with the excellent craftsmanship of the Merkel. The combination of light weight and easy handling makes this far superior to a Browning. I fully expect to have a honker for Thanksgiving.
>
> The bride was attended in absentia by the Honorable Robert Boochever, Chief Justice of the Alaska Supreme Court."

We returned to Anchorage the next day. I didn't dare miss the swearing in.

There was a celebration of both events at a party at Susan Connolly and Fred Biere's house in Fairview. Susan now is an insurance defense lawyer in Eugene. We barbecued everything under the sun until it was too late and too cold to stand outside. Larry arrived just as it was getting dark, carrying a tiered cake still warm from the oven, with frosting dripping down the sides. I'm certain it was a Julia Child recipe. There were two figurines on top of the cake. The bride wore black and the groom carried a shotgun. Regrettably, I couldn't keep them because they had been borrowed from Paul Bryner's toy box.

A few years hence, Steve and Barbara also ran off to Cordova to be married by Mary Wentworth, in September. It was the first and only trend I ever started.

More departures

When Barbara left the agency the following summer, there was less fanfare but certainly greater loss. Her farewell bash was hosted by Eric Sanders, whose successful negotiation of a Bush case had just yielded a dozen fresh salmon. There was a huge crowd at Eric's not-so-huge-house. Chris Schleuss, who lived next door, got stuck with the cooking, upon discovering that Eric's abilities were limited to sprinkling charcoal lighter on the barbeque pit. Among the highlights of the evening, people went upstairs to look at all the clothes in Eric's closets. It was better than shopping.

Barbara left to become an A.G. in Natural Resources. It was a step toward leading a calmer life and eventually becoming a mother.

We each thought it important to leave something of value behind at the agency.

Barbara left a black dress and red slip that had resided for years on the coat rod by the copy machine. It was the female equivalent of the tie that some lawyers hang in their office for emergencies. Always anticipating the next battle, Barbara, probably thought that a client might need it some day.

I left next to the dress a stylish leather coat with fake fur trim that had been given to me by a defendant to show his appreciation. The coat had come in a plain paper bag with a Nordstrom's tag on it. The price was cut off, but the tag did not contain the secret code that the store puts on the back so that it can determine the price if the gift is returned.

Barbara had once represented the client too. We silently agreed he could not afford to shop at Nordstrom. Furthermore, all of his cases fell in the category of property crimes. We decided to leave that coat right out in plain view. If the D.A.'s wanted it, they could come get it!

Fond memories

I don't remember a dull moment at the agency. The mix of people from all walks of life contributed to this. But, what made it so stirring, almost intoxicating, was the hilarity and sport inspired by people like Barbara and Larry and Rick. Fearless themselves, they made the rest of us dare to try our hand.

I suspect I am not alone in being unable to think of the past without thinking of them. Other people knew them better, but few had greater need to look up to them.

Most of us at the agency then were young, both in years and in experience. We did not know what lay ahead. We did know that we had a job to do. That job required us to defend unpopular positions, often for losing causes, and often alone. Rick and Barbara and Larry taught us how to do that job well, and with imagination. They taught us to laugh while we did it. They gave us courage. Now they are gone, abruptly and so unfairly. Their deaths have left us numb.

When it rains, it hails.

•

Larry Kulik died in May 1981, in a scuba diving accident in Hawaii. He was 36.

Barbara Miracle died in May 1985, after a plane crash in Turnagain Arm. Her two sons died also. She was 39.

Rick Lindsley died in June 1985, of cancer at home in California. He was 38.

Bill Bryson died in January 2006. He was 58.

•

The author is an Alaska Superior Court judge in Palmer