The Alaska
BAR RAG
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Dignitas, semper dignitas

Serious business in Paradise: 9th Circuit conference

By Brewster Jamieson

For the record, not a single penny of taxpayer's money was spent on entertainment at this year's Ninth Circuit Judicial Conference in Maui, Hawaii (August 13-16, 2012), unless you count the timely, vibrant and interesting programs conducted by a roster of our nation's most distinguished jurists, scholars and practitioners.

Certainly, this year's conference followed Congress's explicit direction to the Federal judiciary that it meet annually to consider ways to improve the administration of justice in each Circuit. My point about the statutory mandate is deliberate—the conferences were at one time considered by the legislative branch to be important enough to encourage and authorize explicitly by law. In the news recently, however, several members of Congress have made a point of complaining about the location of this year's conference, and, indeed, the need for the conferences at all.

To be sure, the surface optics of heading to Hawaii at public expense—during an election year, and in the wake of allegations that the other branches have wasted taxpayer funds on their own conferences—were less than ideal.

However, the truth of the matter is that a group of extremely dedicated professionals came together and spent the vast majority of their time indoors attending meetings and educational programs aimed at improving the fairness and efficiency of the administration of justice. No judge returned from this conference with even mild sunburn; some Alaska judges even paid their own way as a tangible demonstration of how much they value this conference. The cost of the conference—held in Hawaii's off season—was in line with conferences held on the mainland. Certainly, it would be far more expensive to hold it, say, in Anchorage in the summer.

Four lawyer representatives (Kevin Clarkson, Lane Tucker, Greg Razo and me) and an Appellate Lawyer Representative (Heather Kendall-Miller) attended this year's conference. Federal Public Defender Rich Curtner and Federal Bar President Darrel Gardner also attended, bringing the criminal defense perspective to the proceedings. The role of these non-judicial attendees is to provide input to the Federal courts—something that the bench takes seriously. At the Bench/Bar breakout sessions the jurists met at length with the lawyer representatives to discuss judicial ethics, new procedures for expedited short trials, criminal settlement conferences, and the role of new technologies on legal proceedings, among other topics. These discussions were arranged with deliberate geographical diversity in mind, so that the best ideas from around the circuit could be shared. The discussions were informal, lively and candid.

In addition to the educational program, the conference provides each district the opportunity to meet and conduct its annual business meeting. As is its custom, the Alaska delegation held its business meeting during its district dinner, arranged with perfection by outgoing Lawyer Representative Chair (and renowned gourmand) Kevin Clarkson. Chief Judge Ralph Beistline hosted the dinner and meeting with his usual ebullience. Ninth Circuit Judge Morgan Christen (herself a former lawyer representative) and District Judge Sharon Gleason attended in their new capacities, adding fresh perspectives and good humor to the occasion.

Senior Judges H. Russell Holland, Jack Sedwick and James Singleton—all former Chief Judges—attended and gave Judge Beistline no quarter during his remarks, and added to the overall joviality of the event. And, of course, everyone paid for his or her own dinner (in case certain lawmakers and pundits are reading this). For those of you who have not considered applying for the position of lawyer representative, you should do so for the sheer fun of joining this remarkable group of jurists for dinner once a year.

Special mention should also be made about two attendees—"recalled" Bankruptcy Judge Herb Ross and "recalled" Magistrate Judge John Roberts. In most contexts (funerals and politics, for instance) being "recalled" is a bad thing. In the case of these two gentlemen it was in recognition of their special dedication and ability that they were asked to return to their former positions. Before they "retired," Judges Ross and

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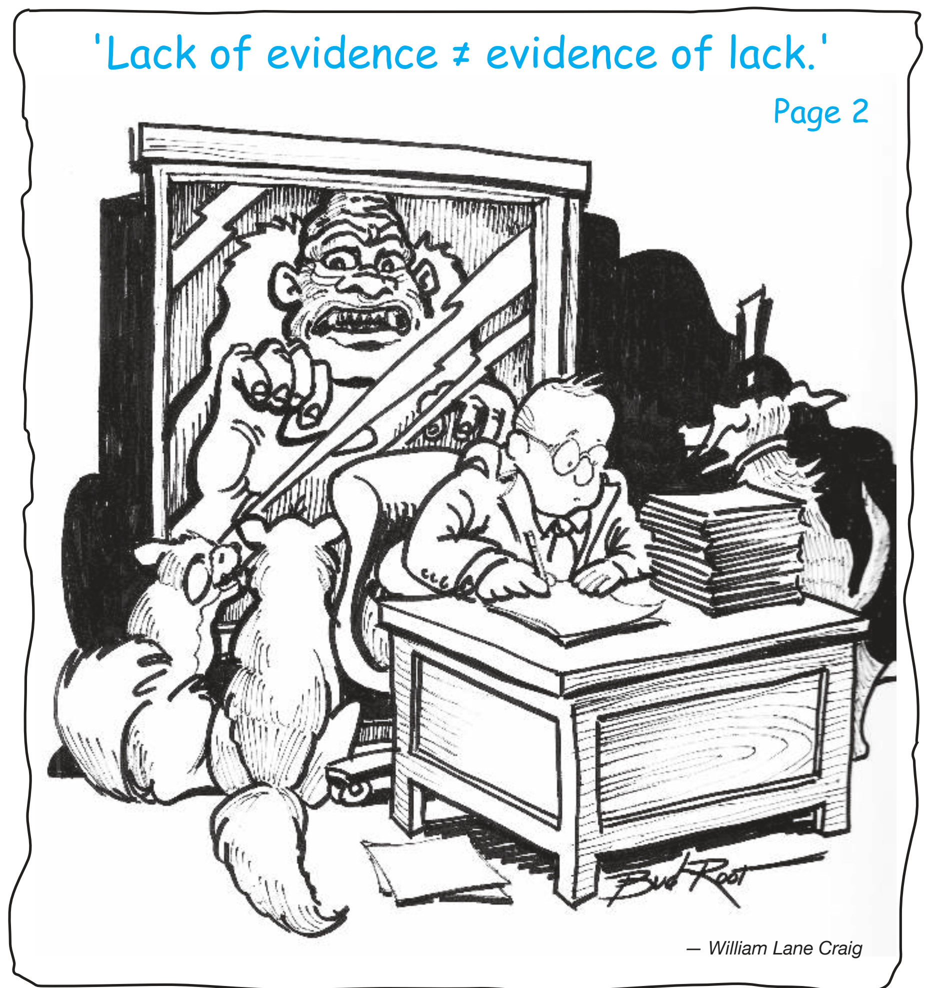

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Maassen appointed to Supreme Court

Peter Maassen has a casual moment at the Bar Convention in May.

Gov. Sean Parnell appointed Anchorage attorney Peter Maassen to the Alaska Supreme Court on Aug. 9. Maassen is the 22nd justice appointed to the Court, and he replaces Justice Morgan Christen, who was appointed to the United States Court of Appeals for the 9th Circuit.

Maassen has been in private practice most of his career. He earned a bachelor's degree at Hope College and his juris doctorate at the University of Michigan Law School. He was most recently a partner at the general civil firm Ingaldson, Maassen & Fitzgerald PC. Prior to that, he worked at Burr, Pease & Kurtz PC, practicing as an associate and eventually as a partner.

He has served as co-chair of the Anchorage Youth Court Board of Directors and the Alaska Bar Association Board of Governors and is a former editor of the Alaska Bar Rag. "The proud father of a college student," his interests include skiing and biking.

Raised in Michigan, the son of a minister and a music teacher, Maassen came to Alaska in 1980 with his wife, Kay Gouwens, who is also a lawyer, "though our professional paths rarely cross," he said. In the span of his career, he has represented individuals, businesses, public entities, classes of consumers and public pensioners, and non-profits

"I am more likely to be drafting briefs or motions than picking a jury, though I've done that too...My only marketable skills, however, are writing and legal analysis, which I am eager to put to use in public service," wrote Maassen in his Alaska Judicial Council application.

"Peter's thoughtful, humble, and articulate manner will be an asset to the Supreme Court and the Alaskans it serves," Governor Parnell said. "He has strong legal writing skills, and intelligence."

Maassen was selected from a list of two applicants nominated by the Alaska Judicial Council from among 13 applicants for the Court vacancy. His formal investiture is likely to occur in October.

PRESIDENT'S COLUMN

Summer passes, seeing Alaska . . . and lawyers

By Hanna Sebold

Alaska is a beautiful state. I encourage folks to travel outside their communities and experience these beautiful places. One way to do so is to volunteer and take a pro bono case. If you work for the state, offer to fill in for one of your colleagues when they go on vacation. I guarantee the experience will be rewarding and exciting.

One of the benefits that I have enjoyed as the president is getting to visit our vast state, with our Pro Bono Director, and connecting with members of our legal community. It is important to hear from all of the members of our legal community and see first-hand what their various needs are. For those I have yet to meet or connect with, please feel free to share your experiences or concerns when you see me.

It is important to hear from all of the members of our legal community and see first-hand what their various needs are.

I'm just returning from the top of the world where the Barrow legal community opened its arms to me and showed me cooperation between agencies at its finest. I also experienced the $18.75 chimichanga and got a certificate from Fran of Pepe's for crossing the Arctic Circle.

Earlier this summer, the Kenai bar invited me to their community and their picnic. They have a beautiful new courthouse and I even got a tour of the catwalk. Poor Krista Scully was subjected to me singing "I'm Too Sexy" by Right Said Fred (for those unfamiliar with the song, the lines include 'I do my little turn on the catwalk…" for the rest of the car ride home.)

"I encourage folks to travel outside their communities and experience these beautiful places. "

I am heading to Dillingham, where I know I will be greeted as warmly. I also travel to Sitka, Ketchikan, Craig and other southeast communities through my practice and they have let me know what is or isn't working. But I can say from personal experience, these communities know how to zealously advocate in an adversarial process without becoming adversaries. It is an impressive balance and makes the practice of law much more enjoyable.

My travels have led me to discover, unsurprisingly, that although there are some geographical challenges that cause some difference, most of our lawyers are quite similar. They are dedicated to providing excellent services to clients and want to make sure the bar association is there to support its community needs. Kenai told me of the importance of having CLE's in their community and we are looking at how to meet that need at the next board meeting. This was a good reminder that although we have a majority of folks in Anchorage, we are in fact the Alaska Bar Association and we need to be mindful of making services available statewide.

In my last column I suggested that people take care of themselves. One way I relax is reading.

Here are a few titles I've been reading this summer and would recommend: *Catherine The Great : Portrait of A Women* by Robert K. Massie (it's big, so not always best travel book-but definitely good); *Night Circus* by Erin Morgenstern; *Nine* by Jeffrey Toobin; *Love in the Time of Cholera* by Gabriel Marcia Marquez.

Voltaire said "Let us read and let us dance - two amusements that will never do any harm to the world." I recommend both.

The Alaska BAR RAG

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EDITOR'S COLUMN

Myth, logic, fear, and fact

By Gregory S. Fisher

I have no political or judicial aspirations, no children to embarrass (only my dogs, and they can't read), and my wife learned a long time ago to more or less ignore everything I say, so I enjoy an undeserved freedom to think, speak, and write as I will. It's like being a seven year old with a glass of Dewar's. What harm could come from that? These days my thoughts have drifted on the alternate currents of D. B. Cooper (I've concluded he was the Northwest Orient purser) and cryptozoology, specifically Big Foot.

I don't know that there is or could be an unknown primate or hominid inhabiting woodlands and swamps in North America. But I don't know that there couldn't be either. I've argued wilder positions, heck I used to work for Harry Davis in Fairbanks. Actually, though the six strongest arguments against Big Foot's existence are surprisingly weak. They don't even stand up to Alaska's Civil Pattern Jury Instructions. I think they don't get tested more because we're slaves to our own unique visions of stability. In a weird way our own myth of an ordered garden obscures the real myths surrounding us.

1. There is no physical evidence. I'm not sure this is true. Not really at least. What is "physical evidence"? There are print casts. Credible witnesses have seen fresh prints. There are photos and videos. Many of the casts, photos, and videos are undoubtedly fake. But that does not mean that all of them are? Some of the casts display an incredible knowledge of primate physiology and podiatry, with dermal ridges and flattened toes. How does someone fake that?

2. No one has found any remains. This is true. However, have you found any bear remains in Anchorage? If we accept the premise that there might be a relatively small population of primates or even hominids in a thickly forested region, it's really not hard to accept that remains would be scavenged or decompose relatively quickly.

3. No one has captured one on video. This is a question of interpretation. There are plenty of videos that purport to depict "something" out there. I believe it is the "somethingness" that flips a switch in our primitive imagination. It's like we're on the parapets staring into the mists, the last shift having left us with rumors of the King's ghost. It is the thrill of controlled fear. The camera pans, jerks, the photographer is struggling through brush and a broken tree-line, deep breathing follows, and there's a splash of what, what was it exactly out there? Did you see that? What is it? A bear with mange? A hunter in a thick coat? My brother George in an ape costume?

"I only know I don't have answers for most of life, and am suspicious of those who do."

4. Why aren't there more sightings? Wild animals have an amazing ability to blend in with the background. How many times have you been riding your bike on the trails in Anchorage and come across a moose standing a few feet away? And the moose is not even trying to hide itself. Predators move with greater stealth. With the abundance of black bear in and around Anchorage, I myself have only ever actually seen a black bear three times in 21 years, twice on Arctic Valley Road and once in a neighborhood near where we live. And two of those sightings were of the "black blur" variety. I saw a clump of black moving quickly into the brush, and am reasonably confident it was a bear, but have to admit it could have been a large dog. I have never seen a brown bear in Anchorage. I mean, if it came to it, as far as I am concerned there are no brown bear in Anchorage. I have never seen one. I also think potential reports are or could be chilled by people not wanting to leave themselves open to ridicule or potentially career-ending consequences.

In a weird way our own myth of an ordered garden obscures the real myths surrounding us.

5. It simply could not happen, you wouldn't find an unknown large primate. The Giant Panda and Mountain Gorilla were both thought to be creatures of legend before they were "discovered" by western explorers. Giant Pandas were not seen alive by a European until 1916. Mountain Gorillas were not confirmed to exist until 1902. In Sumatra, the Orang Pendek remains debated. Is it an unknown primate, a hominid of some sort, or simply mistaken sightings?

6. The purported sightings are easily discredited. Some are, some aren't. Some are such clumsy hoaxes that they are actually enjoyable. Some are from credible witnesses who describe activities primatologists have later confirmed as being consistent with great apes; for example, breaking branches to mark territory, knocking on tree trunks to warn intruders away, throwing rocks. How can one account for that? How would a credible but otherwise uneducated witness "make up" facts of that sort?

Do I believe in Big Foot? "Believe" is such an imperative. It's an uncomfortable word to me. I only know I don't have answers for most of life, and am suspicious of those who do. But it would be cool if I could find a foundation to fund me on a summer-long camping trip through the Cascades next year. I'll even buy my own Dewar's.

In praise of alternative fee arrangements

By John C. Pharr

You can bill for every thought, word, and deed – especially deed – right? The client agreed, and it's your right: You spent your valuable time on the client's case, at the client's request. You could have been working on some other client's case, but instead you worked on that case. You earned and deserve that money!

Think about that for a second. What are you selling the client – an hour of your time, or a service? No attorney who has ever prepared or reviewed hourly billing records believes those two concepts always exactly coincide.

Hourly billing is an anomaly. Do you pay a politician for the number of hours spent trying to solve a social problem or the result? Do you compensate a football coach for the number of hours spent coaching or the team's record?

The billable hour was not born with the practice of law. In the early 19th century, attorney fees were regulated by state statutes, which evolved later in the century and the early 20th century into the "eyeball method," then minimum fees set by local bar associations. An attorney could be sanctioned for undercutting those fees. Timesheets appeared around 1919, as a way to track attorneys' efficiency. But at some point in the '20s, '30s, and '40s, an attorney *inventory* morphed into attorney *pricing*. In 1958, the American Bar Association began promoting hourly billing as a way to increase attorneys' incomes. The ABA concluded that attorney incomes were falling behind those of doctors and (gasp) dentists. In addition, clients began to demand greater transparency in their bills. Over the next ten years, hourly billing became more and more prevalent. Whatever efficacy bar association fee schedules had disappeared in 1975 after Lewis and Ruth Goldfarb tried to find an attorney to prepare a less expensive title report and found there was no price competition. They sued the local bar association and in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Supreme Court ruled that bar association fee schedules violate the Sherman Act. The billable hour really took hold after that and other methods of billing (other than contingency fees) receded into the background. Hourly rates have become the coin of the realm, and the hourly rate is now the measure of an attorney's worth and ability.

There are a lot of problems with the billable hour:

It rewards inefficiency. The more time you spend on a task, the more money you make.

It does not meet the criteria for a "reasonable fee" in Rule of Professional Conduct 1.5(a). Of the eight criteria for determining a "reasonable fee" in RPC 1.5(a)(FN 1), "time required" is part of only one (FN 2).

It sets up an inherent conflict between attorney and client. Clients expect and deserve effort. As the attorney expends effort, the client might not be able to keep up with the fees generated. There is a big disconnect between a client making $7.50 an hour and an attorney charging $250 an hour. RPC 1.5(f) provides, "A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject." But a high potential for controversy is built right into hourly billing.

It inhibits communication. At a minimum $60 a call (.2 x $300), clients don't want to talk very often.

It puts the emphasis on the lawyer, not the client or the case. In most cases attorney fees are the 800 lb. gorilla in the room. In settlement negotiations, potentially staggering legal fees can dwarf any other consideration, including the merits of the case. In recent years even the ABA has backed away from supporting hourly billing. In Alaska, one of the few U.S. jurisdictions to award attorney fees to the prevailing party as a matter of rule rather than controlling statute or private contract, litigation over attorney fees consumes an inordinate amount of effort. In almost every reported decision, there is a section addressing a challenge to the attorney fee award.

I*t can tempt hitherto honest attorneys to push the envelope ethically and even legally.* The pressure to bill hours can be tremendous. Plenty of prominent attorneys have gone to jail for inflating bills (think former Associate U.S. Attorney General Webster Hubbell). The most ethical attorney will be tempted to fudge when submitting itemizations for a prevailing party. In recent years the Alaska Supreme Court has increasingly admonished, "A trial court should consider objections regarding allegedly duplicative and otherwise unreasonable attorney's fees and actually review challenged fees for reasonableness." *Armstrong v. Tanaka*, 228 P.3d 79, 86 n. 36 (Alaska 2010)(FN 3).

As a result of the billable hour, most attorneys in private practice, if he or she could collect 100% of accounts receivable, would never have to work another day.

Insurance companies and large businesses are constantly trying to figure out a way around these problems yet retain top-flight legal talent. A cottage industry has sprung up to review attorney billings; insurance companies have turned to salaried in-house counsel.

What is the alternative? Attorney billing practices other than hourly are referred to as "Alternative Fee Arrangements" (AFAs), terminology which shows just how entrenched the billable hour has become: Any other method is now "the alternative."

Some firms engage in "value billing." The client is given the absolute right to deduct (or add) an amount based on what the client believes was the value of the service rendered. I have no idea how that could possibly work, but according to these firms, it does.

So-called AFAs also include set fees, negotiated at the beginning of representation. Clients like it; the potential for fee disputes is eliminated up front; the attorney is free to work the case without having to consume enormous amounts of time recording and billing tasks in six-minute increments, and trying to collect. If the attorney "underbids" the case, there will be others that require less effort than anticipated to make up for it, within the bounds of RPC 1.5 of course. (Always leave an "out" for unexpected but hefty costs, like experts.) Set fees can *reduce* accounts receivable, lead to many more satisfied customers, and *improve* an attorney's bottom line. There is still a place for hourly billing, but the occasions are a lot fewer than most attorneys realize, even in civil cases.

Not to put too fine a point on it, the billable hour has become the bane of the profession. Most attorneys are hardworking, ethical, and really want to do a good job for their clients. A business practice, no matter how widespread, should not be an obstacle to that service.

Imagine being free to have thoughts, words and deeds in service of a legal matter, free of the tyranny of hourly billing.

Footnotes

(FN 1) The Alaska Supreme Court has ruled, "We have never adopted Professional Conduct Rule 1.5 as the test for calculating attorney's fee awards." *Valdez Fisheries Dev. Ass'n v. Froines*, 217 P.3d 830, 833-34 (Alaska 2009). This is primarily because the rule addresses the fee between attorney and client, not the fees to be awarded to a prevailing party. Id. at 833.

(FN 2) "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) [T]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services;(4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client;(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." RPC 1.5(a).

(FN 3) See also *Tenala Ltd. v. Fowler*, 993 P2d 447, 451-52 (Alaska 1999)(itemizations can be questioned on line item basis); *Marshall v. First National Bank*, 97 P3d 830, 837-40 (Alaska 2004)(remand to determine whether charges to trust excessive); *Marron v. Stromstad*, 123 P3d 992, 1013-14 (Alaska 2005)(insufficient detail in itemizations); *In the Matter of the Estate of Clifford Johnson*, 119 P3d 425, 431-32 (Alaska (2005)(level of specificity required in itemizations; burden on attorney to justify fees); *Kenai Chrysler Center, Inc. v. Denison*, 167 P3d 1240, 1260-61 (Alaska 2007)("full reasonable fees" properly reduced as unreasonable); *Valdez Fisheries Development Assn., Inc. v. Froines*, 217 P3d 830, 833 (Alaska 2009)("Froines III")("where the party against whom fees are awarded requests an itemized billing affidavit and objects to specific items in the bill as unnecessary, duplicative, or otherwise unreasonable," it is the superior court's task "to determine whether the hourly rate is reasonable, and how many of the hours of work billed were reasonably incurred"); *Okagawa v. Yaple*, 234 P3d 1278, 1281-82 (Alaska 2010)(court can reduce fees requested); *Gold Country Estates Pres. Grp., Inc. v. Fairbanks N. Star Borough*, 270 P.3d 787, 800 (Alaska 2012) ("[t]rial courts remain free to reduce awards that would otherwise be so onerous to the losing party as to deter similarly situated litigants . . . from accessing the courts"); *Lentine v. State*, __ P.3d __ (Alaska Supreme Court No. 6700, July 27, 2012)("We have previously expressed concern over high fee awards against dismissed employees, ... [there is] the possibility that such an award would 'impose an intolerable burden on a losing litigant which, in effect, denies the litigant's right of access to the courts.'"), slip op. @ 23.

Letters to the Editor

Salute to legal profession

To the Editor and fellow Bar Members,

I would like to take a moment to salute all of the very worthy and honorable men and women who practice law in our community by complimenting one that I saw in action recently. I was the "driver" of an elderly couple in my neighborhood who wanted to see their lawyer to amend their will shortly before one of them had to undergo surgery. I drove them to see Glenn Cravez who had drawn up a simple will for them many years ago. He fit them into his busy schedule.

Glenn was as gracious and careful and attentive to them as if they were the most important clients he had met all year. He was careful to make sure that they both understood the changes they were making. He did not let the more verbal partner speak for the other. Understanding the difficulty for them of getting to his office, he made the changes at that meeting and had everything executed and finished.

Being old fashioned elders, they wanted to know then and there what they owed, so Glenn calculated his extremely reasonable bill and then gave them a hefty "senior discount" on top of that. The bill was very much in line with what he had charged them ten years ago. They left pleased and relieved. I left proud of my profession.

— A Proud lawyer (name withheld)

New Board of Governors Appointments

The Board of Governors has appointed

- Laura Farley to the Board seat recently vacated by Peter Maassen, and
- Nelson Page has been appointed to the Board seat that will be vacated by Krista Stearns shortly.
- Governor Sean Parnell has appointed Bill Gordon of Fairbanks to fill one of the public member vacancies on the Board.

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Historical Bar

The Alaska Bar Historians Committee is pleased to present the first in a series of articles taken from items in the Joint Archive of the Alaska Court System and the Alaska Bar Association. In this article, former Sitka District Court Judge mentions that the accompanying photo was taken for his mother. The reason for the particular pose? It is reminiscent of a portrait of his mother's ancestor, Sir Thomas Lefroy, Lord Chief Justice of Ireland. The portrait may be familiar to some readers, as it can be seen in the movie Becoming Jane, *which was based on the romance between Jane Austen and Thomas Lefroy.*

By Peter Page

I had the honor of serving as District Court Judge in Sitka 1967-1969. In accordance with Chief Justice Fabe's letter of October 24, 2008, I am sending a picture taken soon after my appointment that I had taken for the benefit of my proud mother. I am also sending some biographical information and some anecdotes from my short judicial career. It will undoubtedly include some information extraneous to the purposes of the archival effort, so please feel free to edit as appropriate.

I was born in Richmond, Virginia, August 16, 1935, the second of three children of Robert Nelson Page and Melinda Montague Caperton. I attended St. Christopher's School in Richmond, and graduated from Episcopal High School in Alexandria, Virginia, in 1953. I entered the University of Virginia in the fall of 1954. During the summer of 1954, with four other Virginians, including my older brother, Robert N. Page, Jr., I worked on the White Pass and Yukon Railroad as part of a "pole gang" reinforcing the telephone polls which supported the dispatcher's lines between Skagway and White Horse. It was then that I met Charlie Tunley, a teenager working on the baggage car of the passenger trains. Of course, years later Charlie became a Superior Court Judge.

In 1956 I took a leave of absence from the University to enter the Air Force as an Aviation Cadet, receiving my pilot's wings and commission in 1957. I entered gunnery training flying the F-86 Sabre jet, and went on the fly the F-100 Super Sabre. My service included armed alert in Germany, and nuclear alert in Turkey with a target in the Soviet Union. While in Turkey I was called upon to fly a search grid for Francis Gary Powers when it was thought that he had gone down in Eastern Turkey.

In 1961 I re-entered the University of Virginia to complete my undergraduate work before going on to law school. I then had a wife and one child, and no GI Bill. My severance pay was soon gone, so I drove a taxi between 7:00 pm. and 7:00 am. That job did not pay the bills, and I was lucky to land a job as manager of a linen service which provided linens for the students in the dormitory, and later to students living off campus. I held this job until I graduated from law school in 1965. During law school I augment my income by flying F-84F's in the Virginia Air National Guard. This frequently required my absence from Saturday classes, and sometimes other weekday classes as well. I asked the Dean of the Law school if I could be allowed to take the examinations in spite of missing a number of classes. He replied that there were no part time law students at the University of Virginia. I thought, but did not say, JJThere is one." I had more luck making my peace with individual professors, one of whom, my evidence professor, had lost his arm as a captured WWI fighter pilot.

Prior to graduation in 1965, I cast about for a job in Alaska, finally landing a job in Sitka with Warren Christianson who had been a decorated B-17 pilot in WWII. One of the duties he assigned me was management of property on Swan Lake belonging to an absentee landlord. Rents, from which I was paid a commission, were paid to me every month by two smiling, portly native ladies It was not until later that I discovered that the ladies supported themselves catering to the needs of sundry loggers and fishermen. Hence, one of my first duties in my early practice was running a brothel.

In 1966, when fire destroyed St. Michaels Cathedral and much of downtown Sitka, I joined firemen on the roof of the Ben Franklin store manning a hose to keep the fire from spreading further. It was 10 degrees with a stiff breeze blowing and the flat roof was a skating rink, requiring a half dozen men to overcome the jet effect of the hose.Had the fire spread in that direction before the wind, it would have destroyed Warren Christianson's law office and my job along with it. The faces and beards of the nozzle men were quickly covered with ice from the spray, and they would rotate to the back of the line. When I was on the nozzle I reached for the stirrup to shut off the water and was violently prevented from doing so by the men behind me, as the hose would have instantly frozen. I lost my job as a fireman.

When the Bar Historians Committee saw Peter Page's portrait, and an historical portrait of 19th Century ancestor Thomas Langlois Lefroy, they were struck by the family resemblance--and the similar career paths. Lefroy was a chief justice in the British Empire.

When an opening appeared on the District court bench in 1967, I was encouraged to submit my name as a candidate. I flew to Ketchikan to be interviewed by Judge Tom Stewart, and presiding Judge Walsh. After being entertained by both judges with tales of their exploits hunting, fishing and trekking in the wilderness, I was sent off to lunch. When I returned, Judge Stewart greeted me with, "Congratulations, Judge!" - proof positive that in Alaska in those days a young man could walk before he could crawl.The first trial I ever saw from start to finish, I presided over as Judge. I always suspected that my appointment was affected by a favorable recommendation from Judge Stewart's father, Ben, who lived in Sitka and attended St. Peter's Episcopal church, of which I was a vestryman.

While I was serving as judge I taught a course in criminal law fashioned after the course I had taken at the University of Virginia, using the same materials. The Chief of Police required all of his officers to attend the class. Both state troopers and an aspiring law student who later became my wife also attended. All did a credible job on the examination - except one city police officer who froze and handed in a blank examination book. He had been a good student so I told him to go home and relax and return the next evening to take the exam. He did. I told him that his exam would receive high marks in any law school.

After I left Sitka this officer was disabled by terrible gunshot wounds received while answering a domestic violence call, to the extent that he could no longer serve as a policeman. When he recovered he called me and asked if I would recommend him to law school. I did and he is now a practicing attorney in Ketchikan.

Of the officers who took the course several became chiefs of police in various Alaska cities.

When I was appointed Judge the District Court had original jurisdiction of juveniles. Sitka was said to have 3500 juveniles, counting students from the Native school at Mt. Edgecumb, the students at Sheldon Jackson and those in the public schools. They provided plenty of fairly mundane work, though I found that handling native children from far away places like Nome required some innovation. One young fellow from Nome was sent over from Mt. Eedgecumb for returning to the dorm with alcohol on his breath. Not knowing what the system provided as an appropriate disposition, I asked the boy what Judge Sadie Neokook would have done with him. He said she would make him clean up a mile of the beach. I made him clean up a mile of Halibut Point Road, and had a stern talking-to with the school administration about doing their own internal discipline. I didn't see many students from Mt. Edgecumb after that.

One day I got a call from a doctor at the Mt. Edgecumb hospital, saying that a patient was about to deliver a baby who would die unless it was given an immediate and complete blood transfusion. For religious reasons the mother would not give her consent to the procedure. I told the doctor that I would enter an order declaring that the baby would be born into the custody of the Department of Health and Welfare as a Child in Need of Aid, and authorizing whatever medical procedure was necessary. I knew when the baby was laid at the breast of the mother she wouldn't appeal. She didn't.

Two of my recurring juvenile customers were the pre-teen sons of a sad old native man whose wife had died. I had given them stern lectures and imposed such sanctions as I could devise, all to no effect. After trying again this time, it was apparent that the two boys could have been carved from an oak stump. I said, 11Mr. B---, those boys haven't heard a word I said. I want you to take them into my chambers and see if you can get their attention.

After a frightful din, things bouncing off walls and the blubbering cries of the boys, I began to have second thoughts about state liability, and knocked on the door to call a halt. Two terrified, crying boys and a thoroughly satisfied old man emerged. I never

Continued on page 5

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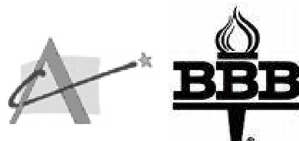

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Historical Bar

Continued from page 4

saw those boys in court again.

There were no Rules of Juvenile Procedure at the time. Judge Stewart, who had become Presiding Judge, commissioned me to draft the first set of Juvenile Rules. I applied myself diligently to the task, and produced a set of rules based on the notion that the state and the courts stood in loco parentis to Juveniles, and that they therefore had limited rights. The ink wasn't dry on my effort when the Supreme Court threw out the concept of in loco parentis and awarded juveniles basically the rights of adults. Not long after original jurisdiction over juveniles was transferred to the Superior Court.

One day the Chief of Police, who acted as de facto prosecutor, came into my chambers and closed the door. He said, "Judge, what do you think of the vagrancy laws?" I said "I think the Supreme Court has recently declared them unconstitutional" He said, "There's a fellow, a broke down, out of work logger sleeping in the rain behind a pile of lumber in the roofless new library which is under construction. I don't think he has had a square meal in days." I said, "Well, if you bring him in I will arraign him. If he pleads not guilty I will have to turn him loose."

That afternoon the Chief came in with a tall, gaunt man with a lined face and graying hair, dressed in a hickory shirt and black jeans. His name was Jake K. I noticed he wasn't handcuffed. The chief read the charge of vagrancy. I read the man his rights. He declined a lawyer, and entered a plea of guilty. I gave him a suspended imposition of sentence on the condition that he spend five days in the Sitka jail. His reply was, "Oh, thank you Judge!" While the paperwork was being done Jake sat in a chair in the clerk's office. I noticed he had the imprint of a Copenhagen can on the pocket of his shirt, but no can. In those day I chewed Copenhagen, so I offered him a chew which he gratefully dipped with three fingers. I gave him the can and told him to keep it. The Chief never closed the door on Jake's cell.

One of the duties of the District Judge was that of coroner, which required that I witness autopsies and sign the accompanying paperwork with the examining physician. I had declined my brother's invitation to join him in medical school, because the sight of blood and desecrated human bodies did terrible things to my constitution. I had held the preliminary appearance of a man who had split his favorite uncle's skull with a piece of firewood, and I was then required to attend the autopsy of the unfortunate uncle - my first autopsy. The examining physician was sensitive to my abhorrence and interrupted his work frequently to take me outside for fresh air. After a few of these I could have gone to medical school.

In the middle of one night the Chief of Police called me and asked me to put on my coroner's hat and accompany him to retrieve a body. We went to a small house by Swan Lake, one I knew well. Inside we found one of my former tenants and a raft of terrified children huddled under a blanket in a corner. On a lower bunk with his face turned to the wall, dressed in a hickory shirt and black jeans, old Jake was sleeping out of the rain.

The local fish and game officer asked me if I would accompany him to Tenakee Springs to arraign a man charged with a fishing violation. Having never been to Tenakee, and justifying the trip as 11 Showing the flag" in support of fish and game enforcement, I agreed. The weather was wretched, but we boarded a float plane and made the trip. The water was so rough at Tenakee and the wind so strong that the pilot declined to wait there, saying he would return later, weather permitting.

The fish and game officer and I went into Snyder Mercantile, the only store in Tenakee, and were directed by Dermot O'Tool, the proprietor, to a large man who looked like a Barbasol ad, warming his backside by a potbellied stove. He had a lantern jaw and wore a striped stocking cap that came down to his belt. 11That is your defendant," said Mr. O'Tool. I caught a note of disdain in his voice. On the wall was a stick from which dangled a piece of string ending in a bent pin. Under it was a sign saying, 11 First step, buy a license." I asked Mr. O'Tool where we might hold court. He directed us next door to the Shamrock, a building with a checkered past which included Saloon, church and brothel. I stood behind a counter and using a borrowed hammer, called the court to order. The upshot of it was the defendant had been caught sport fishing in front of town with no license. He explained that he had lived in Tenakee for about twenty years, and had fished with a license every year. He just hadn't gotten around to buying one this time before he was stopped by fish and game. I fined him ten dollars and put the bill in my jacket pocket, feeling that the show of force might have been a bit of overkill.

The weather was still wretched and there was no plane, so the defendant invited the fish and game officer and me to come down the beach to his cabin where his wife would make us coffee. We spent a rather pleasant time with the defendant and his wife before the plane picked us up for the return to Sitka.

In 1969, more than a year later, I resigned from the bench to join the staff of Attorney General Kent Edwards in Juneau. The staff included among others, Justin Ripley and Chuck Cranston, both destined for careers as Superior court judges.

Before leaving the job I asked the Court System to audit all accounts under the care of the District Court. An auditor came from Juneau, and after a long day of work announced that the accounts were in good shape, but for a missing ten dollars. I slapped my brow and said, "Oh my God, I bet it's still in my jacket pocket." The auditor forcefully implored me not to complicate his life by trying at this late date to insert that ten dollars into the accounts.

That is s long-winded account of the "law west of Chatham Straits" in the late 1960's.

In Juneau, I did various work on the civil side of the AG's office, worked on the original structure of the permanent fund, and served as acting District Attorney while newly appointed DA Gail Fraties, my future law partner, studied for the bar.

When there was a change of administration, Attorney General John Havelock sent me and Joe Balf to Anchorage to cull and unclog the court system's crushing criminal load. The District Attorney there was Seaborn Buckalew and on the staff were Ed Burke and Justin Ripley, among others.

In time I again joined then U.S. Attorney Kent Edwards prosecuting federal felonies before federal judges James Von Der Heit and Ray Plummer. If I ever reached the point of becoming a "good" lawyer it was largely due to the influence of those two no-nonsense judges, who inspired in me the fear of God, trembling respect, and in the end sincere affection.

In 1974, I returned to Juneau to become a partner in the law firm of Gregg, Fraties, Peterson, Page and Baxter. After several years the firm underwent an amicable dissolution. After that I practiced alone, often joining with other former partners on particular cases.

I joined with Tom Nave to prosecute a civil case on behalf of a young fisherman who had been hideously shot and disabled by state and local police who ignored acceptable procedures which would have avoided the situation. After a five week trial the jury returned the largest civil verdict returned 1n Southeast Alaska to that time.

My wife, one of the last two people in Alaska who qualified to take the bar examination by "reading the law", and I retired from the practice in 1998.

If this rather rambling dissertation has departed from the guidelines for the 50th anniversary archives, please extract whatever you find appropriate for that purpose. This was just the easiest way to collect my thoughts.

Should you have any need to contact me I can be reached at the Virginia address on the enclosed card until May when Donna and I will return to our Juneau home.

Peter M. Page

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Between them, Senior Justice Warren Matthews (Ret.), former Justice Alex Bryner, and Judge Beverly Cutler (Ret.) have served the Alaska Court System for nearly 100 years. Each recently participated in an oral history interview as part of "Judges of Alaska: Project Jukebox," a special initiative to preserve the history of Alaska's judiciary led by the Oral History Program of the University of Alaska Fairbanks in conjunction with the Bar Historians Committee. Join us as the panelists explore, through interview clips and in-person reflections, the instances of public pressure during their judicial careers, the personal and professional impacts of public pressure, and the responses of the legal community.

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Pitfalls may plague a disability claim

By Vivian Munson

Imagine a government program that provides benefits of great value. Imagine that all citizens have a right to receive these benefits if they can prove eligibility based upon their medical records.

Imagine that an enormous bureaucracy exists, to process all the applications and make determinations as to eligibility and the nature and extent of benefits it will award. And this bureaucracy is run according to a body of administrative law that has developed over 50 years.

Finally, imagine that, against all odds, the results produced by this government program have been pretty good.

The program is Social Security Disability (and its low-income associate, Supplemental Security Income, or SSI) providing cash and medical coverage for 8.7 million Americans, average monthly payment, $1,111. In Alaska the numbers are 12,825 disabled workers receiving Disability benefits and 10,780 receiving SSI benefits.

When I began to practice in this area, representing disabled people, I was amazed that a single claim went through so many hands in so many states: the local Social Security Field Office on 8th Avenue, the Disability Determination Services offices on Ship Creek, the official data center in Salt Lake City, the Payment Center in Baltimore. The entire paper trail goes into an electronic system, and somehow, it works.

The factors involved in winning—how somebody qualifies for Disability—this is the stuff of urban legend. Common misconceptions: they never approve you on the first application; you have to keep applying, over and over, and eventually, you'll get it; they deny you hoping you'll die.

Forty percent of claims are approved (national SSA estimate), usually within six months. The rest can be appealed to a hearing office. Alaska has one such office, the Office of Disability Adjudication and Review [ODAR], located in Midtown in Anchorage. The Alaska ODAR opened in 2010. It is budgeted for two administrative law judges, but for half of its brief existence, it has only had one.

Disabled Alaskans run into some serious problems when it comes to proving disability, pursuant to Social Security law. The claimant at a hearing on appeal needs lots of medical records, and critical evaluations must be signed by doctors. Doctors recognized by Social Security are MD's, OD's and Ph.D. psychologists. Claims of physical impairment must be supported by x-rays, MRI's, and lab results; mental impairments by psychiatric or psychological evaluations, hospitalization and treatment records. The findings and opinions of nurse practitioners, physician assistants, chiropractors and social workers can be used only to corroborate the reports of doctors.

The claimant must show that (s)he has obtained treatment for the disabling condition. Lack of medical care brings up an issue of credibility on the theory that-- if the claimant really was in so much pain, (s)he would have gone to an emergency room. Lack of medical facilities in the geographical area is not recognized as an excuse for failure of obtain care. Likewise, lack of health insurance is no excuse. Living in a shelter is no excuse. The claimant has to find medical care and follow through with recommendations, cooperate with providers, fill and refill prescriptions, make appointments. Failure to follow through—credibility at stake again.

Alaska provides Medicaid coverage to some low-income individuals, but generally not to single men and women without minor children. If single adults are desperate enough, they can request a coupon to see a particular doctor who will accept the coupon. The coupon system may be used for treatment of one chronic condition. The maximum income for eligibility in this program is $343 per month.

Claimants are encouraged by Social Security to obtain legal representation for the appeal to ODAR. Unfortunately, perhaps disgracefully, disabled Alaskans cannot find lawyers who will do this work.

The explanation is two-pronged. One, it doesn't pay well, even if the lawyer has excellent skills and good luck. The maximum attorney fee on a claim is $6,000. An example: A claimant who earned good money might qualify for $2,000 a month in Disability benefits, from the "onset date" through the date of approval of the claim on appeal, minus the five-month waiting period. The onset date is the date upon which the claimant has medical proof of disability. These cases exist, but they are subject to offsets for worker's compensation, and unpaid child support trumps attorney fee.

More typical example: Claimant applied for SSI 14 months ago, while living at the Brother Francis Shelter. Benefits are awarded by the ALJ, and are calculated over at the Field Office at $698 per month for the 4 months at the shelter, plus $424 for the next 10 months when claimant slept on a friend's couch. Total: $7,032 back payment due. Attorney fee is 25% of that, minus administrative fee, or $1677. Repayment of adult public assistance ($280/mo.) from the State of Alaska trumps attorney fee.

This is the payment for meeting with the claimant two or three times, completing forms, bird-dogging the collection and submission of medical records, review of same, writing a 2-4 page brief that proves disability under the Agency's rules, and appearing at a fifty-minute hearing. Amazingly, very few Alaskan lawyers are interested in this practice.

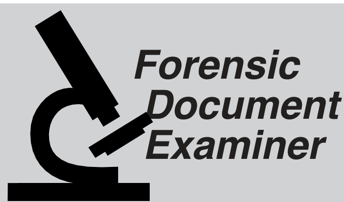
Second prong: The Partially Favorable Decision. An ALJ can interpret the medical records so as to lop off most of the past-due benefits. This is called "amending the onset date."

Apparently, lawyers in the other 49 states are not deterred by these problems. We hear that most claimants are represented in every other state. In Alaska, it's maybe twenty percent. Statistics on this are not available.

Social Security does publish statistics on the number of claims approved by each administrative law judge in the country. Alaska's presiding ALJ has approved 24% of the claims he's heard in 2012 (through July 12). That includes the Partially Favorables. The approval rates for the two ALJ's who came and went are 66% and 40% for the few cases continued into the same time frame. The national average is 48%.

Possibly Alaska has more phony, lazy bums applying for Disability benefits than has any other state. Perhaps we have fewer cases of advanced cancer, multiple sclerosis, blindness, schizophrenia, bipolar disorder, severe, chronic depression, degenerative disc disease affecting ambulation, scoliosis, heart disease, lung disease…. Perhaps we have fewer industrial accidents that leave men and women disabled after the workers' compensation claim is settled.

Whatever the reasons, disabled Alaskans are being denied life-saving benefits at a rate which is twice the national average.



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Book Review

(Federal Practice): Business and Commercial Litigation in Federal Courts

By Gregory Fisher

Loyal and faithful reader(s) of the *Alaska Bar Rag* (thank you, Mom—hey, your subscription is overdue) will no doubt recall Tom Van Flein's wonderfully snappy review of the Second Edition of *Business and Commercial Litigation in Federal Courts* that appeared in the December issue of 2006. I miss Tom. He is funny, sharp, irreverent, and Dutch—pretty much everything I am not. The Third Edition of *Business and Commercial Litigation in Federal Courts* (Thomson Reuters 2011) follows where the prior editions left off. Without Tom, it falls upon me to attempt a review.

Robert L. "Bob" Haig returns as the Editor in Chief. Bob assembled 251 authors, including 22 distinguished judges "and the cream of the commercial litigation bar" (somehow I missed the cut) who collectively churned out 12,742 pages and 96 new chapters. If you pile all 11 volumes in a stack it is about 27 inches high or generally close to the withers of a solidly compact wheel dog. Don't ask. Joey didn't lift his leg. Good boy.

This remarkably useful treatise is a soup to nuts practice guide that includes commentary, explanations, citations, and checklists. It covers both substantive and procedural issues. General and particular subjects are discussed, as are specific legal fields. For example, there are general chapters covering case investigations, discovery strategies, oral arguments, motion practice, case management, civility, and ethical issues in commercial cases (to name just a few). There are also particular chapters addressing topics such as tax, court-awarded attorneys' fees, mergers and acquisitions, e-commerce, collections, franchising, white collar crime, and others. The treatise additionally includes chapters exploring specific fields such as SEC regulatory litigation, Antitrust, Employment Discrimination, Labor Law, and the False Claims Act (and many more).

Each chapter is uniformly organized, with a discussion of claims, considerations for plaintiffs' or defense counsel, jurisdictional issues, pretrial and trial procedure, and practice aids (including checklists and sample pleadings)—and, yes, it is chock-a-lot full with enough citations to satisfy any tech editor and hopefully the judge you are arguing before.

It is, in a word, "ambitious." Maybe not moon shot ambitious, but it's more than a Sunday hike getting lost on Williwaw looking for your berry patch ambitious. Regrets? I had a few. I did not see anything on Indian Law. That struck me as an odd omission. I thought a chapter on the extent to which Article III courts may rely upon or ignore unpublished authority would be helpful, particularly since the "publication" lines have blurred over time. Being a general treatise tailored for a national audience, it of course does not include anything on Alaska-centered measures such as ANILCA or ANCSA. I am not an Environmental Law lawyer, but it seemed to me that the brief section on NEPA in the Environmental Law chapter could have enjoyed more prominence. Maybe it's just me but it seems as if a lot of the environmental cases here in Alaska get fought on procedural NEPA grounds.

As with any comprehensive treatise covering a wide range of topics, one will find pockets of dust. For example, the Third Edition was already published before the Federal Courts Jurisdiction and Venue Clarification Act of 2011 was enacted. Consequently, the chapters on removal, venue, and subject matter jurisdiction are slightly out-of-date. But, honestly, aren't you going to find that to be the case with any treatise? And supplements and pocket parts will cover that.

On balance, I had to look hard to find something to complain about. This is an authoritative, useful guide. It delivers what it promises at a fair price. If you have a federal practice you should consider this resource for your office or library.

For more information: http://store.westlaw.com/business-commercial-litigation-in-federal-courts-3d/183594/15342716/productdetail. Call 1-800-328-4880.

Book Review

DISROBED: An inside look at the life and work of a Federal Trial Judge

Providing a view into the private world of a sitting judge on one of the highest benches, and in one of the world's most famous cities, a new book by Judge Frederic Block gives a personal account of his experiences with controversial legal topics such as the death penalty, racketeering, terrorism, discrimination and foreign affairs. In DISROBED: An Inside Look at the Life and Work of a Federal Trial Judge (July 17, 2012; Thomson Reuters Westlaw and National Association of Criminal Defense Lawyers; $29.95), Judge Block illuminates this sometimes mysterious branch of government, sharing a behind-the-scenes look into his life and some of the trials of a federal court judge.

The federal bench is presided over by men and women who adhere to the traditional standard of judicial lock-jaw where nearly all of the communication outside of their courtroom is through formal written opinions and scholarly journals. Judge Block breaks that mold by taking readers on his own personal journey to the bench, a journey riddled with political potholes, and bares some of the most intimate details surrounding several landmark cases of our time.

DISROBED is an autobiographical account that begins miles from the federal bench with a small-town attorney in Suffolk County making headlines extending the "one man, one vote" policy. Early in his career, Judge Block served as defense counsel on a key manslaughter appeal case that resulted in the establishment of the Clayton Hearings, where a defendant can be acquitted of criminal charges based upon the "interests of justice" - a doctrine that remains an integral part of the New York criminal justice system to this day.

Appointed to the federal bench in 1994 by President Bill Clinton, Judge Block provides commentary throughout DISROBED on some of the most prominent and sensational cases that he has presided over during his nearly 20 years as a federal judge, including the Crown Heights Riots and the trials of mafia boss Peter Gotti and nightclub magnate Peter Gatien.

DISROBED takes you into the courtroom and chambers of a federal judge, offering a rare and real look at some of the least-talked-about aspects of the bench, including the difficulties of sentencing and the mental toll it takes knowing you have the power to drastically alter someone's life and liberty. The prevalence of death threats and the risks that judges and their families have to face to serve and uphold the justice system also is discussed.

Praise for DISROBED:

- "Judge Block gives the reader an engaging, often humorous account of his life, as always, and a compelling introduction to the world of a federal judge whose decisions are subject to plenty of public scrutiny but whose decision-making process remains a mystery for most Americans." - President Bill Clinton, founder of the William J. Clinton Foundation and 42nd president of the United States
- "A pleasure cruise, first class all the way, with a superb navigator. Judge Block tells a story the public needs to read and appreciate about its great justice system. And he tells it simply and compellingly as he lived it, with facts, figures and even more, with extraordinary humor and humanity." - Judith S. Kaye, former chief judge of the state of New York
- "DISROBED is a lot like its author: honest, smart, interesting, provocative and deeply humane. It is not often we are permitted into the private world of the robed men and women who have the awesome responsibility of judging others." - Ben Brafman, criminal defense attorney, New York
- "DISROBED is a fascinating look at the real world of federal judges - and a revealing story about how the law works, and doesn't, in America." - Jeffrey Toobin, author of The Oath: The Obama White House vs. the Supreme Court

About the Author. Judge Frederic Block was appointed United States district judge for the Eastern District of New York by President Bill Clinton on September 29, 1994, and entered duty on October 31, 1994. He assumed senior status on September 1, 2005. He received a bachelor's degree from Indiana University in 1956, and an LL.B. degree from Cornell Law School in 1959. During his 17-year tenure on the bench, Judge Block has presided over a number of high-profile criminal trials, including, most recently, a securities fraud prosecution against former Bears Stearns hedge fund managers Ralph Cioffi and Matthew Tannin. He also oversaw the trials of Kenneth "Supreme" McGriff, Peter Gotti, Lemrick Nelson and nightclub magnate Peter Gatien.

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W.A. Mozart sprinkles 'Tutti Frutti' Spenardwards

By Peter Aschenbrenner

The 'wrap party' has shifted into high gear.

"Spenard's Culinary Boastoff!" Dolley Madison leans on Jimmy's arm. "It's why we come to Alaska. This is the greatest place in the world to live."

"Mr. Whitecheese's Fun Palace supplies," the Governor agrees, "a delightful venue for this purpose."

Julia motors into our circle.

"To prevent intrusive plagiarism," the Master Chef explains to the assembly, "I named ingredients for these constitutional dishes without disclosing the proportions."

"Lemme ask a dumb question," I bolt my Cuvée TJ 1796. "How can there be a recipe to write the Alaska Declaration of Rights? Not to mention the rest of our state constitution. We're talking 10,924 words for the structure of government – "

"And 1,117 words for the Alaska Bill of Rights," Dolley ticks off the numbers. "Jimmy said everything he had to say in 461 words."

"You're forgetting my mentions in Farrand volume 3," her husband protests.

"Wolfgang. And when are frock coats coming back into fashion?" our newest guest introduces himself. "Lemme guess. Jimmy, Dolley, the Governor, Professor, Julia Child, and 'J.C.' himself. Bald as the day he was born."

"He looks like he's been dead," I *sotto voce* my partner in crime, "for two thousand years."

"You missed quite the performance," Julia ahems politesse. "The dish one might describe as – "

"The muscle," J.C. interrupts. "That's what we call it in Rome. Sinews and ligaments. Bone-in."

"Offices, duties, titles-on-the-door," the Governor adds.

"I also mixed up a batch of rights," Julia continues. "Of man and *woman* and the citizen."

"I'll bet that's Déclaration humour," TJ elbows the Governor.

"For example, in the Early American constitution, it's about nine to one. Might to right, heart to soul. In Germany it's seven to one," she adds.

"The Germans have a constitution?" Caesar interjects. "The last time I crossed the Rhine I had to build my own bridge. *Pons ad nusquam*," he winks at the Governor.

"Your legions crossed," I gasp, " 'the bridge to – ' "

"I'm throwing in my toque," Caesar takes the prosecco T.J. offers and retreats. "Working around knives make me nervous."

"Do you know each other?" the Governor turns to Mozart and the Madisons.

"Your fourth President delayed Virginia's ratification of the Bill of Rights until ten days after my death."

"It was the least we could do," Dolley adds.

"So you're an opera fan?" I blurt. "*Don Giovanni? Cosi Fan Tutti Frutti?*"

"Jimmy is a great admirer of Wolfgang's powers of recollection," Dolley goes on."The year was 1770 – "

"I was fourteen," Mozart sighs.

"I was nineteen," Madison dittoes the reminiscence.

"Wait a second," I gasp. "You came to Spenard, Alaska to take down the secret recipes of the Alaska constitution?"

"So what if I did?" Mozart laughs. "Is Julia going to excommunicate me?"

"Pope Clement the Fourteenth named Mozart a Knight of the Golden Spur," Dolley points out, "after Wolfgang heard Allegri's Miserere and transcribed it from memory."

"So what is the formula?" Julia challenges Mozart. "I dare you," she wiggles her empty goblet Master-of-Monticello-wards.

"There are a finite number of appraisives in the English language," Mozart begins.

"3,507," I reckon.

"And the number of words freighting value judgments differs dramatically, counting their frequency in the Alaska Bill of Rights and the remainder of your state's constitution."

"Article I's the Declaration of Rights," Whitecheese ticks off the score.

"As compared to Articles II through XV," Mozart continues.

"Omitting Article XIV and the (three) ordinances," Whitecheese ahems his footnote. "So the count stands at 155 apprasives in Articles II through XV; words, like 'sound,' 'work,' 'yield,' 'beauty,' and the like, conveying value judgments in 10,924 words; while the Bill of Rights, at 1,117 words includes 115 appraisives."

Mozart flashes a wicked smile.

"And this offends you as a comedian?" Julia stares down Wolfgang.

"It intrigues me as the composer of *Die Zaubercybern*."

"*The Magic Numbers*," Whitecheese gasps. "Three tests, silence imposed, a catcher of birds on the loose!"

"And this is all you have?" Julia ripostes. "Everyone knows the ratio between the Philadelphia constitution and Madison's Bill of Rights. That's 4,321 to 461. Take the German Basic Law – Whitecheese stay your *Grundgesetz* – not to mention the French Déclaration of 1789: Bills of Rights are heavy on value judgments. I reference words of 'high fact content.' An original invention, patent pending."

The Governor clatters away. "Roughly one in every sixty-four words in the Philadelphia Constitution and," she continues, "one every fifteen words in Jimmy's first ten amendments."

"Look up Mrs. Shelley's *Frankenstein*," I ask the Governor. "Let's see how Madison scored against – "

"That's rich," the Governor offers her tabulation for all to see. "Madison used 'high fact content' words six times as often as Mrs. Shelley. And the conventioneers in Fairbanks (1955-56) were even more liberal than Jimmy."

"Words are cheap," Dolley sniffs, "north of the Alaska range."

"Words must correspond to ideas," Mozart bows, "and behind every word there must be an idea."

"*Goethe's Fragment!*" TJ calls out the citation. "Published in 1790, the year after Madison crafted the Bill of Rights and the year before it was ratified."

"No one would assign numbers to words," Julia retreats to dignified hauteur. "Or concepts."

"You did," Mozart ripostes.

"It was merely," Julia throws out a gay laugh, "a culinary metaphor."

"And you brought him along?" Dolley points to Julius Caesar.

"I thought he deserved credit for the salad dressing," Julia replies. "It was all in good fun."

"Give it up," the Governor orders our seventh Secretary of State.

"It was 1828, a year after Ludwig van Beethoven departed this life. How much trouble I had instructing Americans what to do with the federal constitution."

"It wasn't his fault," Dolley assures us.

"Are there really fifteen methods of constitutional reasoning?" Jimmy asks me.

"You did your best," I assure Jimmy.

"And Bladensburg wasn't his fault either," Dolley appeals to the assembly.

"I was sure there was a better way. That's why I wrote Cabell."

"You and he were Trustees at the University of Virginia," the Governor explains.

" 'Pleonasms, tautologies & the promiscuous use of terms & phrases differing in their shades of meaning, (always to be expounded with reference to the context and under the controul of the general character & manifest scope of the Instrument in which they are found) are to be ascribed sometimes to the purpose of greater caution'."

"Quite so," Mozart nods the quotation. "But you were eager to blame the 'imperfections of language; & sometimes the imperfection of man himself'."

"I confess! I couldn't get people to settle on how to use constitutional words! And Hamilton said there was plenty of work for the federal government to do without constitutional language!"

"We're sorry about what happened in 1804," Dolley turns to the Governor. "Weehawken, New Jersey and all that. Jimmy doesn't play with guns. I think the record's pretty clear on that point."

"So I wondered: Is there someone who could bail me out? Not just to show that language is imperfect in the hands of human beings – the history of the Supreme Court pretty much proves that – but to expose the perfection of numbers, a perfection that inheres in the very means by which we express ourselves."

"We worried," Dolley takes Mozart's hand. "It could have been that 'Crazy Ludwig' Wittgenstein."

"He's from Linz," the Governor assures the assembly. "Wolfie's from Salzburg."

"And what if I did unravel the greatest secret," Mozart laughs, "since the Sphinx tempted that fellow from Corinth?"

"What's the formula?" the Governor asks. "You heard Julia whip up a coupla batches of constitutional law."

"Please, Wolfie!" we all entreat our Austrian visitor.

There's adjectives and adverbs,
How their colors we adore.
You can count the purpose clauses,
They texture so much more!
And as for negatory words, a
Constitution's got its 'nots.'
And words that zap
And words that zing
And terms of art that ting-a-ling.
But the funnest thing of all to do
Is counting up the score.

(To be continued)

REQUEST FOR PROPOSALS FOR LEGAL SERVICES

The Legal Services Register for RFP No. 13P008SAS is available online at http://tinyurl.com/UAF-Solicitations

The University of Alaska General Counsel is requesting proposals from qualified attorneys available to 1) represent and advise the university in various areas of the law and 2) provide services as independent hearing officers.

This Request for Proposals (RFP) will develop registers of qualified and available counsel for the following areas of law as stated in the RFP:

- administrative law, including student appeals;
- admiralty/marine protection and indemnity;
- bankruptcy;
- communications/FCC;
- construction, including architects/engineers errors and omissions;
- contracts, including insurance;
- disability law;
- employment, including wrongful termination, discrimination and employee relations;
- employee benefits;
- environmental/hazardous materials issues;
- export compliance/ITAR;
- immigration;
- intellectual property and copyright/patent;
- labor/collective bargaining;
- land management (real property, oil and gas, and/or timber);
- personal injury/tort liability;
- public competitive procurement/disposal;
- public debt financing;
- public utilities;
- workers' compensation;
- appellate practice; and
- trial practice.

The RFP will also develop a register of independent hearing officers for use in internal university matters such as employment termination, student suspension and procurement disputes.

The Legal Services Register RFP and Register Response Package are available online at http://tinyurl.com/UAF-Solicitations (RFP No. 13P008SAS).

To be considered in this process, a proposer must meet the minimum qualifications outlined in the RFP and submit a separate proposal response as specified in the RFP for each area of law in which they seek consideration.

Responses must be received by UAF Procurement and Contract Services by 4:00 p.m. on October 15, 2012 or by the date and time as subsequently amended.

The Board of Governors invites member comments regarding the following proposed amendment to Alaska Bar Rule 26. Additions have underscores while deletions have strikethroughs.

Alaska Bar Rule 26. This proposal addresses an informational and a procedural omission in Bar Rule 26 regarding motions for interim suspension. Under Rule 26(a), this proposal alerts a respondent to the respondent's ability to file an original application under Appellate Rule 404 if the respondent challenges an interim suspension order as the result of the respondent's conviction of a serious crime. Under Rule 26(e), this proposal allows a respondent to file an objection within seven days after service of an order imposing interim suspension for threat of irreparable harm. The Bar would then have seven days after service of the objection to file an opposition. The Court would then consider the objection and any opposition and take whatever action it deemed warranted.

Alaska Bar Rule 26 is amended as follows:

(a) Interim Suspension for Criminal Conviction. Upon the filing with the Court of a certificate that an attorney has been convicted of a serious crime as defined in Section (b) of this Rule, the Court will enter an order of interim suspension immediately suspending the attorney. The order of interim suspension will be entered whether the conviction resulted from a plea of guilty or nolo contendere, or from a verdict after trial, or otherwise, and regardless of the pendency of an appeal. The Court will notify the Bar and the attorney of the order placing the attorney on interim suspension. The order of interim suspension shall be effective immediately upon filing and entry and will continue in effect pending final disposition of the disciplinary proceeding initiated by reason of the conviction, without prejudice to the attorney's right to file an original application under Appellate Rule 404.

...

(e) Interim Suspension for Threat of Irreparable Harm. Interim suspension will be imposed by the Court on a showing by Bar Counsel of conduct by an attorney that constitutes a substantial threat of irreparable harm to his or her clients or prospective clients or where there is a showing that the attorney's conduct is causing great harm to the public by a continuing course of misconduct. The attorney may file an objection to the order of interim suspension within seven days after service of the order on the attorney. The Bar may file an opposition to the objection within seven days after service of the attorney's objection. The Court will consider the objection and any opposition and may take such action as it deems warranted.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by October 15, 2012.

Will you be my friend? Covert investigations through social media

By Mark J. Fucile

Last year I was involved in a personal injury case that included a large claim for loss of consortium. The plaintiffs presented themselves as a devoted couple. There was only one problem: both of them had posted on various social media sites that they had left their relationship under acrimonious circumstances 10 years before and had not been together since. One of the defense lawyers in the case discovered the postings (which the plaintiffs' lawyer hadn't known about) and used them to devastating effect during their depositions.

This "real life" story underscores the critical role that social media evidence has come to play in many cases today. Social media evidence can generally be obtained through formal discovery as long as long as it meets the standard criteria for relevance in a particular case. *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012), and *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. 2010), are recent examples of how social media evidence is handled through formal discovery. *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr.3d 858 (Cal. App. 2009), contains an equally good discussion on the associated issue of why social media postings usually aren't entitled to any privacy protection that would otherwise preclude discovery.

The most effective use of web postings, however, is often the fruit of informal investigation that doesn't "tip off" an unsuspecting witness or litigation opponent before the trap is "sprung" in a deposition or at trial. In those circumstances, there are two primary ethical concerns: (1) the "no contact" rule, RPC 4.2; and (2) using misrepresentation—sometimes called "pretexting"—to gain access to the information involved, which invokes RPCs 4.1 and 8.4(c). These concerns, in turn, reflect the twin goals of minimizing disciplinary risk and making sure that any useful evidence obtained is not subject to exclusion on the grounds that it was gathered improperly. *In re Korea Shipping Corp.*, 621 F. Supp. 164 (D. Alaska 1985), includes a useful survey of remedies on this last point. In this column, we'll look at both the "no contact" rule and prohibitions on "pretexting."

The "No Contact" Rule

RPC 4.2 prohibits communication with a person that the contacting lawyer "knows to be represented by another lawyer in the matter[.]" Comment 7 to RPC 4.2 notes that the prohibition applies when the contacting lawyer either has actual knowledge of the representation or the requisite actual knowledge can be inferred from the circumstances. RPC 4.2 applies to both represented parties and represented witnesses.

Use of social media, of course, isn't limited to individuals. Corporations also use social media and often have detailed information about themselves and their principals on firm web sites. Alaska Bar Association Ethics Opinion 2011-2 discusses direct contact with corporate employees. It generally concludes that, as applied to entities, the prohibition applies "only [to] employees who have authority to legally bind the corporation[.]"

The New York and Oregon state bars have both addressed the "no contact" rule in the web and social media contexts. New York Ethics Opinion 843 (2010), is available on the New York State Bar web site at www.nysba.org, and Oregon Formal Ethics Opinion 2005-164 (2005), is available on the Oregon State Bar web site at www.osbar.org. The opinions conclude that simply viewing publically available web pages does not violate their comparable versions of RPC 4.2 because it entails no communication. By contrast, direct "interactive" communication by means of social media or a web site with a represented person on the subject of the representation is generally prohibited under the "no contact" rule.

"Pretexting"

RPC 4.1(a) prohibits lawyers from making "a false statement of material fact . . . to a third person." RPC 8.4(c), in turn, prohibits lawyers from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" Moreover, RPC 8.4(a) applies this prohibition to both our own conduct as lawyers and to "the acts of another" such as someone who works for us. RPC 5.3 emphasizes this last point by generally making lawyers responsible for staff conduct.

Before "pretexting" went electronic, courts and bar associations nationally had already grappled with the question of whether lawyers could misrepresent their identities in the course of investigations or related work. The results were not uniform. Lawyers in *In re Gatti*, 8 P.3d 966 (Or. 2000), and *In re Pautler*, 47 P.3d 1175 (Colo. 2002), were disciplined for conduct held deceptive. By contrast, ethics opinions in Utah (02-05 (2002)) and Virginia (1738 (2000)), among others, reasoned that lawyers were permitted to use deception in conducting otherwise lawful covert investigations. A few, such as *In re Ositis,* 40 P.3d 500 (Or. 2002) (since modified by a rule change, see Oregon Formal Ethics Op. 2005-173 (2005)), extended the prohibition to lawyer supervision of covert investigations by non-lawyers. More, however, such as *Apple Corps, Ltd. v. International Collectors Soc.,* 15 F. Supp.2d 456 (D.N.J. 1998), concluded that supervision was permissible as long as the investigation itself was lawful.

In the social media context, emerging opinions nationally have taken the general approach that lawyers cannot misrepresent their identities (or intentions) to gain access to the "private" portions of an adversary or witness's web site or social media page. Ethics opinions from local bar associations in Philadelphia (2009-2 (2009); www.philadelphiabar.org), New York City (2010-2 (2010); www.nycbar.org) and San Diego County (2011-2 (2011); www.sdcba.org) reason that their state versions of RPCs 4.1 and 8.4 prohibit lawyers (directly or through staff) from affirmatively using deception to gain access to web information that is not otherwise openly available to the public. The New York City opinion, however, concluded that a lawyer (or the lawyer's agent) could make a "friend" request in the lawyer's own name that did not disclose the reason for making the request. The Philadelphia and San Diego opinions, by contrast, found that even this approach would be deceptive because it would omit the material fact that the only reason the request was being made was to gather potentially damaging information about the recipient. Given the still evolving state of the law in this area, the Philadelphia and San Diego opinions are clearly the "safer" approaches pending further clarification.

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FEDERAL PROBE

How the Feds started investigating Ted Stevens and moved toward an indictment

By Cliff Groh

Our understanding of the Ted Stevens case has grown substantially in the past several months from the U.S. Department of Justice's Office of Professional Responsibility ("OPR") report on misconduct in that prosecution, which comes on the heels of the report of the court-appointed special counsel ("the Schuelke report").

There is so much in the record now about the Justice Department's development of the indictment against Ted Stevens, in fact, that this piece—the second in a series of offerings on this highly significant case—is only the first installment of my columns on the charging decisions in that case.

The following analysis presents facts and opinions based on the more than 2,000 pages contained in those reports and the responses and rebuttals to them. This column also relies on information gained from my in-person coverage of the five-week Ted Stevens trial in Washington, D.C. in 2008, my continuing coverage of the post-trial litigation and other cases arising out of the "POLAR PEN" federal investigation into Alaska public corruption, and dozens of interviews with participants and observers.

Contrary to what many Alaskans believe, a search of the record does not show a malevolent plot to prosecute Ted Stevens so as to remove him from the U.S. Senate for partisan reasons or to retaliate against him for some old personal slight. The Justice Department's handling of the case can be legitimately faulted on a number of levels—the timing was ill-advised, the organization was chaotic, the management was dysfunctional, and the discovery violations were deeply disturbing. There does not appear, however, to have been an evil mastermind behind the charges against Ted Stevens. My reporting and analysis backs up the reporting of the *Wall Street Journal* and the *Washington Post* in pieces published at the time of the collapse of the Ted Stevens prosecution in April of 2009 regarding the absence of what the latter newspaper called "base political motivations."

The Ted Stevens case grows out of Operation Polar Pen, and Operation Polar Pen starts with private prisons

Let's walk through the process that brought the charges. The investigation that brought down Alaska's most important public official began not with an examination of a U.S. Senator's home renovations and his mandatory annual disclosure forms. Instead, the probe that led to the prosecution of Ted Stevens started five years before his indictment as an investigation into private prisons. In the dry words of the OPR report, the U.S. Attorney's Office in Anchorage opened that corrections-focused investigation in July of 2003 "after the FBI developed information that an Alaska private prison company and a lobbyist were corruptly influencing state legislators." In a nod to the Last Frontier correctional origins of the investigation, the probe was dubbed "Operation Polar Pen."

The investigation began with the work of an FBI agent named Mary Beth Kepner. Her blond hair and trim physique made her look a lot more like a soccer mom than one of the grim-faced feds famous from the days of J. Edgar Hoover. (Indeed, her achievements as a college soccer goalie still live on the Internet.) Starting in Philadelphia—where she investigated complex white-collar and organized crime cases—Kepner had been with "the Bureau" for more than 10 years when she opened Polar Pen while working in the FBI's small Juneau office.

"There does not appear, however, to have been an evil mastermind behind the charges against Ted Stevens."

The investigation grew in depth and scope after the federal government got Frank Prewitt—a former Alaska Commissioner of Corrections turned private prison lobbyist and consultant for Texas-based Cornell Companies—to become a cooperating witness. Prewitt started recording ("wiring up") on various Alaskans and provided information that allowed federal investigators to get wiretaps on telephones. (Setting aside whatever immunity Prewitt's cooperation got him for his own potential exposure as a defendant, it is striking that Prewitt received $200,000 from the federal government for his work; it is indeed odd that Prewitt couldn't find room to mention that payment in a 167–page book he wrote about his experiences as an informant.)

The Justice Department's top corruption fighters get on the case

As Polar Pen ballooned, the lawyers working on the probe changed. The Anchorage-based U.S. Attorney's Office started receiving assistance in June of 2004 from the Justice Department's Public Integrity Section. Given that the Public Integrity Section soon came to direct all the prosecutions growing out of the Polar Pen probe—including the Ted Stevens case—a little examination of that unit is in order.

The Public Integrity Section was founded in 1976 on a wave of reforms following the Watergate scandals. By its official mission, it "oversees the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government." Staffed with about 30 attorneys, the Public Integrity Section has had some high-profile successes. Notable achievements included the Abscam investigation in the late 1970s and early 1980s (which led to the convictions of six Members of Congress) and the more recent probe into super-lobbyist Jack Abramoff (which has led to the conviction of more than a dozen people, including a Member of Congress and several executive branch officials and Congressional staff members).

The Public Integrity Section had traditionally been known as an elite outfit and a breeding ground for stars like Attorney General Eric Holder and Reid Weingarten, one of a number of the unit's lawyers who went on to a well-compensated career as a criminal defense attorney for the rich and famous.

By 2004, however, the Public Integrity Section was in the midst of some turmoil. Heavy turnover dogged the section during most of the 2000s, with the *New York Times* finding that only a quarter of the prosecutors who had been with the unit at the beginning of President George W. Bush's tenure remained there at the end.

The comings and goings were particularly frequent at the unit's top. The *Washington Post* reported in April of 2009 that the Public Integrity Section had had five heads in the past six years.

Nick Marsh comes to probe Alaska corruption

The lead attorney on the ground for the Public Integrity Section—Nicholas "Nick" Marsh—was new to his job as well, and his part in this story is important enough that it's worth sketching out his background. A slender and intense man in his early 30s when he began work on the Polar Pen probe in 2004, Marsh had only become a prosecutor about a year before he started traveling back and forth between the "Main Justice" headquarters in D.C. and Alaska.

The boyish-looking Marsh had been a high-flyer in his relatively short life. After clerking for Fairbanks-based Judge Andrew Kleinfeld of the Ninth Circuit Court of Appeals, the native Kentuckian had worked for two old-line law firms in New York City, rising to junior partner at the second.

Marsh wanted to be a prosecutor, however, reflecting a passion for public service and a strong impulse to mix it up. That last quality showed up in his lettering in lacrosse in college, a fact at odds with the wonky vibe he displayed in court. He joined the Justice Department in 2003 and was assigned to the Public Integrity Section in the fall of that year. After he completed a six-month detail in the Washington, D.C. U.S. Attorney's Office, Marsh's supervisors in the Public Integrity Section put him on Polar Pen.

Marsh's assignment on the Last Frontier was definitely not full-time, as the young attorney juggled a variety of cases around the country. The new hire impressed his bosses by handling three appellate cases his first year, according to the *National Law Journal*. Marsh also worked in 2004 on the Mississippi-based prosecutions flowing out of fraud in lawsuits involving the drug fen-phen, and he was on the government's courtroom team at a 2005 trial in New Hampshire over a Republican campaign official's involvement in jamming the phones on a Democratic Party get-out-the-vote drive.

The Justice Department approved a partial recusal of the Anchorage-based U.S. Attorney's Office in September of 2004 that gave Marsh a particularly big role in the Polar Pen probe. While giving four lawyers from that office the job to "monitor, manage, and direct the day to day operation" of Polar Pen, the Deputy Attorney General simultaneously assigned the Public Integrity Section "overall responsibility" for the probe, including "investigative and prosecutorial decisions."

Bolstered by more than 17,000 intercepted conversations caught on wiretaps, the Polar Pen probe into Alaska public corruption expanded to cover allegations that VECO executives corruptly influenced state legislators over the construction of a natural gas pipeline and related petroleum tax legislation. Polar Pen progressed to the point that federal officials investigated at least 19 people, according to a filing submitted by one of the prosecutors involved in the investigation, while Alaska journalist Bill McAllister reported in 2007 after news broke of the probe that multiple sources had told him that it would result in the indictment of 26 people.

Polar Pen zeroes in on Senator Ted Stevens

Back when Polar Pen was still covert, the probe started focusing on its most prominent target, U.S. Sen. Ted Stevens, an Alaska icon and Capitol Hill powerhouse who had held his Senate seat for more than three decades.

The record isn't clear about when the investigation began that focus on Ted Stevens. Some observers thought that the *Los Angeles Times* started that ball rolling with two articles in 2003. The first focused on the links between the lobbying and consulting clients of Ted Stevens' son Ben and legislative assistance provided by Ted Stevens to those clients, including VECO. Another *LA Times* story published that year headlined "Senator's Way to Wealth Was Paved with Favors" laid out how Ted Stevens became a millionaire "thanks to investments with businessmen who received government contracts or other benefits with his help."

At Ted Stevens' trial, prosecutors introduced evidence of assistance that the Senator had provided to VECO on a Pakistani pipeline project referenced in one of those newspaper articles; on the other hand, federal investigators never interviewed Chuck Neubauer, the journalist who did most of the reporting and research on the two *Times* stories.

Another straw in the wind comes from a statement in a Wall Street Journal article by reporter Evan Perez in 2009 that the Ted Stevens case "was investigated for more than four years." Given that the indictment and trial both occurred in 2008, that would put the start of the federal probe into Ted Stevens at no later than 2004.

The Department of Justice's official history—the OPR report—says that it was a monitored telephone conversation between VECO executives Bill Allen and Rick Smith on October 19, 2005 that shifted the spotlight of the federal probe onto Ted Stevens. In that call, Allen and Smith discussed benefits VECO had provided to Ted Stevens in the form of renovations at Stevens' Girdwood residence. The OPR report then states: "Thereafter, the government obtained additional information about the Girdwood renovations, noting that Stevens had not reported the benefits on his United States Senate Public Financial Disclosure Reports for the corresponding years."

Whatever the precise date federal investigators started looking hard at Ted Stevens, it is clear that very shortly after that telephone call the leadership of the Anchorage-based U.S. Attorney's Office wanted no part of the probe.

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FEDERAL PROBE

How the Feds started investigating Ted Stevens and moved toward an indictment

Continued from page 10

On November 5, 2005, the Justice Department approved what the OPR report describes as an "office wide" recusal of that office based on the office's concern "[g]iven the high degree of sensitivity of such an investigation and the controversy likely to be engendered by investigating such individuals in the close knit Alaskan community."

This recusal left the Public Integrity Section in charge of the federal probe into Alaska public corruption. Despite that "office wide" recusal, the investigation also proceeded with the assistance of two Anchorage-based Assistant U.S. Attorneys, Joseph Bottini and James Goeke.

In practice, this recusal made Marsh Polar Pen's "top dog," as veteran Anchorage attorney Jeff Feldman told *New Yorker* writer Jeffrey Toobin. This development meant that Bottini—who had been a prosecutor for approximately 20 years—was effectively supervised on POLAR PEN by a lawyer with about 10 percent of his experience as a prosecutor.

The Polar Pen prosecution team increased to four in 2006 with the addition of Edward Sullivan, who was immediately assigned to the probe upon his joining Public Integrity. (Confusingly, three unrelated Sullivans played significant roles in the Ted Stevens case—there was Edward Sullivan the prosecutor, Emmet Sullivan the trial judge, and Brendan Sullivan the chief defense counsel.) Edward Sullivan had been a lawyer for 10 years when he started on Polar Pen, and he—like Marsh and Goeke—had clerked for a federal judge. (It is a telling social commentary that the OPR report details federal clerking experience of these three lawyers while omitting Bottini's experience clerking for a state court judge.) Despite Edward Sullivan's impressive resume, his prosecutorial experience was zero.

The Grand Juries hear evidence, while a logical source of help goes largely untapped

The Polar Pen team presented evidence regarding Ted Stevens to grand juries between November of 2006 and June of 2008. One grand jury sat in Anchorage, and the other sat in Washington, D.C. Despite the use of the grand jury in the nation's capital, the Washington, D.C. U.S. Attorney's Office had no significant involvement in the Ted Stevens case.

This was too bad for the prosecution, particularly since the Justice Department was aiming for a possible trial in Washington. As *Washington Post* reporter Carrie Johnson pointed out after the government's case collapsed in 2009, the government's path could have been smoother if the Washington U.S. Attorney's Office had been part of the case, thereby adding "players who were familiar with the courthouse and the personality of the trial judge." Such a role for that office would have not been at all unprecedented in a major public corruption case. The Washington U.S. Attorney's Office ran the prosecution of U.S. Rep. Dan Rostenkowski (D.-Illinois), the long-time chairman of the tax-writing House Ways and Means Committee, that produced his guilty plea in 1996 and a sentence that put him in federal custody for 17 months.

There are varying explanations for the lack of significant participation by the Washington U.S. Attorney's Office in the prosecution of Ted Stevens. That 2009 *Washington Post* story reported that prosecutors in that office "were consulted about the Stevens case starting in 2006 but declined to participate, thinking that the charges were shaky, according to sources familiar with the discussions." That article also stated that sources said "The assistant U.S. attorneys also considered overly aggressive the prosecutors' early plan, later abandoned, to get a warrant to search the lawmaker's D.C. area home…."

On the other hand, the OPR report suggests that it was the competition for glory that blocked the participation of the Washington U.S. Attorney's Office, not that office's perception that the Polar Pen team was on the wrong track with Ted Stevens.

Glen Donath, an Assistant U.S. Attorney from the Fraud and Public Corruption Section of the Washington U.S. Attorney's Office, did attend at least one grand jury session in Washington in April of 2007 regarding Ted Stevens. The Public Integrity Section ran him off the case quickly, however. Donath—who had previously served on the team defending President Clinton at the impeachment trial—ended his slight participation in the Ted Stevens case after Public Integrity officials communicated to him that he was not needed and that any role he would play would be minor and merely an accommodation to his superiors. Edward Sullivan told OPR that Public Integrity Section Chief William Welch spelled it out more bluntly, conveying the message that Donath was "coming in late" and would be viewed as a "fifth wheel."

Charges the Justice Department considered

Contemporaneous media reports in the *Anchorage Daily News*, the Associated Press, and *Roll Call* showed that the federal government conducted a wide-ranging investigation of Ted Stevens and his close associates. As detailed in that coverage and in interviews, this probe included an examination of legislative assistance Ted Stevens had provided that had benefitted his son Ben (who was by 2006 President of the Alaska State Senate), Ted Stevens' former long-time legislative aide Trevor McCabe, and Anchorage businessmen who had engaged in real estate deals with Ted Stevens that the Senator bragged about publicly. As part of this investigation, the FBI Interviewed former state legislator and activist Ray Metcalfe, who had accumulated evidence to support allegations regarding real estate transactions and fisheries legislation. The Justice Department also perceived early on in the investigation that tax charges could be brought against Ted Stevens, and the OPR report says that IRS agents remained part of the prosecution team through the Ted Stevens trial.

In the end, however, the prosecution's charges did not relate to real estate transactions, fisheries legislation, or income taxes, and the word "earmark" appeared nowhere in the 28-page indictment issued on July 29, 2008.

Instead, the prosecution focused during the three-month period before the issuance of the indictment on five charges:

--Bribery under 18 U.S. Code Subsec. 201(b)(2);

--Illegal gratuities under 18 U.S. Code Subsec. 201(c)(1)(B);

--Honest-services fraud under 18 U.S. Code Secs. 1341-1351;

-- Conversion of services of government employees for personal use under 18 U.S. Code Sec. 641; and

--False statements, by concealment under 18 U.S. Code Subsec. 1001(a)(1) and by omission under 18 U.S. Code Subsec. 1001(a)(2).

Except for the potential conversion charge—which concerned Ted Stevens' alleged use of Senate staff members to pay the personal bills of himself and his family—all these potential charges would have related to things of value received by Ted Stevens and not reported on mandatory annual Senate disclosure forms. Most of those things of value involved renovations to the Senator's Girdwood home provided by Bill Allen and/or VECO.

There's a common problem with the three charges listed above regarding Ted Stevens. Conviction under the bribery or illegal gratuities statutes requires "official acts" in connection with the crimes. Honest-services fraud—a favorite arrow in the federal prosecutor's quiver before the U.S. Supreme Court sharply restricted the reach of the statute in 2010—does not explicitly require a *quid pro quo* between the receipt of a specific thing of value and a specific official act. With honest services fraud, prosecutors have tended to look to prove the defendant received a stream of things of value in exchange for a series of official acts.

At least one line prosecutor pushed hard for the inclusion of one or more of these counts in the Ted Stevens indictment. Higher-ups at the Department of Justice, however, seemed to perceive that Stevens had delivered so much for so many Alaskans over four decades that it was difficult to say that the Senator was motivated by gifts to do official acts. Those supervisors appeared to understand that it was difficult to throw a rock in any populated place on the Last Frontier and not hit somebody who had benefitted from an official act of "Uncle Ted"—whether it was a local appropriation or intervention with the federal bureaucracy—and that the great majority of those who had received help from the Senator had never given him a penny in campaign contributions, much less gifts (and had certainly never given his son Ben a lobbying or consulting contract).

It would have probably fortified the Justice Department brass in their rejection of bribery/illegal gratuities charges/honest services fraud charges against Ted Stevens if they had been aware of a conversation the lead FBI agent on Polar Pen had with a journalist in May of 2008. Mary Beth Kepner met with reporter Tony Hopfinger at a coffee shop in midtown Anchorage. This meeting occurred more than nine months after the FBI had executed a search warrant on the Senator's Girdwood home and in the final throes of the Justice Department's decision on the indictment. In the conversation—later recounted in *Crude Awakening*, a book by Hopfinger and Amanda Coyne, and in a recent interview with Hopfinger—Kepner speculated that Allen had bribed Ted Stevens by renovating the Senator's house. The FBI agent then asked the reporter: "What do you think the *quid pro quo* was?"

Given that this conversation occurred after the FBI had been investigating Ted Stevens for at least 2.5 years and in the last 90 days before the Justice Department announced the indictment, it was surprising that the lead FBI agent on the Ted Stevens investigation would at that point ask a reporter in a coffee shop for that reporter's opinion on a critical element of a case against Ted Stevens. (Then again, Kepner was known for her ability to get people to tell her things, and playing dumb is one well-known way to do that.)

The prosecutors also considered a charge of conversion. This charge would have been based on evidence that the Senator had for years arranged for Senate staff members to work on the Congressional clock to pay from his personal account his family's personal bills—including his wife's credit card bills, the family's regular household bills, and the bills for the Senator's participation in a horse racing partnership. The 1994 indictment against another Congressional titan—Rep. Rostenkowski—had included a charge of conversion of federal funds based on the Congressman's alleged use of Congressional staff members working on federal time to perform personal services for Rostenkowski. As laid out in a 2007 article by John Stanton in *Roll Call*, Ted Stevens' alleged use of a Senate staff member making more than $150,000 annually to serve as his "personal bookkeeper" substantially exceeded the occasional de *minimis* personal tasks some Senators asked of their own Senate staff.

Although Polar Pen's line prosecutors expressed to their superiors in the spring of 2008 their belief that the evidence and the law supported a conversion charge against Ted Stevens, those lower-level lawyers advised against pursuing such a charge because it would significantly distract from a prosecution based on the Senator's alleged falsehoods in his annual disclosure forms. (The prosecution did use evidence that the above-described Senate staff member routinely paid Catherine Stevens' department store credit card bills while cross-examining the Senator's wife at his trial.)

Next: The charges of failure to disclose required financial information that the Justice Department finally settled on

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

The case for an inspector general

By John Havelock

Early History. Since coming into Alaska more than fifty years ago, the virtues of Article 2 of the Constitution, establishing a strong governor with power to appoint all executive officers including the attorney general, were pressed upon me by both experience and persuasion. The chief persuader was Tom Stewart, lawyer, legislator, judge and the man more than any other who laid the groundwork for the first and only Alaska Constitutional Convention, convened when Alaska was a Territory, a friend if not a companion in those early Juneau years.

My first experience was with J. Gerald Williams, an elected attorney general under the Territorial government, but a man who carried with him tales of amusing irresponsibilities bordering on abuse of the office. The first state attorney general, John Rader, was idolized by the new staff of the Department of Law and tribute was also given to the first two attorney generals who followed him, Ralph Moody and George Hayes, all three of whom I served before leaving for private practice. As is the way of the all offices, those that followed were usually of high distinction and some less so, but in general, they kept up the notion that the office was squeaky clean and capable of carrying out all the broad duties of the office, escaping the abuses carried with the role of the elected attorney elsewhere. There was no covert obligation to contribute to the election of the office. There was no fighting with a governor, the obvious subject to challenge in the next election. The criminal justice system, including the appointment of regional district attorneys and assistants was free of the politics that were a notorious embarrassment elsewhere in the nation.

The elected Attorney General

But electing the attorney general as a political cause arose regularly. Tom and I made frequent legislative committee appearances over the years in opposition to proposed constitutional amendment. The force behind this advocacy arises partly from knowledge that almost all state attorneys general are elected elsewhere. But it has also been fed by incidents involving public corruption where the Attorney General has been seen as a puppet under the intimate control of a governor who may be implicated, directly or indirectly, in that corruption. This concern must be conceded as having some basis, looking back now.

Examples of Attorney General failure

One governor was actually investigated and a grand jury called to consider indictment of this governor. Members of his staff were implicated. In this situation an invitation for bids on a building lease was set up with conditions that only a specific political ally of the governor could meet. The Grand Jury recommended a referral for an impeachment proceeding of the governor. The senate could not reach agreement on an impeachment and the governor "walked." At first this result seems salutary. The attorney general can indeed respond to the duties of his office. As his oath indicates, the attorney general responds to the office of governor and not the person, as is the case with the U.S. attorney general- who is also appointed by the chief executive. But a second look at this case is not so encouraging. The attorney general and his deputy for the criminal division paid for their integrity with their employment and a new attorney general was appointed who, while competent, was clearly not as interested in the activities of the governor's office as his predecessor.

In a later case, an Alaska attorney general was appointed who had been a staff attorney with primarily political responsibilities to that governor earlier in his career as a U.S. senator. This attorney general was caught up in a conflict of interest involving a personal interest in oil company stock. He was forced to resign. This instance reflected an error in the original appointment. Beyond the issue of flawed character, a governor should be reaching out for the best lawyer to serve the interests of the state as a whole. In looking for a doctor, one doesn't consider political coloring to be an important consideration. So it should be with a lawyer. The governor shops among the best the state can offer with political affiliation as, at most, a secondary characteristic. To hire a person of weak legal background whose primary experience is in looking out for the political safety of his boss does neither the boss nor the state any favor.

The state is immediately faced with substantial duplication of legal services, sometimes in conflict with each other. It is a model of inefficiency. Thus we have a case here of not throwing out the baby with the bathwater.

The third circumstance that has driven the question of election of the attorney general to the top was the recent story of legislative corruption that brought in a FBI investigation with a federal investigative team. Though the federal effort stumbled, there is no question that corruption was rampant among a group of legislators in one party, fed by an oil industry contractor, but also including corruption in the private contracting of prisons. In all this, the attorney general has looked the other way. That is totally understandable once the US Attorney's office was engaged, but citizens have to ask, how come all this was going on under the nose of two successive attorneys' general without any action?[1] Part of this is attributable to the rapid turnover of Alaskan attorneys general who seemed to be serving for no more than a couple of years.[2] It takes a while for the main man[3] to get his feet on the ground to the point where he is informed enough to take the heavy duty, proactive action that is involved in a major internal or legislative investigation.

Duties of the Attorney General

What is notable about these complaints is their focus on high level corruption. Calls for an elected attorney general do not arise out of concern that all the functions performed by the attorney general through the Department of Law should be administered with a greater degree of independence. The attorney general appoints all district attorneys and is responsible for their performance and for criminal prosecutions of white collar crime and other issues that may not lie easily within the scope of a district attorney's responsibilities, particularly the many smaller offices. This assignment has worked remarkably well. Alaska is not encumbered by district attorneys who are using the job as a stepping stone to higher office. We have no cheap exploitation of criminal conduct and prosecution for the glorification of the prosecutor and the teasing of temporary public opinion. Consistently, criminal prosecution has been professional, quite unlike the many states and districts where the district attorney is often primarily a political figure.

The civil side of the Department of Law has performed well. It undertakes the litigation in which the government is involved in a businesslike way. It provides legal advice to the many departments of state government. When a state elects its attorney general, the attorney general immediately becomes a political figure whose political interests are naturally antagonistic to those of the governor. He is on the short list of those who can run against the governor in the next election. He is not necessarily a great fan of the governor's programs. In the worst case his is an obstructionist. The governor must hire his own counsel and that counsel an extensive staff. The state is immediately faced with substantial duplication of legal services, sometimes in conflict with each other. It is a model of inefficiency. Thus we have a case here of not throwing out the baby with the bathwater.

Recommendation: create an Office of Inspector General

The problematic situations described above (and some other that come up in the examination of the election process in particular) suggest the requirement of a narrow functional exception to the vesting of executive power solely in a governor. That exception is public corruption. The citizen needs a place where the citizen can freely talk without fear of retaliation or being fully ignored.[4] There are a number of ways that an important official can be selected besides public election.

Judges are selected through a screening process conducted by the judicial council. Persons apply for the job. They are evaluated by the council with the assistance of public input, including specially law enforcement and the legal community. Not less than two nominations are made to the governor who is limited to appointments by the judicial counsel. The commission on judicial conduct could be an alternative nominating authority. The public should have understandable reluctance to having the Inspector General confirmed by a legislature one or more of whose members might well become the subject of an investigation. Still, the creation of the office, by itself, might well have a salutary effect in reminding legislators and executive officers of the danger in wandering from the path of honor.

The selection of the Inspector General might be given to a special grand jury. Grand jury selection promises a high degree of political neutrality but grand juries are not the best instrument for examining and evaluating employment credentials.

The Inspector General might be elected. The problem with creating another elective office is that it carries with it all the other problems of elective office: the role of political ambition, the cost of election, the corrupting influence of money in elections (if not fixed by a convention). A moratorium on continuing political activity could be attached as a condition of holding the office. A life prohibition is too strong a limitation on a public servant who might well have more to contribute to public life, but a limit of four years might constrain a person from applying who was primarily looking ahead to higher office.

The term of the Inspector General should not exceed ten years. The country's experience with J. Edgar Hoover as a lifetime head of the FBI provides a warning against vesting too much investigative power for too long in one person. A salary could be set at (for example) 90% of the salary of the governor, so that legislative interference through budgetary limitation could not destroy the effectiveness of the person. The same considerations arise in considering the budget of the agency.

Other duties can be assigned to the office of Inspector General that now are awkwardly assigned elsewhere within the executive branch. Of these duties, the leadership of the Division of Elections is among the most conspicuous. The lieutenant governor, who now leads this division, is an elected official with a very direct stake in the outcome of the election. The perennially under-funded Alaska Public Offices Commission has a natural fit within an office of Inspector General. Depending upon the other duties assigned to the office, the same kind of funding standard could be applied to the office of Inspector General, giving the office, for example, an established percentage of the budget of the legislature.

The constitution drafted in a few weeks of the winter of 1955-56 was an excellent piece of work but it was the product of its times, shaped by the need to persuade Congress that statehood was right for Alaskans. Those few delegates, meeting under a Territorial ordinance, could not be expected to have fully anticipated the organizational needs, more than half a century later, of a government of a state with many times the population then dwelling in the Territory, vastly greater wealth and a much more complex social and economic structure. Wisely, the delegates provided for a vote every ten years on the question "Shall there be a Constitutional Convention?" 2012 is a good year to vote "yes."

The above article is adapted from material from the author's book, "Let's Get It Right," the case for a constitutional convention. Copies of the book may be obtained by sending $25 to Alaska Legal Publishing at 725 W. 16th Avenue, Anchorage, Ak, 99501, most book stores or at Amazon.com.

Footnotes

[1] It might also be asked why, after the federal job was botched, an attorney general did not step in with a cleanup operation. Many state laws as well as federal laws were violated.

[2] Bruce Botelho stands as a distinguished exception. How did he do it?

[3] There have been no female attorneys general though the ranks of both prosecution and civil side assistant AGs are now well-staffed with women.

[4] The fact is that through ignorance of the law or misperceptions of observation, a complaining citizen will sometimes think that the whole system is ignoring him for reasons of indifference or malfeasance. That is part of the normal experience. The best that can be done is to give citizens a place where they can report their concern without fear of retaliation. An investigator, be it an inspector general or an attorney general must also deal with the issue of sufficient grounds, the issue of pro-activity. If every rumor was a cause for investigation, public administration would be hounded and hampered by investigators, wiretaps, interruptions, distrust and evasions and every manner of disabling interference. On the other hand, what was happening in Juneau during the "Corrupt Bastards" period was so blatant that it is difficult to avoid the conclusion that the attorney general was averting his eyes to what was apparent to so many.

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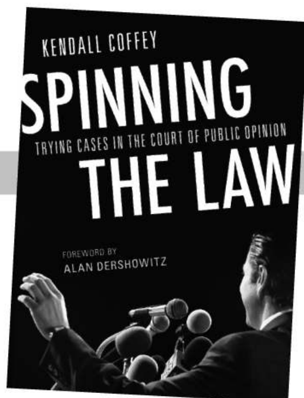

Spinning the Law: Trying Cases in the Court of Public Opinion

Thursday, September 27, 2012 | 8:30 a.m. - 11:45 a.m. | Hotel Captain Cook | 3.0 General CLE Credits | CLE # 2012-011

Presented by: Kendall Coffey, former US Attorney and Legal Analyst

Power of Attorney Hot Topics & A Guided Tour of the Uniform Power of Attorney Act

Presented by: Professor Linda Whitton

Friday, September 28, 2012 | 9:00 a.m. - 12:15 p.m.
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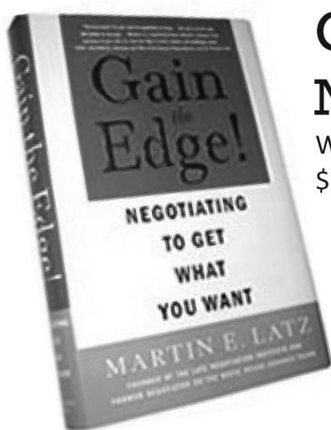
Our Wounded Warriors: Understanding PTSD and How it Fits (or not) into Your Case

Presented by: Dr. John Mundt, Staff Psychologist, Jesse Brown VA Medical Center

Monday, October 1, 2012 | 1:00 p.m. - 4:15 p.m. | Hotel Captain Cook
$109 Registration Fee | 3.0 General CLE Credits | CLE # 2012-037



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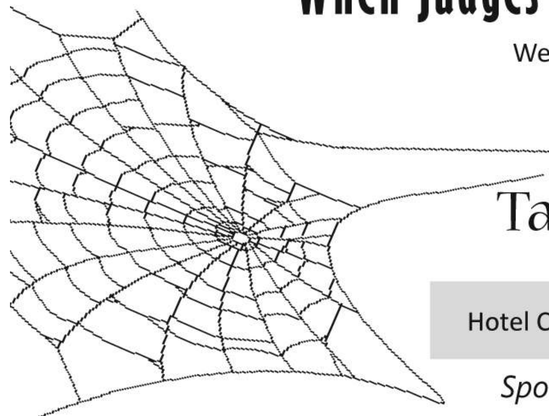

Taking the "Scary" Out of Corporate Compliance

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Turbo Charge Your Advocacy: From the Initial Client Interview to Closing Argument

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Evidence at the Movies

Juneau Friday, December 14, 2012 | Westmark Baranof Hotel |$99 each or $149 for both | Professionalism: 8:30 a.m. - 11:45 a.m. | Evidence: 1:00 p.m. - 4:15 p.m. | CLE # 2012-029

Anchorage Monday, December 17, 2012 | Hotel Captain Cook |$99 each or $149 for both | Professionalism: 8:30 a.m. - 11:45 a.m. | Evidence: 1:00 p.m. - 4:15 p.m. | CLE # 2012-030

Fairbanks Tuesday, December 18, 2012 | Westmark Hotel |$99 each or $149 for both | Professionalism: 8:30 a.m. - 11:45 a.m. | Evidence: 1:00 p.m. - 4:15 p.m. | CLE # 2012-031

Territorial Lawyers gather in July

Territorial lawyers, their spouses, and widows gather for the 2012 photo: Front row, left to right: Barry Jackson, Jamie Fisher, James von der Heydt, John Hughes, Charlie Cole, Russ Arnett, and Charlie Tulin. Back row, left to right: Juliana Wilson, Bob & Mildred Opland, Verna von der Heydt, Ghislaine Cremo, Christine Cole, Verona Gentry, Betty Arnett, Lucy Groh, and Louise Tulin.

A night among our founders

By Holly Wells

The Alaska bar is, as its members well know, comprised of a vibrant and colorful legal community. One of the most unique aspects of the Alaska bar is the continued participation of the founding fathers and mothers of our legal community.

While the founding lawyers of most states live only in history, these individuals continue to thrive in our communities and even in our practices. On June 22, 2012, at Aladdin's Restaurant, the Alaska territorial lawyers met for their annual dinner honoring not only the lawyers practicing law before Statehood, but also lawyers who have been members of the bar for 40 years or more. As always, the dinner proved to be a who's who in the formation of the Alaska Constitution, its courts, its legislature, and the first law firms to take root in what once was, and to many still is, the last frontier.

The restaurant was bustling with dozens of territorial and early statehood lawyers, including James Fischer and Bill Erwin, who were both members of Alaska's first legislature, Judges James Von der Heydt and Russel Holland along with David Ruskin, Bob Erwin, Bob Opland, John Hughes, Roger Dubrock, Ames Lewis, and Tom Meacham. Judges John Mason and Jim Singleton, Charlie and Dick Cole, and Barry Jackson, all made it down from Fairbanks. Jan Wilson was also in attendance. During dinner, Ms. Wilson shared stories of being one of the very first women to practice law in the State of Alaska and even brought pictures of the territorial lawyers gathered together before Statehood. Ms. Wilson was one half of the partnership Wilson and Wilson, a practice she shared with her husband.

Throughout the night the attendees took turns regaling the room with stories of the trials, tribulations, and challenges of practicing law and living in Alaska during its infancy. The stories ranged from comical accounts of defending those accused of murdering over a cigarette to finding love in the harsh Alaska wild. As the night wore on, the dinner host Jim Powell moved gracefully from one fascinating account to the next.

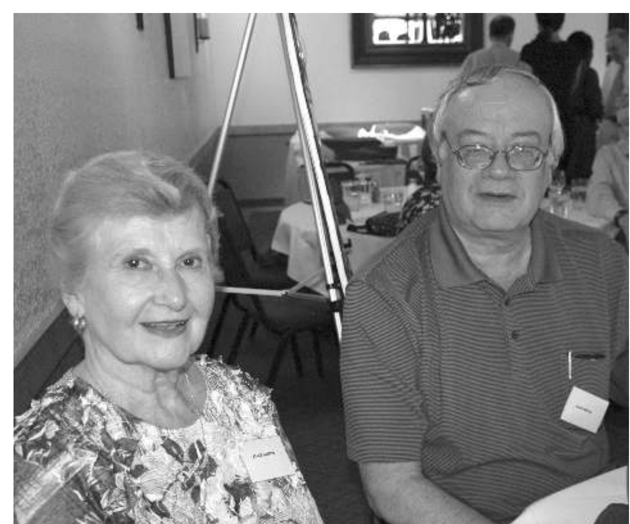
While listening to the stories shared with the group and chatting with the attendees, there is a feeling that you are catching a glimpse of history and the makers of it. The fleeting nature of this glimpse becomes especially apparent as the attendees pay respects to territorial lawyers who have passed away since the last dinner. This year, one of the most vibrant attendees, Charles E. Tulin, died only weeks after the celebration.

Mr. Tulin was admitted to the Alaska bar in 1956 alongside James Fischer, a fellow dinner attendee. He was a territorial judge and later opened his own practice, which he continued to operate until his death. He was not only a great lawyer, but a great storyteller and committed Alaskan and for at least one night, those attending the territorial lawyer's dinner had an opportunity to discover the myriad of adventures and achievements made by one of our forefathers.

Once again, the territorial lawyer's dinner proved to be a memorable and enlightening celebration of our founders and colleagues.

Ames and Connie Luce

Tim & Joyce Middleton



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771-8300 (wk)

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Brant G. McGee
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243-5377

Michael Sean McLaughlin
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Michael Stephan McLaughlin
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Moira Smith
276-4331

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Glen Price
746-5970

Fairbanks

Valerie Therrien
452-6195

Territorial Lawyers gather in July

Judge John Reese (left) came to dinner with a broken wing, taking an outdoor break with Brock Schamberg and Judge Justin Ripley.

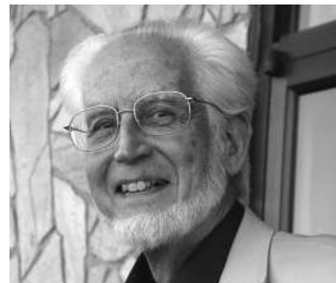
John Hughes visits Judge Jim and Verna von der Heydt's table for a chat.

Lawyers who passed on 2011-2012

- Homer L. Burrell, Deceased July 28, 2011 in Anchorage, AK
- Daniel A. Gerety, Deceased July 30, 2011 in SaddleBrooke, AZ
- Russell E. Mulder, Deceased September 10, 2011 in Anchorage, AK
- U.S. Ninth Circuit Court of Appeals Judge Robert Boochever,
- Deceased October 9, 2011 in Pasadena, CA
- Roger E. Henderson, Deceased November 17, 2011 in Anchorage, AK
- Dennis Maloney, Deceased December 18, 2011 in Anchorage, AK
- Bruce Horton, Deceased January 1, 2012 in Sitka, AK
- Judge Hugh Connelly, Deceased late April 2012 in Fairbanks, AK.

Tom Meacham (l) poses with Jim Powell, chair of the dinner committee, at the past-dinners photo wall.

Judge Jim Wannamaker


Judge H. Russell Holland

Roger Dubrock & Elaine Andrews

Photos by Barbara Hood

The Territorial Lawyers dinner each year now includes not only those who were practicing at Statehood, but lawyers who have logged 40 years or more in the profession. The large group fills the Alladin Restaurant.

THE KIRK FILES

Cheka mate, or a darkness at 8:30

By Kenneth Kirk

Pavel Mikhailovich turned up his collar as he stepped out into the cold morning air. The wind was blowing off the Volga, making it feel even colder than the below-zero temperature would indicate. If he walked quickly, he could make it to the detention center in 10 minutes. A giant picture of Comrade Brezhnev looked down at him from a nearby wall; it was a clear day, and he could see the statue to the Motherland in the distance.

It took an hour for the guards to bring his client to the interview room. The man looked rough; the guards cannot have been gentle with him, Pavel thought, given his crimes. In a way, though, what Pavel had to tell him would be even harsher than the beatings he had already been given. The man had hope in his eyes. Pavel was about to crush that.

"I am sorry, Comrade," Pavel began, "but it appears the trial will not go well for you. I have reviewed the record. There is nothing good in it".

The man looked like he had been kicked in the crotch. "But you must try, Comrade, you must give me a strong defense. I did not do these things they accuse me of. There must be some way for you to challenge the evidence? To bring out the truth?"

"I am sorry," the lawyer replied, "but the evidence shows that you are guilty. The Investigator has already interviewed the witnesses, who both insist you committed these crimes. He included a summary of your statement, but no additional evidence can be submitted. There will still be a trial, but it will be only to serve as an example to others. You will be found guilty."

His client's voice quivered. "You do not understand, Comrade! These two who accuse me, they are Party apparatchiks. They desire advancement, and they would do anything to please the district political secretary. The only crime I have committed, was to love the political secretary's sister! It pleases him to get rid of me, to free his sister for a better marriage. And so they gain his favor by accusing me of horrible crimes I have never committed."

"I don't really have a lawyer, I have an entire law firm. Joabab, Kettle & Wicks."

Pavel shook his head. "The only evidence allowed, is the Investigator's report. And it makes no mention of any such personal relationship."

"But I told him," the client protested. "I went into great detail. He cannot have left it out entirely."

"Apparently he thought it irrelevant. The Investigator can leave out anything if it is unimportant in his view, or if it would be harmful to the interests of the nation. Scandalous accusations directed at Party members, usually are harmful. At any rate it is not included in the record, so it is useless information. Besides, even if we could bring this into the record somehow, do you think it would really help to accuse two well-regarded Party functionaries of perjury, in front of a court consisting of a Procurator and two other Assessors, all of whom are loyal Party members themselves? No, your sentence would be even harsher. I am afraid I have no option but to denounce you."

"Denounce me?" The man asked. "I don't understand. You are my lawyer, are you not?"

It was Pavel's turn to be surprised, by the man's naïveté. "I take it you have no experience with the criminal justice system. My responsibility is to the People, not to you. Based on the record as it will be presented at trial, you are guilty as charged. Therefore it is my responsibility to the People of the Soviet Union, to formally denounce you to the court, and ask that you be found guilty."

The client began to sob. "Please, no, Comrade! I will be sent to Siberia for 20 years or more. I have young children. My wife is an invalid and depends on me. I have been in prison nine months already, awaiting trial. And you tell me that my own lawyer will stand up before the court and declare my guilt, when I am an innocent man? This cannot be!"

And he continued to sob disconsolately. It was disturbing to Pavel, who disliked emotional scenes. He nodded to the guard, standing 10 feet away, who gave the signal to open the door and let him out.

And then he woke up. It had been merely a dream. He was still Paul Michaels, a young public defender in Anchorage, Alaska.

Why did he keep having these strange dreams that he was a lawyer in the Soviet Union? He had been a small child when the Iron Curtain fell. He had never been to that country and had no Russian ancestry. He didn't even speak a single word of the language.

It was almost time to get up anyway, so he ambled down the stairs of his condo and hit the button on the coffee maker. Did he have time for a full breakfast this morning, or would he have to make do with a quick food bar? He picked up his cell phone and checked his schedule. Aside from a short staff meeting, he had nothing calendared.

Why was that, he tried to remember? He nearly always had a number of hearings and client meetings scheduled; the life of a public defender did not usually involve an open day. And then he remembered, he had set aside the time to work on an 'Anders brief'. He had been appointed to represent a client who wanted to appeal a serious felony. But he had been unable to find any reasonable grounds for appeal in the record. Under the Court of Appeals decision in *Griffin v. State*, he would now have to write a brief which explained, in great detail, why the arguments his client wanted to make on appeal were frivolous. It would have to be a very good and thorough brief, too, because otherwise the Court would insist he pursue the appeal. Paul pondered for a moment that this was not a task he relished; he spent most of his time defending accused clients, not writing briefs against them.

On the other hand, at least he would not have to wear a tie today. He took an egg from the carton and cracked it against the frying pan.

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Lawyer representatives annual report District of Alaska

From: LRCC Alaska District Chair Kevin G. Clarkson
Re: 2011-2012 Alaska District Report

LAWYER REPRESENTATIVES:

The current lawyer representatives for the District of Alaska are Kevin G. Clarkson (out-going chair), Brewster Jamieson (incoming chair), S. Lane Tucker, and Gregory P. Razo. Kevin is finishing his third year. Brewster is starting his third year and will assume responsibilities as chair following the Circuit Conference in August, 2012. S. Lane Tucker and Gregory P. Razo are new to the LRCC and are each completing their first year as lawyer representatives. Heather Kendall-Miller is finishing her third year as an appellate lawyer representative.

In lieu of the Ombudsman Program previously considered at the recommendation of the Circuit, the District now publishes the names and contact information of Alaska's lawyer representatives in the Alaska Bar Rag, the quarterly newspaper published by the Alaska Bar Association. The District's Judges encourage attorneys who practice before the Court to communicate with the lawyer representatives regarding any concerns they may have related to the Court.

NEW JUDGES:

This year marked significant change for the District of Alaska. And, it was also a year of milestones. In November, 2011 Judge Sharon Gleason was confirmed by the United States Senate to become the first woman to serve on the United States District Court for the District of Alaska, replacing Judge John Sedwick who took senior status. Then, in December, 2011, Morgan Christen was confirmed by the United States Senate as the first Alaskan woman to serve on the United States Court of Appeals for the Ninth Circuit. Judge Christen replaced Judge Andrew Kleinfeld who also took senior status. Judge Donald MacDonald IV, who has served on the Bankruptcy Court for the District of Alaska since 1990, will retire on October 9, 2012. The Circuit is in the process of selecting a new bankruptcy judge for Alaska. The selection is expected to be announced by August, 2012.

THE JAMES M. FITZGERALD U.S. COURTHOUSE IN ANCHORAGE:

The United States Courthouse in Anchorage, Alaska was renamed after the late Judge James M. Fitzgerald in recognition of his long service and lasting impact upon Alaska's federal and state judiciaries and legal systems. Judge Fitzgerald, who was nominated for appointment by President Ford and who received his commission as a district judge on December 20, 1974, passed away on April 3, 2011. Judge Fitzgerald was a decorated World War II veteran, serving with the Marines in the South Pacific. He attended the University of Oregon and received his law degree from Willamette University College of Law in 1951. Prior to Alaska statehood, Judge Fitzgerald served as an assistant United States attorney for the Territory. He later served as Anchorage's City Attorney and as legal counsel to Alaska's first governor, William A. Egan. Prior to his appointment to the District Court, Judge Fitzgerald served as Alaska's first Commissioner of Public Safety, a superior court judge, and as an associate justice on the Alaska Supreme Court.

QUARTERLY MEETINGS AND ACTIVITIES:

Lawyer representatives met quarterly with available district judges, magistrates, the Clerk of the Court, the U.S. Attorney, and the Federal Defender to discuss matters of interest. Topics varied and included, among other subjects, issues of concern to the District's judges, the offices of the U.S. Attorney, the Federal Public Defender, and Probation, and Alaska's federal practitioners. Other topics included the ECF filing system, prisoner transportation, and the development of Local Policies regarding cellular telephone usage and wireless internet access in the District's courtrooms. Chief Judge Ralph Beistline attended the Circuit's Chief District Judge's meeting in San Diego, California in January, 2012.

THE DISTRICT'S JUDGES PROVIDE SERVICE OUTSIDE ALASKA:

In addition to their work within the District, Alaska's judges also perform substantial work outside of the District. Senior Judges Sedwick and Holland have been designated for service to the District of Arizona where they are on the regular draw for civil cases. Judge Burgess accepts a criminal sentencing calendar in the District of Arizona. Senior Judge Singleton adjudicates habeas corpus petitions for the Eastern District of California and the Northern District of New York. Judge Ross regularly conducts settlement conferences as a visiting judge for the Bankruptcy Court in Las Vegas, Nevada, and occasionally accepts assignments for the Bankruptcy Court in Phoenix, Arizona.

Additionally, the District's judges serve on both national and circuit committees. In this regard, Senior Judge Sedwick is completing an extended assignment on the Ninth Circuit jury instruction committee. Judge Burgess is serving on one or more national committees addressing technology and judicial resources. Chief Judge Beistline serves on the Ninth Circuit Judicial Council. And, Magistrate Judge Smith serves as a member of the Ninth Circuit Magistrate Judges' Executive Committee.

COMMUNITY INVOLVEMENT/ALASKA HIGH SCHOOL MOCK TRIAL COMPETITION:

Senior Judge James Singleton, Magistrate Judge Deborah Smith and Magistrate Judge John Roberts participated as judges in the Alaska High School Mock Trial Competition. The competition is organized and sponsored by the Anchorage Bar Association's Young Lawyer's Section.

DISTRICT COURT SPONSORS CLE AT THE ANNUAL ALASKA BAR CONVENTION:

Continuing its tradition, the United States District Court for the District of Alaska sponsored a Continuing Legal Education seminar at the annual Alaska Bar Convention. The U.S. District Court's sponsored CLE at the Alaska Bar Convention serves as a substitute for a District Convention. This year District Judge Burgess and Magistrate Judge Smith participated in a CLE program entitled "The Practice of Law Goes Global: Do You Want To See The World?" The panel examined topics related to the international practice of law. As the world shrinks, with instantaneous communication, what is the impact on the practice of law? Is the globalization of law a threat or opportunity? Topics such as economic sanctions and the Foreign Corrupt Practices Act were discussed. Panelists also shared their experiences providing legal expertise in foreign countries as diverse as Syria, the Republic of Georgia, Liberia, Mexico, Zambia, Armenia, Azerbaijan and Indonesia.

In addition to Judge Burgess and Magistrate Judge Smith, the panel included Prof. Speedy Rice, Professor of Practice at the Transnational Law Institute at Washington and Lee University; Kevin Feldis, Criminal Chief, U.S. Attorney's Office; Jay Seymour, Senior Counsel for Global Trade, British Petroleum, and Andy Haas, former public defender and solo practitioner. In addition, during the convention, Magistrate Judge Smith moderated a presentation on Social Cognition and Implicit Bias: Tools to Minimize Subconscious Bias in Your Courtroom, presented to Alaska state judges.

The faculty for this session included Judge Bernice W. Donald, U.S. Court of Appeals, Sixth Circuit and Judge Mark Bennett, U.S. District Court, Northern District of Iowa. The panelists explained that in order to make sense of and navigate the incredible volume of data that Human beings encounter from day to day, human brains organize and categorize information into schemas or mental shortcuts.

The field of psychology studies these patterns and has developed concepts such as social cognition and implicit bias that may have direct application to the justice system.

ALASKA'S LAWYER REPRESENTATIVES CONTRIBUTE TO THE ALASKA BAR RAG:

In cooperation with the Alaska Chapter of the Federal Bar Association, Alaska's lawyer representatives contributed articles on a variety of legal topics to the Alaska Bar Rag, the quarterly newspaper published by the Alaska Bar Association. Kevin Clarkson wrote an article regarding free speech and the United States Supreme Court's decision in Arizona Free Enterprise Club's Freedom Club PAC v. Bennet. Brewster Jamieson wrote a summary of the 2011 Ninth Circuit Judicial Conference and Justice Anthony Kennedy's keynote presentation. Brewster also wrote an article regarding the District's Local Rules regarding dispositive motion practice.

FEDERAL BAR ASSOCIATION:

The District's Judges and lawyer representatives are actively involved with the Alaska Chapter of the Federal Bar Association. The Chapter generally meets once per month. Each lunch meeting features a speaker, presentation or panel discussion addressing a topic of interest to the federal bar and bench. The District's judges participate in programs for the Alaska Chapter from time to time.

AUGUST 2012 ALASKA DISTRICT DINNER:

This year, the district's dinner will be held August 14th at Merrimen's Restaurant, 1 Bay Club Place, Lahaina, HI 96761.

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Judge Nora Guinn award presentation to Magistrate Arlene Clay

The courtroom of the new Aniak courthouse was dedicated to Magistrate Arlene Clay (ret.) on June 27, 2012. In May, she received the annual Nora Guinn Award at the Bar Convention. The award is presented each year by the Bar Historians Committee to a person who has made an extraordinary or sustained effort to assist Alaska's rural residents, particularly its Native population, overcome language and cultural barriers to obtaining justice through the legal system.

Below are the remarks made by Chief Justice Walter Carpeneti at the Aniak dedication ceremony.

I'm delighted to have the honor of presenting this year's Judge Nora Guinn Award to someone whose role in our state's justice system is truly historic. Magistrate Arlene Clay of Aniak, who is with us today at the age of 99. [Ed. note: Magistrate Clay celebrated her 100th birthday in August.]

Arlene Clay and her husband came to Alaska from Maine in 1944 to serve as a communications team for the Civil Aeronautics Administration. After the war, they built a cabin on a remote homesite upriver from Aniak and, with the help of Alaska Native neighbors began a subsistence lifestyle that they enjoyed together for many years. When her husband died in the 1950's, she found part time work as a secretary and postal clerk in Aniak. Then when Statehood arrived, the U.S. Commissioner submitted Arlene's name—without her knowledge—to the Alaska Court System for the newly created magistrate position. The very first court system newsletter, in June 1960, reported that she would "commute to her (new) job by boat in summer, and by dog sled in winter."

In the beginning, court was held in someone's living room, then later in a leaky trailer. Yet despite these and many other challenges, Magistrate Clay would serve the people of Aniak and twelve surrounding villages in the Yukon-Kuskokwim region for over 17 years. Looking back now, over 50 years later, I can hardly imagine how different things must have been in those early days, and how difficult it must have been to be the only face of justice in a region so isolated and remote.

The nearest state trooper was in Bethel, there was only one village phone, and there were no runways where planes could reliably land. So it was almost impossible to call the troopers to handle local disturbances, and Magistrate Clay often was called out to respond. "I had no problem breaking up the parties," she once said. Just asking politely usually did the trick, because people respected the court. But there were two instances that gave her difficulty, both involving domestic violence. "The husband would be standing by the door with the wife pointing at the door hollering (that if) anybody came in that door he was going to shoot," she once explained. "But I just kept on walking towards the door, said a little prayer, rapped on the door, and it was fine. No problems."

In addition to traditional magistrate duties, which were many and varied, Magistrate Clay served as coroner and coordinator of search and rescue operations.

In addition to traditional magistrate duties, which were many and varied, Magistrate Clay served as coroner and coordinator of search and rescue operations. And as if these were not enough, she also took care of the medicine chest and responded to medical emergencies because the village had no local health aide. It was in the context of responding to a stabbing that she encountered one of her most memorable cases. The alleged stabber was highly intoxicated, and the person who had given him the booze was a notorious local bootlegger who worked as a pilot. The bootlegger was eventually arrested, brought to court, and found guilty, and Magistrate Clay sentenced him to 90 days in the Bethel jail. But while in Bethel, he petitioned Magistrate Clay's close colleague, Judge Nora Guinn herself, for a work release so he could return to flying. Judge Guinn contacted Magistrate Clay for her recommendations, and Magistrate Clay showed the mix of compassion and toughness that was her trademark: work release was OK, she said, as long as he was assigned to the honey bucket detail.

Magistrate Clay traveled frequently to serve the villages within her jurisdiction. She would set up court in a public building, or a bar room, or across the bow of a boat—anywhere that worked. And she met often with local village councils and elders to consult about sentencing options, not unlike the circle sentencing efforts underway today. Knowing the culture of the area was in her mind as important as knowing the law.

Through her love and respect for the wilderness life, her familiarity with local ways, her admiration of the Native culture, and her knowledge of the law, Magistrate Clay made an indelible mark on our justice system when we were a young state, and still very much a frontier. The Judge Nora Guinn Award is intended for those who have gone beyond the call to help improve rural justice delivery in Alaska. I am sure that if she were here today Judge Guinn would be proud to recognize the efforts and achievements of her dear friend and colleague Arlene Clay. And I am honored to add my appreciation to Magistrate Clay for everything she has done for the people of Alaska and her beloved Aniak region.

This year's Nora Guinn Award winner & Retired Magistrate Arlene Clay (seated) "presides" at the dedication of the Aniak Courthouse with (left to right) Ron Woods, Alaska Chief Justice Walter Carpeneti, and Delta Junction Magistrate Tracy Blais. Photo by Annalisa DeLozier

Time for H.U.G.G.S.: MLK Day service model meets back to school

By Grace LaVance and Carlos Bailey of Mendel & Associates

On August 15, 2012, the Alaska Bar Association's Pro Bono Director, Krista Scully, organized a group of volunteer lawyers to provide free legal consultations with members of our community. Readers might be familiar with the annual joint Anchorage community-outreach events, H.U.G.S.S. and "Coats for Kids." H.U.G.S.S. ("Help Us Give School Supplies"), and "Coats for Kids" which provide low-income families with free school supplies and warm winter wear for children in need. At the request of the event organizers, the idea was to pilot bringing legal services to clients instead of them coming to us.

The event routinely serves 5,000 families many of whom begin lining up as early as 4:00am for the 9:00am start. Upon our arrival at 2pm there was a line nearly a ½ mile long of families waiting to receive their numbers to wait again in Clark's large multi-purpose room where they could receive access to various social services before receiving their school supplies and coats. The Anchorage School District screens each family to compile data on homeless statistics and identify those community members who may be eligible to receive additional services.

Sarah Horton, a staff member with the Bar Association, greeted the droves of people standing in the long lines outside the event, promoting awareness of the free legal consultations. Alexandra Foote-Jones, Nicole Borromeo, and Carlos Bailey handled client screening with individual people in the bustling multi-purpose room and listened to their legal issues in order to streamline the consultations. MLK Day veteran volunteer Leslie Need then escorted folks to their legal consultation with fellow MLK Day veterans Zach Manzanella, Jon Katcher, Russ Winner, and Monica Elkinton provided legal advice along with newcomers Grace LaVance and Erin Bennett. In three hours the volunteers were able to serve over 35 clients on topics including family law, public benefits, landlord-tenant, health care, personal injury, and bankruptcy.

H.U.G.S.S. and "Coats for Kids" are joint projects of the Anchorage School District, Catholic Social Services, Lutheran Social Services, and the Salvation Army. The event is made possible through the generous business sponsorships from 3M, BP, Carlile Transportation, ExxonMobil, Fireweed Cleaners, Providence Health & Services Alaska, Walmart, Wells Fargo and TOTE.

The volunteer lawyers all described the event as a success, and we encourage the Bar Association to do it again next year. The Alaska Bar Association is proud to boast a high percentage of bar members who recognize the importance of pro bono legal service. If you are interested in volunteering for next year's event, please contact Krista Scully and join our efforts to serve those who need us most.

Anchorage families line up to participate in HUGSS event. Photo by Krista Scully

Bar People

Burr, Pease & Kurtz, an Anchorage law firm since 1957, is pleased to announce that **Nora Barlow**, **Constance Livsey** and **Patrick Carnahan** have recently joined the firm to continue their practice of Workers Compensation litigation defense.

Hartig Rhodes LLC announces that it has recently moved its offices to 1049 W. 5th Avenue, Suite 202, Anchorage, Alaska 99501. Hartig Rhodes' practice continues to focus on estate planning, probate, tax, divorce, custody, adoption, litigation, real estate, employment, Native law, and commercial transactions.

Mike Hotchkin has left the state Attorney General's Office and is now staff attorney with the Alaska Supreme Court.

Alexandra Foote-Jones received her L.L.M. in Taxation from New York University School of Law on May 18, 2012. She has now resumed full-time practice as an associate at Durrell Law Group, P.C., in Anchorage, and is happy to be home.

Alexandra Foote-Jones

Ryan Fortson received the Ben Walters Distinguished Service Award from the Anchorage Bar Association in May. President Elizabeth Apostola presented the award at the Justice Center in Anchorage.

Levesque opens new office

Joseph Levesque, an Anchorage attorney with a practice focused generally in municipal law, is now the owner of a new law firm in Anchorage named Levesque Law Group, LLC. Best Lawyers, national a peer-review publication in the legal profession, named Mr. Levesque as one of the best lawyers in America in the practice area of Municipal Law in its 2012 edition of The Best Lawyers in America. Selection to Best Lawyers is based on an exhaustive and rigorous peer-review survey, comprised of more than 3.9 million confidential evaluations by top attorneys.

Mr. Levesque's office is located at 3380 C Street, Suite 202, Anchorage, Alaska 99503. His telephone number is (907) 261-8935. Mr. Levesque may also be reached at joe@levesquelawgroup.com. Mr. Levesque was previously associated with Walker & Levesque, LLC in Anchorage.

Wilkens named LCA Fellow

Anchorage attorney **James K. Wilkens** of the law firm of Bliss Wilkens and Clayton has been selected as a Fellow of the Litigation Council of America (LCA). Bliss Wilkens and Clayton has offices in Anchorage, Alaska, and in Tucson, Arizona. A 1997 graduate of St. Olaf College in Northfield, Minnesota, Wilkens received his Juris Doctor degree (with honors) from Drake Law School in 1980. He was selected under the Attorney General's Honor Law Graduate Program, where he served as a trial lawyer in the US Department of Justice, Tax Division. Since 1984, Wilkens has represented business, insurance, aviation and individual clients, both in Alaska and in Arizona, in a wide variety of trial and appellate matters. Wilkens is active in community and business organizations, and serves on the Board of Directors for the Oro Valley Business Club. Wilkens is a member of the Forensic and Litigation Service committee of the Arizona Society of CPAs, and a frequent speaker on forensic accounting and litigation matters.

The LCA is a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Fellowship in the LCA is highly selective and by invitation only. Fellows are selected based upon excellence and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation. The LCA is aggressively diverse in its composition. Established as a trial and appellate lawyer honorary society reflecting the American bar in the twenty-first century, the LCA represents the best in law among its membership. The number of Fellowships has been kept at an exclusive limit by design, allowing qualifications, diversity and inclusion to align effectively, with recognition of excellence in litigation across all segments of the bar. Fellows are generally at the partner or shareholder level, or are independent practitioners with recognized experience and accomplishment. In addition, the LCA is dedicated to promoting superior advocacy, professionalism and ethical standards among its Fellows.

--LCA press release

Saade joins Stoel Rives

Stoel Rives LLP, a leading U.S. business law firm, is pleased to announce that **Renea Saade** has joined its Anchorage office as a partner in the firm's Labor & Employment group. Renea has more than a decade of experience counseling clients on labor and employment issues. She assists clients on a broad range of employment matters including noncompetition/nonsolicitation enforcement, wrongful termination, requests for accommodation, workplace investigations and discipline.

Renea frequently gives presentations on workplace topics including performance reviews, discipline and discharges, privacy issues, and employment law fundamentals. In addition, Renea has authored several articles relating to labor and employment matters. As an active member of the community, Renea sits on the board of YWCA Alaska, has volunteered for thread Alaska and is co-leader of the Alaska Chapter of the Northeastern University School of Law Alumni Association. Her professional activities include active membership in the Anchorage Association of Women Lawyers and the Alaska Chapter of the Society of Human Resource Management.

Prior to joining Stoel Rives, Renea was a partner at Oles Morrison Rinker & Baker LLP, an of counsel attorney and associate at Schwabe, Williamson & Wyatt in Seattle and an associate at Riemer & Braunstein LLP in Boston.

Renea Saade

Landye Bennett Blumstein adds 3 attorneys

The law firm of Landye Bennett Blumstein LLP is pleased to announce that attorneys **Joseph M. Moran, Bruce A. Moore** and **Adolf V. Zeman**, formerly of DeLisio Moran Geraghty & Zobel, P.C., and Robert H. Schmidt, formerly of Groh Eggers, LLC, have joined the firm's Anchorage office.

"Joining with these experienced attorneys provides our clients with the added benefit of their comprehensive capabilities in civil litigation, banking and commercial law," said Philip Blumstein. "This expertise, combined with their focus on delivering proactive, responsive service, is a combination that will enhance the legal services provided to our clients and complement our firm's culture of providing high quality and effective legal representation that brings value to our clients' businesses."

For over 30 years, Joe Moran has served as primary counsel to local and national banks in Alaska, representing clients on loan documentation and collection projects involving commercial and residential transactions and financing to business entities. Joe also advises public utilities, and has gained a wide range of experience in real estate secured transactions, lien law and title insurance coverage and foreclosure matters. Joe received his J.D. from the University of San Francisco School of Law and is admitted to practice in Alaska's state and federal courts, the U.S. Court of Appeals for the Ninth Circuit and the United States Supreme Court.

Bruce Moore has over 20 years' experience in commercial litigation, creditor bankruptcy, banking operations, Alaska Native law and resource development. One of Bruce's fraud cases resulted in the largest bankruptcy fraud recovery and conviction sentence to date in the District of Alaska. Bruce is a graduate of the University of Puget Sound School of Law and is admitted to practice in the Alaska state and federal courts, the U.S. Court of Appeals for the Ninth Circuit and the United States Supreme Court.

Adolf Zeman focuses his practice on complex civil litigation and mediation, corporate and business law. Adolph received his J.D. from Gonzaga University School of Law, where he studied international business law. He is admitted to practice in Alaska's state and federal courts.

Robert Schmidt has helped clients prevail in numerous high profile lawsuits and transactions, many worth over $1 million. He brings his talents to the firm's practice areas of civil litigation, banking, commercial transactions, corporate, real estate and employment law.

Landye Bennett Blumstein, with offices in Oregon and Alaska, is a regional law firm that provides legal services to clients throughout the Pacific Northwest, including public and private corporations, real estate developers, homeowner associations, municipalities, nonprofit groups, and individuals. In addition, the firm represents clients throughout the United States on specialized matters.

Chambers and partners recognizes five Dorsey lawyers and three practices in Anchorage office

Dorsey & Whitney LLP announced today that five lawyers in Dorsey's Anchorage office were ranked among "America's Leading Lawyers for Business" in the annual guide published by Chambers & Partners.

Partners Jahna Lindemuth, Robert Bundy and Spencer Sneed were ranked for their Litigation: Corporate/Commercial practice. Partners Richard Rosston, Michael Mills, and Mr. Sneed were ranked for their Corporate/M&A practice, with Mr. Mills and Mr. Sneed also separately ranked for their Corporate/M&A: Bankruptcy practice, and Mr. Rosston also separately ranked for his Real Estate practice. In all, the five Dorsey Anchorage lawyers received a total of nine individual rankings, including four top rankings of Band 1 and a Senior Statesmen ranking by Mr. Bundy.

Dorsey's Litigation: Corporate/Commercial, Corporate/M&A, and Real Estate practices in the Anchorage office all received Band 1 rankings from Chambers, the highest ranking awarded.

ECLECTIC BLUES

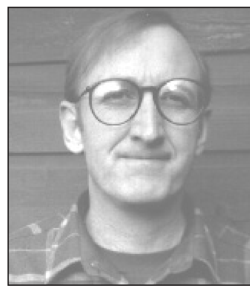
A trip up Tenakee Inlet evokes images of movies past

By Dan Branch

It's 7 a.m. on Sunday as the MV Le Conte starts its slow run to Hoonah. My excursion partner, the Captain, and I are hunkered down at a table in the ship's cafeteria. Wind-driven rain obscures the windows and the coffee is so strong that I switch to Chai tea. We'd just loaded hundreds of pounds of food and gear on the ferry's luggage cart and carried the Captain's 50 year old Klepper folding kayak onto the car deck. When the purser announced all visitors ashore I thought for a moment that I should join them. Then I remembered the gear and kayak lurking on the car deck and took another sip of Chai.

In three hours we will pull into Hoonah for a 7-day paddle down Port Frederick and after a portage, move up the Tenakee Inlet to the town of Tenakee Springs. There will be rain, wind, cold, and brown bears. Earlier, another friend had told me that three habituated brown bears greeted his party when they arrived at the portage last May. It took a lot of paddle waving and speeches to keep them at bay. Believing that by now my friend's pesky bruins would have abandoned the portage grasslands for the salmon streams, I decided to keep this piece of information to myself until we made the portage. Then the very guy slips into a seat beside me and spilled the beans to the Captain. He then beats down all my arguments for why we should have a bear-free portage this time of year. By the time he gets up to order a scramble egg breakfast I am trying to remember whether Alaska courts honor holographic living wills.

There was too much inertia pushing the trip forward to stop now so at Hoonah we carry our gear and boat from the ferry down a path to the waters of Port Frederick. I take heart in the absence of memorials for kayak bear victims at the site and in the appearance of a humpback whale that surfaces nearby as the Captain packs the kayak.



"The joy is in the doing if you feel it through the pain" was all that came to me in those 105 degree waters."

Wrapped as we are in waterproof rain gear and a spray skirt we barely notice the steady rain beating a tattoo on our hats. The whale helps. We see it often as we paddle to our intended campsite on Midway Island --- a plug of rock and old growth forest now forming a hazy green point on a grey horizon. I start to reconcile myself to a week in the grey ---beautiful grey clouds reflecting in a grey sea broken occasionally by a grey humpback and the dull black Dall's Porpoise now streaking by the kayak in pursuit of salmon. We and the whale are co-starring in a film noire. Call me Ishmael.

The whale puts on a tremendous display as we approach Midway by hurtling out of the water then throwing up huge "V" shaped splashes when he slams back into the surface. Later he will bubble feed by himself just offshore of our camp site.

Blue invades the grey skies the next morning, which clear by lunch time. We paddle down Port Frederick to the new Forest Service Cabin at Eight Fathom Bight, which still smells like fresh cut yellow cedar. After carrying the gear and boat above the high tide line we set everything wet out to dry in the sun and then strip off our long underwear and rain gear. Now we've stepped onto the Munchkins set of the Wizard of Oz and everything is in living color. (Munchkins played by crows and gulls). The Captain walks over to a nearby salmon stream while I dig out my fishing gear. A yearling brown bear saunters out of the woods while Cap is stretched out on the gravel.

Driven off the good fishing grounds in the woods by aggressive companions, the bear tests his luck in the deeper water near the stream mouth. He tries the fast water sideways slap without success then with butt in the air, sinks his head into the water to better study his prey. We want to cheer when he finally scores a fish.

The next morning we see the other, larger brown bears that run the stream area as well as the hapless yearling. Abandoning the stream, he walks slowly down the beach in front of the cabin before disappearing into the dissipating fog. Tracks in the sand tell us that the smaller bear checked out the kayak while we slept but didn't damage it.

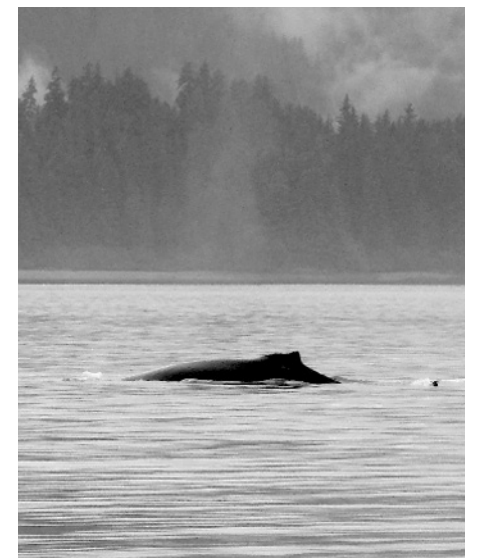
As the fog burns off we pack up and paddle the short distance from the cabin to the portage. We expect a hard slog because today's high tide will be under 12 feet. You need at least 14 or 15 feet of water to float a kayak all the way to the actual portage. This means spending a long time in bear country moving food and the kayak over grass and muddy shallows. (Think "For Whom the Bell Tolls" but without Ingrid Bergman).

C.S. Forrester could have written a sequel to "The African Queen" based on our adventures at the portage: Mud and bugs and much hard work. There might have even been leeches if we had bared our legs. There were no bears. We saw tracks and places where they had dug up chocolate lily bulbs, but no bruins. Thank the maker for salmon and the appetite bears have for them.

After the kayak high centered in the approach creek we spend the next four and half hours lugging dry bags full of food and gear and a rather decent box wine toward Tenakee Inlet. We also carried or lined the kayak through a region of foul-smelling and sticky mud. Bogart and Hepburn had nothing on us.

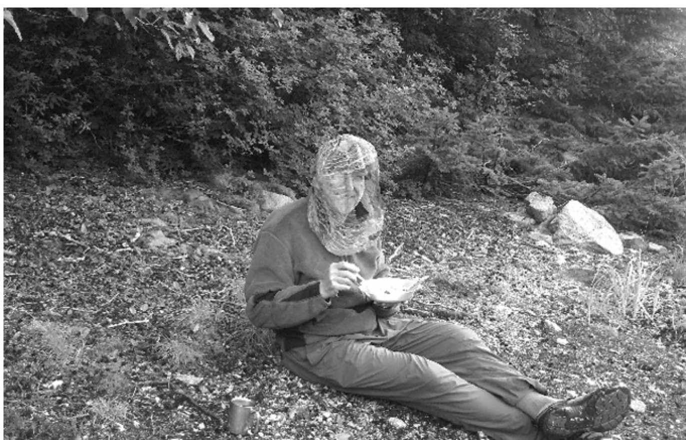
Tenakee Inlet seemed tame after the anima-rich Port Frederick. There bears had to be seen with binoculars if at all, and we rarely spotted whales. We did paddle the kayak into other spawning streams at high tide. At the upper end of the inlet we passed 30 or 40 seals who splashed around the water with vigor to drive the homebound salmon into the mouths of their mates. A few would swim close to the Klepper giving us the hard eye. Theirs was a serious business. Toward the end the lure of Tenakee Springs town with its public hot springs, bath and liquor store drove us to the trip's finish on a sunny Saturday afternoon.

While soaking sore muscles in a hot springs pool shared with two older town folk, I waited for my thoughts to deepen as they do for characters in well written movies. "The joy is in the doing if you feel it through the pain" was all that came to me in those 105 degree waters.



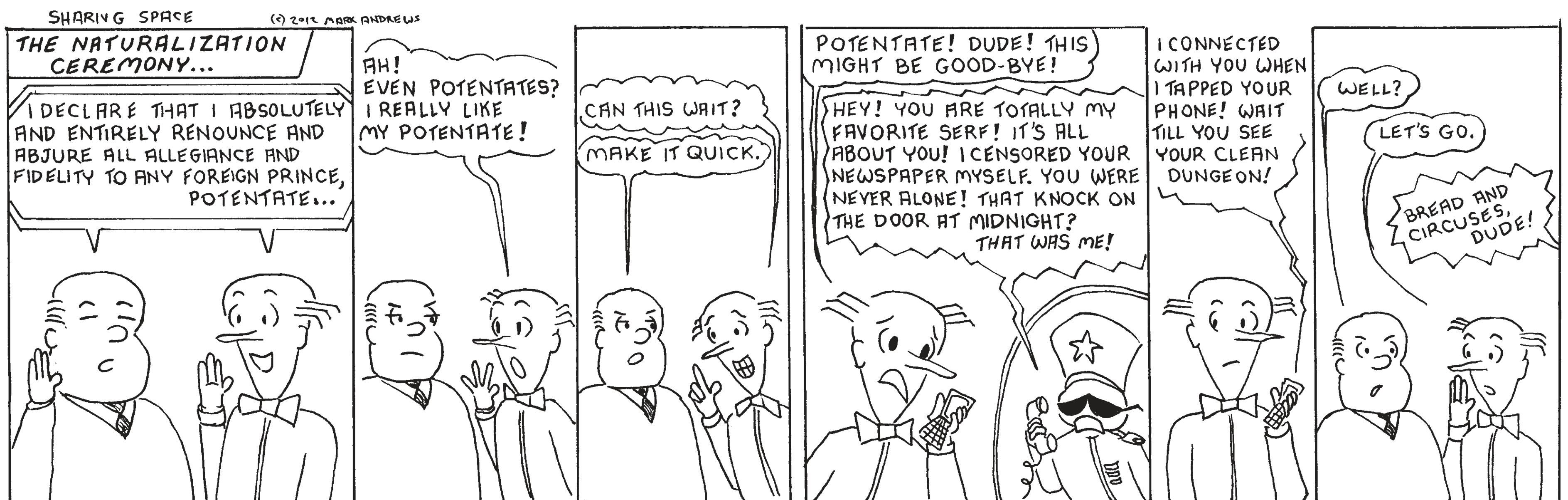
A humpback whale entertains the kayakers near Midway Island.

The hapless yearling attempts to find a salmon.



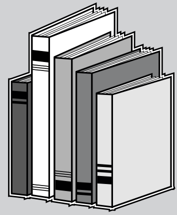
The author dons a bug-screen upon his head, but sacrifices his ankles.

A serene campsite on Tenakee Inlet.



New faces at the Anchorage Law Library

By Susan Falk



If you've been in the Anchorage Law Library lately, you may have noticed some new faces at the Reference Desk. We've added two new staff members in the last year, Sofie Grant and Buck Sterling.

Sofie, our Cataloging Library Assistant, began work at the library in the summer of 2011. As a member of the Technical Services team, Sofie largely operates behind the scenes, but she does staff the Reference Desk several hours each week. Sofie moved to Alaska from Michigan after completing her MLIS degree through the University of Wisconsin-Milwaukee.

As the new Public Services Librarian, Buck spends much more time at the Reference Desk, so there's a good chance you've already met him. Buck has a great deal of reference experience, as you know if you've already benefited from his assistance. Buck got his JD at American University Washington College of Law, in Washington, DC, and his MLS at the University of Pittsburgh, in Pennsylvania. He comes to us from Gonzaga University School of Law, in Spokane, Washington, where he was Senior Reference Librarian and Assistant Professor of Law. In fact, many of his former students are Alaska Bar members. He's looking forward to a new career experience of working in a court system, and to the adventure of living in Alaska.

Next time you're in the library, say hello to our newest staff members.

Alaska Chief Justice receives national award

Alaska Chief Justice Dana Fabe at the NCSC annual meeting.

Alaska Chief Justice Dana Fabe is the recipient of the 2012 Distinguished Service Award from the National Center for State Courts, one of the highest awards presented by the organization. The Distinguished Service Award is presented annually to those who have made significant contributions to the justice system and who have supported the mission of the NCSC.

"During her extensive career in the justice system, Chief Justice Fabe has worked tirelessly to improve the courts both in Alaska and around the world," said NCSC President Mary C. McQueen. "She has devoted extensive time, effort, and energy to increasing awareness about the need for diversity on the bench and for full access to the courts for all segments of society."

Chief Judge of the District of Columbia Eric T. Washington presented the award to Chief Justice Fabe on July 24 during the annual meeting of the Conference of Chief Justices/Conference of State Court Administrators in St. Louis, Missouri. Chief Judge Washington is president of CCJ and chair of the NCSC Board of Directors.

Chief Justice Fabe has long supported the work of the NCSC, especially its efforts to improve the administration of justice internationally. She assisted in securing a project to help improve the courts of South Africa and is active in the International Association of Women Judges. Chief Justice Fabe is the first woman to serve on the Alaska Supreme Court and the first woman to serve as the state's chief justice. She is a past president of the National Association of Women Judges, chair of the Judicial Ethics Advisory Committee of the American Judicature Society, and a Fellow of the American Bar Association. She has also served two terms as second vice president of the Conference of Chief Justices.

The National Center for State Courts, headquartered in Williamsburg, Va., is a nonprofit court reform organization dedicated to improving the administration of justice by providing leadership and service to the state courts. Founded in 1971 by the Conference of Chief Justices and Chief Justice of the United States Warren E. Burger, NCSC provides education, training, technology, management, and research services to the nation's state courts.

ABA urges states to act on human trafficking

American Bar Association President Laurel Bellows on Aug. 7 praised efforts by 28 states to add human trafficking laws to the books this year but called on four to act quickly to protect victims of this crime and to penalize those who exploit victims. Bellows is responding to today's release of the 2012 state-by-state human trafficking ratings from Polaris Project.

"When more than half of states act within a single year to pass anti-trafficking laws, we know we are making progress," Bellows said. "But clearly we have more work to do. This report is a road map of where we need to go and what needs to get done in the states that have not yet acted. It underlines the need for a legal framework for legislators, prosecutors, law enforcement and social service agencies to institute and implement laws to combat human trafficking."

"The ABA is looking forward to working closely with Polaris to make certain that Americans understand the depth of the human trafficking crisis in the United States," she added. "It is only through strong partnerships that we will eradicate this scourge."

Polaris Project, a nonprofit organization dedicated to ending human trafficking and modern-day slavery, reported that 28 states passed new trafficking laws last year as part of its annual ratings of all 50 states and the District of Columbia. The most improved included Massachusetts, South Carolina, West Virginia and Ohio. The "faltering four," states that have not made even minimal efforts to combat human trafficking, are Wyoming, Arkansas, Montana and South Dakota. The ratings are based on 10 categories of laws that combat trafficking, punish traffickers and support survivors.

Bellows became president of the ABA today and will serve a one-year term. "The ABA will harness its considerable expertise to end the shameful horror of human trafficking in the United States of America," Bellows said in her speech Monday to the ABA House of Delegates. "The victims are unfree in the land of the free — 100,000 U.S. citizens forced into sex or labor for the profit of their captors. Hundreds of thousands more men, women and children are trafficked into our country every year." One of Bellows' top presidential initiatives is human trafficking.

The ABA's Task Force on Human Trafficking, established by Bellows and including Polaris Project, is working with the Uniform Law Commission to write a consistent statutory law for all states to adopt. The Task Force is also developing best practices for businesses to follow and training for lawyers and law-enforcement officials who are often the first to respond to trafficking situations. In addition, the Task Force will strengthen pro bono networks to ensure that all the civil legal needs of trafficking victims are addressed.

Polaris Project 2012 annual ratings on state human trafficking laws can be found at http://www.polarisproject.org/what-we-do/policy-advocacy/current-laws

With nearly 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

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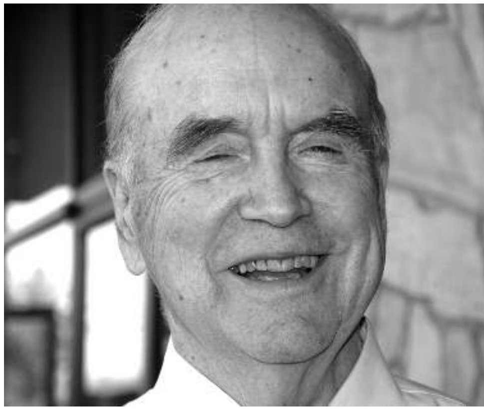
Charles E. Tulin: In Memoriam

Lawyer, entrepreneur, and Anchorage resident of 57 years, Charles E. Tulin, 82, died on August 6, 2012 from complications of a broken femur. He had met with clients that morning at his law offices on West 3rd Avenue, doing what he loved the most-practicing law.

Charles was a lawyer since territorial days and played a pioneering role in the state's nascent judicial system. "He practiced an Abraham Lincoln-style of law, championing the little guy, taking on any legal issue that came into his office if it would help a friend, even when they couldn't pay a cent," says long-time friend and fellow lawyer, Marc W. June. An occasional case would take him to a federal court or the Alaska State Supreme Court. No matter what the issue, he displayed an unwavering passion for his work. "He was like a kid in a candy store when it came to the law," says his son Bill Tulin. "It's as if he were just admitted to the Bar, loving every minute of it."

Charles, known as "Bud" to family and friends, was born in Seattle, the younger of two boys born to Finnish parents, Edward and Fern Tulin. His formative years were spent in rural Agnew, just outside of Sequim, Washington. His folks owned a general store and embodied the Finnish ideals of determination, competition, and strength. While his parents toiled long hours in the store, Bud and his brother enjoyed unfettered freedom in the surrounding countryside. He often shared fond memories of fishing and riding his beloved horse "Muggins" on the beach. As Bud often would recall, "We ran wild and pretty much raised ourselves."



Nevertheless, his parents' work ethic and drive left their mark. By high school, Charles' star began to rise as he earned high marks and excelled in football and track. He was valedictorian of the 1948 graduating class at SequimHigh School. He attended Stanford University for one year, and transferred to the University of Washington, where he lettered in track and field and was active in the ROTC program. He attended the University of Washington's law school, earning his Juris Doctorate degree in 1954. Shortly before graduating, he met his beautiful wife, Louise, on the library steps. Four months later, they married, entering a productive partnership spanning nearly 60 years, a union that produced two sons and many successful business enterprises.

Right out of law school, Charles joined the U.S. Air Force, serving in the Judge Advocate General's office of the AirWarCollege at Maxwell Air Force Base, in Montgomery, Alabama. To complete his foreign tour of duty, Charles brought his bride to Alaska, then a U.S. Territory, where he worked with the Judge Advocate division at Elmendorf. The couple drove a 33-foot Alma motor home to reach their new home, through rugged terrain up the Alaska Highway. "It was the adventure of a lifetime," says wife Louise. "And the journey heralded many more adventures to come."

In 1956, Charles was admitted to the Alaska Bar, along with other pioneers in the Alaska judicial system, including James E. Fisher, James J. Delaney, Lloyd Jackson Webb, Warren C. Colver, Howard Pollock, and Lloyd L. Dugger. Charles left the military to serve as a Territorial Judge, while Louise taught school at Mountain View and AirportHeights in Anchorage. "He was drawn to the pioneer spirit and sense of opportunity and freedom that this place offers," says son Don Tulin. "There was no other place in the world he would rather live and work."

In 1958, Charles opened his private law practice, which proved the perfect fit for his entrepreneurial spirit, drive, and caring for people. "His clients knew he could be reached any time of the day or night, and that was ok with him," says Don. "No one worked harder or cared more than my dad."

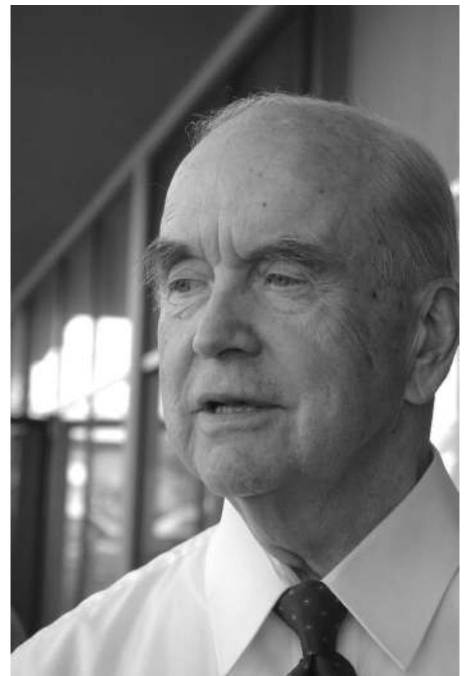
Charles was a story-teller, often regaling folks with tales from his practice, including the time he made a court appearance in the Old Federal Building, in the days before security screening. He was representing the husband in a bitter divorce proceeding. In the middle of his argument, the wife pulled out a gun and shot his client, who survived his wounds only to be killed few months later in a plane crash. "He was filled with colorful stories like that," says Bill. "Sometimes it was hard to get a word in edgewise."

Charles was a member of the Alpha Delta Phi fraternity from the University of Washington. He was a 50 year member of the Washington Bar Association. Charles was admitted to practice in the State of Washington Supreme Court in 1954; admitted to the United States Court of Claims in 1955; the United States Court of Military Appeals in 1955; the District Courts for the District of Alaska in 1956; the United States Court of Appeals in 1963; the United States Supreme Court in 1986; and, the United States District Court, District of Arizona in 1994. He also was a member of the Alaska Territorial Lawyers Group in Anchorage, as well as an Elk's Lodge member and a BIL to Chapter Eof the PEO.

When not practicing law, Charles worked with Louise to acquire and develop property throughout the state, including a private fly-in fishing lodge on Kalgin Island that his wife designed. He was an expert aviator, taking family and friends for adventures aboard his Piper PA 12 and Cessna 206 float planes. He continued flying until slipping and breaking his leg in February. One of his greatest pleasures was flying solo and landing a plane in a lake in the middle of nowhere, watching a bear on the shore, or an eagle overhead, finding his connection to something bigger than himself. He also was a life-long fitness buff, working out every day, often jokingly comparing the size of his biceps with those of his 16 year-old grandson, Chris.

At his heart, Charles was a family man, taking great pride in his two sons, Bill and Don, his grandson, Chris, and in his enduring marriage to Louise. The family homesteaded without running water or electricity in Eagle River Valley, snaring rabbits for food, brushing their teeth in the creek, sacrificing personal comforts to move ahead. The couple saved every penny they could, investing their earnings in land. When the boys reached adolescence, Charles and Louise had done well enough financially to take them to see the world. The family embarked on Pan Am's legendary Flight One, circling the world in 12 days, traveling to Thailand, New Delhi, Lisbon, London, and New York. "There was always a sense of adventure, that the best was yet to come," muses Bill. "He was the eternal optimist."

Charles indulged in full bragging rights about his sons and spoke admiringly of his beloved wife of 58 years. Every morning, Charles and Louise began the day with a cup of coffee and a yellow legal pad, planning their day. Every night ended with a silent touch of each other's arms before drifting to sleep.



Charlie Tulin, Territorial Lawyers Dinner, July 2012.

Perhaps his enduring legacy is how he lived his life, embodying rugged individualism, the belief in personal liberty, self-reliance, and hard work. "He lived life in his own way, on his own terms," says Don. "He was the every man' from humble means who made it, inspiring all of us."

Charles Tulin is survived by his wife Louise; his son, Don of Anchorage; his son Bill, daughter-in-law Rebecca, and grandson Chris of San Anselmo, CA; his sister-in-law, Betty, niece Diana, nephew Mike, of Vacaville, CA; his nephew Matt of Texas; and his dogs George and Ginger. He is preceded in death by his brother Bill, who died earlier this year. He will be laid to rest in his casket with a soft white teddy bear placed beside him by his wife, Louise. A service will be held at the First Baptist Church, 1100 W. 10th, Anchorage, Alaska on Saturday, August 18, 2012 at 2:00 p.m. There will be a visitation from 1:00 p.m. - 2:00 p.m. before the service. He will be laid to rest in the Mausoleum at Anchorage Memorial Park Cemetery.

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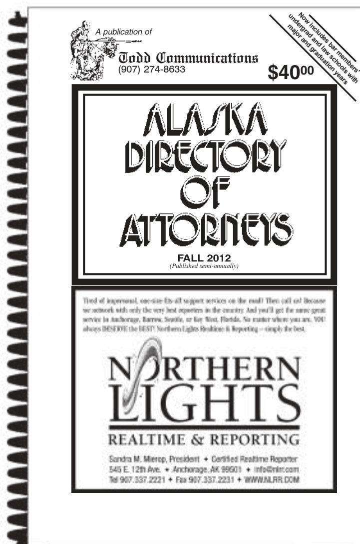

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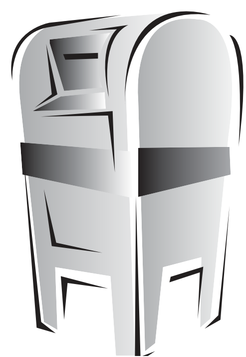

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ESTATE PLANNING CORNER

2012 is significant

By Steven T. O'Hara

"... in considering gifting in light of 2012 law please sit down with your tax advisors well in advance of any gifting and consider a plan that fits your situation."

Below is an illustration of a written reminder to clients on the possible significance of this year from an estate planning standpoint.

Dear Client:

As Congress debates tax policy, you might hope for the best and plan for the worst. In considering the worst, figure for simplicity that if you die ***after*** 2012 a sum equal to roughly as much as 55% of your net worth could be payable to the IRS within nine months following your death. That sum would be in addition to any other taxes payable, such as tax computed on the total amount of taxable gifts you had made over your lifetime.

Beginning next year in 2013, the amount that can pass tax free at death under the federal estate tax system is scheduled to be $1,000,000 with a 55% top tax rate. The same is generally also true for the exemption and tax rate under the federal generation skipping transfer tax system.

One reading of the law in effect in 2012 is that with assets of as much as $5,120,000 (or $10,240,000 for a married couple), you might be able effectively to "elect out" of the federal estate tax and generation skipping transfer tax systems. In other words, 2012 is significant.

This year in 2012, $5,120,000 per donor (that's a total of $10,240,000 for a married couple) is the cumulative amount that might be given away without incurring federal gift tax or generation skipping transfer tax, after taking into consideration prior gifts made. In other words, it may be possible to sidestep the federal estate tax at your death as well as the generation skipping transfer tax through giving your assets away in 2012.

You obviously do not want to give all of your assets away, in effect become dependent, in order to avoid taxes that may be speculative. For example, it is possible that the federal estate tax system could be abolished or the $5,120,000 unified credit equivalent amount could be extended and, indeed, increased.

One client recently said to me in so many words: "If my heirs get less of my hard-earned property at my death because of tax, so be it. They did not earn it. I did, and I want to keep it available on an unrestricted basis." This client did not reject the possibility of significant gifting in 2012 out of hand. Instead, she made her decision like a business decision, with a dispassionate cost-benefit analysis. Of course, she was free to assign whatever weight she wished to the benefit of unrestricted funds.

After giving to trusts for others to the extent you feel comfortable, consider that under Alaska law you may also "gift to yourself." Specifically, you might transfer property to an Alaska Asset Protection Trust while naming yourself as a beneficiary of that trust. In other words, if you are a beneficiary of the trust, the Trustee could return property to you under the terms of the trust.

Moreover, even though you are a beneficiary of the Alaska Asset Protection Trust, it is possible that the trust and its assets might be sheltered effectively from federal estate tax at your death, depending on the terms of the trust.

On a technical note, taxable gifts are included in the federal estate tax computation, but it may be possible that the benefits of gifting this year may include a credit for gift tax paid, available at your death, even though no gift tax was ever paid. Whether or not there is a credit for gift tax paid even though you did not pay any gift tax for a 2012 gift is a calculation issue under line 7 of the federal estate tax return (IRS Form 706). If no credit for gift tax paid is allowable, then the tax benefit of making a 2012 gift is "clawed back" such that the 2012 gift may generate a federal estate tax payable within nine months after your death.

Keep in mind that your beneficiaries could get a stepped up tax basis to fair market value in assets you keep and pass at death. By contrast, there is generally only a carryover tax basis on gifted property where no gift tax is paid. So in lifetime gifting, you might be increasing income taxes down the road. The bottom line is that you need to consider the pros and cons of 2012 gifting on an asset-by-asset basis.

This planning is unique to each client. Therefore, in considering gifting in light of 2012 law please sit down with your tax advisors well in advance of any gifting and consider a plan that fits your situation.

As always, my very best.

P.S. Just in case you may be interested, below are two illustrations with respect to a hypothetical client with a net worth of $1,250,000. These illustrations are for discussion purposes only. Any illustration applicable to you would obviously need to be customized to your facts and circumstances. The illustrated tax savings of approximately $100,000, which may or may not be possible, might increase to over $2,000,000 for a client with a net worth of at least $5,120,000.

The following is an illustration of perhaps what may be the best possible scenario where 2012 law is attempted to be maximized. The left column shows the federal estate tax that could be payable where no gift is made. The right column shows that it might be possible that no federal estate tax is payable where a gift is made in 2012. In the right column, assume that the first and only taxable gift occurs on December 31, 2012 and that Congress has not repealed 2012 law retroactively. Also for purposes of this illustration, assume that death occurs on January 1, 2013, with tax rates and unified credit as in effect as of January 1, 2001.

No Gift		Gift
$1,250,000	Taxpayer's Net Worth	$1,250,000
-0-	Gift	$1,250,000
-0-	Gift Tax "Payable"	$ 418,300
(-0-)	Unified Credit Used	($ 418,300)
-0-	**Gift Tax Actually Payable**	-0-
$1,250,000	Taxable Estate	-0-
-0-	Adjusted Taxable Gifts	$1,250,000
$1,250,000	Total	$1,250,000
$ 448,300	Tax on Total	$ 448,300
(-0-)	**Credit for Gift Tax Paid**	($ 102,500)
($ 345,800)	Unified Credit	($ 345,800)
$ 102,500	**Tax at Death**	-0-

By contrast, the following is an illustration of another possible scenario where 2012 law is attempted to be maximized. The left column is the same as the above left column and shows the federal estate tax that could be payable where no gift is made in 2012. The right column shows that even where a gift is made, the federal estate tax payable could be the same. Here again assume that the first and only taxable gift occurs on December 31, 2012 and that Congress has not repealed the 2012 law retroactively. Also assume that death occurs on January 1, 2013, with tax rates and unified credit as in effect as of January 1, 2001.

No Gift		Gift
$1,250,000	Taxpayer's Net Worth	$1,250,000
-0-	Gift	$1,250,000
-0-	Gift Tax "Payable"	$ 418,300
(-0-)	Unified Credit Used	($ 418,300)
-0-	**Gift Tax Actually Payable**	-0-
$1,250,000	Taxable Estate	-0-
-0-	Adjusted Taxable Gifts	$1,250,000
$1,250,000	Total	$1,250,000
$ 448,300	Tax on Total	$ 448,300
(-0-)	**Credit for Gift Tax Paid**	(-0-)
($ 345,800)	Unified Credit	($ 345,800)
$ 102,500	**Tax at Death**	$ 102,500

Under this second illustration, the potential tax benefits of gifting would be generally limited to (1) avoidance of estate tax on post-gift appreciation and accumulated income, (2) possible valuation discounts, (3) avoidance of state estate tax for property outside Alaska, and (4) possible leveraging of the exemption on generation-skipping transfers.

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ABA Conference

Lynn Allingham (l) and Maryann Foley (r) take a break at the American Bar Association House of Delegates meeting in Chicago in August, representing Alaska at the ABA's mid-year House meeting. Accompanying them on the trip was Judge Michael Jeffery, who advocated for Fetal Alcohol Spectrum Disorder at the meeting.

9th Circuit judicial conference in Maui

Continued from page 1

and Roberts served with diligence and distinction. In retirement, each has remained active in the law. Judge Ross in particular has been notable for conducting pro bono settlement conferences in pending Alaska Supreme Court cases. Each is back doing what he did so well before retirement, to the benefit of the courts and litigants.

This year, we were joined at our district dinner by a noticeably fit Ninth Circuit Chief Judge Alex Kozinski and his wife Marcy Tiffany, who seem to have a special affinity for the Alaska delegation. We are not sure of the reason, but we like to think it is because we are better company (as opposed, say, to the fact that our small size lets us pick the best restaurant). As usual, the Chief Judge more than returned the hospitality, serving piña coladas in his room each night after the conclusion of the official events (again, at his personal expense for those playing "gotcha") to all conference attendees. Judge Kozinski has an egalitarian and open demeanor that is a hallmark of the 49th state, and if you met him on the street you wouldn't guess that he heads the largest judicial circuit in the country—at least not unless and until the conversation turned to the law.

Supreme Court Associate Justice Anthony Kennedy addressed the conference at its beginning and end. The Ninth Circuit, he contended, should be proud and unapologetic to hold its conference in the 50th State: "There is a loveliness and a loneliness and a serenity in Hawaii's islands and the Pacific, which makes it ideal to re-examine our purpose," he said, going on to describe Hawaii as a "citadel of freedom in the Pacific." Justice Kennedy also described the "absolute probity" required of our judiciary, and he led the way by example, attending the 4 days of programs.

Judge Kozinski has an egalitarian and open demeanor that is a hallmark of the 49th state, and if you met him on the street you wouldn't guess that he heads the largest judicial circuit in the country—at least not unless and until the conversation turned to the law.

Justice Kennedy closed the conference by engaging in conversation with a panel of judges and lawyers. This was a sobering, yet ultimately uplifting, discussion. He remarked that his colleagues in the lower courts seem dispirited by the partisan political atmosphere pervading all the branches; he described the watershed moment facing our law schools and students, and the crushing debt that many students bear; he reflected on the amazing pace of technology and the tension created when the Court acts or fails to act in the absence of a national conversation on new and complex issues; and he was powerfully moved by the racial disparity in criminal sentencing, which was compellingly demonstrated during one of the conference sessions.

"The hardest thing to understand is the present," he said, and he gave the example when, as a teenager he learned that *Brown v. Board of Education* was decided, he thought "well, that's great, there will be no more discrimination." That was his understanding of the present as he perceived it at the time, but of course, he said, "the battle against racial discrimination has not ended."

By demonstrating his understanding of our past, present and future challenges, Justice Kennedy inspires confidence and hope. Certainly, he believes that the tools we have—the rule of law and an independent judiciary prominent among them—give us the ability to confront and overcome these challenges. "The Constitution is one of the most brilliant documents in the history of human thought," he said, although quickly acknowledging that it contained a deep and tragic flaw that was not corrected until after the Civil War. How comforting it is to have someone in his position express such awe for our founding document; the respect he shows for it is the key to understanding how he exercises his considerable power as a jurist—carefully, cautiously and respectfully. His final remarks admonished the assembled jurists to take pride in their calling: "For us, the law is a promise; it gives you your freedom."

Unfortunately, the Ninth Circuit has decided to forego the 2013 Judicial Conference, and will next convene in 2014. This decision, most likely made in the face of thinly-veiled Congressional threats to withhold funding from the courts, was understandable from a practical political perspective, but unfortunate for the administration of justice in our circuit. The lawyer representatives discussed this at their business meeting during this year's conference, and voted to put a resolution before the entire conference reaffirming the need and wisdom of annual in-person conferences.

The lawyer representatives, who pay their own way to the conferences, view these events as vital to the practice of law in the Federal courts. The lawyer representatives participate in the selection of topics and speakers at the conferences, and in so doing give voice to the issues of greatest concern to the practicing bar. There are precious few ways for the bar to communicate in a candid and informal way with the Federal judiciary, and we hope these programs continue uninterrupted in the future.

Traveling clothes often defy 'fashion'

By Barbara Hood

She is a tourist in the Top-of-the-World Tour, circa. 1960's. Her faded velvet parka is worn thin above the pockets; and though the photo is black and white I imagine that the matted polar bear fur and bright metallic rick-rack trim a vision of turquoise, or crimson. She is above the Arctic Circle, an instant Eskimo.

The Eskimo yo-yo she holds is flying and her eyes beam to follow its flight, her face alight with the thrill of this act of oneness, of common experience, with those who live in the wide barren landscape that she will visit for half an hour before getting back on the plane. Her companion, an older woman with a sensible kerchief around her hair and white plastic boots on her feet, wears a skirt and stockings beneath her own velvet parka and grips her handbag firmly on her lap. She is not smiling.

I feel more kinship than judgment for these women and their travels of decades ago on the airline package tour. I've lived in Alaska for nearly 50 years and might consider myself more seasoned and authentic here. But I have been there myself, on the edge of an unknown community, an unfamiliar way of life, wending my way hopefully and clumsily to some sense of connection and understanding. In absolutely ridiculous clothes.

In Fairbanks the prize for the junior division of the 1970 regional science fair was a trip to the Arctic Research Lab in Barrow. At 15, a trip to the far north for my mom and me didn't seem like a very nice prize. I had no concept of what Barrow would be like, but as a teenager I thought Fairbanks was the end of the road—the end of the universe—and I couldn't imagine Barrow being more isolated, or much different. So for the plane ride I put on my favorite dress, with navy blue polka-dots and a crisp white collar, "suntan" nylons, and my best shoes. I packed pants and warm clothes for any outings during our stay, but I wanted to honor the importance of the occasion by dressing well for our arrival. Perhaps I expected an entourage.

The man who greeted us on behalf of the lab wore an old army parka with a wide wolf ruff and smiled broadly as we entered the tiny terminal. Bags in hand, we stepped onto the dusty road and loaded a dirty caravan for the drive through the community and along the coast to the lab. It was June, and the snow was still melting over the mounds of winter's secrets: piles of garbage, abandoned snow machines, the carcasses of dogs. It was Breakup: the ugliest time of year in Alaska if you live in a human community and take your eyes from the lengthening daylight to look downwards, towards the ground.

Mom and Me don smarter clothes in 1970s Barrow.

As soon as we arrived at our guest room, I dug out more practical clothes. The photos from that trip—now 40 years ago—show me in jeans, tennis shoes, and a tan lab-issued parka, holding wolf puppies, posing with polar bear cubs, and helping drill core samples from the unending miles of near-shore ice. Thankfully, they don't show the dress.

And then there was my first trip to the Bush when I served 12 villages on the Yukon River as a newly-minted attorney for Alaska Legal Services Corporation. I was flying to Tanana to hang out a shingle at the city office and see walk-in clients. I wanted to look earnest and serious, so I boarded the small plane with neatly pressed wool slacks, a turtleneck and blazer, and sensible shoes. A sleek leather briefcase my little sister had given me for law school graduation hung from my shoulder on a slender stylish strap. It was smooth on both sides—no pockets—and barely wide enough for a single file. But I thought it made me look helpful, and focused.

The runway was gravel, and there was no terminal. A couple of four-wheelers sped towards the plane as it landed, pulling up when the propellers stopped and beginning to unload. There was no agent, no one from the city office, no one to greet the visiting lawyer. And my sensible shoes sunk deep into the soft gravel as the plane taxied back down the runway and took off, leaving me standing alone in my city clothes. Soon one of the four-wheelers returned pulling an empty cart and offered me a ride on the wooden planks. We rode to Jake's Place, the local hotel, where I paid $75 a night for a bare room and a dinner of fish sticks and fries, then changed quickly to jeans and boots for the duration of the trip. Later, the stylish briefcase lived in the back of my closet for 20 years before I found the heart to give it away.

These personal fashion mistakes happened decades ago, but they still resonate with me. Anchorage was just recognized as the worst dressed city in the world by the readers of a prominent travel magazine. To me, it came as no surprise. A good friend's East Coast mother has long observed with dismay that Alaskans seem "aggressively casual." And my closest friend from our Fairbanks childhood—now a Californian—considers my favorite faded jeans "sooooo 80's."

I really can't argue with our town's new distinction; in fact it makes me quietly proud. Because travels in Alaska have taught me that clothing is fundamentally about weather and place--something to keep you comfortable and safe in the landscape in which you choose to live. Alaskans understand this better than most people, even if some may use it as an excuse for a complete lack of imagination when it comes to what they wear. To me, there is something endearing—even wise—about ignoring a fashion culture that has little bearing on the lives we lead.

I'm going to a conference in Florida soon, where it will be humid and 90 degrees. I'll take a few summer dresses that have been in my closet for years, my best sandals, and little sweaters to deal with the air-conditioning. But I know that I will feel like the lady with the faded parka and her friend with the plastic boots—far outside my clothing comfort zone. I will imagine, as I always do, that everyone is noticing the deficiencies in my dress styles and my hopelessly dated shoes. And as an Alaskan, it will bother me only as long as it takes me to grab my swimsuit, throw on a towel, and find the pool.

iCivics volunteers from the Law Related Education committee, Board of Governors and Alaska Court System gather for a group photo at the Dena'ina Center.

Emma Wrigley, a Central Middle School 7th-grader, got to meet Justice O'Connor and present her with hand-tied flies she and her dad had made, knowing of the Justice's interest in fly fishing. Julie Wrigley, Emma's proud mom, looks on. She practices law in Anchorage.

Supreme Court Justice gets blustery welcome in Alaska

U.S. Supreme Court Justice Sandra Day O'Connor made a special trip to Alaska on Sept. 5 to promote civic learning and iCivics, an online civic education program she founded in 2009. Plans called for her to join Central Middle School students in the school's computer lab to play iCivics games, followed by an all-school assembly for all 600 Central students. Central had won the honor of hosting Justice O'Connor in the "iCivics Middle School Challenge" held last spring. An assembly in the West High Auditorium for 1,500 students from 13 high schools in the Anchorage School District was also on the agenda.

Alas, the windstorm that struck Anchorage Sept. 4 closed all Anchorage schools and scuttled the Sept. 5 iCivics events at Central and West. Courts remained open, however, so event co-sponsors – the Alaska Court System and Alaska Bar Association-- quickly regrouped and presented an impromptu presentation at the Boney Memorial Courthouse. About 150 teachers, students, court staff and members of the public were able to attend and hear a conversation between Justice O'Connor and Alaska's Chief Justice Dana Fabe . The evening reception at the Dena'ina Convention Center went forward as planned, with a crowd of over 300.

Justice O'Connor's iCivics initiative is catching on nationwide. When she retired from the U.S. Supreme Court in 2006, she was concerned about the state of civic education in our country. "A healthy democracy depends on the participation of citizens," she asserted at the time, "and that participation is learned behavior; it doesn't just happen." Initially concerned with fostering understanding of the role of the judicial branch, Justice O'Connor founded the online educational program "Our Courts." But she soon became convinced that misunderstanding of all branches of government runs deep, and that many Americans don't understand fundamental principles of our democracy. So in 2009 she expanded the online program to teach about all aspects of our government, and renamed it "iCivics." Today, the iCivics website (www.icivics.org) hosts 16 educational video games and interactive teaching materials that have been used in classrooms in all 50 states and reached over two million students.

Justice O'Connor was disappointed that the rain and wind storm kept her from meeting with the 2,000 students who had prepared for her visit for weeks. But she was undaunted. "I love Alaska," she said at the reception, "so I hope you will invite me back." Justice Walter Carpeneti responded quickly: "You can come to for our Bar Convention next year in Juneau," he said, "where it almost never rains."

Singing the Alaska Flag song at the Dena'ina reception were Shawn Campbell, Mears Middle School music teacher; and Bar members Cindy Ducey, Moira Smith and Jim Powell.

Supreme Court Justice Sandra Day O'Connor (ret) was scheduled to spend the morning of her visit playing iCivics games with the students in the Computer Lab at Central Middle School and speaking to an all-school assembly. When the event was canceled because of the Anchorage wind storm, she spoke instead at an impromptu event in the Supreme Court Courtroom of the Boney Courthouse. Here, Central Middle School Social Studies Department Chair Rick Bivins, who helped coordinate her visit, meets Justice O'Connor at the Alaska Supreme Court with Chief Justice Dana Fabe, L, and Justice Walter Carpeneti, R, Alaska's iCivics Chair.

Photos by Barbara Hood and Vasco Vea

It's a family affair at the reception: Alaska Commissioner of Education Michael Hanley (L) and Anchorage District Judge Pat Hanley with their mother, former legislator Alyce Hanley.

Vic Fischer, one of the three surviving delegates from Alaska's Constitutional Convention in 1955-56, greets Justice O'Connor at the reception in her honor. L-R: Justice O'Connor, Chief Justice Dana Fabe, Fischer, and Justice Walter Carpeneti.

Justice O'Connor shares a moment with Fairbanks attorney Charlie Cole, one of her Stanford Law School classmates, during the reception in her honor at the Dena'ina Civic and Convention Center.

A tax or not a tax? That is the question

By Kevin Clarkson

Most everyone, me included, was surprised by the United States Supreme Court's decision in National Federation of Independent Business v. Sebelius, the National Health Care or "Obama Care" decision. Some were surprised by the conclusion the Court reached. Those who anticipated the Act's survival were nonetheless surprised by the cast of Court Members who voted for that result. Virtually everyone anticipated the Court to split in the case along ideological lines. No one ever dreamed of a Court majority that would consist of Roberts, Ginsburg, Breyer, Sotomayor and Kagan, let alone a dissent that would be joined by Kennedy. But, wonders never cease.

My goal herein is not to debate, critique, or support the Court's decision. Those tasks would take more time and pages than I have available to me at this juncture in this venue. I choose a more practical task. I'd like to simply explain the Court's reasoning for those who have not dared to crack open the Decision's daunting 193 pages. If you have not yet so dared, I can't blame you. It requires almost one-half a ream of paper to print the Court's opinions. But, the heft of the opinion seems only fitting given that the Act itself contains 10 titles stretching over 900 pages consisting of hundreds of provisions. And, what can I say but "forgive me," because this article will run a tad over the *Bar Rag's* normal word limit.

Background

Congress passed the Patient Protection and Affordable Care Act in 2010 for the declared purpose of increasing the number of Americans covered by health insurance and to decrease the cost of health care. The Act requires most Americans to maintain "minimum essential" health insurance coverage. This is referred to as the "Individual Mandate." Basically, those who are not exempt (prisoners and undocumented aliens) and who do not receive health insurance through an employer or government program, must either purchase insurance from a private company or make a "[s]hared responsibility payment" to the Federal Government. This payment, which the Act refers to as a "penalty," is paid to the IRS along with a person's income taxes and is intended to encourage people to buy health insurance.

The Act also expands the scope of the Medicaid program and increases the number of individuals that States must cover. The Act requires that by 2014 state programs provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level. Many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. Under the Act, if a State does not comply with the new Medicaid coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.

There were five basic questions of law raised in the case, the first one statutory and the latter four constitutional. The questions were as follows. Did the Anti-Injunction Act, which provides that people may only challenge a tax in court after they have paid it, by suing for a refund, bar the Plaintiffs' lawsuit challenging the Act? Did Congress have the constitutional authority to pass the Act, under the Commerce Clause, the Necessary and Proper Clause, or pursuant to its Taxing power? And, was the Medicaid expansion, which threatened States with the termination of other federal grants as a means of pressuring their participation in the Medicare expansion, a constitutional exercise of Congress's spending power?

It's not a tax

The Anti-Injunction Act protects the Government's ability to collect a consistent stream of revenue by barring litigation to enjoin the collection of taxes. Taxes can generally only be challenged after they are paid by suing for a refund. And, thus you see the issue. If the Individual Mandate, not first due until 2014, is a tax under the Anti-Injunction Act then the Plaintiffs' action challenging the Act was barred.

But, the Anti-Injunction Act applies only to suits seeking to restrain the assessment or collection of "*any tax*." The Court concluded it did not apply to this case because, as The Chief Justice noted, Congress "chose to describe the '[s]hared responsibility payment . . . not as a 'tax,' but as a 'penalty.'" Put simply, the Anti-Injunction Act was inapplicable because it applies to "any tax" and does not apply to a "penalty." Congress labeled the Individual Mandate a "penalty" while at the same time applying the "tax" label to other provisions of the Law. Assuming Congress knew and intended the different labels to mean different things, the Individual Mandate is not a "tax" for purposes of statutory construction. Because the Anti-Injunction Act and the Health Care Act are both creatures of Congress's own design, how they relate to each other is up to Congress. If Congress wanted to use a label to differentiate the "penalty" of the "Individual Mandate" from the "taxes" covered by the Anti-Injunction Act, then that was Congress's prerogative

Congress's power

It is never a given that Congress has power to enact a law. The National Government possesses only limited powers; the States and the people retain the remainder. The Federal Government is "one of enumerated powers." The Constitution does not empower the Federal Government to perform all the conceivable functions of government. Instead it lists, or enumerates, its powers. For example, Congress may "coin Money," "establish Post Offices," and "raise and support Armies." The enumeration of powers is also a limitation of powers. "The enumeration presupposes something not enumerated." As The Chief points out, "the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government." Alexander Hamilton wrote in Federalist No. 84 that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." Powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" are held by governments more local and more accountable than a distant federal bureaucracy.

The act does not regulate commerce

The health care market is "commerce" and it does have a cost-shifting problem. Everyone eventually needs health care, but if they do not have insurance they may not be able to pay for it. Hospitals are required to provide certain care to individuals without regard to payment. Thus, hospitals are compensated for only a portion of their services. To recoup, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Arguably, the Act regulates commerce by requiring individuals to purchase health insurance, thus preventing cost-shifting by those who would otherwise go without. Also, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average are higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the Act requires them to accept.

Congress has the power to regulate commerce among the several states. Does this enumerated power include the authority to pass the Act? True, Congress's commerce power is broad. The power extends to activities that "have a substantial effect on interstate commerce." The power also extends to activities that effect interstate commerce only when aggregated with similar activities of others. But until the Act, Congress had never attempted to rely on its commerce power to compel individuals not engaged in commerce to purchase an unwanted product. The power to regulate commerce, The Chief explained, presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous.

The individual mandate does not regulate commercial activity. Instead, it compels individuals to become active in commerce by purchasing a product. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and vast domain of congressional authority. If the commerce power encompassed the Individual Mandate, then Congress could, for example, address the Nation's poor diet problem by ordering everyone to buy vegetables. That everyone will one day need health care is immaterial. Congress cannot regulate potential, future health care that has not taken place just because it will someday. Congress is not allowed to anticipate commercial activity in order to regulate individuals not currently engaged in commerce.

Not necessary and proper

Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. Thus, Congress can enact laws "incidental to" an enumerated power, and "conducive to its beneficial exercise." But, the Necessary and Proper Clause does not license the exercise of "substantive and independent power[s]" beyond those enumerated. In other words, because the commerce power does not authorize the Act, neither does the Necessary and Proper Clause.

It's a tax

Congress has the power to "lay and collect Taxes." Under the mandate, if an individual does not maintain health insurance, the consequence is that he must make a payment to the IRS. Thus, if the shared responsibility payment is a tax then Congress has the power to create the Act. But, didn't the Court already conclude that the payment was a "penalty" and not a "tax"? Cue the subtle distinction between statutory construction and constitutional application. While the "penalty" label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power.

"[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." In the land of constitutional application, the question is not whether an interpretation is most natural, but only whether it is a "fairly possible" one. In the land of statutory construction and application by contrast, it is up to Congress whether to apply the Anti-Injunction Act to any other particular statute. So, the Court was guided by Congress's choice of label on that question. That legislative choice does not, however, control whether an exaction is within Congress's constitutional power to tax. Thus, the Court analyzed the constitutional question separately and under a different and more deferential standard, one favoring constitutionality. This distinction is nothing new. The Court has previously held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax.

The shared responsibility payment looks and acts like a tax, so regardless of the statutory label it is a tax under the Constitution. For most Americans the amount of the payment due will be far less than the price of insurance, and it can never be more. The individual mandate contains no scienter requirement as would a "penalty," and the IRS is not allowed to use criminal prosecution to enforce it. The payment is collected solely by the IRS through the normal means of taxation. Taxes that seek to influence conduct are not new. Early federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. In distinguishing penalties from taxes under the Constitution, the Court has said that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. The Act attaches no negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.

Spending power

Congress may use its spending power to grant federal funds to the States, and may condition the grant upon the States' "taking certain actions that Congress could not require them to take." But, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." Congress may use its spending power to create incentives for States to act in certain ways. But when "pressure turns into compulsion the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." When conditions take the form of threats to terminate other significant independent grants,

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TALES FROM THE INTERIOR

Oy vey, I'm Jewish! Pass the pink roast beef, please

By William Satterberg

Ever since the Pilgrims landed on Plymouth Rock, America has grown with the influx of foreigners of all races, creeds, religions, and styles. Some people brag that they can trace their roots back to the Mayflower. Others simply claim their right to blue blood from various local families in Fairbanks, which is not really that impressive, since there were once many working women in Fairbanks, later to become respectable through marriage to not-so-respectable men.

I have never had such luck. My father was half-English and half-Swedish. He carried the name of Satterberg. I once asked my father where the name Satterberg originated. He gave me some evasive answer about a large mountain in Sweden. Still, Dad proudly used to impress upon me that the "berg" in Satterberg was Swedish, and not German or Jewish. When I pointed out that Swedes had a reputation of being non-combatants, Dad usually dropped the subject. The English side of my father never really surfaced, except in his cooking.

Mom, on the other hand, was 100% Romanian. Mom's family had emigrated from a small border town in Romania, Santa Maria, to the American midwest. As proof, Mom spoke fluent Romanian, and our childhood visits to the midwest reinforced the fact that we were Romanians. Everybody was short, fat, and bald, a trait which I later developed, as well.

For years, I identified as a Swede. I ignored my English side. I also ignored the Romanian side. Besides, because Romania was communist, there was not much to brag about. In fact, the only thing that Romania ever really had going for it was that Count Vladimir Draculuti, a.k.a Count Dracula, had staked his claim in his fellow citizens.

However, when the Romanians underwent their recent revolution, executing both President Ceauşescu and his wife on Christmas Day, their cultural stock went up in my mind. It showed a certain amount of barbarism which, as a lawyer, I really appreciated.

Mom always emphasized that she was raised Catholic, but had later converted to Presbyterianism. For me, Catholic was easier to spell, but Mom was adamant that she was a Presbyterian, so Presbyterian we were. Personally, I was more of a Protestant in the true sense of the word, continually protesting going to church.

When I entered law school, I attended Syracuse University for two of my three years. My second year was spent at Notre Dame University, an openly Catholic school. Syracuse, on the other hand, was known as the "poor man's Cornell." But, contrary to Cornell, Syracuse Law School also had a large Jewish component, with many welcomed benefactors.

" I once asked my father where the name Satterberg originated. He gave me some evasive answer about a large mountain in Sweden."

The day that I arrived at Syracuse, I immediately fell in love with the place. It was a warm day, and all of the girls from Long Island were wearing short-shorts and tank tops. For a country boy from Alaska, Syracuse was the place for me.

What I did not know was that I was not part of "the Faith." I later was to learn that almost all of the cute girls from Long Island were Jewish. There was an unwritten code that good Jewish girls should not date non-Jewish boys, referred to as *goyas*. I learned the hard way.

The lesson came during a first date at a delicatessen. After all, with a name like Satterberg, certain assumptions were made. The exchange was positive until my target innocently asked me, "Are you going to Temple tomorrow?" I responded that I was unaware that there was a football game. In fact, Syracuse was not playing Temple for two weeks. The girl gave me a confused look for a second, followed by an expression of shock. Clearly, she realized that she had been dating a *goya*. Excusing herself, she left to never return. After an hour, I realized that the date was over. I consoled myself by ordering a ham sandwich.

My first year roommate, Hal, was kosher. I learned a lot from him regarding Jewish tradition. Fortunately, Hal was not 100% kosher, and would eat off the same silverware as myself. At dinner, Hal would often lecture me about following the tenets of his faith. As such, I felt safe leaving him with my girlfriend that summer. When I returned in the fall, however, I learned that Hal had undergone a conversion. Both Hal and my *goya* girlfriend soon got married. So much for tradition and tenets.

As the years passed, I became more and more intrigued with Judaism. As a good Jewish Fairbanks lawyer friend, Jason Weiner, once explained, "Judaism is a practical faith, Bill. Many of the dietary restrictions are established out of concern for one's health." Still, I could never understand the funny beanie thing. I also grew to enjoy Jewish comedians. In many respects, I reasoned that I would have actually made a rather good Jew, if not in the strict sense.

All of that changed in 2012.

I was at a pig roast for a friend. It was not really a party. In fact, it was a wake, since my friend was dead. But it had all the attitudes of a good party, since the friend was Irish.

Over dinner, I commented to a friend of mine, Richard, that I was Romanian. I boasted that my family claimed in its lineage the great Count Dracula. It was at that point Richard corrected me, pointing out that he was "100%" Romanian. Moreover, Richard was certain that his line was the ancestry of the infamous Count Dracula. This debate continued until Richard pulled out an iPhone and accessed the Internet. The history of Richard's clan soon became apparent. Richard was correct. Richard's family, which even had its own snooty coat of arms, had preceded Count Draculuti by over a century, and was even famous in its own right for also impaling the heads of its enemies upon sharpened wooden stakes. I immediately gained a newfound respect for Richard. After all, I was in the presence of Romanian royalty. As I bowed reverently, Richard then asked for my mother's maiden name. I responded "Sipos." Richard next entered Mom's name into his now clearly defective iPhone.

It was then that I had an awakening. In seconds, my presuppositions over my lineage were dashed on the rocks due to some Wikipedia information.

"Sipos", according to the Internet, was not Romanian at all. Rather, Sipos was a Hungarian name.

I thought back on the fact that the background of the Sipos name as being Hungarian could have been possible. After all, my mother's parents had immigrated to the United States shortly after World War I. At that time, the Hungarians were not a favored nationality in Europe, having been the genesis of the Great War. Furthermore, Santa Maria was a border village. Borders shift in times of war. As such, it was plausible that Mom's parents may have called themselves Romanian when arriving on Ellis Island to avoid delicate political issues. I also recalled that, on a previous trip to Hungary, I had met a Hungarian family named Sipos. Fortunately, I still enjoyed a modicum of royalty, since the Hungarian Sipos was the respected short, fat, and bald mayor of his little village. Perhaps my lineage did not rise to the level of Count Dracula, but it was something.

Had the Internet stopped at that point, I might have been able to handle the shock of my change in nationality. But the education was not over. The second hit came when the Internet disclosed that the Sipos clan was a small splinter group of "Hungarian Jewish musicians." I immediately began to gag on the piece of pulled pork that I was gnawing upon. I recalled all the years that I had failed to recognize my Jewish tradition, and of all the bacon that I had eaten. And, I thought of all the nice, Long Island girls that I could have dated at Syracuse.

I remembered on one conversation which I had had with mom, when she had told both myself and my sister that "Remember, Julie, Billy, there was a thirteenth lost tribe of Israel. Perhaps you are it." I suddenly realized that Mom's admonishment was more than something simply said in passing. Rather, Mom was gently preparing us to accept our Jewish faith, which had been hidden so long, along with our Hungarian ancestry. Most likely, I was also a gypsy.

The next day, I contacted a good friend of mine, Judy Kleinfeld, the wife of Ninth Circuit Judge Andy Kleinfeld. I told Judy that I was Jewish. Judy giggled happily, and said something about "*l'chaim*." Although I did not understand the meaning, someone later told me that at least it was not an insult. I also later spoke with Andy, who disclosed to me that my Jewish heritage now explained why I was "such a good lawyer." Until then, I had never viewed legal abilities as being hereditary, but I was not going to argue with a federal judge.

I next contacted Jason Weiner. I announced that I was Jewish. Jason also laughed and said that he would give me "a Jewish starter kit." Jason went on to complain that he was no longer the "Farthest North Practicing Jewish Lawyer" since my office was north of his in Fairbanks. Jason next asked if I needed to be circumcised, apparently willing to volunteer his time and skills. Although I did not know what comprised a starter kit, I concluded it likely included a little beanie like a Mickey Mouse hat sans the ears, a list of dietary restrictions, and a book of jokes. But I had my limits. I firmly told Jason that circumcision was out unless it had already been done without my consent.

I am now over the age of 60. As a grandfather, my days of chasing the little cutie pies is over. I am also coming to grips with my own mortality and what legacies, if any, I will leave behind. Given the latest revelation, however, I am now having to restructure my personal and religious philosophies. Fortunately, I believe that I am still capable of handling complex personal issues. It is just that now I have so much guilt in everything I do. Still, perhaps I should quit complaining so much. But complaining also is in our culture, Jason reminds me.

(Author's note: This article has been read and approved for publication as Semetically acceptable by Jason as being somewhat politically correct, especially considering the author.)

A tax or not a tax?

Continued from page 26

the conditions are properly viewed as an improper means of pressuring the States to accept policy changes.

This all makes sense, or, why did he do it?

If you focus upon the fine distinction between statutory construction and constitutional application then you can appreciate the idea that the Individual Mandate is "not a tax" while still "being a tax." If not, well then you can join thousands of other pondering souls asking, "Why did Chief Justice Roberts do it?"

I can of course add no more than my own speculation. But, I favor this theory. You need read only a little about The Chief in order to learn that he is a respecter of the institution of the Court. Like Justice Harlan who resisted any rapid and wholesale overruling of decisions during the Warren Era despite having been an avid dissenter for 15 years, The Chief is perhaps very concerned about the apparent politicization of the Court.

After Justice Blackmun joined the Court, Harlan resisted taking the immediate opportunity to outright overrule Miranda or to rethink the "exclusionary rule," law with which he thoroughly disagreed, out of his respect for "*stare decisis*" and his concern for the reputation of the Court. Overruling years of precedent simply because the membership of the Court had changed would make the Court look like a mere machine of politics. Chief Justice Roberts perhaps resisted the political pressure to overturn a law simply because it was championed by Democrats, and because having the Court do so along straight ideological lines would have made the Court look just a tad too political for his taste.

Federal telecommunications regulatory reform devastates Alaska telephone companies

By Shannon M. Heim and Elizabeth Gray Nuñez

When federal agencies undertake substantial regulatory reform, it often evokes a strong reaction in the affected industry. This is especially true for the Federal Communications Commission's ("FCC") recent reforms of telecommunications policy. On November 18, 2011, the FCC issued the *Transformation Order*, a comprehensive rulemaking introducing dramatic changes to one of the longest-standing communications policies in our nation's history: the guarantee that every American deserves access to telephone service. (1) This guarantee is known as "universal service."

For more than 50 years, voice telephone service for areas where providing service is not profitable has been explicitly subsidized, with the goal of ensuring that all Americans pay reasonable rates for phone service that are "comparable to urban areas."(2) These subsidies are known as "high-cost support," which has historically been drawn from the "Universal Service Fund." The *Transformation Order* fundamentally shifted the focus of high-cost support from traditional voice networks to networks capable of providing both broadband internet and voice services.(3) Carriers are now required by law to provide not only voice services, but also broadband services. For Alaska, a market dominated by very high cost-to-serve areas spread over a vast terrain, this transition in high cost support threatens to leave rural telephone companies without adequate support to maintain their existing voice networks, let alone upgrade network infrastructure to provide the dynamic broadband services envisioned by the FCC.

The federal law guaranteeing support for telephone service in high-cost areas requires this support to be "sufficient, predictable and specific." (4) Over the last decades, Alaska carriers have used those high cost funds to provide service in areas where extreme climate, geography and a lack of roads would price basic telephone out of reach for virtually all consumers.(5) Until the *Transformation Order*, incumbent telecommunications carriers received funding from the Universal Service Fund based on their actual costs of providing service. In 2011, Alaska received approximately $219 million in high cost support, the highest in the nation. It is impossible to understate the necessity of this funding to ensuring continued telecommunications in Alaska.

The reforms enacted by the FCC abolished the Universal Service Fund, replacing it with the Connect America Fund, and also established a Mobility Fund to support wireless service and a Remote Areas Fund to support the very highest-cost areas. However, these new funding sources no longer provide the core support to maintain rural networks, and high-cost support is expected to continue its downward spiral in the coming years.(6)

The *Transformation Order* imposes a nationwide cost model on Alaska carriers to determine whether or not a carrier's costs are valid. The cost model fails to capture the unique costs of doing business in Alaska and the substantial logistical challenges faced by Alaskan carriers. As a result, the support expected from those models falls far short of the actual cost of constructing and maintaining telecommunications networks in Alaska.

The *Transformation Order* also fails to provide Alaska carriers with adequate recovery of their costs for their ongoing investments to build out telecommunications networks in Alaska. Carriers and their lenders, including the USDA's Rural Utility Service, relied on the promise of sustained federal funding to secure loans to build networks to connect Remote Alaska. The *Transformation Order*'s new funding structure is not sufficiently reliable for these carriers to service existing debt or maintain the networks they have already built, especially in light of the new obligations to provide broadband.

Carriers in Alaska have strong last mile networks that connect customers to their phone company, but lack adequate middle mile facilities that connect the phone company to the national internet facility. Under the new reforms, for carriers to receive any high cost support for their telecommunications networks, they must provide broadband service at an upload speed of 4 megabytes per second and a download speed of 1 megabyte per second. Urban areas of Alaska like Anchorage can already fulfill this requirement. Even some more rural locations with microwave middle mile facilities can meet the requirements.

Unfortunately, many portions of Alaska depend on satellite connections to provide the middle mile between the customer and the necessary internet facility. Those connections are very expensive and too slow to provide service anywhere near the level required by the FCC or demanded by customers. There is an exception for those areas to continue support to the carrier, but the FCC has not made any plan to construct the needed facilities to avoid the problem of satellite. Until this middle mile problem is confronted, there is little likelihood that rural and remote Alaskans will benefit from the increased prioritization of broadband. The new broadband obligation prematurely requires Alaska carriers to provide "dessert," when they are still working hard to serve their customers the "main course" in the form of voice service.

Though the *Transformation Order* provides a waiver process for its reforms, it makes the process to obtain an exception considerably more difficult. Carriers seeking a waiver must demonstrate that they are likely to cease providing basic telephone service to qualify for a waiver. Several Alaska carriers, including Adak Eagle Enterprise and Windy City Cellular, have requested this relief, but other than limited, interim assistance, the FCC has done little to alter its course.

The stakes of this regulatory overhaul are incredibly high for Alaska carriers and consumers. Many of the funding mechanisms created by the FCC have not been fully articulated or implemented. The current regulatory environment is rife with uncertainty. Virtually all Alaska carriers, regulators and legislators have been providing the FCC with comments and feedback on the complex details of the *Transformation Order's* reforms, emphasizing the potentially devastating results of some of the current financial models. Alaska businesses and consumers should monitor the future of these discussions, for their outcome will have a significant impact on life and business in Alaska.

Notes

(1) See Connect America Fund, WC Docket No. 10-90, A National Broadband Plan for our Future, Docket No. 09-51, et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*Transformation Order*").

(2) 47 U.S.C. § 254.

(3) *See Transformation Order.*

(4) 47 U.S.C. § 254.

(5) Alaska Congressional Delegation Letter to FCC Chairman Julius Genachowski, July 2, 2012.

(6) *See Transformation Order.*

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