The Alaska BAR RAG

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Dignitas, semper dignitas

'Irrepressible Alaskans' court swing vote at 9th Circuit conference

By Brewster Jamieson

The Ninth Circuit Judicial Conference, held this year August 15-18 near Carlsbad, California, was a gathering of a remarkable top-down collection of jurists from the largest Federal Circuit in the nation. By statute, each circuit holds its conference annually "for the purpose of considering the business of the courts and advising means of improving the administration of justice within the circuit." 28 U.S.C. §333. This is a serious purpose, and the program reflected it. As a new Lawyer Representative, it was an opportunity to hear some truly bright lights of the bar and bench examine thorny and timely issues facing, or soon to be facing, our nation's courts.

For reasons on display at The Ninth Circuit Judicial Conference, the judicial branch deserves its position at the top of public perception of our national government. Faith in the legislative branch is nearly non-existent, and at record lows—it has degenerated in public perception due to abuse, money and intentions both good and bad. Few believe it retains the ability to turn this perception around. Much the same for the executive branch, which in recent decades has rarely enjoyed more than tepid popular support. Our faith in these two governing branches, it seems, is going or has gone missing.

With its principal actors chosen by the other two branches, but appointed for life and functioning independently, our federal judiciary was well designed by the founders as a counter-balance to the other branches. But there is more to it than just the design—it takes good craftsmen, artists even, to fulfill the promise of good design.

Justice Anthony Kennedy explored this notion in his remarks at the opening of the Conference. Comparing great Anglo-American jurists to the great artists they resemble, he revealed their defining characteristics. Marshall, Holmes, Cardozo, Black, Douglas and others—these were all legal artists, whose brush strokes—from the bold, sweeping and obvious to the detailed, realistic and subtle—painted the canvas of our judiciary that we see today.

But Justice Kennedy's remarks demonstrated more: he is a jurist who knows history well, and the singular importance of Federal courts to our nation. And he surely understands his own singular position—the fifth vote in most every close case—as the most powerful jurist of our time. The source of his power, and essence of his artistry, is a light touch. His medium is water color, and his choice of color is never garish. He decries the use of adverbs in legal prose, with one very notable exception from 1803 penned by Chief Justice John Marshall in *Marbury v Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."

As a fitting bookend to Justice Kennedy's fond treatment of the best of the Supreme Court's history, Justice Ruth Bader Ginsberg treated the conference to her rendition of a 19th Century jurist in a reenactment of *Bradwell v. Illinois*, a decision which denied a qualified woman admission to the bar, and which is to women's rights what the *Dred Scott* case was to civil rights. Justice Ginsberg "grilled" the advocate for Bradwell, sniffing "You argue that she is a person. The courts accepts the premise. But so are children."

Those who attended our Bar Convention a couple of years ago will remember her "interview" by our own Justice Dana Fabe, during which Justice Ginsberg recounted her own remarkable rise in a profession that was all but closed to women, no matter how talented. That she retains a sense of humor about this low water mark in American jurisprudence

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LONG LIVE 'FREE' SPEECH — page 6

American Bar rebuffs changes to citizenship clause

By Margaret D. Stock

Since the ratification of the 14th Amendment in 1868, being born in the USA has meant US citizenship as well—but some now want to change that Constitutional guarantee. If they succeed, all babies born in America in the future will pay the price—and a new American caste system will be created. The American Bar Association (ABA) took up the birthright citizenship issue at its Annual Meeting this past August; the meeting featured a showcase panel on which I was privileged to participate. Following the panel, the ABA House of Delegates also adopted ABA Resolution 303, which upholds the traditional understanding of birthright citizenship.

The Declaration of Independence famously asserted that "all men are created equal," but this assertion did not become a Constitutional reality until the Fourteenth Amendment was ratified. The Fourteenth Amendment's Citizenship Clause—intended to overturn the infamous US Supreme Court Dred Scott decision[1]—states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Traditionally, the Clause has been interpreted to confer US citizenship on anyone born "subject to the jurisdiction"—which has meant that only babies born in the United States to diplomats, invading armies, or within certain sovereign tribes[2] have been excluded from American citizenship.[3] Alarmed by the thought that undocumented immigrants, wealthy tourists, and temporary workers are giving birth to thousands of US citizens, some are attempting to change the longstanding rule by introducing legislation that would reinterpret or amend the Citizenship Clause.

Such challenges to the traditional understanding have taken several different approaches, proposing either Congressional legislation, a Constitutional Amendment, or State legislation to bring back the concept of "State citizenship" so as to create a two-tier caste system that would distinguish between babies born in the US with citizenship, and babies born in the US who do not hold US citizenship.

In line with the first approach, some have argued that changing the Citizenship Clause requires no Constitutional Amendment because Congress can change the Fourteenth Amendment's meaning by passing a statute that "clarifies" that "subject to the jurisdiction" means "subject to the complete or full jurisdiction." Such a "reinterpretation" would work to deprive babies of US citizenship if their parents do not hold certain specified lawful immigration statuses, on the theory that those parents are not subject to the "complete" jurisdiction of the United States because they hold

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PRESIDENT'S COLUMN

Picking up the pro bono ball

By Donald W. McClintock

On the occasion of the recent announcement that the Alaska Pro Bono Project is closing its doors, I would like to ask what we, as a profession and as individuals, can do to improve access to civil justice. Although we have institutionalized principles of access to criminal justice, we have not articulated a comparable Gideon right to counsel to civil matters, even those affecting fundamental human rights, other than cases involving termination or limitations on parental rights and advocacy for the incompetent.

The World Justice Project, http://worldjusticeproject.org/rule-of-law-index, presents an intriguing perspective on where the United States stands on various measures of the rule of law, including access to justice. Using expert interviews and statistically based polling techniques, the Project's goal is to quantify each country's adherence to the rule of law. Metrics of measurement include access to civil justice, as well as limited government powers, absence of corruption, publicized and stable laws, order and security, fundamental rights, open government, regulatory enforcement, and effective criminal justice.

The United States ranks relatively high when compared to all 35 nations measured in the 2010 survey, but near the bottom when compared to other countries in our high income cohort. Our highest ranking, third, was in open government, and should be contrasted to our bottom ranking for access to civil justice, 11th out of the 11 high income nations. We were behind Sweden, South Korea, Japan and Australia among others. And a few nations in lower income cohorts ranked just below us in access to justice, including Poland (13th), Turkey (14th) and Columbia (15th). Civil access to justice measured perceptions of affordability, cultural competence and effective, timely, and impartial justice. Accessibility measured not just access to representation, but the general awareness of remedies and the absence of barriers to dispute resolution systems. So clearly, others provide better access to civil justice and yet others are close behind with far fewer social resources.

"This is a national as well as a local issue."

The Anchorage Bar Association Young Lawyers Section has garnered national recognition for their community efforts and contributions to pro bono practice.

This is a national as well as a local issue. The American Bar Association has made access to justice a national priority. Although Alaska has been spared the worst of the Great Recession's impact on the legal system, many states have dramatically reduced funding for their court systems. Closed courts, restricted hours, and unfilled judicial seats all negatively affect the cost and effectiveness of adjudication. Although the Legal Services Corporation reported in 2010 that 57 million Americans qualify for its services, the funding and even the existence of the LSC is under steady pressure.

What are we doing to improve access to civil justice in Alaska? The good news is that Alaska starts with real strengths when one looks at the framework of effective state measures to improve access to justice initiatives as articulated by the ABA Access to Justice Support Project. http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html I encourage each of you to look at the following efforts in our state to see how you can best contribute.

Our court system has historically provided leadership for access to justice initiatives. Justice Daniel Winfree chairs the Alaska court's Access to Civil Justice Committee. The committee provides both continuity and a resource to investigate and support new initiatives. Our justices have historically advocated for new initiatives to improve the effectiveness of and accessibility to our courts. That leadership is part of a broader partnership among the courts, the bar and legal aid providers. Martin Luther King Day is but the most visible recent manifestation of that collaboration. Future collaborations with law schools who may locate intern programs in Alaska under our intern practice rules are now under discussion.

The Anchorage Bar Association Young Lawyers Section has garnered national recognition for their community efforts and contributions to pro bono practice. It is proving to be an incubator for future leadership on access to justice initiatives. Contact Leslie Need and Elizabeth Apostola if you want to help.

Prior Boards have institutionalized the Bar's commitment to access

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EDITOR'S COLUMN

Hope, change, and promise in "The Broken Age"

By Gregory S. Fisher

It often seems as if nothing works anymore. Commentators are beginning to refer to this as "The Broken Age"—an era where no one can or will agree on anything. The Alaska Legislature convenes a million dollar special session and achieves . . . nothing. Congress fritters away a summer, endlessly wrangling over the debt ceiling, and secures little but the promise of future rancor. Several state and local governments are facing monumental budget crises. The economy is uncertain. Debt simmers. Unemployment remains above 9% with no hope that it will soon change. We are bogged down in Afghanistan. Our bridges and roads are falling apart. Healthcare costs are out of control. Illegal immigration cannot be checked. Pick any foreign or domestic issue and the odds are fairly good that it's in the ditch.

How did it come to all of this?

To some extent, there's much wisdom in those who comment we're seeing nothing different. It's all more of the same. We are not far removed from the 1995 governmental shutdown. People forget "Black Monday" (October 19, 1987) or the double-dip recession of 1981-82. There is not one decade that has not faced its Rubicon issues. Those who think that state-federal relations could not be worse forget that Arizona dispatched its "navy" (a converted ferry named the "Nellie Jo") to halt construction of the Parker Dam in 1934. FDR pounded his desk. Arizona's Governor Mouer doubled-down and deployed the state National Guard armed with machine guns along the banks of the Colorado River. Fists shook. Threats roared. Then everyone sat down and figured out how to make it work. Our grand and great-grandparents knew how to fight.

"For whatever reason, it sometimes appears as if we've lost that uniquely American outlook that mixed opportunity with pragmatic calculation. Everything is just too damn shrill anymore."

The fact of the matter is that our system is designed to be a little broken. It's always been broken. Inefficiency is our national genius. Decisions are slowly and poorly made. We awaken late and groggy to an issue. Coffee is brewed, committees appointed. White papers are written. Disagreements bubble. We chart a safe middle ground, sort of the "let Mikey do it" solution to policy crafting. We get there, eventually, wherever "there" may happen to be, but not with any sense of compelling urgency. In the process we avoid drastic, unstable lurches left or right. We are fated, as Ben Franklin observed, to float along on our own leaky raft. We never really sink, but we don't progress far or fast. It's worked pretty well. The alternative is a well-oiled society marching on Paris. Who needs that?

But, still, doesn't it seem as if things are leakier now than ever before? Somewhere along the way we stopped talking. Everyone began adopting militant "no compromise" positions. If I'm "right," well, you must be "wrong." And if you're "wrong," why are we talking? It's anyone's guess how or when that came to pass. It might be that technology coupled with the ever-shrinking news cycle stoked the furnace. Or maybe it was the post-Watergate reforms that emptied the smoke-filled rooms where deals were struck. Perhaps it's the explosion of media outlets that shelter extreme views on the left and right. For whatever reason, it sometimes appears as if we've lost that uniquely American outlook that mixed opportunity with pragmatic calculation. Everything is just too damn shrill anymore.

How lucky we are for this profession, and for this profession in this state. Law teaches compromise. Nothing is ever ironclad. Risk attends our decisions. Compromise seems equal parts respect, risk, cost, and communication. We have to be able to talk to each other. We don't have to like each other, but unless we are complete fools we have to respect the fact that an educated professional colleague is stating a position that could well be correct. The cost of proving ourselves right could well exceed any gain. The risk of trying to prove ourselves right, and losing, should give us pause. And if our position is that strong, or someone

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The Alaska BAR RAG

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January-March	Feb. 10
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July - September	Aug. 10
October - December	Nov. 10

Board of Governors meeting dates
September 8 & 9, 2011
(Thursday & Friday)
October 27 & 28, 2011
(Thursday & Friday: July Bar Exam results & budget)
January 26 & 27, 2012
(Thursday & Friday)
April 30 & May 1, 2012
(Monday & Tuesday)
May 2 – 4, 2012
(Wed. - Friday: Annual Convention)
(Annual Convention – Anchorage)

Territorial lawyers gather -- pages 14-15.

21 Territorial lawyers, spouses and widows pose for their 2011 photo. Present and accounted for in 2011 were: Back row (L to R) are Barry Jackson, Dan Cuddy, Joy Burr, Don Burr, June Robison; Lucy Groh, Verona Gentry, Betty Arnett; Russ Arnett, Jan Wilson, Mildred Opland, and Della Barry Colver. Front row (L to R) , are Charles Tulin, James Fisher, Charles Cole, John Hughes, Shirley Lewis, Priscilla Thorsness, Judge Jim Von der Heydt, Verna Von der Heydt, and Bob Opland. Not pictured but present were George Hayes and Carolyn Rader.

Pro Bono Project

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to justice issues by funding our pro bono director position; Krista Scully clearly plays a major role in coordinating the efforts of this broader coalition. That would not be possible but for the willingness of our members to support this effort with your dues. I know many of you respond to her calls. Krista also helps publicize our accomplishments.

Open communication and cooperation with our institutional partners remains an on-going goal.

The benefit of an enhanced perception of our profession is no small collateral benefit; certainly, the Anchorage Bucs management's favorable reception of the July pro bono event means this can be an annual event for those who feel a need to leaven the practice of law with a little baseball.

The Access to Justice Support Project does outline other goals we must continually reinforce. Each member of our court, bar and provider coalition must keep its own constituency committed to this effort. This article is one small manifestation of the Alaska Bar Association's desire to institutionalize access to justice projects as a vital component of our mission as a bar association. Open communication and cooperation with our institutional partners remains an on-going goal. It is important in speaking to our policy makers and our client communities that we speak with a common and supportive voice and we can only do that effectively if we continue our collaboration with an open dialogue.

The ABA's national Pro Bono Celebration event is the week of October 23-29, 2011. Think about what you can do to improve access to justice. It can be the one brick at a time approach: take on a pro bono client. Apropos of the demise of the Alaska Pro Bono Project, support and volunteer for its former program the Volunteer Lawyer in the Courtroom project at the Anchorage court system by contacting fellow bar member Katherine Alteneder. It is a great program with proven effectiveness where you can limit your time commitment to a day in the courts advising pro se litigants in a settlement setting with other volunteer counsel advising the adverse party.

You can be a leader. You can contact your friend who happens to be in the legislature and ensure that public funding for legal service providers is strengthened. Or think about what new programs we can initiate to improve access to justice. Access to justice does not have to mean free access; it can also mean affordable justice. Think about ways we can deliver services more efficiently or effectively. Regardless of whether you help one person at a time or whether you think of an initiative like MLK Day that reaches out to hundreds of people, our profession and our community are only strengthened by your efforts. Access to civil justice is one component of the strength of the rule of law in our country; let us do our part.

Letters to the Editor

Please know that our 14th AnnualTerritorial Bar Dinner went off without a hitch on June 10, 2011 and it was seemingly enjoyed by many "older lawyers and judges," quite a few of whom seemed to really relish the reunion, however brief, with their fellow barristers. As I see the joy in their faces each time it does reinforce the knowledge that it has to continue to happen somehow each year. If they can continue to come in their walkers and wheelchairs we have to somehow continue to make it happen.

There is absolutely no way that we could do it without your gracious offerings of assistance and the invaluable help given by your staff. For so many years Kathryn Hovey was so obliging with getting the invitations out and keeping account of the widows list and this year I have been delighted that Amy Curkendall has stepped up to the plate and provided the same thoughtful assistance to make this another successful endeavor.

We are indebted to all of you,as well as to Barbara Hood as the best and nicest photographer ever and this year Sally Suddock of the *Bar Rag* offered her talents to our group again! They made each and every attendant there feel special.

On behalf of each of us,"old folks" I repeat again that we could not do it without you! We could not!

Thank you and God bless you all from all of the volunteers trying to put this on each year. On behalf of all,especially Jim & Judy Powell,current chairs, Betty & Russ Arnett, chairs for 12 years, Leroy Barker, Priscilla Thorsness, Helen Williams,Ghislaine Cremo,and many many others, I sign as,

— Lucy Groh,widow of Cliff Groh,Sr.
(also the proud mom of Cliff Groh, III)

Hope, change, and promise in "The Broken Age"

Continued from page 2

else's that weak, we ought to be able to figure out a way to discuss those subjects with each other. Each of us, somehow, recognizes these concepts in our respective practices.

However, I'm not sure that it's solely the profession that promotes consensus. I think it's more a sense of community. In Fairbanks, where I cut my teeth trying cases in the early 1990s, I had some knockdown drag out fights with Mike Stepovich, Bill Satterberg, Ken Covell, Robert John, and others, but the minute we walked out the courtroom door it was over. We didn't have to be friends, but we all recognized and respected our different roles. Even here in Anchorage our Bar is relatively small. The odds are pretty good that on my weekend bike around the city's trails I will cross paths with some members of the Bench or Bar. By comparison, things are quite different in Arizona where I am also admitted and practice. I can't tell you how many lawyers or superior court judges are based in Maricopa County. But I can tell you that anonymity breeds a sort of professional disregard. If we are across the table from each other at a deposition, or arguing a motion in court, it may be the first and last time we encounter each other. The judge may never have seen us before and may never see us again.

Perhaps then it is a sense of a shared community—shared risks or shared benefits—that gets people rowing together in one direction. Whether it's to secure some benefit or avoid some catastrophe, we work together because it's in our self-interest. Alaska validates that premise. By any historical or social model, we ought to be a state embroiled in civil strife. We have competing and conflicting industries. We are culturally and ethnically diverse. We are a boom and bust economy. Our weather is extreme. But leaving all of that aside, and even with all of our problems, we are solvent. We have an unmatched potential for growth and sound, prudent development. The fights over AGIA, ACES, ASAP, Pebble, or other state issues obscure a more promising reality. We're fighting over a pie that doesn't lack for ingredients. It just needs to be baked. Maybe most importantly, we're a people friendly state at our best. A week or two ago my wife and I were walking our dogs on Sand Lake when a woman stopped her truck to warn us of a moose browsing in the alder at the bottom of the hill. That's how we are.

America is little different. That should give us hope that we are heading for a far more promising future than presently understood. We have huge problems. We always will. But we have greater potential. Congress represents the American people, but does not reflect who and what we are. American business tempered by a lightly regulated economy has always shown an ability to grow, adapt, and evolve. It's debatable whether we can tax or spend (or tax and spend) our way to a sounder economic foundation. But we can work our way there. And left to our own devices, Americans know how to work and share risks for a common good. It's not because we're good (although I think fundamentally we are). It's not because we're bad. It's because we're a community. We're in this together. We'll weather through it all. "The Broken Age" may yet prove to be our best era.

FEDERAL PROBE

What about Ben?

By Cliff Groh

Judging by what has happened in court, Ben Stevens might argue that he was an honest man wrongly dragged into the Last Frontier's public corruption scandals.

After all, the man who only a half dozen years ago seemed set to be the next Alaska Governor or U.S. Senator was the only state legislator in 2006 whose offices were searched by the FBI who did NOT become either a criminal defendant or a cooperating witness.

But you have to wonder.

Accounts of the actions of Ben Stevens in the seafood industry as a consultant, lobbyist, investor, and member of a federally funded non-profit board while his father Ted was in the U.S. Senate read like textbooks on conflict of interest. While continuing to deny wrongdoing, Ben Stevens was by his own account under investigation by four federal agencies in 2007.

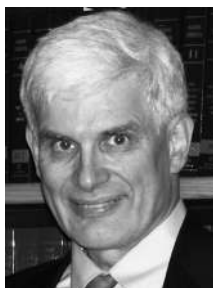
More pointedly, two executives of the now-defunct oil-services giant VECO testified under oath in 2007 that they had pleaded guilty to bribing Ben Stevens. Those VECO executives—Bill Allen and Rick Smith—agreed with federal prosecutors that the $243,250 in consulting fees that the Anchorage Republican lawmaker reported receiving from VECO through a private company he owned while he served in the State Senate was actually for "giving advice, lobbying colleagues, and taking official acts in matters before the legislature."

Yet the eight-year-old federal investigation into Alaska public corruption has not produced a charge against Ben Stevens, and I will eat my baseball cap if he is prosecuted in that probe. [UPDATE: Several hours after this column was submitted to the *Alaska Bar Rag*, the *Anchorage Daily News* reported on its website that the Department of Justice has advised former Alaska State Senate President Ben Stevens that the ex-lawmaker will not face charges in the federal investigation into public corruption in the 49th State.]

Why didn't that dog bark?

We must clear substantial underbrush in answering this question. Understand that nothing in this analysis is based on inside information from decision-makers within the federal government. Recognize that nothing written here is intended to accuse anyone of committing a crime. Ignore the controversy stirred by Ben Stevens getting more than $715,000 for three years of part-time work as chief executive of the 2001 Special Olympics World Winter Games. Set aside any surprise over the fact that he served four years on the Select Committee on Legislative Ethics.

Let's skip any sense of regret or schadenfreude about this obviously intelligent and hard-working man's meteoric career in business and public office, folks, and just focus as lawyers on how Ben Stevens escaped criminal charges.



"Let's skip any sense of regret or schadenfreude about this obviously intelligent and hard-working man's meteoric career in business and public office, folks, and just focus as lawyers on how Ben Stevens escaped criminal charges."

It is not enough to whistle the Creedence Clearwater Revival song lyric "I ain't no senator's son." Whatever protection (as well as career promotion) was afforded by having Ted Stevens as a father seemed to be over by 2008, when the iconic U.S. Senator got charged in a case that generated guilty verdicts on seven felonies before imploding less than six months later.

Nor does it work to suggest—as some observers have—that Ben Stevens made his own deal with the feds to give him immunity from prosecution. It's not just that no evidence exists of such an agreement—there appears to be nothing that the former Anchorage Republican lawmaker ever gave the Justice Department to make such a deal plausible.

No, Ben Stevens' avoidance of prosecution in the "POLAR PEN" probe seems to stem from a combination of luck, prudence, and hiding in plain sight.

Ben Stevens caught a big break when the Justice Department did not include him in the first wave of defendants charged in May of 2007 with crimes associated with VECO executives' corruption of state legislators over oil-tax legislation debated the previous year. This omission might have been caused in part by the feds seeing the potential prosecution of Ben Stevens as a bargaining chip they could play later in the negotiations with his father.

...time did not turn out to be kind to the federal investigation into Alaska public corruption.

Yet time did not turn out to be kind to the federal investigation into Alaska public corruption. The feds charged Ted Stevens without charging Ben Stevens, and the probe's fortunes soured quickly after the jury returned guilty verdicts against Ted Stevens in October of 2008. The Ted Stevens prosecution collapsed in April of 2009 in the wake of revelations of failures to provide discovery, putting the government employees best informed about "POLAR PEN" under investigation themselves. Additional disclosures have dented the credibility of Allen and Smith, two of the prosecution's key witnesses in previous trials. Last year's U.S. Supreme Court decision in *Skilling v. U.S.* sharply pruned the scope of the honest services fraud statute, a favorite weapon wielded by federal prosecutors in public corruption cases that was used against half of the 12 defendants charged in the "POLAR PEN" probe.

The prosecutors might well have perceived additional problems with charging Ben Stevens even back when the feds were flying high in 2007, however. The combination of what appears to be his relative invisibility on incriminating tapes and his extensive financial disclosures may have saved him.

Ben Stevens received almost a quarter of a million dollars in fees from VECO while he was in the State Senate and also took positions as a legislator on oil taxes that VECO wanted him to take, but those facts do not by themselves constitute a crime. What was going on in Ben Stevens' mind is where the action is in prosecuting him, as it often is in public corruption cases. (That's also true in the broader category of white-collar crime cases, like that of his father.)

Prosecutors have found that the best way to show that a defendant in a public corruption case has criminal intent is by playing tapes that show him saying and/or doing things that make him look guilty. All the defendants that juries have returned guilty verdicts against in the Alaska public corruption cases have had damaging tapes of them played in front of the jury.

Tapes tend to trump other evidence. As one former federal prosecutor observed, the government attorneys in the "POLAR PEN" cases sometimes seemed primed merely to walk into court and push "PLAY," and the feds might have thought they didn't have enough incriminating tapes on Ben Stevens to go forward.

Unlike other legislators convicted in the probe, Ben Stevens might not have frequented the infamous VECO-rented Suite 604 in Juneau's Baranof Hotel that the FBI bugged to such effect. Whether this conduct flows from a sensible desire to stay away from that "Animal House" atmosphere or from the family needs of a father of four, Ben Stevens' apparent lack of a starring role in the FBI's greatest hits has served him well.

Aside from whatever the more than 17,000 conversations the feds intercepted in the "POLAR PEN" probe may show about Ben Stevens, there is another problem the feds have in prosecuting him on offenses involving either VECO or fisheries. That problem is the fact that the former State Senator apparently disclosed all the income he collected for consulting and/or lobbying that he was legally required to disclose. You might think his conduct was unseemly and unsavory, but it's likely that Ben Stevens would say that he is just a hard-working businessman who laid bare his income as the law required, both when he served as a federal lobbyist and later when he served as a state legislator.

As to all that money from VECO that came in to the legislator when his work product may look minimal or even non-existent, Ben Stevens might well say that he thought he was on retainer—a retainer that allowed Bill Allen to call Ben Stevens about work for VECO anytime 24 hours a day, seven days a week. Ben Stevens might add that it was not his problem that Allen seemed to call him so infrequently to work on matters such as advice on salvaging vessels.

Observers might point to the $983,807.66 in fees that Ben Stevens reported receiving for business services and/or management services from VECO and fishing interests alone during the five full calendar years he served as a legislator in comparison to the relatively small

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FEDERAL PROBE

What about Ben?

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amounts involved in the cases that sent other lawmakers to prison. The sheer amount of money, however, is not all that matters.

A common thread in the cases against the state legislators convicted at trial in the "POLAR PEN" probe was what juries saw as clumsy attempts to conceal benefits: a bogus flooring invoice submitted by former Rep. Pete Kott (R.-Eagle River); a request to hide help on a credit card balance by former Rep. Vic Kohring (R.-Wasilla); a phony Website in the case of former Rep. Tom Anderson (R.-Anchorage). The contemporaneous cover-ups helped the juries find the guilty intent. (Reversals on appeal of the convictions of Kott and Kohring have led to re-trials being scheduled for late this year.)

With Ben Stevens, on the other hand, there appeared to be no subterfuge—all the income seems to have been reported. Although paper trails are often seen as trouble, a particular kind of paper trail—one shorn of detailed descriptions of tasks performed or time spent working—appears to have helped keep Ben Stevens out of trouble. The system could not handle that hiding in plain sight.

You might think that the story of Ben Stevens is a prime Alaska example of the maxim of columnist Michael Kinsley to the effect that the real scandal is not what's illegal—it's what's legal.

You might think that the story of Ben Stevens is a prime Alaska example of the maxim of columnist Michael Kinsley to the effect that the real scandal is not what's illegal—it's what's legal. You might also think that not prosecuting Ben Stevens after getting Allen and Smith to plead guilty to bribing him might pose a particular public relations problem for the Department of Justice, but such a result would be neither illegal nor unprecedented. One well-known irony that involved verdicts by juries rather than the exercise of prosecutorial discretion comes from the notorious Teapot Dome scandal of the 1920s. Albert Fall was convicted for taking a bribe from oilman Edward Doheny while serving as Secretary of Interior, but Doheny was acquitted of the charge of bribing Fall.

Cliff Groh is a lifelong Alaskan who has worked as a prosecutor and represented some criminal defendants in his private practice. He is a lawyer and writer in Anchorage whose law practice focuses on the writing and revision of briefs and motions. Disclosures potentially relevant to his writings about the Alaska public corruption probe can be found at http://alaskacorruption.blogspot.com/2011/05/even-more-updated-biography-with-still.html on the Internet. Conversations with numerous people—including Anchorage lawyers Mark Regan and George Freeman—have sharpened the author's thinking on this column's subject.

Courthouse naming committee seeks recommendations by Oct. 1

Following a resolution approved at the Alaska Bar Association annual convention and other recommendations by Alaska members of the Bar to name a federal courthouse after Judge James Fitzgerald, U.S. Sen. Mark Begich has formed a committee to explore the process. Anchorage attorney Lloyd Miller will chair the committee, which will provide recommendations to the Senate delegatiion by Oct. 1.

The committe is charged with researching the issue of naming federal courthouse facilities in Alaska in honor of some of the distinguished judges or other Alaskans who have served the state and to provide recommendations to the congressional delegation.

Other committee members appointed include U.S. District Court Magistrate John Roberts, Juneau Mayor and former Alaska Attorney General Bruce Botelho, and Liz Medicine Crow of the First Alaskans Institute. Begich said he and Sen. Lisa Murkowski have discussed the issue and are willing to pursue it, but given the complexity "and numerous recommendations" for individuals to honor, they decided to form a committee to obtain recommendations. Sen. Murkowski was expected to name additional members.

The committe is charged with researching the issue of naming federal courthouse facilities in Alaska in honor of some of the distinguished judges or other Alaskans who have served the state and to provide recommendations to the congressional delegation.

Begich said he appointed the committee after receiving a number of recommendations for naming federal court facilities in the state, an action which requires congressional approval. "Since none of Alaska's federal courthouses are currently named for anyone, the committee has been asked to provide advice on whether courthouse facilities should be named at all, and if so, for whom they should be named," Begich said in a press release.

The committee has also been asked to consider whether courthouses should be left unnamed for future generations to address. Finally, the committee has been asked to consider whether to name courthouses for historic figures who did not serve as judges, such as civil rights leaders.

Begich asked the committee to consult with Alaska historians, the Bar Association, and General Services Admibnistration on the issue and invited citizens with recommendations to contact Miller at Lloyd@sonosky.net.

Alaska has federal court facilities in Anchorage, Fairbanks, Juneau and Nome. Judge Fitgerald passed awy in April.

FREESPEECH

Long live free speech

By Kevin Clarkson

"The invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."

James Madison, letter to Thomas Jefferson, October 17, 1788

The idea of limiting corporate influence and curtailing the potency of big dollars in elections has been a popular notion over the past two decades, and more. Congress, state legislatures, and citizen initiative groups have sought to enact legislative measures designed to "level the playing field" among candidates running for public office and to "prevent corruption and the appearance of corruption" in elections by eliminating the risk of "quid pro quo" conduct by elected officials. For the longest time this movement skirted along the finer edges of the First Amendment, but recently it has run headlong into the Free Speech Clause's prohibitions.

In two landmark decisions in the last two years the United States Supreme Court has struck down legislative attempts to regulate free speech in the context of elections and campaigns. In January, 2010 in *Citizens United v. FEC*, the Court struck down limitations that had been placed on corporate and union funding of independent political speech in candidate elections. After Citizens United, governments could no longer place financial limitations on independent political speech simply because it occurred in the context of an election, and this was true regardless of whether the speech directly advocated for or against a candidate for office.

Then, just a few weeks ago in June, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennet*, the Court struck down an Arizona citizen's initiative that provided additional money to candidates who funded their campaigns with public financing "in direct response to the campaign activities of privately funded candidates and independent expenditure groups." In Arizona Free Enterprise the Court held that neither a state's attempt to "level the playing field" or to "prevent corruption and the appearance of corruption" in elections was sufficient to justify the burdens that the Arizona law placed on free speech. A total of six states had adopted matching fund laws that were effectively struck down by Arizona Free Enterprise.

In order to understand the issues raised and decided in these cases one needs to know the lay of the land. So, let's start there. In *Buckley v. Valeo* the Supreme Court emphasized that discussions of public issues and debate on the qualifications of candidates are integral to the operation of our system of government. Thus, as the Court explained in *Eu v. San Francisco County Democratic Central Comm.*, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

Under these guiding principles, the Court has upheld some campaign finance and expenditure laws and struck down others. The Court struck down restrictions on campaign expenditures (Buckley), restraints on independent expenditures applied to advocacy groups (*FEC v. Mass. Citizens for Life*), limits on uncoordinated political party expenditures (*Colorado Republican Fed. Campaign Comm. v. FEC*), and regulations barring unions, nonprofit and other associations, and corporations from making independent expenditures for electioneering communication (Citizens United). However, after finding that other "less onerous" restrictions were "closely drawn" to serve a "sufficiently important interest," the Court upheld them. The latter has included limits on contributions to candidates (Buckley), caps on coordinated party expenditures (Colorado Republican), and requirements that political funding sources disclose their identities (Citizens United).

The distinction between which restrictions are struck down and which are upheld is a fine one, not to mention controversial, but still a distinction that is identifiable and understandable. It is simply not permissible for government to limit the ability of an individual or entity to vigorously and robustly exercise the right to use their own funds to finance their own independent campaign or political speech. Likewise, it is not permissible to force a candidate to choose between the First Amendment right to engage in unfettered political speech on the one hand, and subjection to discriminatory fund-raising limitations on the other hand (*Davis v. FEC and Arizona Free Enterprise*).

"In my view, free speech is always good. Government does not have a legitimate interest in trying to level the playing field of free speech."

The law that was stricken in Davis was the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002. The flaw in the "Millionaire's Amendment" was that it effectively penalized a candidate who spent his own funds (or too much of his own funds) in his own campaign. Under this law if a candidate for federal office spent more than a certain amount of personal funds, then an asymmetrical regulatory scheme came into play whereby the opponent of that candidate was permitted to collect individual contributions up to three times the normal contribution limit. But, at the same time that the higher limit went into play for the opponent, the candidate spending personal funds remained subject to the old lower contribution limit. The Court held that the Millionaire's Amendment violated the First Amendment because it pressured a candidate into refraining from robust speech in his campaign – the impermissible pressure was imposed because if he spent too much of his personal funds speaking he would give his opponent a substantial fundraising advantage.

The matching fund laws suffered from the same form of defect. Under the law in Arizona, candidates could choose to receive public funding for their campaign. Eligibility to receive public funding hinged on the collection of a specified number of five-dollar contributions, and the acceptance of certain restrictions and obligations. Meeting these initial conditions, candidates for public office were given an initial outlay of public funds for their campaigns. But, under certain circumstances the publicly funded candidates would receive additional outlays of "matching funds" designed to "equalize" the election.

Matching public funds were triggered "dollar-for-dollar" whenever a privately funded candidate's expenditures, combined with the expenditures of independent groups, exceeded the state allotment of public funds. A private candidate's personal expenditures were counted in this equation as were expenditures by independent groups, either for the privately funded candidate or against the publicly funded candidate(s). If there were more than one publicly funded opponent, then whenever the privately funded candidate spent more or received the benefit of independent spending, the state would give and equal amount to each publicly funded opponent. Thus, in a three-way race if a privately funded candidate spent $1,000 above the amount of the initial public outlay, then both of his publicly funded candidates would receive about a $1,000 check from the state (about $2,000 total). And, worse yet, if an independent group spent $1,000 against one of the publicly funded candidates then the two publicly funded candidates would again receive about a $1,000 check while the privately funded candidate received nothing, whether the independent group's actions helped or hurt his campaign.

The pressure that the matching fund law placed on privately funded candidates to not spend their own funds in speaking their message was as plain as it was with the Millionaire's Amendment in Davis. But, the pressure that the matching fund laws placed on independent groups to refrain from speaking or to modify their message was even greater. Independent groups did not have the option of taking public funding and once the spending cap was reached, an independent expenditure group that wanted to support a particular candidate – because of the candidate's stand on the issue of concern to the group – could only avoid triggering matching funds by (1) changing its message from electioneering into issue advocacy; or (2) refraining from speaking altogether. It was restraints on free independent electioneering that the Court struck down last year in Citizen's United.

From Citizens united to Arizona Free Enterprise the message from the Court is plain, a "beggar thy neighbor" approach to free speech – "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others" – is "wholly foreign to the First Amendment." Government may not attempt to increase the potency of the speech of some at the expense of the speech of others. And, government cannot force a speaker into the position of speaking only at the expense of helping to disseminate hostile views. As Judge Bea of the Ninth Circuit likened it, the law was equivalent to a Casino forcing a poker player to make a bet knowing that if he does the house will match the bet for his opponent. Forcing or pressuring candidates to switch from private financing to public financing lessens the overall amount of speech, it does not increase it.

These landmark decisions have split the Court on predictable ideological lines: Chief Justice Roberts together with Justices Scalia, Thomas and Alito on one side, and Justices Ginsberg, Breyer, Kagan and Sotomayor on the other side, with Justice Kennedy casting the swing vote. For my part, I'm with the majority. In my view, free speech is always good. Government does not have a legitimate interest in trying to level the playing field of free speech. The First Amendment guarantees all people an equal opportunity to speak their message, it does not guarantee each person an equal ability to speak their message. The First Amendment guarantees the opportunity for the "unfettered exchange of ideas," not whatever the State may view as a fair exchange of ideas. I agree with Thomas Jefferson:

"I would rather be exposed to the inconveniences attending too much liberty, than those attending too small a degree of it." Statement to Archibald Stuart, Philadelphia, December 23, 1791 (Cited in Jerry Holmes, Thomas Jefferson: A Chronology of His Thoughts, Rowman & Littlefield. p. 128).

Challenges on the horizon in the admissibility of computer 'testimony'

By Adam W. Cook

In June the Supreme Court narrowly skirted a problem straight out of science fiction. The case was *State v. Bullcoming*, an otherwise typical DWI prosecution. Police in Framington, New Mexico determined that the defendant drove with a blood alcohol content of 0.21gms/100ml, well over the legal limit of 0.08. Like almost every local law enforcement office in the country, the Farmington Police determine the BAC using computer analysis of the defendant's breath. The gas chromatograph machine measures the composition of the sample and gives the technician a report indicating BAC. The defendant sought suppression of the chromatograph results because the computer-generated analysis was "a written accusation." The defendant argued that he had not been given proper opportunity under the Sixth Amendment to cross-examine the machine which had accused him.

The New Mexico Supreme Court held that chromatograph results were "raw data" that had been interpreted by a laboratory technician. The Court concluded that the technician, not the machine, was the "true accuser." The machine was merely an exhibit. "A defendant cannot cross-examine an exhibit."

The U.S. Supreme Court agreed, building on its 2009 decision in *Melendez Diaz v. Massachusetts,* in which it first ruled that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, was "testimonial" for Confrontation Clause purposes. The Court in Melendez Diaz held that a defendant's Sixth Amendment rights were not violated so long as the prosecution produced a live witness to testify to the truth of the report's statements. The Bullcoming decision took the issue a bit further, holding that if an analyst is called to give such testimony he or she must be the same analyst who certified the report, unless the certifying analyst is unavailable to testify and the accused had an opportunity, pretrial, to cross-examine that particular scientist. What *Bullcoming* didn't address is a more provocative question: at what point is the lab technician not the accuser but merely an observer of the accuser's actions?

But when does a machine become an "accuser in the eyes of the law?"

Where Artificial Intelligence is Headed

At first glance, the idea of a wholly autonomous machine making an accusation seems absurd. But it may be closer than we think. Anyone who has watched the game show *Jeopardy!* lately knows that computer technology that can imitate human reasoning is developing at impressive speeds. *Jeopardy!* contestant "Watson" is a computer designed by IBM. Acting like an internet search engine, Watson sorts through hordes of data to quickly arrive at answers to trivia. It then responds, like a human, to the question presented. The fact that it bested two of *Jeapordy!'s* winningest competitors put people on notice of the breathtaking advance of computer science and the emergence of "artificial intelligence."

Watson is just the tip of the iceberg. Researchers at Aberystwyth University in Wales have created a computer that can conduct its own scientific research independently. "Adam" makes observations in the field of organic chemistry and develops hypotheses. It then tests these hypotheses in experiments and arrives at findings—all on its own. Rather than simply helping in the research process, the computer is acting as a scientist.

The introduction of this technology into criminal forensic work is all but inevitable. In Sir Arthur Conan Doyle's short story *The Sign of Four*, Sherlock Holmes, perhaps the greatest fictitious detective of all time, states that the three qualities present in an ideal detective are "general knowledge, observation, and power of deduction." A computer is potentially capable of all three with astonishing speed and accuracy.

Computers and Personhood

But when does a machine become an "accuser" in the eyes of the law? Article Six of the Federal Rule of Evidence states that "any person" is competent to testify in a criminal proceeding so long as the person has personal knowledge of the matter he or she is testifying on. The Rule leaves "person" undefined. The Texas Court of Appeals has ruled that a breath analysis machine is not "a person" and thus cannot be treated as a declarant. The court stated that the analysis is not a declaration even though it is "the result of a computer's internal operations." The Tenth Circuit Court of Appeals similarly rejected an argument that a computer-generated header on a webpage containing pornographic images was hearsay, concluding the computer was "not a person." The Fourth Circuit Court of Appeals, ruling that only a *person* can be a declarant making a statement, held that "nothing said by a machine is hearsay."

Researchers at Aberystwyth University in Wales have created a computer that can conduct its own scientific research independently.

Achieving "personhood" is a high bar. Although films such as the 1982 futuristic thriller *Bladerunner* envision machines identical to human beings, that doesn't mean they are coming anytime soon. Still, a machine thinking and acting just like a human is not outside the realm of possibility. A team of researchers in Lausanne, Switzerland are attempting to construct a computer version of the human brain. Project Blue Brain seeks to reverse-engineer the anatomy of the brain into a neural network composed of "neurons" in the form of millions of computer chips. The researchers have already had some success constructing a part of the human neocortex, which is thought to be the part of the brain responsible for thought and consciousness. They expect to have a complete and functioning "brain" in 10 years.

The Accusing Computer

Such a device would present at least two obvious challenges to the current Federal Rules of Evidence. First, as noted above, such a machine would presumably be "self-diagnosing." The whole point of *Bullcoming* is that someone must testify that they have diagnosed the accuracy of the machine prior to its use. Artificial intelligence capable of describing its own functions cuts the operator out of the picture. Second, such a machine could be cross-examined. Although the examination may be written rather than oral, the accused would still have the opportunity to question the declarant. These challenges, and many others, will probably have to be addressed by rules committees on the state and federal level at some point. For now, at least one such committee, working for the Court of Appeals of Maryland, has decided that the existing rules "accommodate computer-generated evidence."

Finally, there is a more unsettling question. Will a jury of peers really decide a person's fate based on the testimony of a machine? One answer is that they already do. Jurors accept that a properly maintained gas chromatograph can analyze evidence for the purpose of incriminating someone. Another answer is that it depends on the presentation. A robotic witness in the style of the *Terminator* movies is unlikely to engender a lot of sympathy. Simple text on a computer screen might be more persuasive.

The need to answer such questions is, thankfully, a ways off. Despite the exponential improvements in computer technology over the last 50 years, developing actual cognitive machines presents problems that will take years to overcome. In the meantime, criminal defendants, and their lawyers, are safe from what could be a formidable competition.

This article was originally published in the Summer 2011 edition of SideBAR, the newsletter of the Federal Litigation Section of the Federal Bar Association.

In Memoriam

Andrew E. Hoge

Aug. 7, 1938 - May 6, 2011

I was very fortunate to have been able to practice law for approximately 40 years with Andrew E. Hoge. When I arrived in Alaska in November of 1967 to join the law firm of Robison, McCaskey, Strachan & Hoge, Andy was already a member of the law firm. In 1975, Andy and I left that firm and co-founded the law firm of Hoge, Lekisch, Cardwell, Marcus, & Lawrence, which became Hoge & Lekisch. When I retired in December of 2000, Hoge & Lekisch merged with another firm to become Hartig, Rhodes, Hoge & Lekisch.

Andy was a very skilled attorney, but I will remember him more as a good person. Whether you were a client, an attorney, a secretary, or a bookkeeper, Andy listened to you, treated you with respect, and gave you advice that had a sense of his idea of fairness. His clients and colleagues sought his advice because of this good judgment and integrity. I went to him often for his advice on legal and personal matters.

Andy loved the practice of law. His legal expertise was in the fields of public utilities and administrative law, having been Alaska's first Alaska Public Utilities Commission attorney before entering private practice. He was a past chairman of the Administrative Law Committee of the Alaska Bar Association and a frequent speaker at seminars of the Alaska Bar Association.

There was always a balance in Andy's life. He did not let his love of the law supersede his family obligations. He always made time to help his children with their studies and to attend their baseball, basketball or soccer games. He was good husband and father.

Andy, my friend, we will miss you.

— *Peter Lekisch*

FAMILY LAW

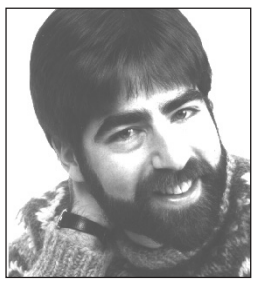
25 years: A substantial change of circumstances

By Steven Pradell

Shortly after I was admitted to practice law in Alaska in 1986, I looked at pictures in the *Bar Rag* of members who practiced 25 years in this state and thought about all of those old people who had been here forever. Now, this summer, it was my turn to be listed there. I'm one of the old guys. I have my pin to prove it.

Looking back over the past quarter century, a lot has changed since then. I remember when pleading paper was legal sized. Today the files are shorter but thicker. As a young associate, I spent much of my time researching and writing briefs in the law library. Today I rarely have to go there. Instead, the Internet has replaced the need for having a large library and hundreds of Pacific Reporters.

I had a case not too long ago where an older lawyer provided my office with the "green copy." I've never used carbon copies of pleadings, other than certain court issued forms. This means someone had to use a typewriter to type a normal pleading in triplicate. In college and law school, I typed papers on a manual typewriter and had to retype a page if there were any substantial edits to be made other than a few typos. My first computer, a Macintosh, was an amazing tool because I could cut and paste copy and save a draft. As a young attorney, I dictated everything and had a secretary who used a Wang computer as a word processor. Today I don't dictate anything, spend most of my time on the computer and have an old electric typewriter in the back room primarily to fill in forms. Many court forms are now available online to be printed and typed in the office on the computer.



"It is hard to leave the practice when clients can find a way to communicate 24/7. The office is never really closed."

Things have changed. Clients have many ways to reach their lawyers. There are still papers that appear by fax, mail and hand delivery, and phone calls to be answered. But now we can also be emailed, texted, cell phoned, Skyped or Facebooked. The pace of the practice of law has increased.

Family lawyers have had to adjust to reflect these changes. There is a sense of immediacy when e-mails describe emergencies, and the smart phone in your pocket dings daily to remind you that there is a client with an urgent matter knocking at your door. It is hard to leave the practice when clients can find a way to communicate 24/7. The office is never really closed.

Twenty-five years ago we did not discuss "unbundled legal services." The normal fee agreement was that lawyers were retained and appearances filed. Some judges did not initially favor lawyers helping *pro se* parties. Today the court system is relieved when such parties receive direction from the Family Law Self Help Center or an attorney who drafts appropriate pleadings. There is even a new section of the bar just for unbundled legal practitioners. Their day has come. There are a large number of unrepresented parties. Clients are demanding services that are parceled out and paid for by the job, and do not believe that they require representation.

The settlement process itself has undergone revisions. Alternate Dispute Resolution (ADR) is encouraged and more resources are available to get the job done. Superior Court judges, their schedules overfull with large caseloads, are working out ways to resolve cases and encourage parties to explore resolution rather than litigation, including initial conferences to discuss alternatives, and judges have become more available to work with parties to resolve matters. There is a group of lawyers who practice "collaborative law" such that everyone agrees that the lawyers must withdraw if settlement does not occur.

Alaska is a young state and there has been an unprecedented opportunity over the past 25 years for attorneys to make a great impact in defining and refining our laws. Unlike older and more populated states, Alaska has issues that are still open for interpretation. Everything has not been done before.

While many of the basic property and debt division principals of married couples are still etched in stone, new cases and statutes have come along to address changing relationships, such as cohabiting couples and legal separation issues. Due to changes in the economy, parties are not necessarily fighting over who gets the house, but deciding how to get rid of it, or trying to require that the other party takes an asset which may be worth less than the initial sales price.

Custody laws were radically revised to reflect the more modern view that parents with histories of domestic violence should not be entitled to custody without first addressing their underlying issues. Substance abuse and treatment plans are given more attention at present than they were in the days when more things were left unsaid.

Privacy concerns prompted the court to require that social security numbers be redacted, due to identity theft issues.

What will happen over the course of the next 25 years? How will the practice of law change in that time period? For those new to our bar, what will you remember when your picture is in the *Bar Rag*? And where do you want to be after 25 years of practice?

THE KIRK FILES

Occasions, persuasions clutter your mind

By Kenneth Kirk

BEGIN REQUESTED PORTION OF TRANSCRIPT

Judge: We're on record. Both counsel are present. Are there any housekeeping matters before we begin?

Mr. Jefferson: I do have one concern, your honor. I filed a motion for reconsideration last week, and it hasn't been ruled on.

Judge: I have read it, and I'm denying the motion. I think my original ruling was quite clear.

Mr. Jefferson: But I don't see how you can apply religious law in a secular courtroom, your honor. It violates the establishment of religion clause....

Judge: Counselor, as I explained, I was guided by that Florida circuit court decision, the Islamic Education Center of Tampa case, in which the court felt bound to apply the Koran to determine whether the parties had followed Islamic law regarding arbitration. In this case, both sides agreed, in your... what did you call the charter again?

Mr. Smithers: It's called the "Shared Idea of Love".

Judge: We'll just refer to it as the charter. Both sides agreed that your religion's principles would be applied to any dispute. So, if the Florida court has to follow Sharia Law because the parties in that case agreed to follow Islamic principles, then I'm going to have to follow this religion's principles in deciding this dispute.

Mr. Jefferson: But your honor, this is not a settled religion like Islam. The Life of the New Reality movement only started 10 years ago....

Mr. Smithers: 15! Fifteen years from the revelation to Brother Amazement Vision.

Mr. Jefferson: Well, 10 years from when he got anybody else to follow him. How can your honor apply the law of a religion that doesn't have settled principles?

Judge: I assume, counselor, that your witnesses will explain these principles to me in their testimony. This case won't be easy, and I admit I have my reservations, but I don't see how I can treat Islam one way, and this movement another way. And again, everybody involved in this dispute signed that charter. If they didn't want a secular judge to decide these disputes, they should have put something different in their charter.

Mr. Jefferson: And the problem with that, your honor, is that... I want to be sensitive in how I say this... my clients believe the Shared Idea of Love was handed down from the universal spirit to Brother Vision, so it's sort of a... they don't use this term, but basically Holy Writ.

"If they didn't want a secular judge to decide these disputes, they should have put something different in their charter."

Judge: Well, divinely handed down or not, I have to decide this case according to the principles the parties agreed to.

Mr. Jefferson: But nobody actually expected this to happen. It was always assumed that Brother Vision, as a great mediator between the physical and the spiritual, would resolve any issues.

Judge: I know, and then he died in that tragic water-skiing accident. I have ruled on this issue, counselor. Any other housekeeping matters?

Mr. Smithers: Yes, judge, there was that one request our side made.

Judge: I am not burning incense in the courtroom.

Mr. Smithers: But it is an essential part of any decision-making process in our belief system.

Judge: It could set off the smoke alarms, and then the other judges would kill me. Opening argument for plaintiffs?

Mr. Smithers: I've already filed my trial brief, so I'll just let you know who I'm calling. Sister Freedom Kindness will start by giving some of the background of the Life of the New Reality movement, beginning with the old testament and then moving to....

Judge: Whoa, hold on. The Old Testament? I didn't think their religion looked back that far.

Mr. Smithers: Not the old testament you're thinking of, your honor. Sorry, I should have been more clear. They refer to '2001: A Space Odyssey' as the old testament.

Judge: I suppose I'll have to rent that tonight.

Mr. Smithers: But only the original film, your honor. The special features commentaries on the DVD versions are not considered canonical. Anyway, after that I'll have Brother Wistful Happiness explain the revelation that came to Brother Amazement Vision, and the subsequent promulgation of the Shared Idea of Love. Brother Joy Ecstatic will then bring it up to date with the practices of the movement in the last 10 years, and then the dispute following Brother Vision's death.

Judge: Will he explain to me how water-skiing fits into all this?

Mr. Smithers: It really doesn't, your honor. It's rather an embarrassment to the movement. Brother Vision was a former water-skiing fanatic. He let the temptations of the flesh overcome him, with horrible consequences.

Mr. Jefferson: And that's where we disagree.

Judge: Please don't interrupt, counselor.

Mr. Smithers: He's right, though, judge. The people on his side of the dispute believe that Brother Vision was trying to show them a new way, to declare that water sports, with all of its motors and noise and lack of serenity, is perfectly acceptable. And our side takes the position that he was just imperfect and let himself succumb to temptation.

Judge: So this is about water sports? Why don't you just split in half, and the ones who like water sports go one way, and the ones who don't go another way?

Mr. Jefferson: The Beloved Place of Serenity, which is a retreat belonging to the movement, is on a really nice lake for boating.

Mr. Smithers: And then there's the matter of a $5 million life insurance policy on Brother Vision, left to the movement. Both sides are in litigation with his ex-wife over that, but we're bound to get most of it.

Judge: Got it. Any other witnesses?

Mr. Smithers: Just Amazement Vision Jr., who will explain his views on the dispute.

Judge: Defendant's counsel, any witnesses?

Mr. Jefferson: Quite a few, actually. Do we have tomorrow available on your calendar?

Judge: No, I'm starting a criminal trial then. We can use what we have today, but it'll probably be January before we can finish this hearing. Uh... why are you both looking at each other like that?

Mr. Jefferson: Your honor, neither side believes we'll still be here then.

Judge: Where is everybody moving?

Mr. Smithers: Not moving, your honor. We don't believe we'll be on this Earth. Do you have any openings before December 21?

Judge: This is going to be a long day.

TRANSCRIPT ENDED TO COMPLY WITH BAR RAG WRITERS GUIDELINES

Editorial Submission Guidelines
Writing for the Bar Rag?

Articles

- Preferred length 5 pages double-spaced, or 2-3 pages single spaced.
- Formatted ("save as") in Word 97 or XP .doc file format or .rtf (rich text) or .txt (plain text).
- Avoid sending in PDF format.
- Avoid submitting article in the body of an e-mail. (ie. include Word or text document as an attachment.)
- Ideally, name the file with author's name & topic. (Examples: JohnDoe_litigation.doc or JohnDoe_column.doc)
- Include suggested headline (if you have one) and author name at top of article.

Photos via e-mail

- Use high-resolution .jpg files.
- "Save as" or name the file(s) with relevant topic. (Examples: JohnDoe1.jpg or summer_picnic.jpg).
- When submitting multiple photos, include photo captions as a separate Word file attachment, labeling each caption with the photo-file's name.

Hard copy photo prints

- Include sticky note on back of photo(s) with people-identifications and/or topic caption.
- Include information for returning the photo.

Comments invited on rules, bylaws changes

Should prosecutor disclose new evidence?

The Board of Governors invites member comments regarding the following proposed amendments to Alaska Rule of Professional Conduct 3.8, Alaska Bar Rules 26 and 21, and Bylaw Article VII, Section 1(a)(10). Additions have underscores while deletions have strikethroughs.

Alaska Rule of Professional Conduct 3.8. This proposal incorporates amendments and additions to the model rule adopted by the American Bar Association House of Delegates in August 2009 as revised by the Alaska Rules of Professional Conduct Committee. The proposal is intended to clarify a prosecutor's responsibilities regarding convicted defendants.

Rule 3.8 Special Responsibilities of a Prosecutor.

…

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose that evidence to an appropriate court or prosecutorial authority, unless the prosecutor reasonably believes that the evidence has been or will otherwise be promptly communicated to an appropriate court or prosecutorial authority. If the defendant's conviction was obtained in the prosecutor's jurisdiction, and unless the prosecutor reasonably believes that the evidence has been or will otherwise be communicated to the defendant, the defendant's attorney, and the appropriate court, the prosecutor shall:

(1) promptly disclose that evidence to the defendant and the defendant's attorney unless a court authorizes a delay;

(2) ask the appropriate court to appoint counsel for the defendant if the defendant is indigent and not represented by counsel, and

(3) undertake further investigation, or make reasonable efforts to cause a further investigation to be conducted, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall promptly seek to remedy the conviction by

(1) notifying the appropriate court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted;

(2) disclosing the evidence to the defendant and the defendant's attorney, if the defendant is represented, and

(3) asking the appropriate court to appoint counsel for the defendant if the defendant is indigent and not represented by counsel.

(i) For purposes of paragraphs (g) and (h) of this rule, the phrase "appropriate court" means the court which entered the conviction against the defendant and, in addition, if appellate proceedings related to the defendant's conviction are pending, the appellate court which is conducting those proceedings.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, ~~and~~ that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. ~~Precisely how far the prosecutor is required to go in this direction~~ The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which ~~in turn~~ are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

…

[6] When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or to an appropriate prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred, unless the prosecutor reasonably believes that the evidence has been or will otherwise be promptly communicated to an appropriate court or prosecutorial authority Compare the equivalent provisions of Professional Conduct Rules 8.3(a) and (b).

[7] If the conviction was obtained in the prosecutor's jurisdiction, then unless the prosecutor reasonably believes that the evidence has been or will otherwise be promptly communicated to the defendant, the defendant's attorney, and the appropriate court, the prosecutor shall promptly disclose that evidence to the defendant and the defendant's attorney, unless a court authorizes a delay. If the defendant is indigent and is not represented by an attorney, the prosecutor shall ask the appropriate court to appoint counsel for the defendant. Finally, the prosecutor shall either undertake a further investigation or make reasonable efforts to have an executive branch agency or the defendant's attorney conduct a further investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

[8] Under paragraph (h), if the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must promptly seek to remedy the conviction by disclosing the evidence to the defendant and the defendant's attorney, by asking the appropriate court to appoint counsel for the defendant if the defendant is indigent and not represented by an attorney, and by notifying the court which entered the conviction and, if appellate proceedings are pending, the appropriate appellate court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor does not violate paragraphs (g) or (h) of this rule if the prosecutor makes a good faith judgment that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), even though the prosecutor's judgment is later determined to have been erroneous.

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Alaska Bar Rules 26 & 21 and Bylaw, Article VII, Section 1(a)(10).

These proposals establish procedures regarding the confidentiality of communications with the Lawyers' Assistance Committee in connection with a lawyer's conviction of a crime relating to alcohol or drug abuse and the Committee's mission.

Rule 26. Criminal Conviction; Interim Suspension

(i) Proceedings Following Conviction of a Crime Relating to Alcohol or Drug Abuse; Interim Suspension for Noncompliance.

(1) Upon receipt of a certificate of conviction of a crime relating to alcohol or drug abuse, other than a crime described in Section (b) of this Rule, the Court may, in its discretion, refer the matter to the Lawyers' Assistance Committee of the Alaska Bar Association.

(2) The convicted attorney shall meet with the Committee and comply with its recommendations for professional evaluation and professionally recommended treatment. All information received by the Committee shall remain confidential with the Committee, which shall report to Bar Counsel once the matter has been concluded to the satisfaction of the Committee.

(3) The attorney may appeal the Committee's recommendations to the Board within 10 days after the date the recommendations were made. If the attorney appeals, the Committee shall disclose to the Board, on a confidential basis, information received by the Committee which supports its recommendations. The Board, in its discretion, may approve, disapprove or modify the recommendations. The attorney may seek review of the Board's decision by filing a petition for review with the Court pursuant to Appellate Rule 402.

(4) In the event that the attorney does not meet with the Committee or comply with the Committee's recommendations, the Committee ~~will~~ shall mail to the convicted attorney notice of the attorney's failure to meet or comply with its recommendations and require the attorney to cure the deficiency within 10 days after the date of the notice. If the convicted

Continued on page 11

NEWS FROM THE BAR

Board of Governors action items September 8 & 9, 2011

- Voted to send Bar Rules 65 & 66 (MCLE) to the Supreme Court.
- Voted to adopt the Area Hearing Committee's Findings, Conclusions and Recommendations to reinstate an attorney from disability status; this matter now goes to the Supreme Court.
- Voted to adopt the Area Hearing Committee's Findings, Conclusions and Recommendations to reinstate an attorney from disbarment status; this matter now goes to the Supreme Court.
- Reviewed the E-mail policies of the Bar and made no changes. Reviewed the CLE co-sponsorship policies which require prior approval by the Board of Governors for a seminar to be co-sponsored with another group and made just one change, i.e., amended the CLE policies to allow the court system to be a seminar co-sponsor without prior approval of the Board of Governors.
- Voted to accept a stipulation for a 90 day suspension, to be stayed, and a public censure by the Alaska Supreme Court.
- Voted to approve co-sponsoring an event inviting Justice Sandra Day O'Connor to Alaska for a program on iCivics and to approve splitting the finances as appropriate.
- Voted to accept a stipulation for a six month suspension, a public censure and to pay $1,000 in costs and attorney fees.
- Informally approved the mentoring subcommittee's plan to put together a model curriculum and send names of new lawyers to local Bars for matching with mentors.
- Discussed the Bar's office space.
- Adopted the Lawyers' Fund for Client Protection Committee's recommendation to not reimburse a client in matter 2010L012, since a reimbursable loss under Bar Rule 45 was not proven.
- Adopted the Lawyers' Fund for Client Protection Committee's recommendation for reimbursement to the client of $5,566.67 in matter 2011L001.
- Voted to approve the recommendation of 11 reciprocity applicants for admission to the Alaska Supreme Court.
- Voted to approve the board meeting minutes of May 2 & 3, 2011 and June 7, 2011.
- Voted to accept the stipulation for a suspension of two years and one day, and a public censure.
- Voted to publish proposed amendments to Bar Rule 26, Rule 21 and Bylaw VII, section 1 regarding the Lawyers Assistance Committee, regarding their mission and confidentiality.
- Voted to publish proposed amendments to ARPC 3.8, Special Duties of a Prosecutor, and to discuss this proposal again at the October 27 & 28 board meeting.

Comments invited

Continued from page 10

attorney fails to cure the deficiency as required, the Committee shall report the convicted attorney's failure to meet or comply to the Court. The report shall disclose to the Court, on a confidential basis, information received by the Committee which supports any recommendations. ~~t~~The Court may, ~~based on a report by the Committee,~~ order the attorney to show cause why the attorney should not be suspended from the practice of law until the attorney demonstrates to the Court that the deficiency is cured.

Rule 21. Public Access to Disciplinary Proceedings.

…

(c) Bar Counsel's Files. All files maintained by Bar Counsel and staff will be confidential and are not to be reviewed by any person other than Bar Counsel or Area Division members appointed for purposes of review or appeal under these Rules. This provision will not be interpreted to:

…

(4) deny the public facts regarding the stage of any proceeding or investigation concerning a Respondent's conviction of a crime, except as provided under Rule 26(i);

Bylaw, Article VII. Committees and Sections

Section 1. Committees

(a) Standing Committees

…

(10) the Lawyers' Assistance Committee whose members provide services to members of the ~~b~~Bar, their families or business associates when it appears a Bar member is suffering from substance abuse or from a mental or emotional disorder affecting his or her practice. Communications between Bar members and the Committee shall be kept confidential by the Committee, as set forth in Rule 8.3(c) of the Alaska Rules of Professional Conduct and Rule 26(i) of the Alaska Bar Rules;

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Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by October 19, 2011.

ECLECTIC BLUES

Fraties' ghost on the gentle art of cross examination

By Dan Branch

"History tells us that Rommel wrote a book about tank tactics and General Patton – having read it – soundly defeated him. Perhaps that is why not much of any significance has been written about cross-examination. But I propose to rectify that problem now, at whatever costs to my future clients. The continuing education of the bar is more important than their "petty disputes."


Gail Roy Fraties

So begins "The Gentle Art of Cross – Examination" by the now deceased Gail Roy Fraties, recently unearthed in the office of a retired colleague. "Gentle Art" is as irreverent and old school as Judge Fraties—dictated by him and then neatly typed on legal sized paper.

It provides valuable information for practitioners as well as a few slaps at his competitors. On the first page he belittles the presenters at a previous CLE for advising attendees "not to cross-examine if they could help it, apparently on the grounds that they were going to mess it up anyway." He then opined, "[t]hey were completely wrong, of course. Without an effective cross-examination, the witness descends from the stand as an oracle -- uncontradicted and unchallenged." I'd expect nothing less from a man who kept Don Quixote on his judicial bench.

Judge Fraties wrote a wonderful column for the *Alaska Bar Rag* for years before he ascended to the Superior Court bench in Bethel. I briefly worked with him when serving as the Aniak magistrate. The first thing I noticed was that he spoke in the same voice as he wrote. Reading "Gentle Art" is like having a one sided conversation with his ghost. Rather than impose any more of my thoughts here are raw excerpts from the judge's work:

"All of us have been subject to rigorous cross – examination – by spouses, sweethearts, parents, partners, or others who have reason to doubt our activities and/or veracity. You have probably noticed yourself that the most successful of these examiners are those who know you best – and that is the key to cross-examination in any forum…"

"Most witnesses are afraid of cross – examination, hopefully with good reason."

"It is not at all uncommon in my own experience to spend many hours studying – from every source available – a key witness, in preparation for a cross-examination that may take no longer than 15 minutes, if it is a good one."


"Trial practice is a blood sport, but it is meant to be practiced by gentlemen."

"…everyone has their own technique – my own is to try to be quick – go for the throat, and leave the witness shaken and damaged. Further I try to make it look effortless- and that is where all of the hard work comes in. "

"[Don't be like the lawyer] who comes to court with an immense deposition all carefully annotated, in order that after three or four hours of relentless questioning, he can impeach some poor paraplegic in an iron lung by getting him to admit that three years ago he said he had a tuna fish sandwich before the accident, and now he thinks it may have been peanut butter and jelly."

"You have probably noticed ….that many witnesses think they are totally bound by any written or transcribed statement made in the past. With certain individuals, depending on how far they have departed from such a statement, the best technique is to show it to them and ask them whether they were telling the truth then or are now. Some years ago, one of the better trial lawyers in the state reduced one of my key witnesses to babbling jelly by that very method – and although the contradiction with the original statement was relatively innocuous soon had him all but begging for forgiveness for having deviated from it."

"Some witnesses respond well to a friendly approach, and can be gently induced to go along with your theory of the case. Most people have a tendency to want to agree with you, and it may not be necessary at all to adopt a hard line."

"It is also crucial, in cross examination, to know when to stop – but particularly so with the friendly witness who unwittingly helps your case with a casual admission. There is no need to nail anything down, and you are risking a retraction or damaging explanation. As long as you get what you need, you can argue it later, to its maximum effect."

"….a liar has a tendency to have an answer for everything - and it is up to you to pose questions that either elicits ridiculous answers, or answers that are clearly false. I always pray that I will have a genuine liar on the other side – if you have done your homework, it is like shooting fish in a barrel."

"I think our friends, the police ….are prone to exaggeration, That is, they have their theory of the case and they are going to conform their testimony to it, probably unwittingly. An example of an effective attack of such a witness comes from the humble drunk driving cases which all of us encounter at some point in our careers, as follows:

CROSS – EXAMINER: You have stated that at the scene my client was unruly, belching, clothes disarranged, and further that he was crawling on his belly and barking like a reptile. (This material comes from a study of the police reports).

WITNESS: That is exactly what I saw

CROSS - EXAMINER: How do you account for the fact that 15 minutes later, on video tape, he was able to successfully perform routine balance tests? (E.g. recite the Gettysburg Address backwards, with his eyes closed, balancing on one leg.)

You have now put the witness in a position where he can give one of three answers, as follows:

WITNESS: My drunk drivers always do better on video tape.

WITNESS: I can't explain it.

WITNESS: He looks as bad on video tape, to me as he looked at the scene.

Any one of these answers tends to discredit the witness…"

"Mr. Witness, is it your testimony that you hold no grudge against my client for ruining your business, running away with your wife, and selling your children to Arab slave traders?"

"About a third of what [witnesses] say is direct memory, and the rest of it is an overlay from what they have heard, been told, imagined, or surmised. They don't know it themselves, and believe they are testifying accurately. That is my answer to the ethical question raised about pulverizing an honest and truthful witness on cross examination."

"Trial practice is a blood sport, but it is meant to be practiced by gentlemen."

Historical Bar

160 appeals (and 50+ years of practice)

By Robert C. Erwin

When one graduates from law school and searches for a job that will allow him to realize his ambitions as a lawyer, he really has no idea of what the future will hold.

In 1959 I graduated from the University of Washington Law School, took the Washington Bar Examination and then returned to Seward, Alaska to await the results and my possible induction into the military under the draft still in force at that time. I passed the Washington Bar in September of 1959 and also received my notice to report to Ft. Richardson in Anchorage for induction into the Army as a private. This certainly looked like a roadblock to my legal career.

The induction process spanned two days and we were in the final process to board the plane for the flight to Fort Ord, California, when I was asked why I was in line for the flight because I had failed the physical exam and I was 4-F. I broke all records getting off Ft. Richardson Base to my aunt's house in Anchorage. (I actually bummed a ride on a paper delivery van.) I spent the next few days making phone calls looking for that magical legal job. Again, my luck was good. The new Attorney General, John Rader, was preparing the leave Juneau on a recruiting trip to hire 10-12 attorneys for the Juneau office and he agreed to hire me as soon as I could get to Juneau.

I arrived in Juneau in late September, 1959 and was assigned to the Civil Division newly headed by Jay Rabinowitz[1], with emphasis on the actions of the department of Revenue and the Alcohol Beverage Control Board apparently based on my degree in financial management and accounting from the University of Colorado.

I was prepared to move mountains but the new state government was just barely in place and actual statehood status was still a few short months away. The framework of state government, the new judicial system, the prosecution office, the jail and correction system were barely outlined with gaps waiting to be filled to get them operating. All of these activities had been formerly handled by the United States in territorial days and their functions needed to be transferred to the new state agencies together with passage of various regulatory statutes by the Alaska Legislature to support their activities.

It was a dream come true. As a new lawyer, I was asked to draft legislation and propose regulations for a new state with the only limitation being my intelligence and my ability to adopt the best ideas from the other states. Jay Rabinowtz and George Hayes[2] (as head of the criminal division) were dynamic, vigorous and intelligent bosses who threw away the clock and worked seven days a week to create a system that would not only work in a state like Alaska, but would avoid problems from other states and provide a model for the future.

The state was new. The Attorney General was 32, Jay Rabinowitz and George Hayes were 31 and the lawyers in the Attorney General's office ranged in age from 25 to 35 and were from all over the United States. Each day was an outpouring of talent and intelligence that one could only dream about and the results were remarkable.

Out came a judicial system, a jail and probation system, a prosecution office and workable offices of Fish & Game, Revenue, Roads & Airports, etc., in all the myriad of areas needed together with the people to staff them.

I was chosen to be the new District Attorney for the Second Judicial District of Alaska with its headquarters in Nome, (an area roughly the size of California) covering the Bearing Sea north of Bethel, the Lower Yukon, Unalakleet, the Seward Peninsula, Kotzebue, the Noatak and Kobuk River Valleys, Point Hope, Wainwright and Barrow. Nome was the main town with 3,000 people. Trials were held in Nome, Kotzebue and Barrow.

It was a dream come true. As a new lawyer, I was asked to draft legislation and propose regulations for a new state with the only limitation being my intelligence and my ability to adopt the best ideas from the other states.

This was a great legal jump for me as I had never even seen a jury trial except on television, and as yet no trials had been held in the new State of Alaska under the new court system with new prosecuting attorneys. Newly appointment Superior Court Judge Hugh Gilbert fixed that issue by immediately moving to Nome and scheduling a Grand Jury for March 20, 1960, with jury trials thereafter. The train had left the station and I had to immediately fly to Nome from Juneau and start a process I had only read about. As a result I tried the first jury case in the new Alaska Superior Court (*Alaska v. James Moses*) with Virgil Vochoska[3] defending. I promptly lost. (Virgil, Judge Gilbert and I were new, but James Moses had previous convictions and knew just what to do.)

The history of being District Attorney, however, disguises how I started as an appellate attorney of what grew to be 160 appeals to various courts in the next 50 years.

The newly appointed members of the Alaska Supreme Court started by adopting Rules of Court (a tremendous task) and had to immediately hear cases appealed from the former United States Territorial Courts after the Ninth Circuit Court of Appeals held they had no jurisdiction to do so.[4] The first oral argument before the Alaska Supreme Court was heard in Juneau in January of 1960 in the case of *Boehl v. Sabre Jet Room, Inc.*[5]

The case involved the validity of the Alcohol Beverage Control Board to adopt regulations prescribing standard closing hours for liquor establishment sin Alaska. More than half the attorneys in the Juneau Attorney General's office participated in research and writing of the appellate brief for the State of Alaska. Jay Rabinowitz both coordinated and edited the final draft of the brief which included a section written by me. Both John Rader and Jay Rabinowitz made the oral argument to the Alaska Supreme Court with Wendell Kay of Anchorage responding for the Sabre Jet Room, Inc. The State won a two-to-one decision and I was fascinated by the appellate process. I was hooked.

In the next five years as District Attorney for the Second District (Nome), the Fourth District (Fairbanks), and the Third District (Anchorage), I wrote and participated in some 14 more appeals in various cases (mostly criminal).[6]

After the Alaska earthquake in 1964 I went from District Attorney in Anchorage into private practice of the law as an associate and then a partner in the law firm of Hughes, Thorsness and Lowe, where I became the appellate lawyer for a busy and growing law firm. In the next six years I wrote more than 42 appellate briefs on almost every conceivable subject from oil and gas to insurance, to personal injury and worker's compensation to admissions to the Alaska Bar.[7]

In May of 1970 I was appointed as a justice of the Alaska Supreme Court, partially based on my appellate experience (50+ cases) and my service as prosecuting attorney around Alaska. The fact I was born in Alaska and the long community service of my parents who had arrived in Alaska in the 1920s certainly helped a great deal.

In June of 1977, I retired as a Justice of the Alaska Supreme Court after writing some 126 opinions[8] and returned to private practice of law as a partner with the law firm of Hagans, Smith, Brown Erwin & Gibbs, and then with Erwin & Smith in several variations until the present day where I work for my youngest daughter, Roberta C. Erwin, of Palmier ~ Erwin, LLC, who has helped me write and edit more than 50 appeals as co-counsel. She edited my writings and is largely responsible for the success we enjoyed.

In that period of time (some 33 years) I have written another 110 appellate briefs including some to the Federal Circuit Court of Appeals, the Alaska Supreme Court, the Alaska Criminal Court of Appeals and the Supreme Court of the United States, primarily as a litigant but also as amicus curiae.[9]

The 160+ appeals do not include the 20-25 cases which settled in various stages after appeal was filed or even after oral argument. The 160 cases referred to herein all had a decision by the appellate court which generally was published. I should note I argued five Supreme Court appeals to the Alaska Supreme Court in 2010, and anticipate future appeals.

As I enter by 51st year of law practice, I am still amazed at the legal process and the accessibility to the courts which is provided. I also reflect on the future of such process in view of the rising cost for an appeal and the time necessarily required to properly present an appeal. My records indicate that between 80 and 100 hours are necessary to research, write, edit and argue an appellate case. The cost for legal service for such an effort is at least $25,000.00 with no reduction in sight. This may account for the steady increase of appeals without lawyers.

The appellate process is largely an academic one with the scope of the written and oral presentation being restricted by the factual record presented to the lower court. It does require careful analysis as well as a sense of how one's argument meets the requirements of the area of the law you are addressing. A candid admission of the weakness or strength of the case is clearly the best starting point, but a sense of how the court has viewed the problem over the years is extremely helpful.

It is my opinion my appellate briefing and argument was aided immeasurable by my trial experiences as District Attorney for the Second, Fourth and Third Districts. I tried some 50 jury trials and as a civil attorney I tried another 25 to 30 jury trials and an uncounted number of non jury trials. The trial process and the appellate process are basically different and an error at trial is not necessarily an error on appeal. It is important to know the strengths and weaknesses of both.

The trial process is a live one with true action at every step. The appellate process is based on a cold record where all witnesses appear the same on paper. An important moment in a trial may not survive the cold record. In order to get a reversal, the error must be clear in the record for all the appellate judges to see. The appellate advocate and the Justices must be on the same page and look through the same window. The careful analysis requirement must be compared to the time available to a Supreme Court Justice to write an opinion in a case. If one assumes each Alaska Supreme Court Justice must write 40 opinions a year and respond to the opinions of the other four Justices, you can see the problem. There are only 365 days per year including weekends and holidays. Thus, a Justice must write an opinion every nine days (over every six and one half working days) and respond to an opinion of another Justice every two to three days (or one and one half working days). When one adds in oral argument, motion practice, conferences, adopting and changing Rules of Court and budget and construction matters, it is clear that every judge has more than enough to keep busy. A clear and careful presentation is a must. There is no time for a Justice to guess what was intended.

I feel I enjoy a slight advantage by starting with the first case and having participated as both a litigant and a judge for over 50 years. Hopefully this does not add a comfort zone which diminishes the scholarship of the task or a failure to properly analyze what an appeal requires.

One cannot fairly judge one's own work: that conclusion must be left to the future. However, it has been a fascinating part of my legal career and an intellectual challenge without compare. 160-plus appeals in 50 years.

--Robert C. Erwin, Attorney at Law, was admitted to practice in 1961.

Footnotes

[1] Jay Rabinowitz later became a Superior Court Judge in Fairbanks, Alaska, and then a Justice of the Alaska Supreme Court. He served as a judge for more than 30 years.

[2] George Hayes later became District Attorney for the Third District at Anchorage, and then Attorney General for Alaska before retiring to the private practice of law in Anchorage.

[3] Virgil Vochoska later became District Attorney at Nome and then a District Court Judge in Anchorage.

[4] *Parker v. McCarrey*, 268 F.2d 907 (9th Cir. 1959).

[5] 349 P.2d 585.

[6] Appendix I.

[7] Appendix I.

[8] Appendix II.

[9] Appendix III.

Historical Bar Territorial Lawyers gather

More than 60 lawyers, widowers and widows, family and special guests returned to the Aladdin Restaurant in mid-June to celebrate their version of Alaska Statehood.

The event recognizes a loosely organized group that was in practice during the transition from territorial to statehood status.

In recent years, the Territorial Lawyers group has opened its ranks to those who have practiced law in Alaska for 40 years or more. The annual dinner has not only reinforced camaraderie, but has evolved into a running oral history of the Bar.

The evening follows a natural format—greeting and chatting with colleagues during an arrival cocktail hour, acknowledging those who have passed during the year, and a round of short and tall tales during open mic after dinner. In some years, news of the day elicits comment and perspective. In others, no particular thread or theme emerges. And some tales have no relationship to the practice of law, whatsoever, such as the one Stan Ditus told his tablemates, perhaps best classified as frontier etiquette.

Stan Ditus

Ditus recalled the annual Ducks Unlimited banquet at the old Westward Hotel in the 50s and 60s, where lawyers, doctors, bankers, businessmen, and other hunting aficionados gathered for chow and a charity auction. In one particular year, it was apparently decided that a few live ducks might add to the guy-mood of the evening.

Meanwhile, Dr. Leonard Ferrucci and Jack Hendrickson mischievously thought it might be interesting to bring along a couple Labrador retrievers to add to the ambiance of the gathering. True to form, the labs took off after the ducks. Tables upturned. Food and beverage were sacrificed during the mayhem. Laughter and chaos overtook the banquet room, as the hotel wait staff watched in horror.

"My god, they're all animals!" shrieked one of the waitresses.

Times have changed, but fond memories of those times have not.

Jack Sedwick (who termed himself an "after-quaker" rather than a territorial lawyer member of the group) recalled that Friday was "motion day" at the Captain Cook Hotel, where often 8 tables of judges exchanged information on cases pending before them.

Judge Jim Fitzgerald was remembered in his days as a lawyer—quietly serving the interest of justice. The late John Manders was apparently known as a lawyer who frequently overlooked filing answers to motions. As his opposing counsel in one case, Fitz finally wrote Manders' answer for him, took it to Manders office and suggested that he should "just go file it so the case can proceed." Had Fitz not done so, the case would have defaulted in his favor.

Russ Arnett recalled "our beloved conservative Jim Delaney," who as an Anchorage High School youth mounted a protest against the school principal. "He was our own Che Guevera of Anchorage."

Tom Meacham remembered the stress of studying for the bar exam, which he passed in 1971. He and Ken Jacobus met to review tapes for the big test, but the tapes never arrived on the plane, which somehow left Seattle and arrived in Algeria via Vancouver.

Jim Hanson

Jim Hanson was in Anchorage during the 1964 earthquake. At the time the district court magistrate needed to resolve overcrowding issues in the local jails at 6th Avenue & C Street and Third Avenue. Hanson and D.A. Bob Erwin "went over to decide who we could release—admonishing them to return in two weeks," recalled Hanson. "We kept murderers and thieves in jail." Two weeks later, at the bar association's judicial meeting at the golf course, they looked out the window and saw the tidal wave approaching. "We all left," he said, for the time being overlooking the inmates who were on temporary furlough from jail.

James Singleton was reminded of Jim Delaney's Judge's Factory. "In trial, my objection to a particularly outrageous statement was overruled. Dave Thorsness asked to join in my objection...and was sustained."

And finally, the group of longtime lawyers can also be a source of assistance to their colleagues. Wayne Ross requested that anyone who knows when John Savage was born (and deceased in 1984?) to please let him know. Ross said he had won a bet and will be the new owner of a "Savage shotgun double barrel, only 12" long." The Bureau of Alcohol, Tobacco and Firearms does not allow transfer of ownership of said weapon without the birth date of (in this case) John Savage. "The life of a beautiful little shotgun is at stake," bemoaned Ross.

—Sally J Suddock

Lucy Groh (l) and Linda Greene get ready to sign in the guests.

Old friends visit. (l to r) George Hayes, Dan Cuddy, Charlie Cole.

Barry Jackson

Bob & Mildred Opland.

Betty & Russ Arnett.

Photos by Barbara Hood

Historical Bar

Territorial Lawyers gather

More than 60 long-time Alaskan lawyers, spouses, children, and widows made it to the annual dinner on June 10 in Anchorage to remember their own oral histories of the practice of law in Alaska.

Jim & Verna von der Heydt.

The annual dinner is a chance to see old friends, such as Bob & Mildred Opland (l), Vic Carlson (c) and George Hayes (r).

John Hughes & his daughter Mary.

Jan Wilson (center) gets together with Betsy & William Hawley.

The Territorial Family Reunion Roster, 2011

Arnett, Russ
Arnett, Betty
Bartlett, Peter
Bartlett, Kay
Barry, Della Colver
Burr, Donald
Burr, Joy
Carlson, Victor
Christie, Reginald
Cole, Charles
Cuddy, Dan
Ditus, H. Stanley
DuBrock, Roger
Andrews, Elaine
Erwin, Robert
Erwin William
Erwin, Sheila
Fisher, James
Flynn, Charles
Flynn, Katherine
Gentry, Verona
Groh, Lucy
Greene, Linda
Hanson, James
Hanson, Mary
Hawley, William
Hawley, Betsy
Hayes, George
Hornaday, James
Hughes, John and Mary, his daughter
Jackson, Barry
Jacobus, Kenneth
Johnston, James
Mendenhall, Vivian
Lewis, Shirley
Lowe, Robert
Meacham, Thomas
Meacham, Jane
Opland, Bob and Mildred
Palmier, Joseph
Powell, James
Powell, Judy
Rader, Carolyn
Reitman, Stanley
Ripley, J. Justin
Robison, June
Ross, Wayne
Ross, Barbara
Ruskin, David
Ruskin, Bernie
Singleton, James
Thorsness, Priscilla
Tulin, Charles
Vochoska, Virgil
von der Heydt, James and Verna
Walter, Gaile
Willoughby, Richard
Wilson, Juliana "Jan"

Dinner chairman Jim and Judy Powell get to relax, at last.

Sarah Palin channels Ludwig Wittgenstein, Part 1

By Peter Aschenbrenner

I round the corner of the marquee tent at Montpelier.

"Professor Aschenbrenner, can you play a ventriloquist's dummy?"

"And quite naturally," I assure Alaska's most recent and former governor.

"Here is someone who requires your services," the governor continues. "Dr. Max Farrand, may I introduce a fellow Alaskan?"

"Isn't your wife," I reference the consultation in progress, "advising Dolley Madison on the progress of Montpelier's Italianate and therefore not-so-formal-garden?"

"Beatrix always enjoys herself at these functions," the author of *The Records of the Federal Convention* declares. Doctor Max signals two couples, who now enjoy the view of Manse Madison from the east. "She and Dolley are entertaining Mssrs. Adams and Marshall, both known for their aesthetic instincts in matters touching on landscape architecture."

"Wasn't John Marshall," I mumble, "best known for his culinary skills, recently featured in *Marshall's Deathly Mallows?"*

"The Chief Justice is a jack of all trades," the governor corrects me. "We have a conundrum for you, Doctor Max. And we need your expert advice."

Cue me.

"In volume three of your Records you quote the instances in which a delegate referenced what was said or done at the federal convention."

"After the constitutional convention," the governor points out, " 'prohibited a promulgation without leave of what was spoken in it'."

"Hello there," the master of Montpelier joins us. 'Class of 71,' he offers Dr. Max the 'Old Tiger' handshake, who responds 'Class of 92.' "May I note that you are quoting my forthcoming letter to Thomas Ritchie? September 15, 1821. But you are quite correct as to the action the convention took on September 17, 1787."

'As you know,' he asides to me, 'I wrote the minutes for the fifteenth and seventeenth.'

"Isn't it a problem that so many delegates – Ellsworth, Gerry, Randolph, to name a few – reported in such detail on the business at Philadelphia?" I ask. "That is, to their state legislatures. Or to the ratifying conventions."

"You believe they fell into the trap that St. Paul laid for that poor old Cretan, Epimenides, Aschenbrenner? A witness attempts to report on events which, if her report is complete, must include an express prohibition on reliable reporting."

"Let's not taunt my guests with brain-teasers," Madison stills Dr. Max. "After all, as to the four hundred and nineteen quotes – ah," he interrupts himself.

"I see the governor has done her homework."

"I've counted the number of times a Philadelphia delegate referenced 'intent of the framers' or 'intent of the founders' or like elocutions," she looks up from her laptop. "This is interesting."

The governor turns her screen my way.

"My goodness," I gasp. "You never used the phrase 'intent of the constitution'."

Madison studies his nails.

"It is a stupid elocution."

"The first time 'intent of the constitution' appeared in print was 1803. *Stuart v. Laird*, 5 U.S. 299," Farrand sniffs.

"And no one ever discussed the 'intent of the framers' – the alternative phraseology – after 1820," I survey the results, "except for you, Mr. Madison."

"I told my correspondents that I was prepared to divulge a 'pretty ample view' – my exact words. At the right time. 'It cannot be very long however before the living obstacles to the forthcomings in question, will be removed.' Another letter of mine. From 1827."

"Item 358," Dr. Max supplies the citation. "But the Secretary's Journal was published in 1819. Surely you could have – "

" 'In general it had appeared to me'," Madison interrupts, " 'that it might be best to let the work be a posthumous one; or at least that its publication should be delayed till the Constitution should be well settled by practice'."

"The Ritchie letter, September 13, 1821," Max Farrand ahems the citation. "Volume three, item 340."

"It may be called an incubation interval," Madison declares. "It is not just the gardeners who tender their attentions on youthful growings."

"Wait a second," I stammer. "You're letting Americans – you're making Americans figure it out by themselves. From 1787 to 1819 Jackson's Journal is unpublished – "

"Phase One," Madison interrupts.

"You could have arranged for its publication," I continue, "given that you served as Secretary of State (1801-1809) which made you the official custodian of the Journal in question. And, after that, you were President and surely could have put publication in motion. Not to mention that you were best qualified to edit Jackson's Journal. And it did need a lot of work."

"It must have slipped my mind," Madison excuses himself, "given my preoccupation with the War of 1812, the burning of Washington, and other unpleasantness."

"But then," I continue, "after the Journal is published, you have another chance to put constitutional history on a sure footing."

"So begins Incubation Phase Two, as I call it," Madison cuts me off. "Jennings, please pour and generously so."

"So when Jackson's Journal is published," I point out, "you refuse to correct the mess Jackson made of the journal. Nor would you admit to our first and most passionate archivist of American history, Jared Sparks, that it was a major constitutional cock-up."

" 'It seems to me that your secretary of the Convention was a very stupid secretary'," Dr. Max drawls the quote, " 'not to take care of those things better, and to make a better journal than the dry bones which now go by that name.' Jared Sparks' letter of 1831. Volume three, item 386," he adds the citation.

"And so devolved my pension plan for Mrs. Madison," Madison explains. "I'm hoping Congress will pay her a hundred grand for the MS of my *Notes*."

"Which publishing event you relentlessly flogged by writing cryptic answers to correspondents," I press forward, "who were eager for constitutional answers. Your letters whetted the public appetite for your Notes."

"I believe an author may surely," the governor intervenes, "enjoy free range in promoting his books."

"And which epistolary responses," Dr. Max confesses his role, "I duly published in my volume three. From 1820, 50 of the 69 selections are yours."

" 'Leave 'em begging for more,' is – I believe – the expression *du jour*."

"It wasn't until 1842 that the Supreme Court began to grapple in earnest with the 'intent' of the delegates," I read from my laptop. " 'We may well think the framers of the Constitution intended to provide for a uniform [fugitive slave] law.' *Prigg v. Pennsylvania*, 41 U.S. 539, 641 (1842), Wayne, J. concurring."

"And that's just so much speculation," the governor corrects me. "Which is as good as it's going to get, anyway, given Chief Justice Chase's assertion of 'the rule that the opinions and intentions of individual members of the Convention … are not to control the construction' of the Constitution. *Legal Tender Cases*, 79 U.S. 457, 655 (1870)," she adds the citation.

"Well played," I applaud the former Governor of Alaska.

"What'd'ya expect?" Sarah drops into the vernacular. "His first name was Salmon."

"Anyhoo," Madison whips out his pocket diary, "from September 17, 1787 to March 1, 1842, that's fifty-four (and a half) years of incubation, hinging on the publication of the Journal. Maybe more, if you take our Sarah's insight into account. During that first half-century Americans had to sort out the oracles of the constitution without, ahem, the help of yours truly."

"So you were the only one who could help, Mister Madison," Jennings joins in. "But you wouldn't. For our own good."

"That certainly works for me," the governor agrees. "People don't know what's good for them. For us to use the constitution, we were obliged to do without the assistance of your superior talent. In effect, the Philadelphians forced Americans to duplicate their efforts in the thousand and one venues – "

"In which constitutional reasoning blossoms," Madison finishes her observation.

"My goodness," Dolley Madison and Beatrix Jones Farrand join us, as Jennings prepares the spectacular roses she offers for Montpelier's nearby vases. "Was that Ludwig Wittgenstein out there?"

"Sounds like a foreigner," John Adams growls.

"He is," Marshall assures Adams, "a wiley Austrian and one with whom I long to cross swords. Metaphorically speaking, of course."

"Another hundredth anniversary," I blurt. "Along with the publication of your *Records*, Doctor Max."

"1911," the governor backgrounds our fourth President, "was the year Wittgenstein burst into Bertrand Russell's chambers, thereby obtaining a Ph.D. for unraveling the tautologies that John Marshall's work celebrates."

"So it would appear," the Chief Justice rocks on his heels.

"And then, of course," I blurt, "there is the 100th anniversary of the publication of your *Records*, the riddles of which have yet to be unlocked."

"So far," Dr. Max agrees, swaying in like fashion.

"If this is a parlour game," says Dolley, "don't stop on our account."

"Okay, Alaskans," Dr. Max turns to us. "Give us your best shot."

` "Is this the same Thomas Ritchie who published the *Amphictyon* and *Hampden* essays?" the governor asks.

"To which the wily," I add, "indeed, über-clever John Marshall responded?"

"To over-ümlaut is a federal crime, Aschenbrenner," Marshall stills my enthusiasm.

"I thought we were going to roast Marshall," Madison intervenes, "for his deployment of tautologous, not to mention tedious, 'trains of reasoning' and 'chains of principles'."

"*Gibbons v. Ogden*, 22 U.S. 1, 221-22 (1824)," Marshall ahems the cite.

"I hope I'm not intruding," Ludwig snatches a glass before Jennings can platter our new guest. "Oh," he sniffs. "Alaskans have joined the party, *ergo*, Austrians are welcome. Mr. President," Ludwig offers his hand. "You studied logic at Princeton. I got a Ph.D. in the same subject from Trinity College, Cambridge."

Wittgenstein turns to our Chief Justice.

"So you're the John Marshall who baffled the Virginians in your *Friend to the Union and Friend of the Constitution* essays."

"Indeed," Marshall winks his reply, turning to Madison. "That's the difference between you and me, Jimmy. You traffic with Ritchie, editor of the *Richmond Enquirer*, and bare your most profound thoughts on the silencing of the oracles of the constitution, whereas I do battle with his right-hand men Brockenbrough and Roane."

"And what a battle," Wittgenstein declares. "You explained, as no one had ever done, the difference between necessary and sufficient conditions. 1819 was – strike that – is a damn fine year."

"And yet, as to Propositional Logic," Marshall studies his nails, "I am entirely self-taught."

"If someone will find a copy of the essays," Wittgenstein calls out, "I would be happy to reveal the mysteries of the Tenth Amendment."

"Starting, of course," the governor adds, "with the Tenth's 'hot little sister' the Necessary and Proper Clause."

"It's necessary to start there, altho'," Marshall permits himself a sly grin, "it would be sufficient to start with any other text."

Madison turns to me.

"You'd better get the volume in question. We're all dying to hear crazy Ludwig," Madison signals my mission, "and especially Mrs. Madison who loves paradox."

"Can you 'put it on pause' until I get back?" I plead and dash upstairs to Montpelier's Library.

'Irrepressible Alaskans' court swing vote at 9th Circuit conference

Continued from page 1

(which was neither the first nor the last) informs us about her character. She gently but pointedly reminded the Conference of past abuses, in so doing giving reassurance that they will not be repeated on her watch. She also serves as a model how to disagree without being disagreeable—some might even be surprised by her close relationship with Justice Scalia and former Chief Justice Rehnquist, who are viewed as being on the opposite end of the politico/legal spectrum.

No less affirming a picture was painted by the Ninth Circuit's own very colorful Chief Judge Alex Kozinski, who addressed the Conference attendees very briefly during business hours, but much more extensively after hours. Born in Romania and naturalized in the U.S. as a teenager, he keeps chickens as pets and grows herbs in his garden. He also mixes a mean mojito.

Throughout the conference, Judge Kozinski entertained any and all who could locate his room until the very wee hours. An intellectually curious and open man, he lives the American Dream. He is approachable and friendly, and someone who is right at home in Alaska. Judge Kozinski has visited Alaska on many occasions and talks particularly fondly of Homer and its (shall we say) interesting collection of people. One can imagine him living comfortably at the end of East End Road raising his chickens and herbs.

The Conference is an opportunity for the Federal bench and bar to collaborate, mingle and learn. There were of course the Big Idea sessions—Federalism in the 21st Century: Balancing State's Rights with Federal Power; The Promises and Perils of Neuroscience Evidence in the Courtroom; The Federal Courts in 2031—Making the Future Happen.

The Federalism panel was moderated by Erwin Chemerinsky, who many Alaska Bar members know from his many impressive Supreme Court updates at our Bar Convention. On the panel were a range of impressive legal scholars, who spoke in complete paragraphs, using words like "paradigm" and "dialectic." Their views ranged from one extreme (that Federalism no longer has a role in our society) to the other (that the Feds should stay out of the business of the 50 sovereign states); but the entire time a very attentive Justice Kennedy sat in the audience directly in front of and positioned in the middle of the lined-up panelists. The two "hot" issues that are on their way to the Court (the health care law with its individual mandate and the Arizona immigration laws) are, of course, quite likely to be decided by Justice Kennedy's fifth vote, and one wonders what he must have been thinking. We will find out, and soon.

The Neuroscience presentation was, by turns, fascinating and chilling. Tools are now being developed that, in time, will likely allow minds to be read, pain to be measured, and capacity to be verified. The legal implications of this technology are increasingly before the courts, and pose significant challenges to our assumptions about conduct, free will and individual responsibility. Big thoughts, indeed. (See related article, page 7.)

No description of the Conference would be complete without mention of the Alaska delegation, the highlight of which was being labeled as "The Irrepressible Alaskans" by Justice Kennedy, who crashed the District Dinner (see the photos), and who received serial invitations to come address the Alaska Bar Convention. Alas, the month of May simply does not work for him. He did, however, express a sincere desire to visit Glacier Bay, leading us to wonder whether the Bar Association would some year hold the Convention in June on an Inside Passage cruise.

We are at the part of this piece where a tell-all about our Federal judges is in order—surely they have stopped reading this by now. But to describe what they are like with their hair down, at least to the extent they still have it, might actually be a federal offense. Their public participation in the Conference is, however, fair game: Chief Judge Beistline, the gracious and jovial master of ceremony at our District Dinner, bestowed autographed copies of a very dense little pamphlet titled "The Federal Courts and What They Do" on the lawyer representatives. We were not sure if this was meant as an advertisement or an admonition, but it surely was directly relevant to the business of the Conference. The tallest Federal judge in the Ninth Circuit, Judge Tim Burgess, led a roomful of, shall we say, outspoken Federal District Court judges in an advanced demonstration/discussion of how judges can make use of the iPad. It is obvious that he has teenaged children, because he was far more familiar with computers and related jargon than anyone could have expected. The good news is that many Federal judges are fully prepared to use their iPads in reviewing briefs, editing opinions and related items. Wonder if there is a "motion denied" app available?

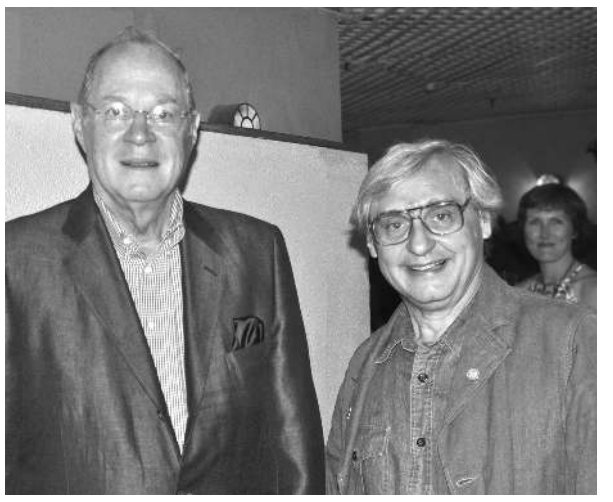
Being one of your lawyer representatives is a privilege—but it is a privilege that is open to a large cross-section of the Bar. Sara Gray, our outgoing chair, is a military lawyer; Kevin Clarkson and I are civil litigators; Erik LeRoy is a bankruptcy specialist; Heather Kendall is our appellate representative; other lawyer participants included Lloyd Miller and Bob Bundy.

Our incoming lawyer representatives are Gregory Razo, VP of Government contracting for CIRI and S. Lane Tucker at Stoel Rives LLP.

Rounding out the lawyers in the party were U.S. Attorney Karen Loeffler and Federal Public Defender Rich Curtner. The Conference truly welcomes and wants to hear from lawyers in a broad and diverse practice backgrounds. The next time you see that the position is open, think about applying. The expense of attending the Conference has long been thought as a deterrent to people applying, but our District has now approved a stipend to encourage public sector and low-income lawyers to apply to for the position. Chief Judge Beistline has made it clear that the stipend is meant to defray only the travel costs associated with attending, and cannot be used for anything fun.

Supreme Court Justice Anthony Kennedy (left) chats with fellow federal bench colleague Senior Judge John W. Sedwick his wife Debbie, who is a former commissioner of the Alaska Department of Commerce & Economic Development.

Justice Kennedy makes the rounds at dinner, with U.S. District Court of Alaska Judge H. Russel Holland and Heather Kendall-Miller, staff attorney for the Native American Rights fund.



Joining the party with Justice Kennedy is the entertaining 9th Circuit Court of Appeals Chief Judge Alex Kozinski (right).

Justice Kennedy's dinner with Alaskans

Photos by the author

Justice Kennedy (standing) visits Herb Ross and U.S. Attorney for the District of Alaska Karen Loeffler.

U.S. Magistrate John Roberts (right) has a word with Justice Kennedy.

Justice Kennedy (left) is surrounded by Alaskans at the District Dinner. In the background is U.S. District Court of Alaska Chief Judge Ralph Beistline, joined by fellow district court judge H. Russel Holland and Heather Kendall-Miller.

American Bar rebuffs changes to citizenship clause

Continued from page 1

allegiance to a foreign country. In line with this view, Representative Steve King (R-Iowa) has introduced House Resolution 140, "The Birthright Citizenship Act of 2011," to restrict citizenship under the Citizenship Clause to a child at least one of whose parents is a citizen, lawful permanent resident, or on active duty in the armed forces.[4] It is unclear what effect, if any, the courts would give such a re-interpretation of a Constitutional amendment, but the proposal would immediately throw into confusion the citizenship of thousands of infants born across the country.

Other politicians agree that "subject to the jurisdiction" can't be reinterpreted by statute, so their solution is a Constitutional Amendment. Along this line, Senators David Vitter (R-Louisiana) and Rand Paul (R-Kentucky) have introduced congressional legislation to amend the Constitution to change the right of citizenship under the Fourteenth Amendment. Senate Joint Resolution 2 would not allow birthright citizenship for those born in the United States unless at least one parent is a citizen, a lawful permanent resident, or an immigrant in active military service. This proposed amendment would create a large class of stateless children who are born and raised in the United States but who do not have strong ties to any other nation. This proposed amendment would also overturn the Indian Citizenship Act of 1924, which grants birthright citizenship to all Native Americans born in the United States, and the special statute that grants US citizenship to children born in Alaska after 1867.[5]

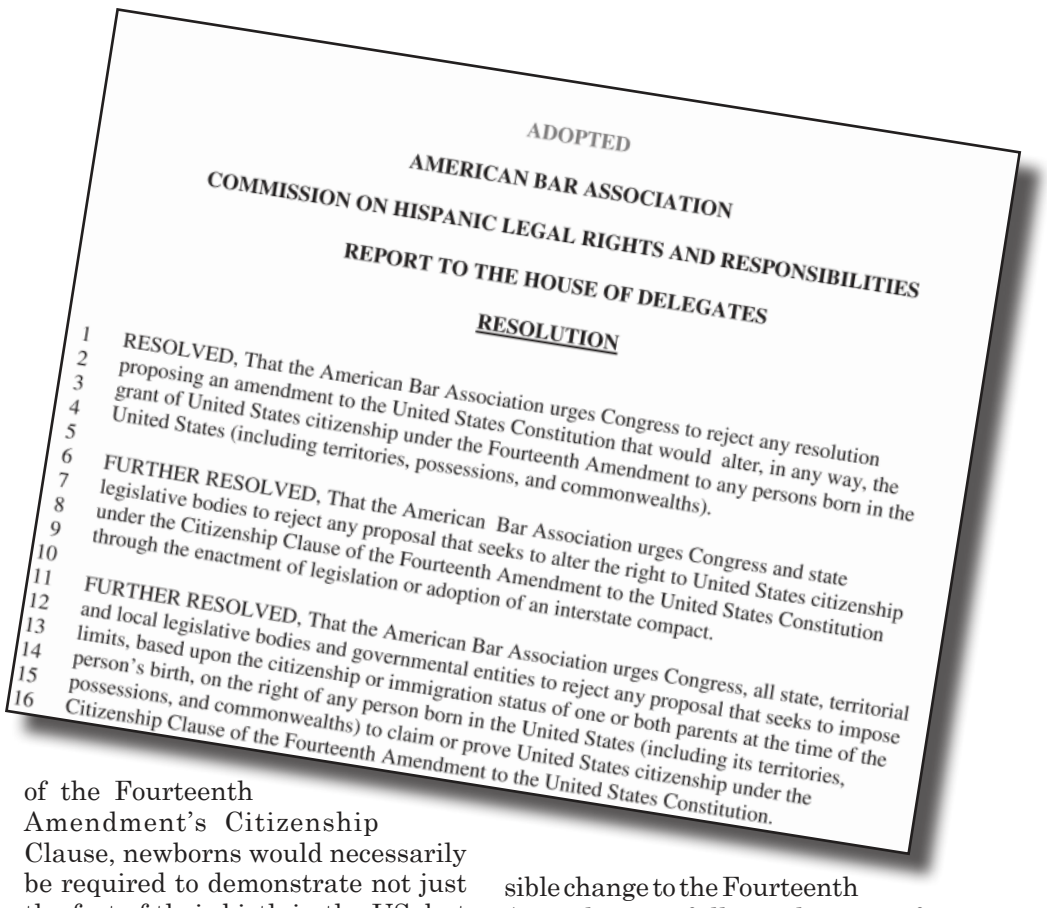
A different approach is being taken by "State Legislators for Legal Immigration (SLLI)," a coalition of immigration restrictionist legislators from forty States,[6] who have proposed State legislation that would resurrect the notion of State citizenship and restrict State citizenship along the lines of the King bill described above. SLLI has proposed an interstate compact strategy under which States would agree to "make a distinction in the birth certificates" of native-born persons so that Fourteenth Amendment citizenship will be denied to children born to parents who owe allegiance to any foreign sovereignty. The interstate compact would be subject to the consent of Congress under Article I, Section 10 of the Constitution. The effect of this approach would be to seek a change in the meaning of the Citizenship Clause without having to secure the approval of the President or a veto override.

The net result of all these different proposals—if they succeed—would be to create different classes of American-born babies by issuing different types of birth certificates to different groups, or by making it difficult or impossible for some to obtain proof of citizenship by birth.

These proponents of changes to the Citizenship Clause all agree that the Clause should be changed, but they do not all agree on what parental statuses would qualify to pass along US citizenship under any new rule. Some say that a baby's parents must be US citizens or lawful permanent residents to pass along citizenship. Others believe that the parents must be in the US with the consent of the US government, so that only the children of two unauthorized immigrants would be excluded. Others state that the parents must owe undivided loyalty to the United States; not only must the parents be US citizens, but the parents cannot be dual citizens of the US and another country.

Some proposals would thus call into question the citizenship of Governor Bobby Jindal of Louisiana (his parents were not US citizens when he was born); others would allow Governor Jindal to keep his US citizenship but would deny it to children whose parents are temporary professional workers (causing a loss of US citizenship to the children of many British Petroleum or Anchorage School District non-immigrant professional workers whose children were born in Alaska). Yet others would deny citizenship to the children of individuals who hold dual US and foreign citizenship. Dual citizenship is held by millions of Americans, so this latter interpretation would potentially affect the largest group of American-born children, potentially causing the loss of US citizenship, for example, to the children of Americans who have one Irish grandparent and therefore hold dual citizenship in Ireland and the United States.

Regardless of which new rule one supports, changing the rule will create a huge new bureaucratic hurdle to the issuance of US birth certificates and will be extremely expensive to implement. Right now, most people can demonstrate their US citizenship merely by producing a US birth certificate—but under any change to the current interpretation



ADOPTED

AMERICAN BAR ASSOCIATION

COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to reject any resolution proposing an amendment to the United States Constitution that would alter, in any way, the grant of United States citizenship under the Fourteenth Amendment to any persons born in the United States (including territories, possessions, and commonwealths).

FURTHER RESOLVED, That the American Bar Association urges Congress and state legislative bodies to reject any proposal that seeks to alter the right to United States citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution through the enactment of legislation or adoption of an interstate compact.

FURTHER RESOLVED, That the American Bar Association urges Congress, all state, territorial and local legislative bodies and governmental entities to reject any proposal that seeks to impose limits, based upon the citizenship or immigration status of one or both parents at the time of the person's birth, on the right of any person born in the United States (including its territories, possessions, and commonwealths) to claim or prove United States citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution.

of the Fourteenth Amendment's Citizenship Clause, newborns would necessarily be required to demonstrate not just the fact of their birth in the US, but also the citizenship status of their parents at the moment of birth. Proving one's parents' immigration status at the moment of one's birth can be extremely difficult, because citizenship and immigration status is often a moving target. A person can change his or her immigration status frequently over the person's lifetime, and even those who have US citizenship can expatriate themselves. Right now, a parent's status is not verified before a birth certificate is issued—and requiring such verification will impose significant new costs on every baby born in the US. Because the Department of Homeland Security currently charges $600 to verify the citizenship status of children born overseas to US citizens, we can estimate roughly what those costs will be—changing the Fourteenth Amendment will be roughly equivalent to a $600 baby tax on every newborn.

Changing the birthright citizenship rule will increase the cost of getting a US birth certificate dramatically, but it will also have many other unsavory side effects. First, it will increase the population of unauthorized immigrants, because undocumented immigration will no longer be cut off at the first generation; the change will also create a large class of stateless persons who live in the US but have no citizenship in any country. Second, the effects of the change will fall disproportionately on the poor and minorities; most middle class and wealthier Americans will have access to lawyers and the documentation necessary to prove up their parents' immigration status and pay the government to give them the required paperwork. Third, the change will impose burdensome bureaucratic costs on all newborns and their parents at a time when many Americans favor less government, not more. Fourth, the change will have important demographic and tax impacts; one think tank has estimated that many far fewer young people born in the US will be US citizens if the Fourteenth Amendment is changed,[7] leading to a much lower tax base in the future as well as a significantly smaller military recruiting pool (US citizens incur worldwide, lifetime tax and military obligations, while non-citizens do not).

There is one salutory effect of a possible change to the Fourteenth Amendment—full employment for immigration and citizenship lawyers. US immigration and citizenship law has long been known as one of the most complex legal fields in American jurisprudence; one federal court famously termed it "King Minos's labyrinth in ancient Crete."[8] In this highly complex and technical area of the law, the birthright citizenship rule has always been the one bright-line rule saving most Americans from the need to hire an immigration or citizenship lawyer. The proposed changes to the Fourteenth Amendment will inexorably alter that reality. If proponents of changing the Fourteenth Amendment have their way, every baby born in America will now face a bureaucratic hurdle before he or she gets a birth certificate—and clearing that bureaucratic hurdle will often require expert legal services.

The author is counsel to the Firm, Lane Powell LLC; Member of the American Bar Association Commission on Immigration; Fellow of the American Bar Foundation; and Alaska's only SuperLawyer in the area of Immigration & Citizenship law.

Footnotes

[1] Dred Scott v. Sandford, 60 U.S. 393 (1857). In this decision, the US Supreme Court held that persons of African descent could never become US citizens.

[2] All Native Americans born in the US—including those born in Alaska—were recognized as US citizens through the Indian Citizenship Act of 1924. This is a statutory recognition of citizenship, however, not a Constitutional grant of US citizenship.

[3] This is also known as the "jus soli" rule; it contrasts with the "jus sanguinis" (citizenship by blood) rule, which the United States applies to children born outside the United States to US citizen parents.

[4] On April 5, 2011, Senator David Vitter (R-Louisiana) introduced legislation that parallels the King bill in the Senate. S. 723, 112th Cong. (1st Sess. 2011).

[5] See 8 USC 1404 ("A person born in Alaska on or after March 30, 1867, except a noncitizen Indian, is a citizen of the United States at birth. A noncitizen Indian born in Alaska on or after March 30, 1867, and prior to June 2, 1924, is declared to be a citizen of the United States as of June 2, 1924. An Indian born in Alaska on or after June 2, 1924, is a citizen of the United States at birth.").

[6] At the time of this writing, no Alaskan legislators were listed as members of this group on the group's public website.

[7] Migration Policy Institute, The Demographic Impacts of Repealing Birthright Citizenship, Sept. 2010.

[8] Lok v. INS, 548 F.2d 37 (2d Cir. 1977).

PROMOTING COMMUNICATION

Think globally, act locally

By David Graham

I am a wannabe writer. It started in childhood. I was blessed to have had a number of published writers in my family. The most influential was my grandfather, as we were very close. He wrote children's stories and books for young adults. From an early age I saw first-hand how books and writing and story-telling were powerful tools of communication. And I learned how important communication was to help people accept, understand and love each other.

Then my infatuation with journalism began. After being on the staff of my junior high yearbook I graduated to writing for a non-sanctioned high school newspaper in New York City. I took photos and wrote articles about topics that were important to me at the time, trying to bring small improvements at least to my universe. I really began to feel like a journalist when I was sent to Havana to cover the 10th anniversary of the Cuban revolution from the perspective of a high school journalist. It was an exciting trip that provided the opportunity to meet Fidel Castro and get to know many other interesting people and places in that beautiful country.

When I returned to school a few years later, I became the editor of my college newspaper and remained involved in mass communications. But as I embarked into law school, the time I devoted to journalism and this sort of writing came quickly to an end. Sure, as a law student and then a lawyer I had plenty of writing practice. But there's a big difference between writing for pay and writing for someone who is being paid to read your work, and the target audience for legal missives is usually small. Legal topics are also not typically conducive to getting those elusive creative juices flowing. The truth is that being a lawyer has made it difficult for me to write for larger audiences because I rarely make time to write about things that aren't on the calendar or coming up to a deadline. While I still occasionally write about some adventure or another that I sometimes send off for family and friends to share, mostly those get lost in some forgotten folder.

Of course there are people who make their living by writing for larger audiences. Some of them even have law degrees and have broken out of the mold, and I think those are my heroes. While I've never earned any real money as writer, I've always contemplated that maybe I could, too. So, always keeping a lookout for a career change, I jumped at the chance to have a deadline on my calendar to write something other than another brief or memorandum. My fear of rejection was held in check by my recollections from reading the *Bar Rag* over the years; it appeared that the editorial standards are not so high that my submission wouldn't stand at least a decent chance of making the cut. And the joy of having a deadline on my calendar that was not just another deadline, but one to write something someone might read because they want to, not just because they're my friend, family, or being paid by someone to do so.

So now I'm faced with the challenge of what to write about, and how to make it interesting. I suspect the topics will have something to do with interpersonal, intercultural, and international relationships. I've noticed how many of us tend to leave interpersonal discussions to therapists and relationship counselors, intercultural studies to anthropologists, and international relations to politicians. But I think that a better understanding of and communication about these subjects can contribute to our collective awareness and promote communication and understanding about how people of different genders, cultures, or nationalities think, feel, act, and resolve conflicts. Obviously, conflicts between people are the root cause of many of the battles that make it into the legal arena or some other combat zone. If we can better communicate with and understand each other we just might help to prevent another dispute from developing, rather than just patching up the pieces afterwards. So you may read about alternative personal relationship models, examples of ways that different cultures have successfully integrated, or examples of international relationships like ITLOS, the International Tribunal for the Law of the Sea. But I'd also like to write about my travel and adventure flying a Bellanca Viking, or about the game of handball, the diverse Alaskans who play that great game, including a number of lawyers, and the many tournaments that are put on each year in Alaska.

So we'll all see what's in store next time.

Snippets from the Tanana Valley Bar Association

The Tanana Valley Bar Association continues its weekly luncheon get-togethers at the (restaurtant). Here are redacted excerpts from the year's discussions of interest to date.

Feb 4

While the food was excellent some of the Bar were intent on serving up thoroughly grilled "4 truths and a lie" guest candidates. (We might name this tradition as Bar and Grill)

Kristin Farleigh (Gazewood/Weiner firm)

Town she lived in burned
Sang with Kenny Rogers
Argued in 9th Circuit
Lie – Drank with Ruth Bader

Tricia (MacDonald's clerk)

Born in Framingham
Raised Bellingham
Lie– School North Hampton
Favorite food – peanut butter
Has 4 brothers

Court Report – Doug Blankenship

New recording system feedback given from Bar: Log notes not as thorough and can be delayed in receiving them; recordings had better channel separation before; everybody loved and misses the clock; no problems with the always-recording-to-hard drive issue yet

Feb. 11

State Court

Log notes will become available again and will be more complete like they were on the old system. In other words we are continuing to make progress towards making things the way they were before

Feb. 18

New Bail Project in the works

It is suggested that clients spend too much time in jail. One possibility is that proposed, that the DA says they will dismiss a case, but then don't get around to it for a while so the client sits in jail and waits more than he should. Another possibility is that the client's 23 prior convictions had something to do with his bail status in the first place.

March 4

Federal Court report – Kleinfeld

The court is moving its chambers. Feds have determined that Kleinfeld's office needs better ingress/egress. It can be done for a mere $1.1 million. TVBA members suggest a ladder. DA office notes that there is room available in the Northward Building.

Covell comments that he has a story he can tell about gov't spending. It's questioned whether he can make his story brief; some people are skeptical about his ability to keep it brief.

The Story: The Feds indicated a desire to procure some warm dirt in Deadhorse for the winter. With such an unusual request more inquiry was clearly warranted. It turns out they wanted to pile the warm dirt up against one of their buildings to insulate it in the winter.. The Fed rep was not even in Alaska, and didn't realize that the buildings are on stilts to keep the permafrost from melting.

Bar Convention

Board of Governors, Weiner mentions the speaker Professor Yoo resulting in the following exchange:

Yoo?
Not me!
No, Professor Yoo!
I'm not even a professor!
I'm not talking about You.
Then who are you talking about.
I'm not the one who'll be talking, Yoo is talking.
I'm not talking
Yoo is talking about torture.
You got that right, talking with Yoo has certainly been torture

March 11

Secret Award Time

Noreen has an award for TVBA VP Amy Tallerico. It's a secret, it's in a box. After much discussion, libel, slander, outright lies, and other odd comments Amy is awarded with a set of Pink Boxing Gloves to commemorate her recent chance to meet a hockey coaching legend.

Militia Disclaimer

Local bar member notes that if he is seen giving money to Schaeffer Cox, it is not to join or otherwise support the militia. Cox did actual landscaping work for him prior to the arrest warrant being issued, and it has been difficult to find him for some reason.

April 8

Federal Court Report

Case loads are down a little. Under past AG immigration cases increased. Current AG has fewer of them. Streamlined processing moves them from brief to argument in 6 to 7 months compared to the 14 months it used to take. The result is more room on the docket for other cases to move.

Andy Kleinfeld is moving to senior status. Essentially this means he is working for free since he would be paid the same in retirement anyways

Guest David Morris, 4 truths and a lie

Has 2 sisters
Born in Vermont (Lie)
Drove to Alaska in March
Never been in Alaska before
Favorite color is blue

April 22

Don Logan Memorial

May 6th will mark the 1st Annual Float-a-Thon in memory of Don Logan. There will be a bonfire at the end. Start Downtown and float to the Chena Campground by Univeristy Avenue. Some discussion of floating all the way to the ocean (its what Don would have done).

Other Don Logan suggestions: Memorial at Bobby's for those who don't want to boat. Buy Don's old boat and turn it into a permanent TVBA Club House

April 29

Don Logan Memorial

No weather contingency plan.

Boat launch at the Chena Wayside Campground will happen on the 7th at 3:30, it should last a little over an hour. Don Logan's preference would be that we find a hole in the fence and climb through without permission. Other aspects of this option that would be favorable to Don: Possible police encounter. Getting cuffed in the sticker bushes. (Don't tell the cops we're lawyers & insist on being taken to jail. Tell them the signs said no camping and we aren't camping.)

Other discussion on whether Don Logan's Law Diploma is still hanging on the wall of the ladies room at the Howling Dog (male member of the bar confirms that it's true--how does he know that?)

Court Reports

– All Courts report that they will be not be sitting on cases involving the Don Logan Chena River Float

June 3

Chena Float Report

– All went well for the Don Logan memorial float trip on the Chena

– Satterberg was able to make arrangements to open the campgrounds in spite of the general agreement that Don would have preferred everyone to trespass.

More discussions about where the cut-off would be on getting a DUI in a canoe – can you get a DUI in a canoe if a swimmer right next to you can't be charged for drunk swimming?

Don's obituary is discussed. It's suggested that his passing is proof that there is no afterlife, because if there was he'd have already come back just to mess with us. On the other hand it is noted that there could be a no contact order. On 7-24-11 at 2:00 his ashes will be scattered at the Howling Dog Saloon.

Remembering All the Good Times Had
In Panama, Aberdeen and Leningrad
(Art Robson is 80)

Let's see. There's Scotland – Thailand – Disneyland – Alaskaland.
Auckland – Ireland – England – Queensland and Land of 10,000 Lakes.
Great Lakes – Great Britain – Great Barrier Reef and the Great Divide.
New Jersey – New York – New Hampshire – New Mexico – Mexico City
Daly City – Forbidden City – Crescent City – The Second City – City of Lights – City that Never Sleeps
The Old West – Key West – Fair East – Deep South – Down South and Points Noth

And then Marseilles – Bombay – Turkey – Berkeley – Italy and Germany
Lisbon – Luxor – London – Lewiston.
Peru – Paris – Portland – Portugal – Papeete – Pitcairn Island
Canary Islands – Easter Island – Hawaiian Islands – Greek Islands and Orkney Islands
Rome – Nome and back home to Ester Dome.

Cairo – Reno – Moscow – Glasgow and the Golden Days Hoosegow
Osaka – Oxaca – Nakita – Korea – Nenana
Russia – Malaysia – Florida – Malaga and Mallorca
Antarctica – Alexandria – Oklahoma – Barcelona.

Bering Sea – Black Sea – Red Sea – Dead Sea – Baltic Sea but not the Holy See
Crete – Caithness – Croatia – Columbia – Constantinople
Costa Rica – Casablanca – Pureto Rico – Puerto Vallarta
Sharm El Sheikh – Phuket and other names I still don't get.

Bora Bora – Santorini – Singapore and so much more:
Suez Canal – Erie Canal – Panama Canal and in Japan, a root canal!
Athens Greece and Paris France – Maui where they do the hula dance
JFK – SeaTac – Orly and LAX
FAI – Chicago O'Hare and Heathrow nonstop to Minto.

Barstow – Beijing – Barrow – Belfast – Boston – Brisbane
Mumbai – Mexico – Mykonos – Montreal and the Mighty Mississippi
The Rivers Amazon, Rhine, Seine, Tanana and Nile
White Horse, Darwin, Fiji and Hong Kong –
Circle, Bangkok, Florence, and on and on…

Around the world in 80 years…
Surely it's been done in less time,
But never with more style!

Art Robson Turning 80

A birthday party gathering is planned for June 24. Theme - "Around the World in 80 Years."

Ken Covell presents the local bar with a singing sensation sung to the tune of "We didn't start the fire." (See the lyrics above) It's reported that Art's 80 years of wisdom have left him with sound judgment that...He hates the government and the Airlines. This makes Ken feel incredibly wise – he already hates the government and the Airlines without having to reach 80.

July 8

Don Logan report

Satterberg currently has Don in his office. Don is traveling around and spending some time with different people before he is scattered at the Howling Dog Saloon.

Aug. 5

Guests Riley Cosgrove, Katie Baird, Christina (sorry missed last name), and Jean Flanerly did the 4 truths and a lie tradition

Katie

Spent one year doing Drake Journal of Ag Law (pigs and such)
Rebuilt a car with dad
Hate Brocoli (LIE)
Never been on a snowmachine (somebody must have told her about Gary Stapp already)
Favorite color is blue

Riley

Wrote a journal article about theft of art in WWII
Middle name is Gaelic
Knows Justice Kennedy
Color Blind (green tie with blue shirt would have been a giveaway until you look around the room at everyone else, especially today where there are a record 4 people wearing a green tie with a blue shirt)
Temporarily working on a minor in interpretive dance (LIE)

Christina

Father is Chilean
Related to a dictator (aren't we all)
Dropped out of high school
Suspected of being a human trafficker in Guatamala
Mother Russian (LIE)

Jean

Art model in College (LIE)
Sang for University Choir in College
Ron Reagan patted her on the head
Lived abroad for 2.5 years
Climbed a mountain after a 100m hike

Outgoing Fed Law Clerks

In the grand old tradition, Margot, Matt, and Josh sang a song for the bar. A song so insightful and entertaining that it may have been the best bar lunch ever.

– Ben Seekins, TVBA Secretary

Attorney Discipline

Conflict of interest merits private admonition

Bar counsel issued a written private admonition to Attorney X who received a substantial gift under a will he wrote.

Attorney X wrote a last will and testament for a longtime friend who named Attorney X both his executor and sole beneficiary. The friend died in an accident about a year later. Decedent left large debts, unpaid taxes and owed child support. Attorney X retained an attorney experienced in probate to assist him in handling the estate. Attorney X spent numerous hours probating the will in his role as personal representative. After taxes, statutory allowances, and debts were paid, Attorney X turned over personal property and transferred title to decedent's house to decedent's girlfriend based on his personal knowledge that decedent wanted his girlfriend to have the house. As the sole beneficiary named in the will, Attorney X inherited several thousands of dollars generated from the sale of other real property.

Rule 1.8(c) states that a lawyer shall not prepare an instrument giving the lawyer any substantial gift unless the lawyer is related to the client or the lawyer and the client maintain a close familial or domestic relationship. The friendship between Attorney X and decedent, although of some years' duration, was not a "close familial or domestic relationship" that presumes an exception to the prohibitions under Rule 1.8. While Attorney X did not influence decedent's testamentary decisions or appear to overreach, Attorney X breached the plain language of the rule when he prepared the will under which he later inherited a substantial gift.

Attorney X has practiced law for many years, but he does not handle probate cases. He did his friend a favor when he wrote the will and understood that his friend trusted Attorney X to carry out his spoken testamentary wishes which in fact Attorney X did. Although the mistake in judgment was isolated, Attorney X acknowledged that he violated Rule 1.8(c). An Area Division Member approved the issuance of a written private admonition under Bar Rule 16(b). Attorney X accepted the admonition.

Court orders four year suspension following abandonment of practice

The Alaska Supreme Court suspended former Anchorage attorney Andrew Kurzmann from the practice of law for four years effective June 20, 2011, adopting the recommendations of an Area Hearing Committee and the Disciplinary Board.

Bar counsel learned in May 2007 that Mr. Kurzmann had vacated his law office and that the landlord was going to file an eviction action for overdue rent. Trustee counsel was appointed to secure legal files and to notify any current clients of Mr. Kurzmann's unavailability. Trustee counsel discovered a total of 83 files in the office. All matters with the exception of three had been closed by Mr. Kurzmann or taken over by other lawyers. No effort had been made to secure the confidentiality of information in any of the files. Trustee counsel could not locate a general ledger or client trust account ledger. Bank statements showed that payments were drawn down in Mr. Kurzmann's office account after he quit his office. A few thousand dollars remained in the account with no ownership interests identified. Mr. Kurzmann did not respond to trustee counsel's request for information regarding the trust account. In October 2007, the Board of Governors approved payment of $12,634.14 to compensate trustee counsel for his time spent closing the law office.

Bar counsel was not successful in obtaining information from Mr. Kurzmann regarding his inadequate closure of his practice. Bar counsel filed a petition for formal hearing alleging violations of rules regarding proper maintenance of lawyer trust accounts and withdrawal from practice. Bar counsel also alleged that Mr. Kurzmann violated rules governing a lawyer's duty to cooperate with disciplinary investigations. Charges were deemed admitted after Mr. Kurzmann defaulted.

An area hearing committee found that Mr. Kurzmann failed to deliver client funds promptly and commingled client funds with his own. The committee concluded that Mr. Kurzmann failed to take reasonably practicable steps to protect the interests of his clients. His failure to protect his clients' confidential information was a total disregard of his obligation to his clients and was an inexcusable ethics violation, according to the committee. The committee also found that Mr. Kurzmann violated professional conduct rules when he failed to answer trustee counsel's and bar counsel's requests for information.

The Committee and Disciplinary Board each recommended that the court suspend Mr. Kurzmann from the practice of law for four years. The court adopted the suspension recommendation and approved conditions to be fulfilled prior to reinstatement. Thus, prior to reinstatement Mr. Kurzmann must make full restitution of any amounts owed to the Lawyers' Fund for Client Protection, the Alaska Bar Association, and to all clients for any fee arbitration awards. He will need to undergo a mental examination and submit to mandatory drug and alcohol testing. He must submit and have approved a plan regarding his law practice financial procedures, including a plan for handling client funds with mandatory quarterly auditing and reporting for a two-year period, and he must complete 18 hours of continuing legal education.

Lawyer admonished for filing late appeal briefs

Attorney X received a written private admonition for a pattern of filing appeal briefs after their due dates, and for not following court rules governing the procedures for seeking extended time. In one case, the lawyer made nine requests for an extension of time to file an opening brief. The court warned the lawyer about the conduct, and the lawyer met the final deadline. The Bar Association decided that a formal discipline investigation was not required, but warned the lawyer that repeat conduct could result in possible discipline. A year later, the court notified the Bar that in a second case the lawyer had again missed deadlines and failed to properly seek extensions. (The court itself fined the lawyer $500 with $400 suspended.) The pattern misconduct violated Alaska Rule of Professional Conduct 3.4(c), which forbids the knowing violation of court rules and orders. Mitigation included the lawyer's clear record of ethics violations and court sanctions, cooperation with the Bar's investigation, and acknowledgement of fault. A member of the local hearing committee panel approved an admonition, and Attorney X accepted it.

HUD exemption is a winner

By Wm. T. (Bill) Robinson III

The Department of Housing and Urban Development's final mortgage loan originator rule, which exempts licensed attorneys when they are providing legal services to their clients and are in compliance with all applicable state court ethical rules and standards, is not just a win for the already well-regulated legal profession, but also for their homeowner clients.

The American Bar Association is pleased with the broad exemption for practicing lawyers included in the HUD's final rule that sets standards for state compliance with the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.

The SAFE Act was designed to enhance consumer protections and reduce fraud in mortgage lending. While the ABA wholeheartedly supports these timely and worthwhile goals, HUD's original proposed rule to implement the SAFE Act contained overly broad language that would have imposed excessive new federal regulations on lawyers engaged in the practice of law.

Lawyers already are subject to extensive state court regulations that impose stringent duties of competency, diligence, confidentiality and undivided loyalty on them, and ensure that they provide the best possible legal representation for their clients. Creating a new overlapping federal layer of regulation on practicing lawyers is unnecessary and the conflicting standards would ultimately hurt their consumer clients.

The ABA—working in cooperation with many state and local bars—expressed the legal profession's concerns that the sweeping regulatory powers given to HUD and individual state agencies under the proposed rule would have undermined the confidential attorney-client relationship, the long standing regulatory authority of state courts, and the ability of consumers to obtain the quality legal advice and services they need when obtaining mortgages.

The author is the president of the American Bar Association.

Need Clients?

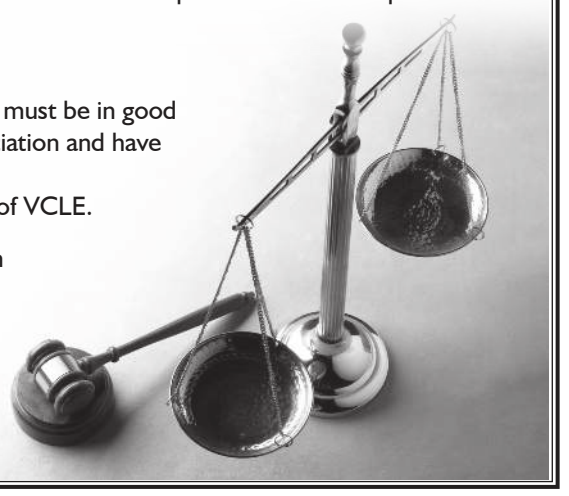
Join the Alaska Bar Lawyer Referral Service

The Alaska Bar Association Lawyer Referral Service is a convenience for people who believe they may need a lawyer but do not know how to go about finding one. The LRS receives over 3000 calls a year from the public and makes referrals to lawyers participating in the program. Calls are answered by staff who do a brief intake to determine the nature of the request. There are 33 practice categories.

How do I join?

To participate in the LRS, a lawyer must be in good standing with the Alaska Bar Association and have malpractice insurance of at least $50,000 and complete nine hours of VCLE.

Contact the Alaska Bar Association at 272-7469 or info@alaskabar.org to receive an application.



TALES FROM THE INTERIOR

To pee or not to pee, that is the question

By William Satterberg

Jacob entered his terrible two's like any other toddler. Almost overnight, my grandson evolved from a basic food processing unit into a functioning little human being. It soon became apparent that Jacob was maturing, as were the rest of us.

Several months previously, my youngest daughter, Kathryn, had moved back into the house. My wife, Brenda, and I were once again transformed back into parents of a two year old. Furiously prized possessions had to be removed from lower shelves, and the house "kid proofed." The good old days had returned.

This is not to say that Jacob's move back into the house was unwelcome. To the contrary, the presence of both Jacob and his mother, Kathryn, was delightful. As proud grandparents, Brenda and I still were able to enjoy a respite from the day to day activity of child raising when Jacob became a handful. Both of our children had been girls, but Jacob was a boy. To Jacob, nothing in the house was sacred. Sugar and spice had been replaced by the proverbial snakes, snails, and puppy dog tails

To Jacob, nothing in the house was sacred. Sugar and spice had been replaced by the proverbial snakes, snails, and puppy dog tails

Given Jacob's status as a boy, many of the tasks of introducing the young tyke to the rites of being male have, by default, fallen to me. These chores include such assignments as learning how to emit a healthy belch, pass gas, and most recently, the fine art of tinkling on trees.

I should have known that the end was near when Brenda announced to me one day that Jacob had flushed his "pee cup" down the toilet.

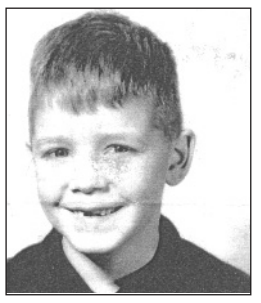
"Pee cup?" I asked. "What was Jacob drinking?"

"No, Bill. A pee cup is what keeps Jacob from squirting outside of his training potty," Brenda advised.

"The girls never had that problem," I responded.

"Different operating equipment, Bill," came the sarcastic response.

In retrospect, perhaps I should have anticipated my little pilgrim's progress earlier. As Jacob became more proficient in using his potty chair and flushing his pee cup down the toilet whenever somebody was not looking, I became equally proficient in replacing the wax toilet rings.



"Almost overnight, my grandson evolved from a basic food processing unit into a functioning little human being."

One day, both Brenda and Kathryn cornered me.

"Dad," Kathryn announced, "You are going to have to teach Jacob how to pee."

"What?" I asked. "He seems to be doing rather well all by himself," thinking back to all of the urine soaked diapers which I had seen around the house.

"Outside, Bill! On a tree." Brenda sternly added. "It's time, and you're the only one who can do it."

Certainly, I had had more than enough experience in that area. Not only was I capable of peeing on trees, but I was also legendary for shooting from the upstairs deck onto Brenda's flower garden. And also for regularly dribbling on my shoes, an attribute of old age.

"OK," I mumbled. "One of these days, maybe."

"Soon," came their combined command.

The following week, I decided to give Jacob his first lesson. Actually, it was rather spontaneous and not a planned event. This was another one of the problems that I had begun to experience with old age.

Jacob and I had been outside mowing the lawn. All of a sudden, I had to go. It seemed like the appropriate time to teach a lesson to Jacob, especially since there was not enough time to take Jacob inside.

I found a nice, unsuspecting birch tree. I then asked Jacob if wanted to see how to pee on a tree. He gave me an eager nod and stepped back.

Jacob watched intently as I did my duty, trying to aim better than I had in the past. Admittedly, I felt somewhat uncomfortable having this young boy watch me water the tree, but I figured it was just something he had to learn. I would explain to him at some other time that it was normally not a good thing to be watching another man pee, especially in bus stations.

Eventually, Jacob spoke. "What are you doing, Grandpa?"

" I am peeing, Jacob."

"Can I pee like that, too?" He asked.

"If you want, " I said. "Do you need to go now?"

"No," came the reply.

He then asked, "Can Mommy pee like that?"

"No," I responded.

"Can Grandma?"

"No," I again replied. "Only boys."

"Only boys?" Came the incredulous inquiry.

"Only boys," I repeated.

"No girls?"

"No girls," I reassured him. It was at that moment that an unseen bond developed between Jacob and myself. Jacob smiled, realizing that he and I shared a special secret.

Two weeks later, I decided to have another go at giving Jacob a go. This time, we were on the back deck. Sensing the "urge," I asked Jacob if he would like to pee through the railing onto grandma's flowers below. Jacob thought that would be fun. Moreover, it was something I always enjoyed doing.

As we stood side by side, I asked Jacob to watch me to see how it worked.

When I finished, I looked over to see that Jacob had already begun the process without my assistance, and was heavily preoccupied with the task in hand.

The problem was that Jacob had not pulled his diaper all the way down before starting. Fortunately, Kathryn had wisely put a pull-up diaper on Jacob earlier so that it would be more convenient for me to teach the young boy. To my surprise, Jacob had still been able to release his operating equipment from the diaper. Regardless, the diaper did provide a certain amount of interference. Things were bent upward at a most uncomfortable angle. As a result, Jacob was shooting a tinkle stream straight up in the air, without much, if anything, in the way of accuracy.

I panicked. Despite my commands, Jacob had no intent in stopping the process once it began. I reached over and immediately jerked Jacob's diaper down in time for him to finish. By then, the area had been liberally anointed. And, although there was not a cloud in the sky, the deck was surprisingly wet.

The job finished, Jacob and I entered the house with Jacob proudly stating that he had been out "peeing off the porch with Grandpa." This announcement quickly brought reproachful looks from Brenda, who did not need any help watering her plants.

Fortunately, I am not the only one that Jacob has singled out for tinkle tutoring. Recently, Brenda and I had Ben Fitial, the Governor of the Northern Mariana Islands and his wife, Josie, stay with us for a long weekend. Notwithstanding the stature of this important guest, Jacob took no prisoners.

One morning, Ben announced that he needed to go to the restroom. Sensing another educational opportunity, Jacob eagerly asked Ben, "Can I go with you?" At first, Ben did not quite understand the child's brazen request. So, Jacob repeated it. Then, to emphasize the point, Jacob went into the bathroom and turned on the light, returning to Ben and declaring "I turned on the light for us." Jacob's objective was clear.

I explained to Ben that Jacob was actively in potty training. Clearly, Ben had been selected as a mentor in the process and should be honored. This time, it was obviously Ben's turn to teach.

In time, Jacob will work on accuracy. Right now, however, he is working on basic targeting, something which also affects us guys over 60. As a practice pointer, I was recently informed by a friend that one of the tricks for accuracy is to toss cheerios into the toilet and let Jacob aim at those. Personally, I do not see the need because I have already explained to Jacob that there is never a need to lift the toilet seat. Hence, there is no need for accuracy. Besides, as for the toilet seat stuff, girls are supposed to take care of that task, assuming it is even necessary.

ESTATE PLANNING CORNER

Family LLCs and partnerships can increase taxes

By Steven T. O'Hara

Gifting interests in Family Limited Liability Companies and Family Limited Partnerships has been popular for a long time. Family LLCs and Family Limited Partnerships are vehicles through which clients may pass on asset-management skills as well as attain other non-tax goals.

From a tax standpoint, gifting often reduces federal estate tax by providing at least a twofold reduction in the amount of property subject to tax at the donor's death. First, the gifted property may avoid estate tax and, second, the appreciation on the gifted property may avoid estate tax.

Unfortunately, gifting can have a significant cost in the form of increased income tax. This cost is particularly unfortunate in estates that are not subject to estate tax.

Consider a client with three adult children. The client resides in Alaska. She has never made a taxable gift, and her only asset is a share of stock. Although she purchased the stock many years ago for $100,000, it is now worth $5,000,000. The client forms an LLC and contributes the $5,000,000 of stock to the LLC.

From a tax standpoint, gifting often reduces federal estate tax by providing at least a twofold reduction in the amount of property subject to tax at the donor's death.

Initially the client is the only member of the LLC; so she does not recognize gain when she contributes the stock to the LLC (Cf. IRC Sec. 721(b)). So long as the client is the sole member of the LLC, the LLC is ignored for federal income tax purposes. In other words, the LLC is disregarded as an entity separate from its owner (Treas. Reg. Sec. 301.7701-2(a) and 301.7701-3(b)(1)(ii)).

Later, when the client brings her children in as members, the LLC is then, absent an election, treated as a partnership for federal income tax purposes (Treas. Reg. Sec. 301.7701-3(a), (b)(1)(i) and (f)(2); Cf. IRC Sec. 721(b) and Treas. Reg. Sec. 1.351-1(c)(5)).

Over the balance of her lifetime, the client gives her children interests in the LLC totaling 13.3% per child. The value of the client's gifts each year are less than $13,000 per child, and thus the client takes the position that the gifts are not taxable (IRC Sec. 2503(b)). The client is careful to file an annual gift tax return — with adequate disclosure — in order to preclude the Internal Revenue Service from raising any valuation or other issue in later years (Treas. Reg. Sec. 25.2504-2(b) and 301.6501(c)-1(f)(2)).

"Gifting can have a significant cost in the form of increased income tax. This cost is particularly unfortunate in estates that are not subject to estate tax."

At all points in time the LLC's only asset is the stock, worth $5,000,000. The client makes no other gifts.

Suppose for purposes of illustration that at the time of the client's death, her only asset is the remaining 60% interest in the LLC. Under her Will or Revocable Living Trust, the client gives this remaining property to her children in equal shares. So now each child owns one-third of the LLC. The LLC's only asset is the stock, which is still worth $5,000,000.

Also suppose that at the client's death the federal tax system is the same as in effect for the year 2011. In other words, suppose as much as $5,000,000 may pass at death free of federal estate tax (IRC Sec. 2010; Cf. IRC Sec. 2001).

If the client had not formed the LLC and instead had continued to own the stock until her death, under tax law applicable in 2011 her children's tax basis in the stock would have been stepped-up to $5,000,000 (IRC Sec. 1014). So the children could then have sold the stock for as much as $5,000,000 at absolutely no tax cost.

By contrast, with the LLC owning the stock and with the gifts of the LLC interests, the donees have tax basis substantially less than $5,000,000. In other words, if the stock is sold for $5,000,000, there will be taxable gain.

Specifically, under tax law applicable in 2011 the tax-basis analysis is as follows:

First: The client's basis in the stock is her cost of $100,000 (IRC Sec. 1012). When she contributes the stock to the LLC in return for 100% of the LLC interests, the LLC takes a carryover basis of $100,000 in the stock (Cf. IRC Sec. 723). The client receives a basis of $100,000 in her LLC interests (Cf. IRC Sec. 722). Although the LLC is initially disregarded as an entity separate from its sole owner, the LLC becomes a partnership for federal income tax purposes on the day the LLC has two or more members.

Second: Over the years the client gives 40% of the LLC interests to her children. The client does so without ever making a taxable gift. The children receive a carryover basis of $40,000 in those interests (IRC Sec. 1015).

The upshot is that gifting could increase income tax down the road. This possibility needs to be figured into the analysis of whether the advantages of gifting, especially with a family business entity, outweigh the disadvantages.

Third: At the time of her death, the client owns 60% of the LLC interests. Although the LLC owns stock worth $5,000,000, the value of 60% of the LLC interests is less than 60% of $5,000,000 (or $3,000,000). The valuation expert assisting with the client's estate believes that a discount of at least 10% is applicable in this case (i.e., 60% times $5,000,000 equals $3,000,000; 90% times $3,000,000 equals $2,700,000). In any event, the valuation expert believes the value of 60% of the LLC interests was roughly $2,700,000 on the date of the client's death (Cf. IRC Sec. 2032). Thus the children receive a stepped-up basis of $2,700,000 in the LLC interests they inherit from their mother (IRC Sec. 1014).

Fourth: The children now own 100% of the LLC and their basis in those interests is $2,740,000 (i.e., $40,000 carryover basis plus $2,700,000 stepped-up basis).

Fifth: By reason of the client's death, the LLC is allowed to elect to step-up 60% of its basis in the stock to $2,700,000 (IRC Sec. 743). So now the LLC's basis in the stock is $2,740,000, which is the same as the children's basis in their LLC interests (i.e., $40,000 carryover basis plus $2,700,000 stepped-up basis).

Sixth: If the LLC sells the stock for $5,000,000, it will have taxable gain of $2,260,000 (i.e., $5,000,000 sale proceeds minus $2,740,000 basis equals $2,260,000). Assuming an applicable capital gain rate of 15%, the LLC members would owe $339,000 in tax (IRC Sec. 701).

Again, if the client had not formed the LLC and had owned the stock until her death, under the law applicable in 2011 her children's basis in the stock would have been stepped-up to $5,000,000. So the children could then have sold the stock for as much as $5,000,000 without incurring any tax — a savings of $339,000 under the facts of this case.

The upshot is that gifting could increase income tax down the road. This possibility needs to be figured into the analysis of whether the advantages of gifting, especially with a family business entity, outweigh the disadvantages.

More competition needed in legal profession?

Opening up the legal services industry to competition would benefit consumers in terms of lower prices and improved service, according to the new Brookings Institution Press book, *First Thing We Do, Let's Deregulate All the Lawyers* by Clifford Winston, Robert Crandall and Vikram Maheshri.

Lawyers have created many restrictions on their industry's size and services through their governing organization, the American Bar Association (ABA), the authors write. Thanks to ABA occupational licensing requirements and state-level restrictions, lawyers have been able to create a club with a limited membership that is able to raise prices to consumers, which is how top lawyers can get away with charging upwards of $1000 per hour for their time.

The ABA accredits law schools, keeping the number of seats available artificially low. In turn, all but a few states today require would-be lawyers to graduate from those ABA-accredited law schools, and all but one state require would-be lawyers to pass the bar exam. The ABA also uses a very loose interpretation of terms to prevent non-lawyers from selling such services as simple, standard-form wills, uncontested divorce documents, patent applications, and the like.

...today's licensure requirements may create only the perception of quality, thus increasing the demand for credentialed lawyers even in situations where the credential does not add value...

The authors argue in today's *Wall Street Journal* that deregulating the legal field would greatly benefit consumers. Every other U.S. industry that has been deregulated, from trucking to telephones, has lowered prices for consumers without sacrificing quality. For example, airline deregulation allowed new carriers to offer service on any route, airline fares declined dramatically and the industry operated with far fewer empty seats and more employees. Deregulation of wireless, cellular telephone services and entry of new carriers has led to the low rates, stimulated huge expenditures, and thus created many new jobs.

Entry by new firms—sometimes from other industries—spurs innovation. The legal industry will be no different, the authors note. For example, Ford, Honda, and Toyota moved into motor vehicle production from bicycle, motorcycle, and farm-equipment production, respectively. More recently, Apple moved from computers into mobile telephones (the iPhone), putting enormous competitive pressure on industry giants such as Nokia, Motorola, and Blackberry/RIM. The resulting innovations improved quality and lowered prices while also expanding employment.

The price of a lawyer can indeed be reduced without sacrificing the quality of legal services. The argument that occupational licensing protects consumers from being harmed by unlicensed practitioners is weak during an era where information is so readily disseminated, the authors argue. A lawyer-specific Angie's List or other places on the internet could easily give consumers information about a practitioner's track record, level of experience, education, and certification, allowing potential customers to quickly and efficiently determine that individual's competence. Instead, today's licensure requirements may create only the perception of quality, thus increasing the demand for credentialed lawyers even in situations where the credential does not add value, they say.

Bar People

Four attorneys in the Perkins Coie Anchorage office and two Alaska practices were recognized in the 2011 edition of Chambers USA: America's Leading Lawyers for Business. In Anchorage, **Eric Fjelstad** and **Brad Keithley** were ranked for Environment, Natural Resources & Regulated Industries, **Thomas Daniel** for Labor & Employment and **Michael Kreger** for Construction Litigation. Perkins Coie was recognized by Chambers as a leader in its Environment, Natural Resources & Regulated Industries and Labor & Employment practice areas in Alaska.

Roger Brunner will retire from the Vice-President and General Counsel position at the University of Alaska in October. **Michael Hostina**, an associate general counsel, will be promoted into the position at that time.

Sumida receives national award

Steve Sumida received the 2011 National Criminal Justice Association Outstanding Criminal Justice Program Award for Tribes for his Alaska Traditional Justice Systems program. The award was presented at the 2011 NCJA National Forum on Criminal Justice and Public Safety on August 2 at the Hyatt Regency Jersey City, New Jersey.


Steve Sumida

The Alaska Traditional Justice System applies pre-contact indigenous processes to reduce crime in Indian country and Native communities. Traditional justice utilizes a system of values instead of rules of law. This system is based on two assumptions: (a) the high crime rates and suicide rates in Indian country are symptoms of cultural destruction; and (b) cultural trauma is exacerbated by the application of western legal system values to Native communities holding traditional values. Training on traditional justice describes how pre-contact Eskimo value systems work in remote Alaska villages and how they have been used to address problems such as juvenile offenses, theft, alcohol offenses and domestic violence.

Alaska Native villages and Indian country have the highest rates of domestic violence, criminal victimization and suicide in the nation. Yet adults today in most remote Eskimo villages can remember a time when there was no crime in their village. Most of these communities do not have state court systems or police. The Alaska Traditional Justice System is a two-part seminar that reinstates traditional justice systems which do not require the support of western police or courts. An initial training session explains how pre-contact justice systems utilize values instead of written laws as a legitimate system of governance. A follow-up session provides technical assistance to address specific community crimes, threats or problems with traditional solutions from the community's own elders or culture.

Travel for community training for the traditional justice system is funded by the DOJ Bureau of Justice Assistance Edward Byrne Memorial competitive grant. This grant was awarded in 2010 to Pribilof Aleuts, Inc. for implementation of the Traditional Justice System in Alaska Native communities and Indian Country around the United States. Since the fall of 2010 onsite trainings have occurred in the remote Alaska villages of Kongiganak, Kipnuk, Gambell, Savoonga, Newtok, and Hooper Bay and for the Tribal Court of the Colville Confederated Tribes in Nespelem, WA. General information sessions have occurred in Bethel, Alaska, and Albuquerque, New Mexico and Newark, New Jersey.

Sumida bases his Traditional Justice System on 21 years of legal and personal experiences in over 50 Alaska Native villages. Steve Sumida has conducted traditional justice trainings in off-road Alaska villages on a priority needs basis for over 15 years. During that time there have been several restorative justice providers but he has been the only provider of training implementing pre-contact Alaska traditional justice systems. The traditional governance models were originally derived from personal observation and interaction with elders onsite in remote villages as an Alaska Legal Services Corporation attorney.

He holds a BS in Social Justice from Montana State University Bozeman, an MA in Rural Development from University of Alaska Fairbanks and a JD from the University of Wyoming College of Law. He is a practicing attorney with experience as a civil and criminal trial lawyer. He has served as executive director or program manager of several Alaska Native organizations and is currently acting as Executive Director and Program Manager for Pribilof Aleuts, Inc.

Sumida also has national and international legal experience in related indigenous issues. He presented "Inupiaq Juvenile Justice: Is there a DV application" at the 8th International Conference on Family Violence, San Diego, California, 2003; presented, "Federal Indian Policy in Alaska" September 2005 University of Hawaii Law School, Honolulu Hawaii; presented "Lasting Consequences of Land Settlement Acts and Their Cultural Impacts," March 2007 Boalt Hall School of Law, University of California, Berkeley; served as the Alaska Inter-Tribal Council "Legal delegate on the Continental working group on the Declaration on the Rights of Indigenous Peoples" October 2006, La Paz, Bolivia; served as the Alaska Inter-Tribal Councils "Delegate creating the Secretaria Internacional de los Pueblos Indigenas," November 2007, Caracas, Venezuela.

Stock joins Lane Powell

Margaret D. Stock has joined Lane Powell as counsel to the firm in the Immigration Practice Group. She plans to focus her practice on immigration and citizenship law.


Margaret D. Stock

Stock is a nationally known expert on immigration and national security law issues, and testifies regularly before Congressional committees on immigration, homeland security and military matters. As a retired Lieutenant Colonel in the Military Police, U.S. Army Reserve, Stock has extensive experience with U.S. military issues. She has also worked as a professor at the United States Military Academy at West Point, and she currently serves as an adjunct instructor at University of Alaska. Stock is a member of the American Bar Association Commission on Immigration.

Stock earned her A.B., with honors, in Government from Harvard College, and earned her J.D., with honors, and M.P.A. from Harvard Law School and the Harvard Kennedy School of Government.

Law Review Article on Alaska Takings Law

Larry Albert is publishing an article in the Public Land and Resources Law Review entitled "Does the Alaska Constitution Provide Broader Protection for Taking or Damage to Property? An Analysis." The article will appear in Vol. 32 of this periodical and should be available electronically by September 2011 at www.umt.edu/publicland/. Members are advised of this article as it is not being published in the Alaska Law Review

Albert's article is the first that comprehensively addresses Alaska's "taking or damage" clause in Article I, Section 18 of the Alaska Constitution. Many states have constitutional damage clauses beyond the taking provision in the Fifth Amendment, however little has been written on the subject. Albert's article critically evaluates whether the Alaska Supreme Court provides broader protection for regulatory interference with property rights pursuant to our damage clause.

Public Defender goes private

After four years at the Public Defender agency, **Monica C. Elkinton** has left and opened her own practice. Law Office of Monica Elkinton is in Resolution Plaza, sharing space with criminal defense attorneys Darrel Gardner and Steve Wells.


Monica C. Elkinton

Monica climbed the ranks through the PDs, from misdemeanors into felonies. Her last two years, she covered one day of the Anchorage CRP (mental health) court on top of her full criminal caseload. She will take criminal cases, DUIs, civil litigation, domestic disputes, and whatever else walks in the door. Monica is a graduate of Northeastern University School of Law. She clerked for Hon. Sen K. Tan. She is a member of the Alaska Bar Association, Alaska Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, and the National Lawyers Guild. She is a graduate of the National Criminal Defense College in Macon, Georgia. She served as an officer of the Young Lawyers Section of the Anchorage Bar, and has volunteered with Anchorage Youth Court and the State Mock Trial competition. She is also a soprano member of the Anchorage Concert Chorus.

Mierop achieves Fellow status

Sandra M. Mierop has been inducted as a Fellow in the Academy of Professional Reporters at the recent National Court Reporters Association Conference held in Las Vegas, Nevada. Fellowship in the Academy is a professional distinction conferred upon a person of outstanding and extraordinary qualifications and experience in the field of shorthand reporting. Candidates for Fellow are required to have been in the active practice of reporting for at least 10 years, and to have attained distinction as measured by performance (which includes publication of important papers, creative contributions, service on committees or boards, teaching, etc.).


Sandra M. Mierop

Mierop is a Registered Professional Reporter, Certified Realtime Reporter, Certified Computer Access Realtime Translation (CART) Reporter and Certified Broadcast Captioner with Northern Lights Realtime & Reporting, Inc. in Anchorage, where she is CEO. Northern Lights Realtime & Reporting provides voice-to-text transcription in litigation matters, to people who are deaf and hard of hearing and in public and corporate environments. Please visit NLRR.com for more information.

Bar People

Stoel Rives adds Anchorage attorney


Kirsten Kinegak-Friday

Stoel Rives LLP, a full-service U.S. business law firm, is pleased to announce that Kirsten Kinegak-Friday has joined its Anchorage office. She has particular experience in matters concerning Alaska Native corporations and tribes. Her experience encompasses all aspects of litigation as well as substantial corporate work, including drafting Native corporation and tribal ordinances, resolutions and policies.

Kinegak-Friday's addition continues the expansion of the firm's Alaska presence. Stoel Rives has more than doubled the number of its Anchorage-based lawyers over the past two years.

Kinegak-Friday is a graduate of UCLA School of Law (J.D., 2009) and Stanford University (B.A., 2005) and is admitted to the state bar of Alaska and to the U.S. District Court for the District of Alaska.

Stoel Rives is a business law firm providing corporate and litigation services to a wide range of clients throughout the United States. The firm has nearly 400 attorneys operating out of 11 offices in seven states. Stoel Rives is a leader in corporate, energy, environmental, intellectual property, labor and employment, land use and construction, litigation, natural resources, project development and real estate law. The firm has offices in Alaska, California, Idaho, Minnesota, Oregon, Utah and Washington.

Tucker, Razo appointed to 9th Circuit panel


S. Lane Tucker

Stoel Rives LLP, a U.S. law firm, recently announced that **S. Lane Tucker** has been appointed by the U.S. District Court for the District of Alaska to serve a three-year term as a Lawyer Representative to the Ninth Circuit Judicial Conference.

Lawyer Representatives provide support and advice to the judges and administrators of the Ninth Circuit, including during the Circuit's annual Judicial Conference. In particular, Lawyer Representatives are expected to help implement conference resolutions within their local districts, and offer constructive criticism of the way courts are functioning. Lawyer Representatives are chosen to serve three-year terms representing attorneys practicing in each of the Ninth Circuit's 15 districts in nine western states and two Pacific Island jurisdictions.

Tucker is a partner in the Stoel Rives LLP Anchorage office and has 25 years of experience in federal government contracts, construction, white collar and health care litigation. Prior to joining Stoel Rives, she was with the U.S. Department of Justice for nearly 20 years, including as the Chief of the Civil Division of the Alaska U.S. Attorney's Office and as Trial Counsel with the Civil Division in Washington, D.C. Tucker currently serves as the Alaska Chair for the American Bar Association's Public Contracts Section, Vice-Chair of the ABA Small Business & Other Socioeconomic Programs Committee, and is the founder and Chair of the Alaska Bar Public Contracts Law Section. She is a graduate of the S.J. Quinney College of Law at the University of Utah (J.D., 1987), Mary Baldwin College (B.A., 1983) and Oxford University (1981), and is admitted to the state bars of Alaska and Pennsylvania.

Also appointed was **Greg Razo**. He is currently vice president of government contracting for Cook Inlet Region Inc. (CIRI). Born in Alaska, Razo is Yupik and a CIRI shareholder. He grew up in Anchorage and earned a bachelor's degree in English from Gonzaga University and a juris doctorate degree from Willamette University.


Greg Razo

Following his graduation from law school at Willamette, Razo served as an assistant district attorney and in private practice in Kodiak.

Razo has been a director of CIRI, Cook Inlet Tribal Council and The CIRI Foundation. He is a director of Alaska Legal Services Corporation and also chairs the Anchorage United for Youth Leadership committee and the CITC-JOM Native Education committee.

The "No Contact" Rule in class actions

By Mark J. Fucile

Class actions are a unique procedural vehicle and pose equally unique issues for the application of the "no contact" rule, RPC 4.2. The Alaska class action rule, Rule of Civil Procedure 23, generally mirrors its federal counterpart, FRCP 23. Similarly, Alaska's "no contact" rule is patterned on its ABA counterpart, Model Rule 4.2. In this column, we'll first look briefly at those aspects of RPC 4.2 that have particular resonance in the class action context and then we'll turn to how the no contact rule has been interpreted in class actions in both Alaska and beyond.

The "No Contact" Rule

RPC 4.2 prohibits communication "about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter[."] It applies to both individuals and organizations. With the latter, Alaska Bar Ethics Opinion 2011-2 notes that managers and other "speaking agents" (defined by evidence law as those whose statements will bind the organization) are generally included within the scope of the entity counsel's representation (both internal and outside counsel). Contact is also permitted under exceptions specified in the rule, the most significant of which in class actions is by court order.

The "no contact" rule is predicated on the fact of representation by another attorney. Under both the Alaska RPCs (Scope, Paragraph 17) and the ABA Model Rules (Scope, Paragraph 17), the question of whether an attorney-client relationship exists is governed by the substantive law of the jurisdiction rather than the professional rules. In Alaska (see *Doyon Drilling, Inc. v. Loadmaster Engineering, Inc.,* No. 3:10-cv-0094-HRH (D. Alaska Apr. 29, 2011), Order at 11 (unpublished)) and nationally (see Restatement (Third) of the Law Governing Lawyers (Restatement), § 14 (2000)), the analysis usually turns on the subjective belief of the client and whether that belief is objectively reasonable under the circumstances. In the class action context, however, lawyers for the class typically don't have a "traditional" attorney-client relationship with their clients beyond the class representatives. For example, Alaska RPC 1.7(d) excludes unidentified class members for conflict purposes. Therefore, courts have attempted to fashion guidelines that blend the traditional yardstick for determining an attorney-client relationship with the unique procedural setting of class actions.

Applying the "No Contact" Rule to Class Actions

Most authorities hold that prior to class certification, class counsel does not represent potential class members other than the class representatives with whom the lawyer has a direct attorney-client relationship (see generally Restatement, § 99, cmt. l; New York City Bar Ethics Op. 2004-1, § 4 (2004)). Accordingly, prior to class certification, potential class members are generally "fair game" for contact absent a direct attorney-client relationship or a controlling court order.

Similarly, most authorities hold that after class certification and the expiration of any "opt out" period, class counsel by virtue of the procedural process has an attorney-client relationship with remaining class members (see generally ABA Formal Ethics Op. 07-445 (2007) at 3). Therefore, after class certification and the expiration of the "opt out" period, class members remaining are "off limits" outside of formal discovery. (Some statutes use "opt-in" periods instead. In those instances, the same prohibition would apply to class members who had "opted in." See *Parks v. Eastwood Ins. Services, Inc.,* 235 F. Supp.2d 1082 (C.D. Cal. 2002).)

The situation is much less clear, however, for the period between class certification and the expiration of the "opt out" period. Some courts have held that contact is impermissible because, as *Resnick v. American Dental Ass'n,* 95 F.R.D. 372, 376 (N.D. Ill. 1982), put it, once the class is certified "[c]lass counsel have the fiduciary responsibility and all the other hallmarks of a lawyer representing a client." By contrast, ABA Formal Ethics Opinion 07-445 reasoned (at 3)—without citation to any authority—that no attorney-client relationship should be inferred until the expiration of the "opt out" period because "[i]f the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation."

Since the ABA opinion was issued in 2007, several decisions have quoted its conclusion without analyzing whether or not it is correct (see, e.g., *Kay Co., LLC. v. Equitable Production Co.*, 246 F.R.D. 260, 264 (S.D. W. Va. 2007); *Morris v. General Motors Corp.,* No. 2:07-md-01867, 2010 WL 931883 at *5 (E.D. Mich. Mar. 11, 2010) (unpublished)). By contrast, the trial court in *Throop v. Air Logistics of Alaska, Inc.,* No. 4FA-03-835 CI (Alaska Sup. Ct. 4th Dist. Jul. 2, 2004), Order (unpublished), found that contact by defense counsel during this interim period violated RPC 4.2. (This issue was not addressed in a subsequent appeal, see *Air Logistics of Alaska, Inc. v. Throop,* 181 P.3d 1084 (Alaska 2008).)

The period between class certification and "opt out" can be especially sensitive—with the "opt outs" potentially shaping the litigation significantly. In that setting, class members weighing whether to remain "in" or "out" may be tempting targets for class counsel, defense counsel or even other claimants' counsel looking to separately represent the "opt outs" (see, e.g., *Austen v. Catterton Partners* V, LP, ___ F.Supp.2d ___, 2011 WL 1374035 at *7 (D. Conn. Apr. 6, 2011) (discussing the contrasting communications interests of class and defense counsel); In re McKesson HBOC, Inc. Securities Litigation, 126 F.Supp.2d 1239 (N.D. Cal. 2000) (involving other claimants' counsel interested in representing "opt outs")).

At the same time, the penalties for "guessing wrong" on the "no contact" rule range well beyond bar discipline (see generally In Korea Shipping Corp., 621 F.Supp. 164 (D. Alaska 1985) (discussing range)). Court-imposed sanctions can include exclusion of evidence (see, e.g., *Bell v. Kaiser Foundation Hospitals,* No. 03-35876, 2004 WL 2853107 at **1 (9th Cir. 2004)), disqualification (see, e.g., In re News America Publishing, Inc., 974 S.W.2d 97 (Tex. App. 1998)), and monetary sanctions for corrective notices (see, e.g., *Tedesco v. Mishkin,* 629 F.Supp. 1474, 1485-87 (S.D.N.Y. 1986)).

In light of lack of firm appellate authority and the potential risks involved, a prudent approach for defense (or other) counsel interested in contacting class members between class certification and "opt out" is to seek the court's permission first. The *United States Supreme Court in Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99-103, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), noted that FRCP 23 permits courts to regulate contact with class members. Alaska Rule of Civil Procedure 23(d) contains a similar provision allowing courts to manage class actions. Moreover, RPC 4.2, like its ABA Model Rule counterpart, includes a specific exception authorizing contact by court order. In short, this is an area where it is far better to be "safe" than "sorry" by asking for court permission.

Man-in-the-middle fraud scheme targets new victims: Attorneys

By Jason Feeken

Crooks using counterfeit checks to defraud unwitting consumers have set their sights on a new group of victims: attorneys.

Phony check scams have plagued bank customers for years, and this new variation on the scheme can be harder to detect at first, especially if the targeted attorney commonly deals with large dollar transactions.

Here is how this fraud scheme typically works: An attorney is contacted via e-mail by an individual or firm outside of the United States requesting services such as collecting a debt, obtaining a business loan or obtaining an alimony settlement. Criminals will sometimes claim they selected the attorney based on a recommendation from the state's bar association.

To establish the relationship, the attorney might have the new "client" sign an agreement or contract. Having such a signed document might give the attorney a false sense of security that he or she is dealing with a legitimate individual or firm.

Once the relationship has been established, the attorney receives a check to process on behalf of the new client. We have found that these checks are often delivered by courier. In a recent situation, the check delivered looked like an actual cashier's check.

The attorney deposits the check and soon thereafter, per the instructions from the client, sends a wire transfer of some or all or the proceeds of the check. The funds are typically sent to a recipient in a foreign country such as South Korea, Malaysia, Taiwan, or China.

It is only after the wire transfer is sent that the phony check is returned as counterfeit. By then it's too late.

When a person deposits a check, cashier's check or money order, the depository bank merely acts as an agent of the owner of the check (normally, the payee of the check) for the purpose of collection of the check.

The depository bank regularly grants provisional credit on the deposited item, pending final settlement or payment of the check. If the person spends that provisional credit or mails the funds to someone else, and the original check turns out to be phony, he or she has no way to recover the lost money and must repay their bank directly.

Keep in mind that even if your bank does not put a hold on the check and initially gives you funds (the provisional credit), it can take up to two weeks or longer for that check to clear. It can take even longer for a bank to determine if a check or money order from a foreign country is valid.

Avoiding A Loss

Here are three facts to be aware of to help avoid a loss:

- If an e-mail or internet opportunity seems too good to be true, it likely is false – especially if it involves an individual or firm outside of the United States. Risks of becoming a victim by a fraud scheme are high.
- If you do not personally know the provider of the check, even if they sign an agreement or contract, be on guard. The risk of becoming a victim by a fraud scheme is high.
- If a portion or all of the proceeds of a check must be wire transferred out of the country or withdrawn for a quick return to the provider, the risk of fraud is high.

If you suspect a client's check might not be legitimate, decline the engagement for legal services.

You could also call the company whose name is on the check. The Wisconsin Law Journal reports that a New Hampshire attorney avoided a large loss by calling the Pennsylvania company that had supposedly offered to hire him to collect a six-figure debt. The company's comptroller laughed and said 24 other lawyers had also called him after receiving similar offers from a fraudster.

If you believe you've been a victim of fraud, immediately contact law enforcement agencies and your financial services institution for help.

Jason Feeken is a business relationship manager for Wells Fargo, working at the bank's Huffman Road office in Anchorage.

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Anchorage

Michaela Kelley Canterbury
276-8185

Dale House
269-5044

David S. Houston
278-1015

Mike Lindeman
245-5580

Suzanne Lombardi
771-8300 (wk)

John E. McConnaughy
278-7088

Anchorage

Brant G. McGee
830-5518

Michael Sean McLaughlin
269-6250

Michael Stephen McLaughlin
793-2200

Greggory M. Olson
269-6037

John E. Reese
345-0625

Jean S. Sagan
263-5414

Anchorage

Moira Smith
276-4331

Palmer

Glen Price
746-5970

Fairbanks

Valerie Therrien
452-6195

Bethel

Megyn A. Greider
543-1143

—News from the courts—

L-R: Justice Christen, Master Hitchcock, and Presiding Judge Gleason.

Hitchcock retires

Long-time Anchorage Children's Master William Hitchcock was honored at a retirement reception held in his courtroom in the Boney Courthouse on August 31. At the time of his retirement, Master Hitchcock was one of the longest-serving employees of the Alaska Court System, having worked for the court since August 1, 1975. Of his 36 years of service to the justice system, almost all were spent as a Master in children's matters, namely child in need of aid and juvenile delinquency cases.

In addition to handling some of the most sensitive and challenging cases a judicial officer can face, Master Hitchcock volunteered for a wide range of service organizations and initiatives that support Alaska's children. He is a recipient of numerous local, state and national awards, including the Alaska Supreme Court's 2002 Community Outreach Award and the 2008 Judge of the Year Award from the National CASA (Court-Appointed Special Advocate) Association. Here, Master Hitchcock holds a certificate of appreciation from the Alaska Supreme Court, which was presented by Justice Morgan Christen. Presiding Judge Sharon Gleason also presented him with a plaque from his colleagues in the Third Judicial District.

Attendees at the August 23 workshop included, L-R: Beth Odsen, Technical Services Librarian, Alaska State Court Law Library; Mike Schwaiger; Joan Clover; Marilyn May, Chair, Bar Historians Committee; Karen Brewster, UAF; Alyson Pytte; and Barbara Hood.

History workshop

The Alaska Bar Association Historian's Committee recently sponsored a workshop on taking oral histories at the Bar office in Anchorage. Karen Brewster of the Oral History Program, University of Alaska Fairbanks, presented the workshop to members of the Bar interested in helping collect oral histories of members of Alaska's legal community. Ms. Brewster is currently coordinating "The Judges: An Oral History Project," a new initiative that seeks to digitize and archive existing oral histories of Alaska's judges and to conduct new interviews with judges who have played a significant role in our state's history.

2-day event explores the Color of Justice

The annual Color of Justice project continues to grow. This year, the 2-day program at UAA and the Boney Courthouse featured programs for youth that included a Constitutional Cranium game, a mentoring session, a "robing" of 8 students who shared their reasons for wanting to be a judge in the future, and a series of workshops.

Judges, professors, presenters, and attorney volunteers gather with Color of Justice participants in the Supreme Court Courtroom at the close of "Meet the Pioneers; Greet the Future." Judges participating in the presentation, who were introduced in the order they were appointed to the bench, included Judge Beverly Cutler (1977-2010), Judge Natalie Finn (1983-2002), Justice Dana Fabe (1988-Present), Judge Sen Tan (1996-Present), Justice Morgan Christen (2001-Present), Judge Sharon Gleason (2001-Present), Judge Pamela Washington (2010-Present), and Judge Jo-Ann Chung (2011-Present).

Alaska Bar Association President Don McClintock serves as a Mentor during "MentorJet: A Speed Mentoring Experience" on the first evening of the 2011 Color of Justice Program. The Bar's Executive Director Deborah O'Regan, in the background, also mentored students during the event, which was held in the lobby of the Boney Courthouse in Anchorage.

Color of Justice 2011

Fostering Diversity in the Legal Profession & Judiciary...One Student at a Time

Sitka, Alaska February 15-16, 2011 Anchorage, Alaska June 22-24, 2011

THANK YOU!

Vara Allen-Jones, UAA
Ella Anagick
Denise Anthony, Alaska Court System
Prof. Lorraine Bannai, Seattle University
Maude Blair, NANA Development Corp.
Peg Blumer, Sitka Tribe of Alaska
Nicole Borromeo
Jason Brandeis, UAA Justice Center
Rex Lamont Butler
Judge Larry Card (Ret.)
Chief Justice Walter Carpeneti
Justice Morgan Christen
Judge Jo-Ann Chung
Lori Colbert, Mendel & Associates
Carol Daniel
Provost Michael Driscoll, UAA
Whitney Earles, Seattle University
Jacqueline Esai, ACS Law Clerk
Judge Natalie Finn (Ret.)
Victor Fischer, Delegate, AK Constitutional Convention
Bernice Galloway, CIRI
Una Gandbhir
Yessenia García-Lebrón, LSAC
Johnny O. Gibbons
Judge Sharon Gleason
Paula Gluzman, U.W. School of Law
Joy Green-Armstrong
Jeff Groton, NAWJ
Bernie Gurule, Mt. Edgecumbe H. S.
Carmen Gutierrez, Dept. of Corrections
Randy Hawk, Mt. Edgecumbe H.S.
Bernetta Hayes, ABA/CLEO
Leslie Hiebert
Barbara Hood, Alaska Court System
Mag. Bruce Horton, Sitka
September Horton, Mt. Edgecumbe H.S.
Mag. Mike Jackson, Kake
Lydia Johnson, Sitka Tribe of Alaska
Barbara A. Jones, Chair, LRE Committee
Cheryl Jones, Alaska Court System
Prof. Jay Kanassatega, Gonzaga U
Monica Kane, Assistant Provost
Teka Lamade, Sitka Tribe of Alaska
Natalie Landreth, NARF
Rachel Lauesen, Fortier & Mikko, PC
Susan Lee, Gonzaga University
Jahna Lindemuth, Dorsey & Whitney LLP
U.S. Mag. Judge Leslie Longenbaugh
Fe Lopez, Seattle University School of Law
Theresa Lyons, UAA TRIO Programs
Dr. Sandra Madrid, UW School of Law
Judge Roy Madsen (Ret.) & Linda Madsen
Don McClintock, President, AK Bar Assn.
Denise Morris, First Alaskans Institute
Ben Muse, ACS Law Clerk
Neil Nesheim, ACS Area Ct Administrator
Margaret Newman, Alaska Court System
Prof. Stephanie Nichols, Seattle USL
Mark Niles, Dean, Seattle USL
Troy Nkrumah, Anchorage Urban League
Deborah O'Regan, Alaska Bar Assn.
Cassandra Sneed Ogden, ABA/CLEO
John Parsi, ACS Law Clerk
Christine Pate, ANDVSA
Jude Pate, Sitka PDA
Candice Perfect, UAA Pre-Law Society
Prof. Deb Periman, UAA Justice Center
Kayleen Preston, UAA Pre-Law Society
Greg Razo, CITC
Lisa Rieger, CITC
Imari Rene Rouzan, AK Native Justice Center
Randy Ruaro, Office of Gov. Sean Parnell
Nevhiz Calik Russell, Anchorage AGO
Bryan Schroder, U.S. DOJ
Krista Scully, Alaska Bar Association
Michele Storms, Gates Program, UWSL
Judge Sen Tan
Doanh Tran, UAA Pre-Law Society
UAA Upward Bound Program
Judge David Voluck, Sitka Tribe of Alaska
Judge Pamela Washington
Amy Wheaton, Alaska Court System
Judge Vanessa White
Christine Williams, Perkins Coie LLP
Tonja Woelber
Chong Yim, Anchorage PDA

NAWJ-Alaska COJ Committee:
Justice Dana Fabe, *2011 COJ Chair*
Judge Patricia Collins (Ret.), *Sitka Program Chair*
Judge Stephanie Joannides (Ret.), *Founding Chair*
Judge Beverly Cutler (Ret.), *2011 M.C.*

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Mystery Solved--Recent amendments to District Court Local Rule 56.1

By Brewster Jamieson

As a freshly-minted civil lawyer representative, it is my duty to interface with our Federal bench on matters of concern to Alaska civil lawyers. So, when the new version LR 56.1 came out effective last December, I decided to inquire.

For those of you who may have "forgotten" what LR 56.1 says (or even that there are such things as Federal District Court local rules), here goes:

Rule 56.1 Motion for Summary Judgment

(a) Single Motion. A motion for summary judgment must contain all the grounds upon which the moving party relies and address all causes of action or affirmative defenses raised in the pleading challenged.

(b) Limitation on Further Motions. Except upon leave of court for good cause shown, a party who makes a motion under Rule 56 of the Federal Rules of Civil Procedure must not make another motion under Rule 56 addressing a cause of action or affirmative defense that was available to the party but omitted from its earlier motion.

This rule basically requires that all bases for summary relief be included in a single motion. Essentially, you have one, and only one, shot at a dispositive motion, and you had better not leave anything out. There is a "relief valve" provision contained in LR 56.1(b) that allows relief from this requirement upon a showing of "good cause," but most litigators will be leery of any escape hatch that requires you to seek permission. Inevitably, there will be someone on the other side disagreeing with you, claiming your conduct is dilatory or worse (and that's just the nice things they will say about you). So I thought it would be of interest to find out what was behind this rule change, and how receptive our judges would be to requests for relief.

My chance came at one of my first District meetings, when Chief Judge Beistline inquired if any Lawyer Representative had an issue to raise. Here is how it went:

Me: [Very timidly] Could you perhaps explain the thinking behind LR 56.1? I have had some discussions with my fellow practitioners, who are a little perplexed as to what drove this change in the Local Rules.
Hon. Judge A: Does anyone know about this?
Hon. Judge B: Not me.
Hon. Judge C: Me neither.
Hon. Judge D: I've seen that Rule in other Districts, and I HATE that rule. I always strike it from my pretrial order.
Hon. Judge E: That rule is just plain CRAZY!

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Hon. Judge F: You mean we have Local Rules? Who knew? [Okay, there are not even this many judges in our District, and this might not be an actual quote]
Chief Judge Beistline: What we mean to say is that we will investigate this issue carefully and get back to you shortly.

As promised, Judge Beistline dutifully followed up with the following:

"We have investigated the question you recently raised regarding the changes to Local Rule 56.1. These changes were initiated in response to several specific cases where multiple Summary Judgment Motions were being filed in a piecemeal fashion and where it was felt that it would have been much more efficient to have dealt with them all at once. The proposed revisions to Local Rule 56.1 and other proposed changes were published on the Court Website and held open for public comment for more than six weeks.

No comments were received. It was therefore adopted. It is important to note that Rule 56.1(b) permits more than one motion upon approval of the court. Revised Local rule 56.1 should not preclude the use of multiple motions where appropriate. The revised rule was intended solely to prevent "end runs" around the page limitations of LR 10.1 and piecemeal motion practice. If "good cause" exists to proceed with multiple motions that certainly remains available under the rule. All the district judges agree that there will be cases where more than one summary judgment motion should be allowed."

So, what does this mean those of us in the trenches? First, our District Court has a website, and it occasionally contains things that we (particularly Lawyer Representatives) ought to notice. Second, there certainly are cases where the judges absolutely understand the need for early dispositive motion practice. It helps narrow the issues, cuts down on needless discovery, and focuses the court and parties on the facts of the case and applicable law.

So, I believe most of our judges will tolerate, and even welcome, multiple dispositive motions in cases involving threshold or complex legal issues. But, of course, there is a limit, and there are times when the dispositive motion procedure can be abused. In practice, talk about this local rule and its application to your case with opposing counsel during your Rule 26 meeting, and address it in the Scheduling and Planning Conference Report filed with the court. If you have a live scheduling conference thereafter, ask your judge for his or her views on this rule, and discuss how it should, or should not, apply to your case.

Judge Chung makes Alaska court history

Judge Jo-Ann Chung was installed on the Anchorage District Court at a ceremony held Sept. 1, in the Supreme Court Courtroom. Judge Chung is the first Asian-American woman to serve as a judge in Alaska.

Both sets of her grandparents emigrated from China, and her father grew up in Boston's Chinatown. Her mother's family ran a Chinese restaurant in Harvard Square in Cambridge, Mass., which is still in business today.

Judge Chung was born and raised in Belmont, a suburb of Boston. After majoring in psychology in college, she served as a Jesuit Volunteer, working as a mental health advocate for indigent people who needed assistance with disability, health care, housing or consumer issues.

Eventually, she followed her chosen path to law school. After earning her law degree, she began an 18-year career as an attorney in the public sector. She first served as a law clerk for Judge Robert Coats of the Alaska Court of Appeals, then as an Assistant Public Defender in Kenai. For several years she was an Assistant Attorney General in the Commercial and Human Services Sections of the Anchorage Attorney General's Office. For the last 10 years, she has served as a prosecutor for the Municipality of Anchorage, supervising the Domestic Violence Unit for much of that time. Judge Chung was appointed to the Anchorage District Court bench in May 2011 by Governor Sean Parnell.

Several members of Judge Chung's family traveled to Anchorage for the installation ceremony. Here, she visits with family members before the ceremony. L-R: Liz Wing, aunt; Chris Chung, brother; Milly Mui, sister-in-law; Youn T. Chung, father; Judge Chung; and Joe Chung, brother.

Judge Chung is congratulated by her father Youn T. Chung after her robing. At right is her brother Joe Chung. Justice Dana Fabe presided over the ceremony and gave the oath of office. With Justice Fabe on the bench are, L-R: Anchorage District Court Judge Catherine Easter; Court of Appeals Judge Robert Coats; Justice Fabe; and Anchorage Superior Court Judge Sen Tan.