The Alaska BAR RAG

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Bar News:
2007 Budget & Rules

pgs. 12-13 & 15

Setting Up a Shingle? Consider a job with the Department of Law

By Attorney General David Marquez

Service with a smile

Tuesday, November 7th was a big day. Thousands of voters visited the polling booths to cast their vote for a new governor, the state's lone seat in the U.S. House, all 40 seats in the Alaska House and 10 seats in the Alaska Senate. A number of state superior and district court judges were up for retention and Alaska voters weighed in on two ballot measures.

It was also a big day in the Department of Law. Almost everybody in the Anchorage office of the department's civil division who wasn't in court, or busy meeting court-imposed filing deadlines, crowded the third floor library to honor 20 outstanding employees.

Dianne Olsen, Gail Voigtlander and Cathy Marvel-Hall received their 25-year service pins. Jim Cantor, Linda Kesterson, Larry McKinistry, Marilyn Sansom and Susan Wibker received their 15-year pins. Twelve others received service awards for 10 and five years. There were some excused absences. Several service award recipients were unable to attend because they were in trial. A couple of people were on leave, including Karyl Richards who was away welcoming her son back from a tour of duty with the armed forces in Iraq.

Later in the month, I was also to be acknowledging the service of 22 other Department of Law employees in both the administrative, criminal and civil divisions. Bob Meiners, Kevin Messing, Margie Vandor and Christine Oles have been with the department for 25 years. Dan Branch, Susan Parkes and Kathryn Daughhetee have been here 20 years. Eleven other employees have 10 or five years of service.

Forty-two people and 500 years of collective service in the Department of Law is impressive. I am sure in the knowledge that a commitment to state service is honorable, laudable and rewarding. In fact, it was why I came to work for the state nearly four years ago. I can testify to how valuable these people are.

As a newcomer to the department I had a lot to learn and I had to learn it quickly. I still have a lot to learn. The recipients of these longer-term service awards have been my teachers and they've all mentored many in the department. They certainly stand as icons for what all of us in the attorney general's office should be striving to be - top notch members of our professions, highly skilled and knowledgeable, highly ethical and devoted

The Department of Law is the largest and I think the best law firm in the state.

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If Santa were judged incompetent pg. 21

Hornaday retires...from the law

By Layton Ehmke

Jim Hornaday has decided to drop the other shoe and jump into the warm waters of retirement, but that doesn't mean he's going to stop running the usual tight ship at the regular meetings of the Homer City Council, where he sits at the helm as mayor--and has since October of 2004.

Many of Hornaday's characteristics from his life as an attorney and judge on the Kenai Peninsula shine through as he presides over city business--that is, when he's not out climbing Mt. Kilimanjaro or volunteering to build houses.

But even before all of that, Hornaday was just another Richie Cunningham from Des Moines, Iowa--a guy with a title of student council president for the class of 1957.

Hailing from American Gothic country in Iowa, Hornaday reflected on how the painting could have been depicting his family exactly, with a "heavy emphasis on education, and not looking up from the plow until you're at the end if the row," he said.

An avid young reader, Hornaday said he got interested in Alaska reading about Balto, the famous sled dog, and other great Alaska adventures. He came to the state in his junior year at Monmouth College and worked in a sawmill. Later, he spent a little quality time getting to know the wildlife as a summer game warden. "It was pretty off-the-cuff. I had a lot of fun, Hornaday said. "My parents thought I was nuts."

Beyond his Midwest youth, Hornaday remained dedicated to filling bigger shoes. His imprint on the law of the land is giant-sized, having brought law to the wilds of the Kenai Peninsula.

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Featured in this Issue

Shopping a Chore?
Some hints & haunts for the holidays

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EDITOR'S COLUMN

Secession from the Union? Another dream dashed by The Court

By Thomas Van Flein

Since the 1970's, Alaska has had an organized political movement, the Alaska Independence Party, seeking a statewide vote that would, in part, ask whether Alaska should "become a separate and independent Nation." (*See* http://www.akip.org/goals.html).

I think it originated out of Fairbanks, which partially explains this dream, obviously concocted between rounds about 3:00 a.m. in the middle of January (or 3:00 p.m.—it makes no difference there). But what a dream it was. Sovereignty! No meddling by East Coast liberals and their effete notions of a greater union. No federal taxes! (No federal subsidies, either, but that did not get as much play).

Recently, in *Kohlhaas v. State*, our supreme court addressed whether Alaskans would ever get the chance to vote on making this dream a reality. The short answer was: "No." The long answer from the court (and I paraphrase) was: "Are you crazy? Do any of you people remember the Civil War and the 630,000 casualties? Much as we, as members of the court, would like sovereignty, we have seen the 'shock and awe' of the Federal military, and we can hear the buzz of a drone over the court right now as it warms up a Hellfire missile, and we'd rather not give the Federal government any reason to test the missile resistance of the courthouse roof."

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Well, the court did not say that, but that is what the court meant. Here is what it really said. In *Kohlhaas,* the Alaska Supreme Court affirmed the invalidation of a ballot initiative submitted by Mr. Kohlhaas to the Lieutenant Governor. The initiative itself indisputably met all procedural requirements to be placed on the ballot, including obtaining the necessary signatures. (Getting people to sign a piece of paper is not a problem. Getting those same people to throw a Molotov cocktail at an M-1 Abrams tank; whole different story).

"In other words, the Union won the Civil War. This constitutional amendment was not written in ink into the Constitution, but written in blood across the Civil War battlefields."

It was the substance of the proposed initiative that doomed this proposal. The initiative intended to ask the people whether Alaska "should obtain independence from the United States of America, and become an independent nation, if such independence is legally possible, and if such independence is not legally possible under present law, shall the State of Alaska seek changes in existing law and Constitutional provisions to authorize such independence, and then obtain independence?"

The Attorney General concluded that the initiative was invalid because "[t]he initiative may not be used to propose amendments to the Alaska State Constitution" and because "the law is clear that a state may not secede from the union." Based on this recommendation, the Lieutenant Governor declined to certify the initiative petition for circulation for placement on the ballot. In reviewing the actual language of the initiative, however, it appears that the Attorney General's conclusion that the initiative proposed a constitutional amendment exceeds what the language of the initiative actually proposed, which was merely an effort to "change" the "existing law and constitutional provisions" *by the state*, not the people directly. The state in fact has a method to alter its constitution. On its face, the initiative did not propose a constitutional amendment by direct action of the people.

But the Attorney General got the second reason right. In affirming denial of the certification of the initiative, the Alaska Supreme Court mentioned substantive restrictions on the initiative process contained in the Alaska Constitution.

I say "mentioned" deliberately, as there is no express limitation in the Alaska Constitution on the substantive provisions contained in the proposed initiative. The actual terms of the Alaska Constitution addressing initiatives are set forth in Article XI, section 7, and provide: "The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."

Again, on its face, the proposed initiative did not intrude in any of these substantive areas. The court pointed to a further limitation on subject matter in Article XII, section 11, which provides that "unless clearly inapplicable, the law-making powers

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BOOK REVIEW

The New Testament of federal court practice

By Thomas Van Flein

Because of the Bar Rag's ranking as one of the top legal publications sponsored by the Alaska Bar Association and its cult status at many of the nation's finer universities, we get a lot of books sent by publishers hoping for a review. Many in the industry know that a positive word here can send a book to the top 20 on Amazon.com. Who can forget how the Bar Rag was the first in the country to review "The Da Vinci Code" and what happened next. Author Dan Brown still sends us pieces of the Dead Sea Scrolls.

Of the many submissions, we choose to review only a few. We have vetted over a dozen recent submissions and can report on one that is worthwhile. It is a treatise edited by the indefatigable Robert L. Haig called "Business and Commercial Litigation in Federal Courts" (Thomson/West 2005). This eight volume, 9,000 page treatise has 199 authors who contributed chapters, totaling "35 million dollars of their own billable time." So, if you are litigating in Federal Court, you could try to hire as co-counsel a hundred or so top federal court litigators and make sure your client ponies up $30 million for a retainer, or you could buy the treatise. Mr. Haig deserves some type of award for simply coordinating 199 lawyers, 13 of them federal judges. The last time that was done Roosevelt threatened to pack the Court.

I obviously could not read all 9,000 pages. It is likely only Mr. Haig can honestly claim that. Instead, I used it for several months in practice. Sort of a test drive. I reviewed and used Chapter 26 on "Motion Practice," Chapter 77 on "Labor Law," Chapter 69 on "Insurance," Chapter 81 on "Products Liability" and Chapter 9 on "Removal to Federal Court and Remand." The chapters are well organized and often contain checklists and forms for the lazy--I mean busy--practitioner. Can't write out a complaint alleging breach of an indemnity agreement and negligent misrepresentation? Not to worry, it's in there. (Pages 462-475). Substantively, the writing is clear, and the analysis solid.

Occasionally, an author may push the envelope. For example, Chapter 7 discusses, among other things, 12(b)(6) motions to dismiss. The author suggests one reason to make such a motion is to "educate the judge" or your "adversary" even though the motion "is not likely to prevail." Not far from Rule 12 is Rule 11, and filing a motion to "educate the judge" or "educate the adversary" may involve both rules, although the author cautions such a motion should not be brought "absent a good faith belief that it could prevail." (Emphasis in original). The author further notes that "there are risks to this strategy" including having the judge conclude that the motion was "a total waste of time." Perhaps in that circumstance you would have successfully "educated" the judge and your adversary that you are an idiot.

Candidly, I had to search to find anything to criticize about this treatise. It is very well written, well organized, and very useful. It is so comprehensive and authoritative that its original title was "The Bible" but part of the settlement of a trademark infringement suit included the promise to rename it. See *Kingdom of Heaven, et al v. West Publishing.*

Like any good treatise, it is extensively supported with case citations and references. Remember that smart associate you used to rely upon that could always find the right answer to the most arcane issues (who left your firm to become a judge)? Having this treatise is like still having her assist you, but without the high overhead and those pesky requests for time off. Any attorney walking through the metal detectors at a federal courthouse should have prepped themselves ahead of time by reading the relevant chapters. There is a good chance the judge you appear before already did.

The Alaska BAR RAG

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April 30 & May 1, 2007
May 2 - 4, 2007 Annual Convention - Fairbanks

Letters to the Editor

Ken Kirk replies

(Ed note: See Larry Cohn's commentary on page 4). I am pleased to see that the Judicial Council continues in its tireless efforts to establish itself as a truly non-partisan arm of government, and to avoid doing anything which would give the impression that it is a bunch of craven toadies of the judiciary. I also doth protest that my intent, in having this point of view expressed by an anti-hero, was to introduce lawyers to what conservatives are thinking, not necessarily to express my own political agenda. However I note that, to the Council's credit, it has this time kept its response polite and factual, and so in return I will avoid going all 'Ann Coulter' on them.

But then, the last time I crossed swords with the Council, they really couldn't find any numbers to support their position (that there had not been hidden gender preferences in judicial selection during the 1980s) so they resorted to distraction and ad hominem attacks. This time they have found a way to crunch the numbers to try to support their position. Hey Larry, do you know the reason your opponents "invariably fail to cite any statistics?" Because they don't have a staff of seven people with nothing to do but sit around and play with the numbers to make things fit their preconceived notions.

Some of Mr. Cohn's arguments don't bear up under scrutiny. I never suggested (nor did my character, Steve) that the Council would be so obvious as to question applicants about their politics, or to admit that they consider them; or that the attorneys on the Council would simply order the non-attorneys around. The fact is, most attorneys in the Alaska bar (as most attorneys elsewhere) swing to the left. As a result, the Board of Governors of the Alaska Bar Association tends to be fairly liberal. And as a result of that, the three attorneys appointed to the Council tend to be liberal. Look at the current makeup if you doubt.

Nor have I suggested that the non-attorney members of the Council are not generally competent, distinguished, or well-meaning. The fact is, though, that most of them have experience with at most a small group of attorneys, whereas the attorney members on the Council generally have experience with a lot more of them. It wouldn't matter if the non-attorney members were Lee Iacocca, Alan Greenspan, and John McCain, they would still be at a disadvantage in figuring out who these applicants really are. As a result, they have to rely more on the attorney members, and on the bar poll.

Mr. Cohn's point about there being only four party line splits out of 700 votes, is a misleading use of statistics. No doubt it would be fairly rare for there to be an exact vote division between the attorneys and the non-attorneys. To begin with, how many of those 700 votes were unanimous in the first place? I'm guessing it leaves only a fairly small number where there was a division. And on how many of those did one Council member side with the attorneys, so that it was not an exact party line vote? How many of those involved one non-attorney member going along with the attorneys because he or she didn't know enough about them, or decided to go along with the bar poll? Or in which one of the non-attorneys was a liberal and split from the others for that reason?

Mr. Cohn goes on to argue that voters should not use retention elections to "promote a political agenda." There is such a thing as judicial philosophy, as much as the Council might try to pretend otherwise. Justice Scalia obviously has a different one than Justice Ginsburg. The Alaska Supreme Court obviously has a different philosophy than the vast majority of Alaska voters (as evidenced by the recent decision in ACLU v. Anchorage and Alaska). The only opportunity the public has to influence the overall philosophy of the bench in any way, is through judicial retention elections. If they can't do that, we will be subject to a regime in which a small handful of privileged citizens (that is, lawyers) exercise sole control over the direction of the branch of government which has taken it upon itself to decide nearly all of the really critical issues under the guise of constitutionality. And down that road lies tyranny.

At least, that's what Steve would say. Me, I'm just a neutral observer.

Sincerely,
Kenneth "making non-violent revolution possible" Kirk

Closing my practice

After 46 years I decided to close the law office. Looking back on raising four kids, losing my dear wife, and law experience from a Summer Streamguard in the Tongass National Forest in 1960, to clerking for Judges Fitzgerald, Moody, Davis and Gilbert, practicing with Jim Fisher, to judging in the Homer Court, and all, it has been quite a ride. Still not good at retirement, but the Homer Mayor job keeps me busy and I have 6 grandchildren and volunteer work. A lot of changes in Alaska since 1960, my first job in Alaska and many friends over the years. Also can't forget the old Anchorage lawyer basketball team in the 60s -we were so bad, we had to bring in some non-lawyers!

Sincerely,
Old coot Jim Hornaday

Please change memoriam

I was a friend of Dick Pennington's and I am writing to request that one word in his memorial (Bar Rag, July-September, 2006) be changed. The last paragraph states that Dick had an "engaging smile and ingratiating personality." While you can argue that "ingratiating" is not technically derogatory (see Webster definitions), in common usage, the meaning is not complimentary. The synonyms for "ingratiating" found in the MS Word thesaurus are "sycophantic, obsequious, fawning, toadying, slimy and smarmy." I don't think--at least I hope--that is not what the author meant.

Melanie E. Fitzgerald
Akin Gump Strauss Hauer & Feld LLP
Washington DC

Secession from the Union?

Continued from page 2

assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI." In other words, as a general matter, unless excluded in Article XII, the people, by way of initiative, can enact any law that the legislature can enact.

The court conceded that "secession is not explicitly addressed in the United States or Alaska Constitutions . . . ." The State argued that the proposed initiative was "clearly unconstitutional under [U.S.] Supreme Court decisions addressing secession. We agree with the state that secession is clearly unconstitutional." Relying on a decision from 1868 called *Texas v. White,* the Alaska Supreme Court held that Alaska may not secede from the union, that instead, (kind of like the Mafia), once you are in, you are in. The court concluded that "[w]hen the forty-nine-star flag was first raised at Juneau, we Alaskans committed ourselves to that indestructible Union, for good or ill, *in perpetuity*." "Perpetuity" is a long time. Black's Law Dictionary defines perpetuity as "continuing forever." And you thought only diamonds were forever.

Thus, there can be no lawful or peaceful method to have Alaska secede from the Union. Although nothing in the State or Federal constitutions expressly prohibits secession, the principle of non-secession "has been settled by the arbitrament of arms" and subsequently crafted into law by "the repeated adjudications of this court." *Daniels v. Tearney*, 102 U.S. 415, 418 (1880). In other words, the Union won the Civil War. This constitutional amendment was not written in ink into the Constitution, but written in blood across the Civil War battlefields.

So, in an historical sense, the initiative and the goal appear . . . a little out there. But not discussed by the court is the fact that some of framers of the Constitution did not think this was such a crazy idea. (Certainly millions of people in the Confederacy thought this right was retained).

For those of you who are constitutional originalists the concept of an indestructible union, the once-you-are-in-you-are-in theory, may not be consistent with how the United States was formed. First, as Professor Patrick O'Neal notes: "Clearly, if a state requests such a separation and Congress approves, such a separation would unquestionably be constitutional." Could the ballot initiative in *Kohlhaas* have been construed as a state request for Congress to approve separation? If so, would that have been a non-violent and lawful approach to secession? (Don't ask me, I am asking you).

Recall as well our own Declaration of Independence, which starts: "When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another . . . ." Certainly the concept of "disbanding" was not foreign to those who started this country. And, as Alexander Hamilton stated in Federalist No. 33 (January 3, 1788): "If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify." That sort of suggests secession was an option at some point.

Unless you think palatial airports and long span bridges are "tyrannical" it seems that a lot of Alaskans like the Federal government. For now. Just keep the money coming.

Back to reality. There is no way in this day and age a state supreme court would test the waters of secession by giving even the impression such a process could be lawful. If nothing else, for most Alaskans I think, the Federal Government is not making life so unbearable or "tyrannical" that fighting this battle seems warranted. Unless you think palatial airports and long span bridges are "tyrannical" it seems that a lot of Alaskans like the Federal government. For now. Just keep the money coming.

ESTATE PLANNING CORNER

Full and fair disclosure of assets and intent

By Steven T. O'Hara

To Whom It May Concern: Do you have a family business? Do you have wealth and children? Do you want to promote family harmony after you are gone?

If so, and if possible, have an annual family meeting in a retreat-type setting. Take your time to allow each of your children to speak. Have a facilitator, such as the family lawyer, to pick up things in the event of a lull. But do not let the facilitator take over the meeting.

At the family meeting, provide full and fair disclosure of your wealth and your intent. Make sure this intent is what your governing documents, including your Will and all Trusts, in fact provide.

Avoid surprises in the event of your death. Recently a friend suffered the loss of his mother. Insult to injury occurred when he learned after her death that the family home, which he had built years ago with his own hands alongside his father, was purportedly going to his siblings with no share whatsoever for him. Here the word "surprise" is spelled "l-i-t-i-g-a-t-i-o-n."

It is your right, and indeed it is perfectly fine, to leave wealth -- including great wealth -- to your descendants. Money does not necessarily ruin children; failing to prepare them may. Money is not bad; greed is the root of evil, not money (see 1 Timothy 6:10). We all know that when greed enters the equation, the result is unsound planning that leaves broken lives in its wake.

"The groundwork is teaching, by example, that a happy life is not based on wealth but, to a large extent, on your family relationships as well as your work ethic..."

In other words, the other side of the right to pass wealth to your descendants is, for me, the duty to prepare them. Each family meeting from now until your death is an opportunity to work on rooting out any greed or control issues or other problems.

Not all will be accomplished in the first, second or third family meeting. These may only lay the groundwork. Exercise patience not only during the family meetings, but throughout the year when financial questions may arise.

The groundwork is teaching, by example, that a happy life is not based on wealth but, to a large extent, on your family relationships as well as your work ethic, whether on a for-profit or non-profit basis.

Strictly speaking, your wealth is nobody's business. But if you have wealth and have brought children into this world, and if you plan to bring them together someday, then I submit you have a duty to be intentional about your financial discussions with your descendants. Here the word "intentional" means having family meetings and teaching that a happy life is not based on wealth.

Speaking of passing wealth and promoting family harmony, my experience also tells me that it is best to give each child an equal share, rather than excluding one or more children on some basis or another. The word "fair" does not necessarily mean "equal," but in the minds and hearts of children of all ages inequality calls up all family dysfunction. Inequality results in conflict, especially when inequality is a surprise.

Videotapes of your intent, played after you are gone, are as unhelpful in avoiding conflict as they are unilateral. Your dictating your intent is not a family meeting and does not prepare your descendants for wealth and family harmony.

Any attempt to politicize the merit selection system should be rejected

By: Larry Cohn

It was recently suggested that packing the Board of Governors of the Alaska Bar Association with additional "conservative" appointments would diminish the "control" that "left-leaning" attorneys have over the selection of Alaska's judges. The suggestion is based on several mistaken notions, including the claim that politics affect the Council's nominations.

I, like the Council members, often have no idea about a judicial applicant's politics. The Council does not solicit that information. Sometimes, however, the applicant or another source provides some information about an applicant's political beliefs. A judicial applicant who has publicly expressed strong political opinions may be asked whether those opinions will affect his or her ability to be impartial if appointed to the bench. The fact that an applicant has strong personal opinions of any kind may be relevant to the Council's assessment of the applicant's ability to decide cases fairly, but the applicant's specific beliefs are not material to Council members when they consider who to nominate. In my five years as executive director of the Council, I have never observed an applicant's particular political views affect the Council's decision to nominate or not nominate a judicial applicant. Not once. The Council strives to nominate judicial applicants who will decide cases based on the law and not according to their political convictions. The Council's criteria for nominating an applicant are the applicant's professional competence, including written and oral communication skills; integrity; fairness; temperament; judgment, including common sense; legal and life experience; and demonstrated commitment to public and community service. I know that the Council has nominated Republicans as well as Democrats, social conservatives as well as liberals, and in all instances, the applicants' politics have had no bearing on whether the applicants were or were not nominated.

The suggestion to pack the Board of Governors presumes that attorneys effectively control Council nominations. This frequently disabused argument is premised on the possibility that the three attorney members vote one way, the three non-attorney members vote the other way, and that the chief justice sides with the attorneys.

The composition of the Judicial Council is a careful balance struck by Alaska's constitutional delegates, less than one quarter of whom were attorneys. Those who claim that Council decisions are dominated by attorneys invariably fail to cite any statistics, so let me offer this: Out of nearly 700 votes on judicial applicants in the past nineteen years, the Council has only divided four times down the non-attorney/attorney line. The most recent such vote was in 1994. On two of those occasions, the chief justice voted with the non-attorneys. Thus, only two of almost 700 votes (one quarter of one percent) have been "controlled" by attorneys.

The list of people who have served as non-attorney members of the Council reads like a "who's who" of distinguished Alaskans. The most recent non-attorney members include the former chief clerk to the Alaska constitutional convention who was also head of the Alaska Board of Education and a candidate for lieutenant governor; a former commissioner of administration now the CEO of a services contracting firm; a second-generation Alaskan newspaper publisher; a small business owner; the co-founder of Victims for Justice; the co-owner of public water and wastewater companies; and the executive director of the ANSCA Regional Corporation Presidents and CEOs Association. Non-attorney Council members have worked at the highest levels for many Alaskan governors from Egan to Murkowski. Several have been lifelong Alaskans. Nearly all have served on other boards and commissions. The suggestion that attorneys tell these people how to vote is laughable to anyone who has known them.

Any attempt to urge voters to use retention elections to promote a political agenda should also be rejected. Retention elections promote judicial accountability, but if judges were merely representatives of public opinion, valuable constitutional limitations would disappear. The Judicial Council provides Alaskans with more information about judges than is available anywhere else. This enables the public to hold judges accountable based on their legal ability, demeanor, their diligence, their ability to manage their caseloads, and their fairness and integrity and not because judges' decisions are popular or unpopular.

It is good that people care about who gets nominated to be a judge. The Council is greatly helped when others share their views about who would make a good judge. It is also fine to disagree with a judge's decisions. At the same time, it is important to recognize that the merit selection system, gifted to us more than fifty years ago, has achieved a highly qualified and principled judiciary, one that must be protected from abuse by political partisans.

DID YOU KNOW...

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

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ALASKA BAR ASSOCIATION

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

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

That member will not identify the caller, nor the person about whom the caller has concerns, to any other committee member, the Bar Association, or anyone else.
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(Anchorage) 343-6445 (private line)

Michael S. McLaughlin
(Anchorage) 793-2200

Michael Sean McLaughlin
(Anchorage) 269-6250

Antone Nelson
(Anchorage) 336-3888

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

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

Lawrence F. Reger
(Fairbanks) 451-5526

Nancy Shaw
(Anchorage) 565-8258

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

Law Library update

Since arriving here in September, I have had to learn what is important to Alaskans. While every state has essentially the same structure and government publications, there are differences. I realize that, in many ways, Alaska's first officials learned from the mistakes made elsewhere to create a similar but unique legal structure.

The Alaska Case Law service, http://government.westlaw.com/akcases, brought to users by the Alaska State Court law library and powered by Westlaw, is an amazing service for Alaskans. I am not aware of any other state with a similar database. It allows anyone to search Alaska case law from 1960 to the present from any location at no cost.

Our contacts with librarians around Alaska and outside can help us get critical information faxed or emailed quickly.

The existence of the Alaska Case Law service may not eliminate the need to use the law library for additional research, however. While the Alaska Case Law service database is searchable, it is not as robust as full Westlaw, available for free at all library branches. The Alaska Case Law service does not provide pagination within the case, access to the digest topics and key numbers, or full Boolean search capability.

For more complex searching, the physical law library is still the place to go. In the library you can use the Alaska digest and other digests. The Westlaw service available in the law library provides access to all state and federal primary law. There are also other useful Westlaw databases. A.L.R., the Am. Jur. Library, and the law journal database might come in handy.

The Alaska statutes are also available online, provided by the Legislature. Did you notice the warning at the top of the screen?

WARNING: These Infobases are not the official versions of the Alaska statutes and regulations currently in effect. The Infobases may contain errors or omissions. They will not contain information that has been inserted after their preparation. These Infobases are intended as informational guides only. The State of Alaska makes no warranty, express or implied, of the accuracy of the Infobases. To be certain of the current version of the statutes and regulations, please refer to the official printed version of the statutes and regulations.

You will find the official print version of the statutes in the law library, as well as in many public libraries. Remember, too, that the annotated print version contains notes of cases, cross references, and collateral references that might provide you with additional leads.

Perhaps the most important reason to come in to, or at least to call, the law library is the wonderful reference staff. Our collective knowledge might think of a resource that had not occurred to you. Our contacts with librarians around Alaska and outside can help us get critical information faxed or emailed quickly. It can also be helpful to confirm that you did, indeed, exhaust the possible resources.

We have some new electronic databases in the library as well. We now subscribe to the CCH Tax Research NetWork. This tool provides easy searches of Alaska tax resources and such familiar tools as the Federal Tax Guide, letter rulings, and the Master Tax guide. The product is easy to use. Pease take a look the next time you are in the Anchorage, Ketchikan, Juneau, or Fairbanks libraries.

HeinOnline, the popular law journal database, has added lots of content. The Code of Federal Regulations 1938-1983 is available and searchable. HeinOnline also has the United States Statutes at Large. I was easily able to use HOL to search for all references to Wrangell National Forest in the Statutes at Large. Hein is constantly adding new content making this resource more valuable all the time.

We have use of all BNA databases on a free trial for the next few months. Come in to the library in Fairbanks, Juneau, Ketchikan, or Juneau and we will set you up. Sets include the Criminal Law Reporter, Family Law Reporter, Environment Reporter, and ABA/BNA Ethics opinions.

Another asset of the law library is the excellent resources for researching state legislative histories.

Another asset of the law library is the excellent resources for researching state legislative histories. I believe that investigating legislative intent is the number one frequently asked question that we hear. Again, I commend Alaska for making so much of the committee information easy to locate. Did you know that information about the 1955 Constitutional Convention is available online? Go to: http://www.alaska.edu/creatingalaska/convention/ or http://www.law.state.ak.us/doclibrary/cc_minutes.html.

Don't forget that you can check the library catalog for books on your subject. Alaska Bar members have three-day checkout privileges. We will ship anywhere in the state. We are investigating the possibility of implementing a scan and fax or email service.

It has become more of a balancing job for libraries to split their dollars between books and electronic access. While we continue to add electronic content, the print products are not going away. When the phone cables to Fairbanks were severed in October, people were without Internet access but were still able to use the law library to perform legal research.

I encourage you to let us know if there are ways that the law library can improve its collection or services. Please email me at clemann@courts.state.ak.us with your thoughts.

Have a Safe & Happy Holiday Season!

The HIPAA privacy rule and medical records discovery

(Part Two)

By Daniel B. Lord

In Part One, I explained how medical releases have to be worded in order to be HIPAA compliant. Absent consent of the party from whom you want medical records, entities covered under HIPAA may disclose protected health information basically if they receive a court order to do so, They may also do so if they receive a HIPAA-compliant subpoena, and now, in Part Two, I will focus on the subpoena options.

The Privacy Rule provides that a covered entity may respond to a subpoena, a discovery request, or other legal process subject to receiving "satisfactory assurance" from a party requesting the release of the medical records containing PHI. *See* 45 C.F.R. § 164.512(e)(ii). Such "assurances" consist of the following: reasonable efforts to give notice to the party whose PHI is sought by the subpoena, *id*. § 164.512(e)(ii)(A), or reasonable efforts to secure a "qualified protective order" for the medical records. *Id*. § 164.512(e)(ii)(B). The term "reasonable efforts" is not defined in the HIPAA Privacy Rule except by reference to the documentation involved.

A subpoena or discovery request pursuant to notice requires a written statement and accompanying documentation that evidences the following: the requesting party has made a good faith attempt to provide written notice to the individual; the notice included sufficient information on the associated litigation or proceeding to permit the individual to raise an objection to the court or administrative tribunal; and the time for the individual to raise objections to the court has passed, and no objections were filed or such objections were resolved by the court. 45 C.F.R. § 164.512(e)(1)(iii). The individual is essentially given sufficient notice and an opportunity to object. Practitioners advise that the notice letter to the individual's attorney indicate a date certain upon which any objections must be made, and include a copy to the subpoena when it is served upon the custodian of the medical record. *See* Grossman & Guillory, *op cit*. (in addition finding a "commendable practice" that attorneys are responding to notice letters with their own letters stating no objection, since it "enables the requesting party to issue the subpoena before the objection deadline expires").

A qualified protective order requiring the return or destruction of all PHI at the end of litigation can ripen into complications, if the order is ever signed.

The Privacy Rule does not provide a precise timeframe for the individual to raise objections, but there is an "emerging consensus" to use 10 days. Harrrison, *op cit*. at 18.; *see also* Abel & Wood, *op cit*. (using Rule 45 of federal or state of civil procedure rules); Langer, *op cit*. (10 days, consistent with Wisconsin statute). *But see* Miller & Robertson (14 days, consistent with Oregon civil procedure rule on *subpoena duces tecum*); Kristen B. Rosati, *HIPAA's Impact on Lawyers and Litigation, in* Health Law Handbook (2005 ed.) 327, 347 (noting "problematic" nature of alternative in jurisdictions that do not set time periods for subject of PHI to raise objections, and advising that in such jurisdictions "covered entities and their lawyers would be wise to wait until the court resolves objections, if any, and orders production" of PHI).

Difficulties with the subpoena with notice option are apparent in disagreements on how notice and the assurances should be delivered. According to one practitioner, covered entities "have been advised to release records only if they receive satisfactory assurances that the attorney requesting the records gave notice directly to the patient," which flies in the face of the prohibition in the Rules of Professional Conduct on contact with a represented party. Harrison, *op cit.; but see* OCR, Answer ID 707 to FAQ (for judicial and administrative proceedings, notice can be provided to individual's lawyer instead of individual directly). Reportedly, health care providers are similarly counseled that a letter containing satisfactory assurances from an attorney "is not enough, rather the requesting attorney must submit an affidavit;" and that the provider neither recognize nor accept such satisfactory assurances unless "included in the subpoena itself rather than in accompanying separate documentation as described in the Privacy Rule." Harrison, *op cit. Cf.* OCR, Answer ID 708 to FAQ (subpoena may function as notice if it contains assurances on its face);

Then there is the subpoena pursuant to a qualified protective order. The Privacy Rule defines a "qualified protective order" as an order, or a stipulation by the parties, that satisfies the following two requirements: first, it must "prohibit the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested;" and second, it must require that the parties to the litigation return or destroy all PHI, including any copies, at the end of litigation. See 14 C.F.R. § 164.512(e)(1)(v)(A) & (B).

Practitioners strongly disagree on whether it is preferable to pursue a subpoena with a qualified protective order, or a court order. One recommends that "at the earliest opportunity, in all pending or newly filed cases" in which litigants may request PHI from a covered entity or health care provider, "the court (on its own motion or by local rule) and/or the litigants (by agreement, stipulation or motion) enter into a 'HIPAA Qualified Protective Order,'" basically reiterating the satisfactory assurances set forth in 45 C.F.R. § 164.512(e)(1)(v)(A) and (B). *See* Emmons, *op cit*. at 38 (proposing practice based on his personal experience that "health care providers generally prefer the direction of either patient authorization or court order to general assurances from litigation counsel"). Copies of the order could then be attached to the subpoena (or discovery request) in the case providing sufficient assurance to the health care provider that production of medical records may be released in compliance with the Privacy Rule. *Id. See also* Langer, *op cit*. (similarly recommending that in cases where a subpoena may be necessary to obtain PHI, "it is probably easiest at the outset to either stipulate with opposing counsel or ask the court to issue a qualified protective order applying to any PHI that either attorney may subpoena in the case").

Interesting in connection with these and the other procedural requirements is that in response to a court order or a subpoena, a covered entity "may" disclose the medical record.

It should be noted that what is required is a showing that the parties have agreed to submit to a qualified protective order or that the requesting party has sought such order from the court, and not a showing that the qualified protective order has been approved or signed by the court. *See*;Harrison, *op cit*. (questioning whether attaching a motion for a protective order to a subpoena "satisfies that test" of reasonable efforts); *see also* Stein, *op cit*. at 438 (pointing out that the term "protective order" is "misleading," because no actual order needs to entered for a covered entity to release PHI)

A qualified protective order requiring the return or destruction of all PHI at the end of litigation can ripen into complications, if the order is ever signed. Practitioners are particularly troubled about this requirement. For one thing, without documentation, "the attorney may have difficulty defending himself or herself if subsequently accused of malpractice associated with the litigation." Miller & Robertson, *op cit*.

One practitioner depicted the requirement of guaranteeing the destruction or the return of PHI as an "absurdity." Buchanan, *op cit*. He presented a couple of "common examples of routine litigation" in support of his characterization of this provision of the HIPAA Privacy Rule: one is where PHI is provided to an expert witness to review a case, and the witness is later used as an expert at trial, and the other example where a deposition is taken in a multiparty medical malpractice action, transcribed, and all other attorneys of record receive a copy of the deposition transcript together with the PHI as exhibits. *Id*. It is said that the attorney cannot control what the expert witness will do with the PHI, in the first example, or what the court reporter, the other attorneys or their clients will do with it, in the second. *Id*. Still, it is also possible for all attorneys or experts to sign acknowledgments on the limitations on the use of such information.

Another troubling aspect of the subpoena with a qualified protective order is that return or destruction requirement of the PHI held by the litigator or litigator's law firm may present "potentially a severe burden on a law firm conducting a business under such an order and may have further implications for a law firm['s] risk management practices, insofar as file retention issues are concerned." Emmons *op cit.,* at 165; *see also* Langer, *op cit*. at 58-59 (observing that malpractice carriers "may require its insured attorneys to retain the PHI as part of the case files for a certain number of years, or it may not be entirely clear when the litigation occurs, due to multiple or repeated collateral appeals"). They caution that return of the PHI is not practicable if used as an exhibit at trial or as to a dispositive motion, and are of the opinion "use it at your own risk and only as an absolute last resort." Grossman & Guillory, *op cit*.; *see also* Langer, *op cit*. (asserting that destruction or return of the PHI "may be difficult or impractical," if it becomes part of the court file). This may or may not be as insurmountable an issue as Grossman and Guillory state, and would obviously be case dependent. A class action suit with hundreds of patient records poses more file management issues that a single party case.

A suggestion from one expert practitioner is to have the qualified protective order state that if the attorney receiving PHI could not "feasibly return or destroy" the PHI at the end of litigation, then the attorney would "be obligated to protect the confidentiality of the PHI for so long as the attorney retained the PHI." Langer, *op cit*. In addition, the order should state that the attorney would limit further uses and disclosures of the medical records "to the purposes making the return or destruction of the PHI infeasible." *Id*. (citing similar provisions in subparagraph § 164.512(e)(2)(ii)(I) on business associate agreement in support). Admittedly, such an order would not be in strict compliance with the return or destruction requirements of paragraph § 164.512(e)(1)(v).

In light of such dilemmas presented by the subpoena with a qualified protective order, other practitioners would avoid the option altogether. *See* Grossman & Guillory, *op cit*. (stating that given options of authorization, court order, or subpoena with notice, "the question of using a QPO should

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The HIPAA privacy rule and medical records discovery

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never enter your mind"). The "best practice," in their expert opinion, is "a court order (not one denominated as a 'protective order') from the court that is sufficiently detailed to permit . . . litigation-related uses and disclosures," including oral disclosures and expert testimony uses. Abel & Wood, *op cit.* Of course, obtaining court orders for what is essentially routine discovery imposes additional costs on the clients and imposes a burden on the courts.

Despite contrary opinion, *see* Harrison, *op cit.* at 18 (citing § 164.502(b)(2)(v)), a covered entity must still make reasonable efforts to limit the PHI used or disclosed to the "minimum necessary" to respond to the request. OCR, Answer ID 711 to FAQ (citing § 164.502(b) and § 164.514(d)).

Interesting in connection with these and the other procedural requirements is that in response to a court order or a subpoena, a covered entity "may" disclose the medical record. 14 C.F.R. § 164.502(e)(2)(v) The permissive term in the regulatory language is seen as opening up the possibility of a health care provider refusing to produce PHI based on a state physician-patient privilege. Olinde & McCard, op cit. at 164-65. Support for this possibility can be drawn from *Northwestern Mem'l Hosp. v. Ashcroft,* 362 F.3d 923 (7th Cir. 2004), where Judge Posner distinguished between an evidentiary privilege and HIPAA as the procedural authority for obtaining PHI in a judicial or administrative proceeding. *See id.* at 925-26 ("All that 45 C.F.R. § 164.512(e) should be understood to do . . . is to create a procedure for obtaining authority to use medical records in litigation. Whether the records are actually admissible in evidence will depend among other things on whether they are privileged . . . ."). *Cf.* Buchanan, *op cit.* at 42 (reminding that failure of covered entity to comply with a *subpoena duces tecum* may result in a sanction against the person because "[a]ny subpoena validly issued by inference is an order of the court," and that sanctions may include payment of reasonable attorneys fees to parties, as well as responding to a court order to show cause).

A better understanding of the permissive term is to read it more strictly within the context of the Privacy Rule. In a sense, the federal regulations place the duty of ensuring compliance on the covered entity holding the PHI, that the procedural requirements of any of the options are met. *See* Langer, *op cit.* In the Preamble to the Privacy Rule the DHHS stated that if a covered entity received a request for PHI without receiving the satisfactory assurances from the party requesting the medical records, "the covered entity is free to object to the disclosure and is not required to undertake the reasonable efforts itself." 45 C.F.R. § 164.103.

In specifically commenting on the regulatory language, the DHHS affirmed the "basic principle" that "covered entities may use or disclose protected health information under certain circumstances, but are not required to do so," and that the "only instance in which covered entities holding [PHI] must disclose it is if the individual requests access to the information himself or herself." 65 Fed. Reg. 82,677 (emphasis in original). The reference to mandatory disclosure in this instance is an authorization, and certainly not to a subpoena or the court order. The DHHS went on to state the following:

> We do not believe that this basic principle should be compromised merely because a court order has been issued. Consistent with this principle, we provide covered entities with the flexibility to deal with circumstances with which covered entities may have valid reasons for declining to release the [PHI] without violating the [Privacy Rule].

Id.

Additionally, under the Privacy Rule, a covered entity may independently pursue a qualified protective order without the required assurances from the requesting party, if the covered entity makes reasonable efforts to provide notice to the individual that meets the requirements of the method of a subpoena with notice or a subpoena with a qualified protective order. *See* 45 C.F.R. § 164.512(e)(1)(vi); 65 Fed. Reg. 82,529-82,530.

In another and strictly practical sense, the responsibility for satisfying procedural requirements of the Privacy resides with the party seeking production of the PHI. *See Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp.2d 1015, 1029 (S.D. Cal. 2004) (HIPAA "places certain requirements on both the medical professional providing the information and the party seeking it"); Abel & Wood, *op cit.* (maintaining that HIPAA Privacy Rule "effectively shifts the onus for protecting the privacy rights of the individual in the course litigation" to litigator seeking disclosure). There are certainly positions to the contrary. *See* Olinde & McCard, *op cit.* at 164 (affirming that covered entities have "obligation" to determine there is satisfactory assurance under a subpoena with notice or that reasonable efforts were made under a subpoena with a qualified protective order option); Langer, *op cit.* (arguing it is covered entity's "compliance duty, not the requesting attorney's legal obligation to ensure that the section 512(e) provisions are met before disclosing PHI," but also advising that attorneys should nonetheless familiarize themselves" with 45 C.F.R. § 164.512(e) to "foresee and forestall any potential objections from covered entities that are asked to produce PHI"). Nonetheless, as the Privacy Rule is implemented and becomes more and more a part of the legal landscape, whatever obligations are placed upon legal professionals is only expected to increase. Ana E. Cowan & Hal S. Katz, *HIPAA and the Practice of Law,* 67 Tex. Bar J. 962, 963 (2004). The issue ultimately will become not where or upon whom the burden of protecting health information should lie, but how the burden is fairly shared.

The issue ultimately will become not where or upon whom the burden of protecting health information should lie, but how the burden is fairly shared.

Hornaday retires...from the law

Continued from page 1

Before he teamed up with Kenai attorney Jamie Fischer, people on the peninsula had to either wait 90-day intervals for a visiting judge, or fly to Anchorage. Reminiscent of the days of frontier lawmen, Hornaday and Fischer were the only full-time lawyers on the Kenai Peninsula, and things were slightly different back in those days.

Hornaday said he recalls clients using land and fish as payment for legal services. "One thing I never accepted was an interest in a portable-potty business," he said. "But there were a lot of characters, and a lot of bear and moose cases." Today, there are some 50 lawyers in Kenai where Hornaday began, and his objective early on was to get at least one district judge to Homer. Not only was he successful at getting one, he became one.

Hornaday's private law practice came to an end in 1976, when then-Gov. Jay Hammond appointed him as an Alaska District Court Judge. "I was known as 'Hornaday, the Hanging Judge from Homer,'" he said. "But I don't think I was too strict

Hornaday was known for being tough on driving under the influence charges. There was even an attempt to run him out of town by lawsuit, which he countered with his own to stay. He obviously remained.

"I was probably the only district judge to file a lawsuit to stay around," Hornaday said. "But the state wasn't cracking down (on driving under the influence cases). It was really kind of disappointing. Some of the other judges were afraid to stand up to these. So I came right out and stated the first offenders get 15 days at least. I think it had a pretty good effect."

Hornaday is credited with starting the first work program in the state for offenders, where those jailed could spend time working on the Little League field outside during the summer months, rather than being cooped up inside. "Since I was working on the Little League field, we decided to incorporate them together," he said.

Hornaday said he is also proud of the work he and now Kachemak Bay Campus Director Carol Swartz teamed up for on victims of domestic violence. Swartz was the former head of the South Peninsula Women's Services. According to Hornaday, it was the first place in the state where alleged victims of domestic violence could get legal counseling.

After 42 years of steady work, even starting the Homer Tribune, Hornaday said he's not sure what's going to happen next. However, he is certain there will be plenty more volunteer positions to fill. "They say men have more of a problem with retiring, but the mayor's job has its demands, and I've got my kids and grandkids to spend time with," he said.

Hornaday said he is also considering getting back into writing, and will certainly be spending more time with his Brittany/Retriever mix named Star, as they attend obedience school together. Star is Hornaday's new puppy, following the death of his famed black Labrador, Sparky. As for his years and experiences in Homer, Hornaday reflected on his time spent in the Greatland so far.

"This is an interesting little town -- and Alaska is beyond all expectations," he said.

The author is a writer for the Homer Tribune, where this article appeared in October. Reprinted with permission

Reporting Period: January 1 - December 31, 2006

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HI-TECH IN THE LAW OFFICE

Digital photography made easy, or at least a little less obscure

By Joe Kashi

Third in a series

Digital cameras are all the rage; even Nikon and Kodak, those bastions of traditional film-based photography, recently announced that they were discontinuing the production of most film cameras.

How do you choose and use a digital camera for evidentiary purposes as part of your law practice? In this article, I will discuss the considerations to take into account when deciding upon the right digital camera for your law office.

For those of you who simply want to cut to the chase, my overall digital camera recommendation for the average law office, discussed in the last issue of the Bar Rag, is Kodak's 8 megapixel P880 ($450-$500 average price). This camera has a very high quality Schneider zoom lens that ranges between an ultra wide angle 24mm equivalent through 140mm moderate telephoto equivalent and is very well-designed and easy to use. Avoid the similar appearing 5 MP Kodak P850 - the P850 has a higher zoom range but the end result just doesn't have enough quality.

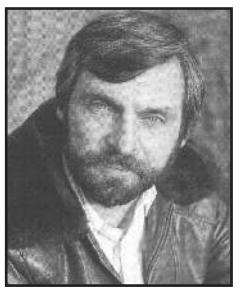
In lower price brackets, I particularly like the 6MP Kodak z760 (about $150 for a factory-refurbished and warranted camera), the 7 MP Sony DSC-W7 (about $270 average price), the 8 MP Olympus SP-350 (about $300 average price) and the 8 MP Canon S80 (About $420 to $500). The Kodak P880 and the Olympus SP-350 include the capability of optionally recording photographs in high quality RAW formats, which I will discuss in greater detail below.

In the higher price bracket, the Sony DSC-R1 (about $850 to $1,000) is exceptional, boasting a lens and sensor combination whose results rival those from SLR cameras costing twice as much.

Even though a digital camera may seem mostly like an extension of computer technology and is often marketed as such, at heart a digital camera remains an optical instrument subject to the same fundamental concepts as film cameras - optical sharpness, depth of field, image degradation due to camera shake, proper exposure, etc. The basic difference is that film is replaced by an electronic sensor similar to the sensors in astronomical telescopes and prints are made with color printers rather than with chemicals and silver-based paper.

High end digital cameras tend to produce better, and more easily corrected, color photographs than comparable 35mm film cameras – indeed, photos made with the best digital cameras can approach the high quality professional grade images that we generally associate with medium format cameras used by professional and fine arts photographers, not to mention NASA astronauts. Traditional film and photographic paper, however, remains far better at rendering high grade black and white images, particularly in fine arts applications.

The default images produced by most digital cameras often closely resemble the contrasty, vivid color images produced by 35mm slide film. In practice, this means that important highlight detail may be lost if an image is over-exposed because the digital sensor's range is not wide enough to capture detail across the entire lighting range. Color negative films tend to have relatively lower contrast and thus are more capable of capturing subtle nuances of detail in both dark shadows and bright highlights. These differences are principally of interest to professional and fine art photographers – they are not really important to the average casual and business user who is careful about proper exposure so long as you are careful to avoid so much over-exposure that you lose important highlight detail.



When used with a high grade color printer, a decent digital camera can easily and inexpensively produce excellent color enlargements that rival or surpass color prints made from 35mm film by professional color labs, and with much more control over the appearance of the final result. (For what it's worth, in addition to practicing law, I once owned and operated a color photography lab business and taught photography for a few years at a local college.)

What is important to the legal practitioner is the ability to directly incorporate digital images and video clips into Acrobat-based briefs and trial presentations and to easily and inexpensively make exhibits, including exhibits with Acrobat-annotations, from digital photographs and video clips.

Digital photo file formats

Almost all digital camera save their still images by default in the standard JPEG compressed format which, although it does allow you to fit more shots on a memory card, inevitably loses some fine detail and reduces your ability to later make corrections using computer photographic software such as Adobe Photoshop Elements. Many standard office programs, including Word, PowerPoint, WordPerfect, Acrobat, and almost all photographic and imaging programs can work directly with standard JPEG files.

In order to minimize loss of detail when a file is compressed, I recommend that you always set your camera's sensor to the highest available megapixel rate and your in-camera compression to "Fine" or, better yet, "Superfine" and that any later computer processing of JPEG files be stored using the maximum quality, largest file size option. Once you have lost image and color detail due to overly-exuberant file compression, you will not be able to re-acquire lost detail.

For that reason, most high end cameras can optionally save the uncompressed raw sensor data in a very bulky form that can later be more completely corrected. These raw data files, appropriately termed a "RAW" format, are unique to each camera model and standard photographic programs may or may not work with images produced by a particular camera. Except when using some popular cameras directly supported by Adobe Photoshop or other programs mentioned below, such as the Canon digital SLR cameras, your use of RAW digital camera files will very possibly be restricted to the capabilities of whatever RAW file conversion program was included when you purchased your camera. At a minimum, such programs will convert the RAW images to JPEG files in your computer.

Better RAW file programs, such as the "Image Data Converter SR" program included with the high end Sony DSC-R1 camera, include a wealth of image correction capabilities that do a very good job of correcting over-exposure or under-exposure and color balance, sharpening the image, and reducing image "noise", which is the digital equivalent of film graininess. The other problem with RAW picture files is that they are huge, on the order of five or six times larger than compressed JPEG files of the same image. Given the increasingly lower cost of high capacity flash memory cards and hard disks these days, this is no longer much of a problem assuming that you do not save absolutely every image that you have ever shot.

JPEG is more than adequate for most legal evidentiary uses so long as you preserve the original image file in a strictly unaltered state. However, I prefer to initially work with a RAW file format when available because I can more readily and completely correct any mistakes and also better sharpen any needed fine detail at a later time. Further, if extremely fine detail is important in a particular photograph, then a RAW format is probably better. If necessary, you can always revert later to the original RAW picture image as taken by the camera, something that cannot be done with JPEG photo files.

RAW files, if the camera's internal options are set to low sharpness, can be readily sharpened later using your desktop computer without creating much in the way of "artifacts," apparent fine detail in a picture that doesn't really exist in the original subject. JPEG's compression inevitably introduces a higher level of "artifacts" that cannot be later undone after the file is saved. If you use a RAW photo format, then it is preferable to print any really large exhibits that need to show very fine detail directly from the RAW file if feasible. However, in order to embed a photograph in a word processing document or PowerPoint presentation, you will need to convert it to JPEG using the camera's RAW file program. These are low resolution uses in any event and small JPEG artifacts are of no consequence.

Video clip capabilities

Most digital cameras include a video clip capability that is often a lot more useful in a law office than using a full-blown video camcorder. That's because digital camera video clips are recorded directly onto a computer-readable memory card and in a computer-readable file format such as MOV or AVI. You should look for a camera that records video clips at 640x480 resolution, 30 frames per second, for an indefinite amount of time limited only by available storage. Cameras that meet these specifications will provide the highest quality and most useful video clip capability.

I prefer cameras that record video clips in Apple's .MOV QuickTime format because I can edit them using Apple's $30 QuickTime Pro software and can distribute a free QuickTime video viewer download along with the video clip. (Be careful to avoid getting the QuickTime viewer download that includes Apple's iTunes software. Its marketing of iTunes and constant Internet messages will become annoyingly intrusive, at best, in a legal environment.) AVI is a standard Windows video format that's usable by more modern versions of Windows Media Player. My concerns about using the AVI format are that AVI tends to be bulkier than MOV, does not always work with older computers that do not have the most modern version of Windows Media Player installed (such as those that are more likely to be found within institutional environments like court systems and insurance companies), and that AVI cannot be readily edited unless you spend the money for a third party program such as Adobe Premiere Elements. Overall, I have found that Apple's QuickTime MOV format seems to work most facilely in the legal environment.

Buying a digital camera

Digital cameras quickly come and go in a bewildering variety of models from both traditional camera makers and consumer electronics manufacturers. Overall, Canon, Kodak, Sony and Fuji seem to offer the best models for the consumer through upper mid-range digital photography. I would have included Panasonic in the above list but for Panasonic's use of very "noisy" sensors that tend to degrade the excellent results that one would otherwise obtain from the Leica lenses used by Panasonic.

Most better consumer grade digital cameras include both photographic and short but very useful video capabilities. Research any camera models that interest you and be careful to avoid similar appearing cameras that may have radically differing performance. As I mentioned at the beginning of this article, Kodak's high end 8 megapixel P880 looks nearly identical to the 5 megapixel P850 and costs nearly as much, but while the P880 performs very well, the P850's lower optical performance generally disappoints discerning users and would result in lower quality photographically-based exhibits.

General Purchase Considerations

Avoid any camera that does not have a native sensor resolution of at least 5 megapixels (5MP), which is rapidly becoming the minimum resolution for consumer cameras. However, the sheer number of megapixels is not dispositive; some high grade 6 MP cameras with fine lenses and low-noise sensors may produce sharper, better photographic enlargements than noisy 8 MP cameras enclosed in big, flashy bodies with less-sharp high ratio zoom lenses, e.g., "10X" or "12" zoom ratios. At least as important as the sheer number of megapixels is the optical quality of the lens and the "noisiness" of the sensor. For example, the 6.3 MP Fuji F10 and F11 seem to produce better images than Fuji's own 9 MP E900 camera.

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HI-TECH IN THE LAW OFFICE

Digital photography made easy

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As a rule of thumb, digital cameras are at their best in bright sunlight, where almost any 5 MP camera will produce usable pictures up to 8 ½" by 11" enlargements. A better quality 5 megapixel (5 MP) camera with a high grade lens, such as the Kodak z730, when used in bright daylight, can produce decent exhibits up to 13" x 19", the largest print size made by readily affordable color printers. A good 7 MP camera, such as the Canon A620 or the Sony DSC-V3 can be enlarged more before degradation becomes obvious. High grade 8 MP to 9 MP cameras are potentially capable producing usable 20" x 24" prints.

I have found that my 10.3 MP large-sensor Sony DSC-R1 can produce good quality 24"x36" photographs, assuming that you don't look too closely, which is better than ANY 35mm camera that I have ever used.

Unless you plan to upgrade to a top grade SLR-style camera within the next 12 months, then a good 7 MP or 8 MP camera is probably your best all around current choice. Current top-end 7 MP, 8 MP, 9 MP, and 10 MP cameras typically cost between $400 and $1,000.

I strongly recommend that you first do a Web search and carefully review several professional reviews of any camera that you are interested in purchasing. Overall, I have found lay user reviews to be unbalanced and not very useful--either breathlessly praising or overly damning.

I have found that the best direct professional comparisons were posted at www.imaging-resource.com, www.dcresource.com and www.dpreview.com. Each of these sites, particularly www.imaging-resouce.com and www.dcresource.com include sample images that allow you to make direct optical quality comparisons between different cameras. I particularly like www.imaging-resource.com. This site includes excellent technical and ergonomic reviews of most higher-end digital cameras and also provides a unique tool whereby you can download and directly compare identical photos taken with two different cameras. www.dcresource.com features identical photos taken by the many different cameras reviewed by the site but in order to make a direct comparison using photographs from this Web site, you will need to download and save the full size sample image files taken with different cameras and then compare magnified portions of those photos using a program such as Photoshop Elements or the Windows XP digital image and fax file viewer.

You should do additional research about the low light capabilities of those cameras in which you are interested. Indoor photographic capabilities become more difficult to generalize because there are many more variables which may or may not be handled correctly by the choices programmed into a digital camera. Sensor noise and color balance tend to become critical in lower light situations and built-in electronic flash units vary a great deal.

Not all cameras have the inherent ability to fully correct for the very different overall color casts of photographs taken outdoors, when using electronic flash, or under incandescent lighting and under fluorescent lights. Only a few high end cameras include the anti-shake technology that reduces the image blur likely to occur from slow shutter speeds and shaky hands. If good low light capability is important to you, then I strongly urge you to first check the numerous professional digital camera reviews posted on the Web.

Try to get a camera with the lowest sensor "noise" level that fits your budget and your needs. Sensor noise is critical, especially when taking pictures in low light levels – high sensor noise produces lower quality photos similar in appearance to photographs made with fast, grainy 35MM film. The sensors used on almost all consumer grade cameras, regardless of the rated number of megapixels, are invariably physically small and prone to serious noise problems, particularly in the 8 MP to 9 MP range, although there are exceptions to this dolorous rule of thumb. The 7 MP sensors used by Sony and Canon are highly regarded as are the 6 MP and 9 MP Fuji HR sensors and the physically large 10.3 MP APC sensor that Sony uses in its top end DSC-R1 camera. Larger sensors usually produce better, lower noise photos and for that reason are used in all professional grade digital cameras. However, cameras incorporating large sensors, and the lenses that fit them, are substantially more expensive. Indeed, the Sony DSC-R1 is one of the few high-megapixel large sensor cameras that you can buy for under $1,000 including a high grade zoom lens.

The optical quality of a lens can be difficult to gauge ahead of time unless you examine expert reviews, sample images, and lens resolution charts often posted on various digital cameras review sites on the Web. Again, there are some useful rules of thumb. Zoom lenses with a low zoom ratio, generally not greater than 3X or 4X, are usually sharper and crisper than high ratio 10X or 12X zoom lenses. For most legal work, you will not use higher zoom ranges anyway. High-end consumer grade lenses made by Canon, Zeiss (used on Sony cameras), Leica (used on upper end Panasonic cameras) and Schneider (used on better Kodak cameras) generally produce excellent images although you should also take high sensor noise on Panasonic and 5 MP Kodak cameras into account.

"Digital Zoom" capabilities generally should be disabled and not used at all – the resulting photos will typically lose too much quality.

Other desirable and useful digital camera features include:

• Accurate automatic modes and the ability to control sensor sharpness, contrast and color saturation. The default settings on most digital cameras are high in contrast, resulting in photographs that look like high-contrast slide films with overly-dark shadow areas and washed out highlight detail. Only the Sony DSC-R1 provides some differential contrast control in shadow and highlight areas. RAW files can sometimes be adjusted to provide differential contrast in shadow, mid-range and highlight areas. However, regardless of the camera that you use, there is no salvation for any image that has been over-exposed to the extent that the highlight detail has been lost. Film cameras have the same limitation.

Optional manual exposure, detailed camera setup, and focus modes. I really like the Kodak z760 in this regard. Even though it is inexpensiove, it offers more manual controls than many cameras costing more than twice as much, including useful advanced settings such as controlling the type and area of the auto focus and varying exposure metering from very tight spot metering to wide area metering, allowing you to vary how the camera might respond to unusual lighting and focus situations.

• Unless you have substantial photographic experience, buy a camera that is easy to use, with simple controls and menus. The high end Kodak P880 camera produces images that are almost as good as the Sony DSC-R1 but the Kodak P880 can be very easy to use while the Sony's controls can be bewildering at first, especially if you do not have substantial prior photographic experience.

• Fast response times – too many digital cameras tend to react far slower than 30year-old mechanical 35mm film camera, which can be a real irritant.

• 640 x 480 full frame video clip capability using, if possible, Apple QuickTime .MOV format (easy to edit with inexpensive Apple software and allows you to provide a free Apple stand-alone video viewing program for the Court's use, eliminating concerns regarding whether the Court's computer has the appropriate Windows Media Player installed). Where possible, try to get a camera that shoots at a full 30 frames per second to avoid potentially jerky video. Slower frames rates, such as 12 or 18 frames per second sometimes cause jerky replays.

• If possible, get a camera that uses inexpensive standard digital data cards and rechargeable batteries. Cameras like the Canon A620 that use rechargeable AA batteries can also use standard off-the-shelf AA alkaline batteries in a pinch. However, rechargeable Lithium Ion batteries are excellent and last longer. It's best to always carry a spare fully charged set of batteries.

Portions of this article previously appeared in Law Practice Today, a publication of the American Bar Association's Law Practice Management Section www.abanet.org/lpm/lpt

TIPS FOR EFFECTIVE LEGAL PHOTOGRAPHY:

1. Always keep authentication and accurate depiction foremost in mind and, where feasible, use a camera and RAW file format that allows you to automatically document every important parameter and revert to the exactly the original image as taken by the camera.

2. To the extent possible, print your photographic exhibits directly from a RAW or JPEG file and try to print at 200 dots per inch or more. Printing a photograph saved as a PDF file can result in lower image quality in some cases due to JPEG compression.

3. Become familiar with the quirks and features of any camera that you use. For example, my Sony V3 has a Zeiss lens that is very sharp except at its smallest f 8 lens opening (aperture). Unfortunately, the auto-exposure program for this camera weirdly defaults to F 8 in bright daylight, resulting in fuzzy pictures unless you force the camera to use a bigger aperture (F 5.6) and a faster shutter speed.

4. Preserve fine detail against blurring induced by slow speed camera shake by using a tripod or monopod in dimmer light.

5. Avoid using any "Auto ISO" or film speed setting. To the extent that you can avoid very slow shutter speeds, manually set your camera to use the lowest feasible ISO speed setting. Noise will be much lower and overall picture quality substantially improved.

6. Always take many more images than you think that you might need. Taking extra photos of anything and any detail, and from any angle, that you might conceivably need basically is insurance that costs essentially nothing but some time. You'll want to be able to pick and choose which images best suit your case. Remember, until you disclose them, photographs taken by you are work-product and probably not discoverable in most circumstances.

7. Never post-process or discard the original image. Post-process and markup only properly labeled copies of the original file photo. Minimize the extent of JPEG file compression at all stages.

8. When post-processing, only make basic corrections such as noise and sharpness enhancement and correcting exposure and color balance problems to the extent possible.

9. Where possible, set your exposures to minimize over-exposure that results in loss of highlight detail. Use the camera's histogram and over-exposure indicators, if available, to monitor whether highlight detail will be lost at a particular exposure level.

10. Use the largest prints that you can as jury exhibits - that may seem like a truism but we all know that juries will consider more carefully what they can read or view more easily. It's not too much to make 24" x 36" enlargements from photographic files or PDF document images. In that regard, HP's DesignJet 130 is the current cost-effective champ in large format printers. Don't make the mistake of marking a small copy of an exhibit and then trying to substitute a large copy later. Chances are that the trial judge won't allow it.

Setting Up a Shingle?
New and experienced attorneys should consider a job with the Department of Law

Continued from page 1

to public service.

The Department of Law is the largest and I think the best law firm in the state. Its mission is to provide legal services to state government and to prosecute crime. The mission is fulfilled by protecting Alaska's future, which means protecting its children, communities, consumers, natural resources, financial assets and our state's rights.

One of my goals has been to make the department of law a better place to work and an environment which would continue to attract and retain the best legal minds and staff.

Governor Frank Murkowski appointed me as Attorney General on March 31, 2005. I was admitted to the Alaska Bar in 1973. I began my legal career with a private law firm in Anchorage doing title opinions for the Trans-Alaska Pipeline System (TAPS) prior to construction. Later I became General Counsel of Alyeska Pipeline Service Company that operates TAPS. I worked for Atlantic Richfield Company (ARCO) for over 20 years serving in Anchorage as Vice President and Chief Counsel for ARCO Alaska and also Vice President of External Affairs and Environment, Health and Safety.

All in all I took a long road before beginning my tour of state duty four years ago. I can truly say that these last years have been the most rewarding years of my professional life. The Department of Law is a good place to start, end or be in the middle of your career.

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Whe work of the department

The criminal division protects the public by prosecuting all violations of state criminal law committed by adults, and a large portion of the serious crimes committed by juveniles, and by placing them under appropriate controls. The criminal division provides assistance to victims and witnesses of crimes and supports the efforts of criminal justice agencies to detect and punish crime through investigation, trial and conviction. It also provides general legal services to the Departments of Corrections and Public Safety relating to their criminal justice activities. The criminal division has District Attorney Offices in 13 Alaskan communities.

The civil division serves the interests of Alaska's citizens by providing legal counsel to the executive branch. The division defends and prosecutes all civil litigation to which the state is a party, and handles legal matters for and provides legal advice to the governor, executive branch agencies, and – upon request – the legislative and judicial branches. The civil division is comprised of 13 sections that are responsible for protecting a number of critical areas of interest. Civil division professionals can work in the child protection; collections and support; commercial and fair business; environmental; human services; labor and state affairs; legislation and regulations; natural resources; oil, gas and mining; opinions appeals and ethics; regulatory affairs; torts and workers' compensation; and transportation sections in six communities across the state.

Only the largest private firms in Alaska can come even close to offering the breadth of experience and opportunity that exists in the department of law. A number of our best attorneys came to us from the private sector looking for opportunities that are not readily available in the private sector. There is ample opportunity for variety and cross-training in various legal disciplines.

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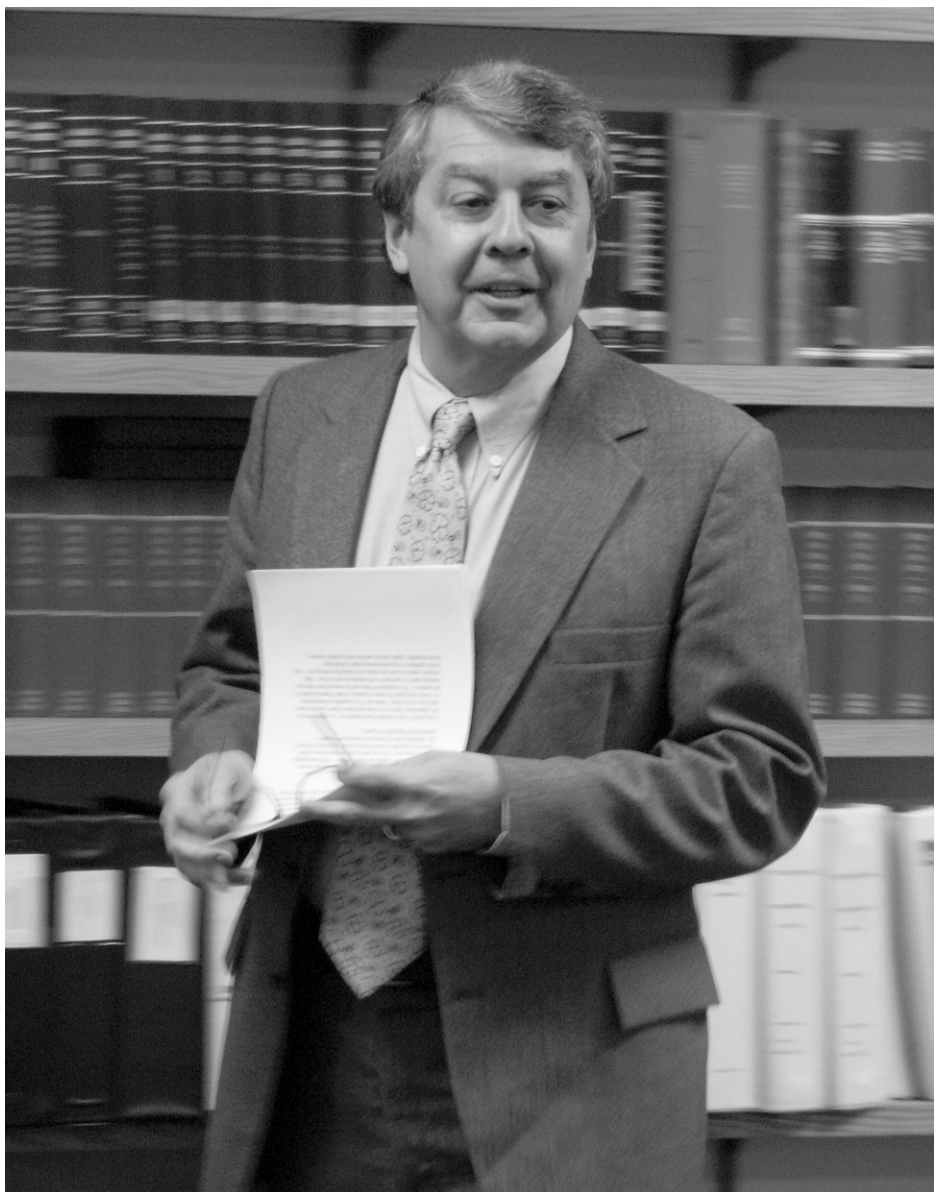
I have heard at least one current assistant attorney general (formerly in the private sector) describe her job as very exciting and likening it to a game of three-dimensional chess, where the playing board consists of law, policy and finance. This employee came to work in the transportation section and immediately was assigned to a high stakes matter involving putting together a $44 million commercial transaction.

An obvious attraction for working in the department of law is the quality of life. You don't need a cot in the back office because you are working an 80-hour week. Although state prosecutors and their civil counterparts need to meet their professional responsibilities, they are not driven by the need to bill clients constantly under the specter of meeting billable hour requirements.



Attorney General David Marquez promotes Law Department service during a Nov. 2 address to staff.

The pressure of making partner does not exist but the opportunities to rise to senior attorney status and section chief are realistic. Another positive comment that I have heard several assistant attorney generals make is the fact that they have the opportunity to take a first chair position on some of the most critical matters impacting the state. They are able to do this knowing that they have the support and assistance of a number of seasoned attorneys within the department.

Life at the Department of Law offers many positive challenges. In the time I have been with the state we have worked diligently to assist the administration of Governor Murkowski in negotiating a natural gas pipeline contract with Alaska's major oil producers under the Alaska Stranded Gas Development Act. A strong foundation in negotiating this "must have" project has been the result of the tireless efforts of attorneys in our oil, gas and mining section.

Attorneys in the civil and criminal divisions have worked effectively to draft legislation and advise the administration and the legislature on a number of critical laws that have improved the quality of life for all Alaskans. We have strengthened our consumer protection laws, created new judicial and prosecutor positions, strengthened our local option laws, increased the penalties for sex offenders and substantially toughened our criminal sentencing laws. Our lawyers regularly testify in legislative hearings and their views on pending legislation are sought after and highly valued. Working with our state lawmakers to develop and improve our laws is an exciting opportunity that is not available to most lawyers in private practice.

Diane Olsen received a 25-year service pin Nov. 2.

This year attorneys in our environmental section have worked with their counterparts in the U.S. Department of Justice to announce a significant claim for $92 million to provide for environmental rehabilitation of the intertidal zone of the beaches within Prince William Sound. This opportunity arose out of the "reopener" provision for unknown injury of the 1991 settlement in the state and federal lawsuits against Exxon arising out of the 1989 Exxon Valdez oil spill. They are also a part of a team hard at work investigating possible claims against BP and others for damages to the North Slope environment and lost revenue as a result of pipeline corrosion, spills and slow-downs and shut-ins of production.

Attorneys in the department's consumer protection and regulatory affairs sections continue to work hard to educate Alaska residents about and protect them from the dangers of consumer fraud and regulatory abuse.

These are just a few examples of the type of work that brings a tremendous amount of experience and professional growth to our attorneys and paralegals while, at the same time, providing the satisfaction that their efforts are used to protect the interests of all Alaska.

Challenging times for the Department of Law

But I must admit that there are also some negative challenges facing the department. As I noted at the beginning of this article, the state is blessed with a number of dedicated state employees who have devoted much, if not all of their professional lives in the public sector. Several have reached that point in their careers where they are contemplating retirement. At a recent civil division section supervisors retreat a speaker from the State Department of Administration, Division of Personnel, shared some sobering news about the prospects for a significant "brain drain" within the Department of Law.

The Department of Law had a 36-percent turnover rate for all employees in 2005. This is roughly 50-percent higher than the average of other executive branch agencies. The problem is likely to get worse in the near future as 85-percent of the department's senior attorneys are eligible for retirement in the next five years.

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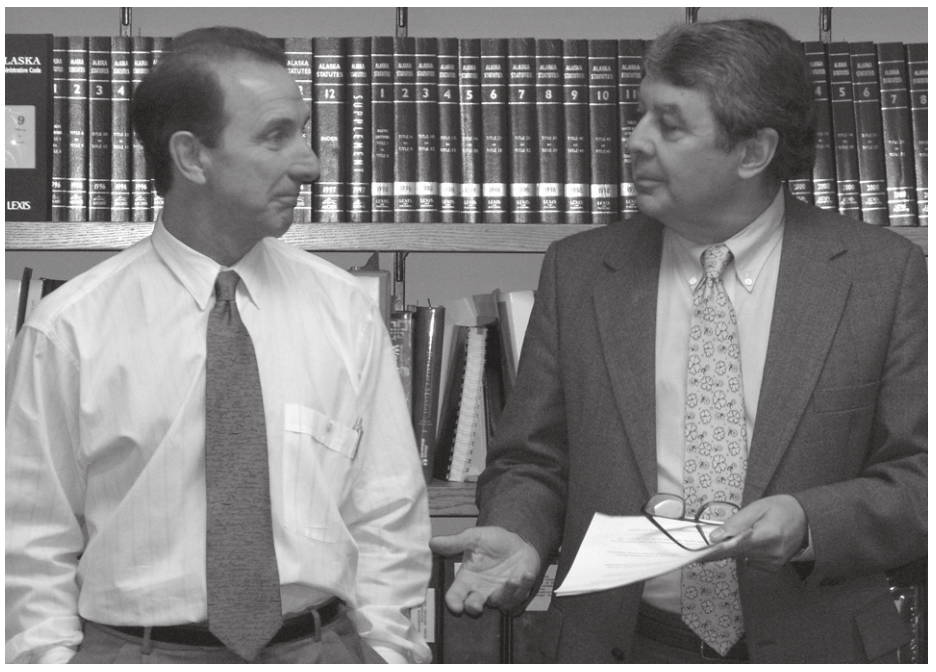


Daniel Patrick O'Tierney & Marquez discuss O'Tierney's 10 years of public service.

Consider a job with the Dept. of Law

Continued from page 10

A lot of time at the retreat was spent discussing the creation of a plan to enhance the quality and quantity of job applicants for open positions and to increase retention of existing personnel. Surveys and exit interviews within the department show that a significant reason for employee turnover pertains to financial benefits. Pay for public service is not competitive with pay for employment in the private sector. Many of the department's current personnel enjoy health and retirement benefits that are better than those available to new state employees.

Because of these challenges we are actively looking into ways to attract and retain new personnel to carry on the vital work of defending Alaska's legal interests.

One of my goals has been to make the department of law a better place to work and an environment which would continue to attract and retain the best legal minds and staff.

A more tangible goal is to decrease turnover in each section of the civil division by five-percent a year until we reach an annual turnover rate of 20 percent. At the same time we hope to increase the number of qualified applicants per position recruitment.

This past legislative session a significant bill was passed that increased the number of and salaries for state judges. This law was passed in recognition that our state caseloads are growing and that competitive salaries are necessary to attract seasoned attorneys from the public and private sector to consider applying for new vacancies on the bench. It is my belief that a similar effort must be used to attract and retain attorneys and other professionals within the Department of Law.

Ultimately I do not believe that the State of Alaska will be able to pay more than the salaries earned by senior practitioners in the private sector, but we should be able to compete (in salary) with the federal government and municipalities. Right now we don't. For attorneys who are primarily motivated to become partners in a law firm, who are focused on maximizing their financial opportunities or who desire to put up their own shingle, working for the state will probably not be attractive.

...we should be able to compete (in salary) with the federal government and municipalities. Right now we don't.

But there are tangible and intangible qualities of state service that will always be a primary draw for those who want to practice law and give something back to the communities and the state in which they live. We want and need those attorneys. As someone who has lived in both worlds I can honestly say that there is no higher calling and no better place to enjoy a rewarding professional experience than public service with the Alaska Department of Law. When openings arise I hope you will seriously consider joining our team.

Governor appoints 4 Superior Court judges

Gov. Frank H. Murkowski on Nov. 17 announced the appointment of four judges to fill Superior Court vacancies in Palmer and Anchorage.

The additional judges fill four of the six new judgeships created by passage of SB 237, which the Legislature passed in May and was signed into law in June. SB 237, originally introduced by the governor, created two additional Superior Court judges each for Anchorage and Palmer, and one additional Superior Court judge in Kenai and Fairbanks.

"These four new judges, two women and two men, represent a collective 95 years of experience practicing law and will bring that significant experience with them to their respective seats," Murkowski said. "I am honored to be able to name such qualified individuals as Alaska Superior Court judges."

The governor appointed Kari Kristiansen and Vanessa White to the newly created Superior Court seats in Palmer.

Kristiansen, 42, has been an Alaska resident for the past 34 years. She formerly served as an assistant attorney general in the Department of Law, Office of Children's Services, Child in Need of Aid Section and currently represents the Alaska Housing Finance Corporation. She worked as a civil and insurance defense attorney for the law firm of Guess & Rudd for two years, prior to joining the Department of Law. She graduated from Northwestern University with a bachelor's of science degree in Electrical Engineering and obtained her law degree from Willamette University.

White, 49, has been an Alaska resident for the past 18 years. She is currently in private practice in Anchorage as a Guardian ad Litem. She graduated from the University of Puget Sound School of Law.

The governor also appointed Jack W. Smith and Michael Spaan to the newly created Superior Court seats in Anchorage.

Smith, 56, has been an Alaska resident for the past 12 years. He is currently an Anchorage District Court Judge, serving in that capacity since February 2003. Prior to holding that judgeship, he served as an assistant district attorney in Palmer for three years and in Kotzebue for two years. He graduated from the University of Idaho School of Law.

Spaan, 60, has been an Alaska resident for the past 34 years. He is currently in private practice in Anchorage. Prior to entering into private practice, he served as U.S. Attorney for the District of Alaska, serving in that capacity for eight years. He graduated from the University of California Law School at Davis.

--Press release, Office of the Governor

NEWS FROM THE BAR

Rules amendments proposed: Trust funds, suspension, mediation & fee arb

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

Trust fund overdrafts

Alaska Bar Rule 15.1: This proposal would add a new bar rule requiring lawyers to maintain their trust accounts in institutions that agree to provide notice of trust account overdrafts whether the instrument is honored or not.

Rule 15.1. Maintenance of Trust Funds in Financial Institutions That Agree to Provide Overdraft Notification.

(a) Clearly Identified Trust Accounts in Financial Institutions Required.

(1) Lawyers who practice law in Alaska shall deposit all funds held in trust in this jurisdiction in accordance with Rule 1.15(a) of the Alaska Rules of Professional Conduct in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.

(2) Every lawyer engaged in the practice of law in Alaska shall maintain and preserve for a period of at least six years after termination of the representation, the records of the accounts, including checkbooks, canceled checks, check stubs, vouchers, ledgers, journals, closing statements, accountings or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client.

*(b) **Overdraft Notification Agreement Required.** A financial institution may be a depository for lawyer trust accounts if it agrees in a form provided by the Bar Association to report to Bar Counsel whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. No trust account shall be maintained in any financial institution that does not agree to so report. Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon 30 days notice in writing to the Bar Counsel.*

*(c) **Overdraft Reports.** The overdraft notification reports made by the financial institution shall be in the following format:*

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

*(d) **Timing of Reports.** Reports under paragraph (c) shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within 5 banking days of the date of presentation for payment against insufficient funds.*

*(e) **Consent By Lawyers.** Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.*

*(f) **Costs.** Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.*

*(g) **Definitions.***

For purposes of this Rule:

(1) "Financial institution" includes a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by lawyers.

(2) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(3) "Notice of dishonor" refers to the notice that a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

Dues suspension?

Alaska Bar Rule 61(a): This rule provides for administrative suspension of a bar member who fails to pay membership dues. The rule currently references April 1st as the date on which the executive director will petition a justice of the supreme court for an order suspending the member.

However, since bar members may pay their dues in installments, the executive director files another petition in September regarding members who have not paid their second installment. Rather than put April 1st or September 1st in the rule, this amendment would permit the executive director to notify the bar member of the approximate date a petition will be filed.

Finally, as a matter of protocol, petitions for administrative suspension should be directed to the Supreme Court itself rather than an individual justice. This amendment corrects the procedure.

Rule 61. Suspension for Nonpayment of Alaska Bar Membership Fees, Fee Arbitration Awards, and Child Support Obligation.

(a) Any member failing to pay any fees within 30 days after they become due shall be notified in writing by certified or registered mail that the Executive Director shall, on April 1, petition a Justice of the Supreme Court of Alaska for an order suspending such member for nonpayment of fees.

The following proposals were submitted to the Board by the Fee Arbitration Executive Committee:

Expand mediation?

Alaska Bar Rule 13. Mediation is presently available for both disciplinary and fee arbitration matters, but the rule is silent on challenges to mediators appointed to conduct the mediation. This proposal borrows from language in the fee arbitration rules regarding challenges for cause and peremptory challenges.

The rule is also silent on the procedure to be followed when a party doesn't respond to requests by Bar staff for scheduling information. The fee arbitration rules permit a petition for fee arbitration to be dismissed if a petitioner doesn't respond to a 30 day letter under Rule 40(e)(2). This proposal would refer a mediation matter back to either a grievance investigation or a fee arbitration proceeding if any party fails to provide scheduling information after a 30 day letter.

Rule 13. Mediation Panels

(a) **Definition.** Mediation panels will be established for the purpose of settling disputes between attorneys and their clients or other persons referred to the panels by Bar Counsel under guidelines set by the Board with the consent of the attorneys and the clients or other persons. However, matters likely to result in disbarment, suspension or probation or matters which involve dishonesty or material misrepresentation may not be referred to mediation. At least one mediation panel will be established in each area defined in Rule 9(d).

(b) **Terms.** Each mediation panel will consist of at least three members qualified under guidelines set by the Board, each of whom resides in the area for which he or she is appointed. The members of each mediation panel will be appointed by the President subject to ratification by the Board. The members will serve staggered terms of three years, each to commence on July 1 and expire on June 30th of the third year.

(c) **Powers and Duties.** A member of a mediation panel will be known as a mediator. Only one mediator need act on any single matter. Mediators will have the power and duty to mediate disputes referred to them by Bar Counsel pursuant to Rule 11(a)(11). A mediator will have the power to end a mediation if the mediator determines that further efforts at mediation would be unwarranted or that the matter is inappropriate for mediation under paragraph (a). A mediator may recommend that the attorney seek the services of a lawyer's assistance program. A mediator may not be required to testify concerning the substance of the mediation.

(d) **Informal Proceedings.** Proceedings before a mediator will be informal and confidential. A mediator will not have subpoena power or the power to swear witnesses. A mediator does not have the authority to impose a resolution upon any party to the dispute.

(e) **Written Agreement.** If proceedings before a mediator produce resolution of the dispute in whole or in part, the mediator will prepare a written agreement containing the resolution which will be signed by the parties to the dispute and which will be legally enforceable as any other civil contract.

(f) **Report to Bar Counsel.** When the dispute has been resolved, or when in the judgment of the mediator further efforts at mediation would be unwarranted, the mediator will submit a written report to the Bar Counsel which will include

(1) a summary of the dispute;

(2) the contentions of the parties to the dispute;

(3) any agreement which may have been reached; and

(4) any matters upon which agreement was not reached.

(g) Obligation of Attorney to Participate in Good Faith. Any attorney involved in a dispute referred to a mediator has the obligation to confer expeditiously with the mediator and with all other parties to the dispute and to cooperate in good faith with the mediator in an effort to resolve the dispute.

*(h) **Peremptory Challenge.** Within ten days of the notice of assignment to mediation, either party may file one peremptory challenge. Bar Counsel will at once, and without requiring proof, relieve the challenged mediator of his or her obligation to participate and appoint a replacement, if needed, from the appropriate mediation panel.*

*(i) **Challenges for Cause.** Any challenge for cause of a mediator assigned to a mediation must be made by either party within 10 days following notice of assignment to mediation, unless new evidence is subsequently discovered which establishes grounds for challenge for cause. The challenge will be ruled upon by Bar Counsel. If Bar Counsel finds the challenge well taken a replacement mediator, if needed, will be appointed by Bar Counsel from the appropriate mediation panel.*

*(j) **Referral for Failure to Proceed.** Bar counsel will contact the attorneys and their clients or other persons involved in the mediation to determine their availability for hearing. If any party involved in the mediation fails to provide scheduling information within 30 days of the date of a written request, Bar Counsel shall refer the matter back to investigation if a grievance or back to fee arbitration if a fee dispute. Bar Counsel's initial written request to the parties for scheduling information must advise the parties that failure to respond may result in the referral provided in this rule.*

More fee arb members?

Alaska Bar Rule 38. Since an increasing number of fee arbitration matters are being mediated, the Committee felt it was important to add a mediator to the Executive Committee. To maintain an odd number of members, the Bar's president-elect would become a non-voting member of the Committee.

Rule 38. The Executive Committee of the Fee Dispute Resolution Program.

(a) **Definition.** The president will select one attorney member from each area fee dispute resolution division, and one public member, *and one mediator from any mediation panel,* ~~who together with the Bar's president-elect~~ will constitute the five member executive committee of the fee dispute resolution program. *Each of* ~~The~~ Bar Counsel *and the Bar's president-elect* will serve in an ex-officio capacity and will be a non-voting members of the

Continued on page 13

Proposed Rules amendments

Continued from page 12

executive committee. The board or Bar Counsel may orally or in writing direct the submission of any matter to the executive committee. The votes on any matter may be taken in person or by conference telephone call.

(b) Quorum. Three voting members of the executive committee will constitute a quorum at any meeting.

Clean up fee arb apps?

Alaska Bar Rule 40. Either party may file an application to modify a fee arbitration decision or file an objection to an application for modification. For some reason, the rule currently states that the time period for making the application starts with "delivery" of the fee arbitration decision or the "receipt" of the application to modify. This proposal changes both words to "service" to make the rule consistent with other portions of the fee arbitration rules.

Rule 40. Procedure.

(s) **Modification of Decision by the Arbitrator or Panel.** On application to the arbitrator or panel by a party to a fee dispute, the arbitrator or panel may modify or correct a decision if:

(1) there was an error in the computation of figures or a mistake in the description of a person, thing, or property referred to in the decision;

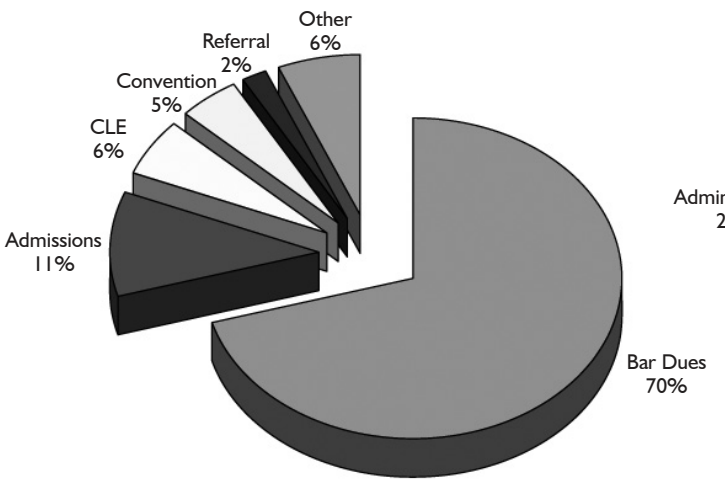
(2) the decision is imperfect in a matter of form not affecting the merits of the proceeding; or

(3) the decision needs clarification.

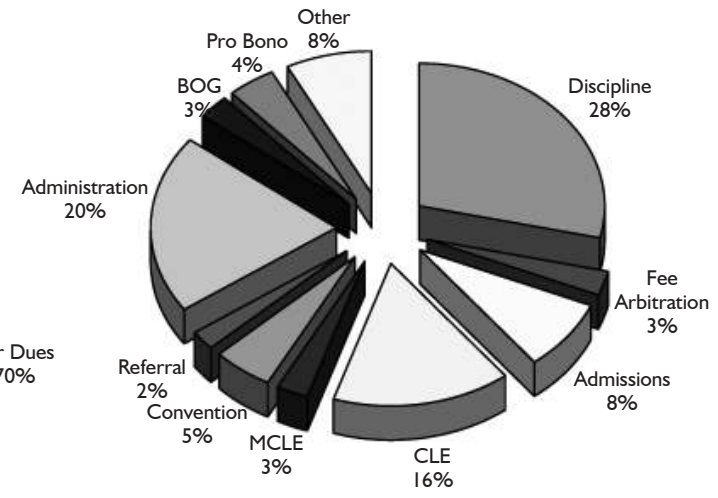
An application for modification shall be filed with bar counsel within twenty days after *service* ~~delivery~~ of the decision ~~to~~ *on* the parties. Written notice of the application for modification will be served promptly on the opposing party, stating that objection to the application must be served within ten days from the *service* ~~receipt~~ of the notice of the application for modification. A decision on an application for modification will be issued within thirty (30) days after the time for filing an objection.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510

2007 REVENUE BUDGET



2007 EXPENSE BUDGET



2007 BUDGET

REVENUE	
Admission Fees - All	253,600
ContinuingLegalEducation	143,345
Lawyer Referral Fees	48,500
The Alaska Bar Rag	17,494
Annual Convention	114,000
Substantive Law Sections	10,860
ManagementSvc LawLibrary	990
AccountingSvc Foundation	12,651
Membership Dues	1,671,595
Dues Installment Fees	12,000
Penalties on Late Dues	17,870
Disc Fee & Cost Awards	0
Labels & Copying	3,935
Investment Interest	105,000
Miscellaneous Income	500
SUBTOTAL REVENUE	2,412,340

For a complete copy
of the
2007 Budget
contact AlaskaBar.org

EXPENSE	
Admissions	189,571
ContinuingLegalEducation	374,640
VCLE/MandatoryContinuingLegalEducation	71,668
Lawyer Referral Service	53,577
The Alaska Bar Rag	40,810
Board of Governors	64,960
Discipline	685,225
Fee Arbitration	70,570
Administration	488,198
Pro Bono	98,167
Annual Convention	125,489
Substantive Law Sections	15,542
ManagementSvc LawLibrary	4,742
AccountingSvc Foundation	12,651
Law Related Education Grants	10,000
ADA Member Services	1,500
Committees	11,432
Duke/Alaska Law Review	22,500
Miscellaneous Litigation	10,000
Internet / Web Page	16,908
Lobbyist	9,800
Credit Card and Bank Fees	22,809
Computer Training / Other / Misc.	2,500
SUBTOTAL EXPENSE	2,403,259
BUDGETED EARNINGS	**9,081**

Law-related education grant deadline is January 10

The Alaska Bar Association Law Related Education (LRE) Committee has been appropriated $10,000 to fund law related education activities in Alaska in 2007. The LRE Committee is accepting applications from organizations and individuals for these funds to promote the mission of the LRE Committee. The LRE Committee anticipates announcing the names of the successful applicants on or about January 31, 2007.

Applications must be received by the Alaska Bar Association on or before January 10, 2007, 5:00 p.m. and must be delivered, mailed or faxed to:

Alaska Bar Association
Law Related Education Committee
550 W. Seventh Avenue, Suite 1900 (Physical Address)
Anchorage, AK 99501
P.O. Box 100279 (Mailing Address)
Anchorage, AK 99510-0279
Fax: 907-272-2932

Applications are recommended to be three to five pages in length and must include the following information, if applicable:

1. Name of Applicant (Organization/Individual):
2. Mission Statement:
3. Project Description, including anticipated state-wide effects:
4. Project Timeline, including Completion Date:
5. Budget
   a. Total Budget (all sources, including In-Kind):
   b. Amount of Grant Requested from LRE Committee:
6. How will the LRE grant affect the success of your project or program in 2007?
7. Proposed Project Participants:
8. Reporting: How will you evaluate your project and by what date would you agree to report to the LRE Committee regarding the completed project, including but not limited to the number of participants served and an accounting of how any funds awarded were used?
9. How will you recognize the Alaska Bar Association, Law Related Education Committee in your project in 2007?
10. Contact Information: The application must be signed, and include the paragraph below before the signature block, as well as the name of the individual completing the application, title or relationship to organization, address, telephone number, fax number, email address.

"I understand that the project submitted must be completed by December 31, 2007, and a final report concerning the project is due on or before that date. I agree to provide a federal tax ID number, EIN, or SSN for the organization or individual to whom any funds would be disbursed, which I understand will be used to report to the IRS. I agree to these conditions on the grant."

Our Euroclass constitution part deux starring Ronald and lots of farmers and ranchers, all getting along

By Peter Aschenbrenner

Alert readers will recall Alaska is not really a state because it lacks counties. No hate mail from our 'Euroclass Constitution Part One', so I guess we're all in agreement here. These occasional but nasty disappointments – as to how much state dignity you deserve, despite the Equal Footing Doctrine – should not be too surprising. West Virginia is actually not a state. 90 Cal. L. Rev. 291 (2002). The learned demonstrate this by poking around state and federal constitutions; and what is this California law review anyway? Why is California which was not even contiguous at time of admittance – okay, Louisiana was the first – now handwringing and hairsplitting our constitution just to beat up on poor ol' West Virginia?

And of course there are the eleven "surly sisters" of that (what's the time frame between ante bellum and post bellum?) vintage. The winning side insisted that the losing side be readmitted with their constitutions vetted by Congress as though they had never been in the Union before. Even thought the slogan in the war on the winning side was 'you can't leave the union'. Now that does explain West Virginia not being a real state. And what about Maine? I'm suspicious of states named after French provinces. How about you?

This must be why they pay historians the big bucks. Alaska has no counties and so it would not qualify it for "diocesan" status in the Eastern Roman Empire. Sports arenas, sex scandals, monuments everywhere – and Jiminy Willikers things change in a millennium and a smidge; every piece of real estate was assigned to a companion of the Emperor. A *comes* pl. *comites*. Who in essence became the chief functionary or count thereof and was responsible for the welfare of the residents of the county. Sir Walter Scott got himself named Sheriff of Selkirkshire in Scotland; good pick. Bull Connor got elected Sheriff of Jeffersonshire, Alabama. Okay, not so good.

At the constitutional convention of 1954/55 there was a lot of self-congratulations on counties being so, well, Byzantine, and dispensable. And of course recent hoo-ha about our cool conventioneers. *Au contraire.* Our state supreme court has said that its writ doesn't run throughout the whole state, and this is not bragging. *John v. Baker,* 982 P. 2d 738, 762 (Alaska 1999)[barriers of culture, geography, and language create [sic] a court system that remains "foreign and inaccessible"]. One county, one courthouse survived *Baker v. Carr* and *Wesberry v. Col. Sanders* (which isn't relevant but is fun to cite) so that would have been a viable solution; and the said conventioneers could give our counties really cool names, like Russian Pelagia and Alaska Septentronalis – names that Justinian would think are nifty and don't forget he has two screen credits in the architecture of that big building covered with a lot of marble in Washington.

So Alaska lacks counties and therefore we aren't a state and somebody at the Cal. Goldenbear Law Review is going to notice this and write us up (or down) and then Congress will take away our bridges and all the money they sent up here to keep us in the union, and then where would we be? Okay, so our county-less constitution's not so cool, after all. Or there's a risk of having sand kicked in our state face, at least.

So if you are (nominally) a state and you are ignoring 1500 years of constitutional history and you can't really be a state over each and every latifundia west of Canadia, then what should you do? I mean we have to have a snappy answer for the professoriat, because they will notice our county-lessness sooner or later.

Now here's where Ronald Coase comes in. First place, he gets cited more than anyone else so that's, like, really cool, right there. Second, he loved farmers and ranchers getting along although he may have lifted the idea from Oscar Hammerstein II's *Oklahoma.* See farmers and ranchers, before Coase, would sue each other or get some regulatory agency to make each get along with the other (known as "the respondent"). This was long before Rodney King. Then Coase said they could do it themselves, actually just like Aunt Eller 'called it out' in the aforesaid *Oklahoma*. This solution never occurred to them, and so they tried it, because Coase and all of his citating professors said they should try it. It turned out that this – negotiated – solution to latifundiary 'peace in our time' was really nifty especially if you are folks who are a long way from anyplace else, such as your state court system is "foreign and inaccessible".

Pretty soon every one was quoting Coase, saying Coase would want solutions delivered this or that way because it's cheaper and then they would go on about the social costs of getting transactions right. So why you don't you just go down to the polluter and promise him a wheelbarrow of money to stop polluting? According to Ronald.

But I think everyone missed the boat here.

What about a whole state that is so Coase-cool that everybody outside of a few boroughs just makes law themselves. Reduced social costs, more Rodney King sightings, lots of subjects for law review articles. Winners all around.

Now take a recent advisory opinion of the Judicial Conduct Commission. You go to court, and then pretty soon it is suggested that you should be out of court, because the cost of being in court is too high. The problem is Coasean and, as I have argued, diocesan, if not Diocletian-dependent at the highest levels of abstraction. First you have counties, and then you have courthouses, and then you have users of court services and then when you get everyone in their seats – peanuts, softdrinks, cruising altitude, and so forth – the pilot says, see the farmers and the ranchers down there, the ones getting along? That's the only way to travel.

So you land, everyone gets out and goes over – boots needed here – and watches to see how it's done, because Ronald loves rural imagery, as did Oscar's Aunt Eller, and then you have to get people to behave like farmers and ranchers or get back in the fun bus if that didn't work out and then take off again.

Okay here's the point. There's a transition in Alaska – as in no other place in this or any other Roman Empire – where you go from county to county-less justice. But there's also a place inside a county where Coase takes us from the justice of the adjudicated and socially costly solution to the do-it-more-yourself and cheaper solution.

It's all in the transitions. But are these transitions constitutionally compelled? Limited? Hurdled? Desirable? Article IV, Section 4 'Republican Form of Government' enough for you? And that's why they call this Part Deux of our Euroclass Constitution.

2007 Bar Convention in Fairbanks — The Golden Heart City

Wednesday - Friday, May 2, 3, and 4
Westmark Fairbanks Hotel & the Rabinowitz Courthouse

Watch for the brochure in late January/early February
Check the Bar website in January for more information (www.alaskabar.org).

Chief Justice John Roberts, U.S. Supreme Court
Awards Banquet Keynote Speaker

CLEs -- Get all 12 recommended CLE credits at the Bar Convention!

Wednesday, May 2

- The 7 Building Blocks of a Highly Efficient Practice – Productivity Strategies for Private and Public Attorneys – Dustin Cole, Nationally-Known Trainer for Legal Organizations, Founder of Attorneys Master Class
- State of the Judiciaries Lunch Address
- Ethical and Successful Client Development (includes 1 hour of ethics)- Dustin Cole
- CLE for Public Attorneys – The Nuts & Bolts of Getting Records – A panel of experienced lawyers and judges
- CLE for New Lawyers – The Business Side of Running a Law Firm: What Partners Want Their New Lawyers To Know – A panel of experienced practitioners and industry experts
- Opening Reception and Presentation, "Shakespeare, Law, and the Inns of Court" with the Fairbanks Shakespeare Theatre – Judge Ray Funk and Professor Terry Reilly, Co-Authors -- UAF Museum

Thursday, May 3

- U.S. Supreme Court Opinions Update – Professors Erwin Chemerinsky and Laurie Levenson
- 25 and 50 Year Pin Presentation and Lunch
- Alaska Constitutional Law Update – Professor Erwin Chemerinsky
- Evidence Cranium Redux! - 3rd Judicial District Presiding Judge Morgan Christen and Criminal Division Presiding Judge Philip Volland, Co-Chairs
- Awards Banquet and Reception – Keynote: Chief Justice John Roberts, U.S. Supreme Court

Friday, May 4

- Juries: Reexamining the Box -- Innovations in Approaches to Juries – Judge Susan Connor, Superior Court of Los Angeles
- Alaska Bar Annual Business Meeting
- Federal Appellate CLE with Chief Justice John Roberts
- Closing Event

Make your hotel reservations by March 10, 2007
The Westmark Fairbanks Hotel is the convention hotel. A block of rooms has been reserved for Bar members. The rate is $75 single or double plus tax. Call 800-544-0970 to make your reservation.
Westmark Fairbanks Hotel
813 Noble Street
907-456-7722
Central Reservations: 800-544-0970

Watch the Bar website www.alaskabar.org for more information!
E-mail us at info@alaskabar.org or call us at 907-272-7469.

Don't miss the Pro Bono Art Silent Auction!

Don't Forget – ***2 for 1 Special*** – A Senior Member of the Bar and a New Lawyer (admitted in the last 5 years) can attend convention CLEs for just one registration fee. Watch for details in the convention brochure!

Note: There won't be a Fun Run/Walk this year.

NEWS FROM THE BAR

Be careful if you're a judge running for office

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2006-4

Use of Information Relating to Prior Judicial Service by Lawyers Who Campaign for Elected Office[1]

Question Presented

May lawyers who run for public office use information relating to their prior judicial service in their campaigns?

The Committee concludes that an attorney who runs for public office may use information indicating prior judicial service where the campaign information (*e.g.*, campaign flier or mailing) only lists the candidate as having been a "former" judicial officer, and identifies the specific position along with the length and location of such service.

Analysis

The issue cannot be addressed solely by reference to a specific provision either in the American Bar Association Model Rules of Professional Conduct, the Alaska Rules of Professional Conduct, or by way of analogy, the Alaska Code of Judicial Conduct. The Committee therefore has based its conclusion on those rules of professional conduct that set forth the guidelines for communications concerning a lawyer's services and letterheads, and the rules of judicial conduct concerning the appearance of impropriety. [2]

Both the Model Rule and Alaska Rule 7.1 provide in pertinent part that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services" if it "is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law."[3] Correspondingly, both Model Rule and Alaska Rule 7.5 prohibit the use of letterhead that violates Rule 7.1. [4]

Canon 2 of the Alaska Code of Judicial Conduct, similar to its ABA counterpart, further provides that a judge "shall" avoid the "appearance of impropriety," "act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary," and "shall not use or lend the prestige of judicial office to advance the private interests of the judge." [5]

Reasonably construed, these specific rules and codes of conduct indicate that an attorney may include readily verifiable – albeit circumscribed – information in a campaign flier or mailing. In other words, the lawyer can indicate in the advertisement only that he or she is a "former" judge and identify only the specific court along with the length and location of such service. [6]

A lawyer campaigning for elected office who refers to himself or herself either as a "former _____ court judge" is distinct from the situation where a lawyer in private practice refers to himself or herself as "Judge" _____.[7] That is because the latter reference raises an issue under Rule 7.1 as to whether the lawyer either is (1) creating an expectation that he or she can achieve results that a lawyer who is not a former judge cannot or (2) improperly creating a false impression as to his or her professional status and access to the judicial decision-making process. [8]

Nevertheless, the Committee cautions that use of the phrase "former judge" in the context of campaigning for public office "has definite status implications in our society," and could be misleading without the additional limitations set forth previously.

Approved by the Alaska Bar Association Ethics Committee on October 5, 2006.

Adopted by the Board of Governors on October 27, 2006.

[1]It is assumed for purposes of this opinion that the lawyer is a former judge. See Alaska Code of Judicial Conduct Canon 5(d)(2) ("A judge shall resign upon becoming a candidate in either a primary or general election for any non-judicial office except the office of delegate to a state or federal constitutional convention.")

[2]*Cf.* ABA Comm. On Ethics and Professional Responsibility, Formal Op. 95-391 (1995).

[3]*See* MODEL RULES OF PROF'L CONDUCT R. 7.1(b) (5th ed. 2003); Alaska R. Prof. C. 7.1(b).

[4]*See* MODEL RULES OF PROF'L CONDUCT R. 7.5 (5th ed. 2003); Alaska R. Prof. C. 7.5.

[5]*See* MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990); Alaska Code of Judicial Conduct Canon 2 (1998). A false or misleading communication about the lawyer or the lawyer's services within this context also can be made through a visual statement such as a photograph depicting the lawyer wearing a judicial robe as symbolic of his or her former position. *Compare* ABA Comm. On Ethics and Professional Responsibility, Informal Op. C-719 (1964) (explaining that paid political advertisement picturing judge in judicial robes and simultaneously advertising judicial position along with endorsement of another candidate for judicial office violates canons of judicial ethics) *with* ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1450 (1980) (stating no violation of code of judicial conduct when incumbent judge, in re-election campaign, allows use of photograph (including televised photograph) of him- or herself where judicial robe, "if the photograph is otherwise proper and if he [or she] normally wears the robe in the performance of his [or her] judicial duties").

[6]*Cf.* NJ Eth. Op. 698 at *2 (2005) (indicating that mailing describing sender as "former Municipal Court Judge" is permissible only if attorney includes the years and location(s) of service in advertisement).

[7]*See, e.g.*, MI Eth. Op. RI-327 (2001) (stating that former judge may not ethically retain the title "Honorable" after entering private practice);

[8]*Id. See also* PA Eth. Inf. Op. 99-156 (1999) (explaining that lawyer in private practice referring to himself or herself as "Judge" improper under Rule 7.1(a) but that designation of law firm member as "Former Judge" on letterhead does not create problem where information is capable of verification); IL Adv. Op. 92-10 (1993) (discussing use of title "Judge" in professional and personal relationships by former judge who is now a practicing attorney); OH Adv. Op. 93-8 at *3 (1993) (explaining that it is unethical under Ohio code of professional responsibility for former judge returning to private law practice to uses statements as to prior judicial positions held or titles such as "Judge," "Honorable," or "Former Judge," on letterheads or business cards in connection with the practice of law); FL Eth. Op. 87-8 (1987) (concluding that it would not be ethically improper for former chief justice of Florida Supreme Court to identify himself as such below his signature on letters to attorneys and other professionals regarding matters unrelated to the practice of law). But see NY Eth. Op. 637 (1992) (concluding that nothing in New York Code of Professional Responsibility as amended prohibits listing lawyer's prior judicial office, "on a letterhead or elsewhere, in a truthful and non-misleading manner," and overruling prior New York State Bar Association professional ethics committee's opinions to the contrary).

See note 2; note 7 at *2; IL Adv. Op. 92-10, OH Adv. Op. 93-8, and FL Eth. Op. 87-8, note 8, supra.

Board of Governors takes action on 15 items in October meeting

• Voted to recommend to the Supreme Court 52 applicants for admission.

• Voted to approve the ethics opinion entitled: "Use of Information Relating to Prior Judicial Service by Lawyers Who Campaign for Elected Office."

• Voted to certify one reciprocity applicant for admission.

• Voted to approve one Rule 43 (ALSC) waiver for Lynda Vaughn.

• Voted to approve the 2007 budget as amended.

• Voted to publish an amendment to Alaska Bar Rule 15.1 to require lawyers to have their trust accounts only at institutions that agree to provide trust account overdraft notices to Bar Counsel.

• Voted to send to the Supreme Court an amendment to Bar Rule 39(a) correcting the Bar Association address.

• Voted to send to the Supreme Court an amendment to Bar Rule 40(u) correcting citations to the Uniform Arbitration Act.

• Voted to send to the Supreme Court an amendment to Bar Rule 3, Sec. 6 changing the reapplicant deadline for the July bar exam to June 15.

• Voted to amend Bylaw VIII, Sec. 3 changing the reference to "Robert's Rules of Order Newly Revised."

• Voted to publish an amendment to Bar Rule 61(a) removing the filing date for the petition for suspension for nonpayment of bar dues and directing the petition to the Supreme Court.

• Voted to publish amendments to Bar Rules 13, 38 and 40 as recommended by the Fee Arbitration Executive Committee.

• There was no motion to reconsider the denial of a claim as recommended by the Lawyers' Fund for Client Protection Committee in 2006L003.

• Voted to approve the Lawyers' Fund for Client Protection Committee's recommendation to deny the claim in 2006L018.

• Voted to accept the Lawyers' Fund for Client Protection Committee's recommendation to reject the application for reimbursement in 2006L017.

• Voted to approve the minutes of the September meeting as amended.

Add these to the List

VOLUNTARY CONTINUING LEGAL EDUCATION (VCLE) RULE – BAR RULE 65
6TH REPORTING PERIOD - JANUARY 1, 2005 - DECEMBER 31, 2005

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

Ruth Bauer Bohms
Donald Logan

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

Nominations Sought for Judge Nora Guinn Award

The Board of Governors is soliciting nominations for an Alaska Bar Association award honoring Alaska District Court Judge Nora Guinn of Bethel, who died July 6, 2005. The award will be presented to a person who has made an extraordinary or sustained effort to assist Alaska's Bush residents, especially its Native population, overcome language and cultural barriers to obtaining justice through the legal system, a goal to which Judge Guinn was firmly committed throughout her long career as a judge and community activist.

The award will be presented at the annual Bar Convention dinner if a recipient is selected. Nominations should include a detailed description of the nominee's contributions to Natives and other Bush community residents as outlined above.

Nominations should be made by March 9, 2007. Please send your letter stating your nomination and why this person should receive the award to the Alaska Bar Association, attn. Deborah O'Regan, Executive Director, P.O. Box 100279, Anchorage, AK 99510 or via e-mail to oregan@alaskabar.org.

Spearin in Alaska: Whose end is the sharpest?

By Kenneth Wasche

I have been told that Alaska is booming again. As a relatively new resident, I am not able to confirm or deny this observation, but I do know that along with an economic boom comes construction activity. To many lawyers and judges, interest in construction litigation falls somewhere between remembering to take out the trash and fixing that chip in the windshield. Construction lawyers are often frustrated by the glazed eyes and seemingly closed ears of judges and others uninterested in the legal issues surrounding such things as the slump test of the concrete used in the footing between grids A-3 and A-7 on plan sheet S-16.

What is the Spearin Doctrine?

In 1918 the Unites States Supreme Court succinctly delineated what has become the backdrop for the way construction is done in the United States. In *United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59 (1918),* the Court set out, and added to, the rights and responsibilities of the parties to a construction contract. The Court first reiterated a basic contract principal that one who undertakes to do, for a fixed sum, a thing which is possible to perform will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered. However, the Court then added an important caveat when it said that if a contractor is bound to build according to plans and specifications prepared by an owner, the contractor is not responsible for the consequences of defects in those same plans and specifications. The responsibility of the owner is not overcome by the standard clauses requiring builders to visit a site, check plans, and inform themselves of the details and scope of the work. This added proviso, which has become known as an implied warranty, is generally referred to as the *Spearin* doctrine.

Spearin was a federal case that arose after a contractor agreed to build a dry dock at the Brooklyn Navy Yard. Part of the contractor's work required the relocation of a sewer. The contractor completed the sewer relocation in accordance with the government's plans and specifications. About a year after the sewer relocation, a heavy rain and high tide caused the relocated sewer to fail before work on the dry dock was done. The contractor refused to resume its work in the dry dock area until the problems with the sewer were resolved. The government cancelled the contract, found out that the problem was related to a dam in a completely separate section of sewer, and repaired the sewer with better materials and specifications. *Spearin* sued for its costs and lost profits, and won.

Spearin was a federal case that arose after a contractor agreed to build a dry dock at the Brooklyn Navy Yard.

The *Spearin* Doctrine in Alaska

Most jurisdictions have adopted the Spearin doctrine explicitly or at least adopted the theories outlined in the opinion. The Alaska Supreme Court cited *Spearin* with approval in 1970. In the case of *Hopkins Const. Co. v. Reliance Ins. Co, 475 P2d 223 (Alaska 1970),* the Court reversed a lower court ruling and ordered that judgment be entered in favor of a contractor that had simply followed plans and specifications. The contractor's customer had accused the contractor of faulty work because the floors in the Kodiak Inn squeaked. The customer had multiple suppositions for the cause of the squeaking floors, such as not putting the sub-floor nails at the proper angle when nailing.

While citing to *Spearin*, the Court required that an owner in this case must specifically prove what part of the contract the contractor failed to do. The owner foolishly tried to rely on the simple fact that the floors squeaked, therefore the contractor did it wrong. The contractor won because it simply followed the plans and specifications. Even though the end product was faulty, the contractor was not at fault.

The Alaska Supreme Court expanded *Spearin* (kind of) in 1974 in *Northern Corporation v. Chugach Electric Association, 523 P.2d 1243 (1974).* Northern and Chugach got into a dispute about the costs relating to hauling rock. The Court acknowledged that the method of hauling rock was not addressed in the owner's original plans and specifications. However, subsequent to entering into the contract, the owner directed the contractor to complete the work in a specific manner by hauling rock across a frozen lake. The Court held that the implied warranty of fitness of an owner's plans and specifications applied to this subsequently given instruction by an owner. The Court did limit this extension such that it required a contractor to stop the work once it became apparent, or should have been apparent, that the owner's instruction would not work. When a contractor should have such knowledge is ripe for a classic battle of the experts.

At first blush, the *Spearin* Doctrine appears a wonderful weapon for a contractor.

The *Spearin* Doctrine Evolves

Over the years, the *Spearin* doctrine has evolved into a discussion of whether the construction contract is a "plans and specifications" (a/k/a "performance") contract or an "end result" (a/k/a "design") contract. If a contract is a performance contract, then a contractor is safe if it just follows the plans and specifications (and timely notifies its customer of problems it does or should discover). A performance contract gives an owner the advantage of greater control over the end product, but the owner (or more likely its architects and engineers) must be competent to properly create plans and specify the intended construction. With a design contract, the owner losses some control over the end product, but can rest assured that the contractor will be responsible for problems in the finished product caused by the contractor's choice of materials and methods. This evolution of terms is merely a shorthand version of the *Spearin* doctrine.

The Alaska Supreme Court recognized this performance contract vs. design contract distinction in *A.R.C. Industries, Inc. v. State, 551, p.2d, 951 (1976).* The contractor in this case tried to recover additional compensation from the state for the construction of a weir. The contractor encountered additional costs when it was required to install rip rap along one shore of the river which had become much deeper than was specified on the State's plans and specifications. The Court noted that it was the contractor's choice of the method to construct the weir and its choice of when to begin the project that made the riverbed deeper. Because the contractor "designed" these components of the project, the *Spearin* doctrine was not applied (although the Court reiterated that it would apply the *Spearin* doctrine if the facts were correct). The contractor should have informed the State of its intended logistics and tried to get the State to specify its logistics plan; it may then have been able to rely upon Northern Corporation to recover its additional costs.

The Court also recognized this performance contract vs. design contract distinction in *Lewis v. Anchorage Asphalt Paving Co., 535 P.2nd 1188 (1975).* Lewis hired the paving contractor to "prepare sub-grade" and pave streets. Shortly after completion, the streets became wavy, buckled, cracked and otherwise failed due to a sub-grade of peat and glacial till. In Lewis, the Court acknowledged the contractor's right to simply comply with the terms of the contract because it was a performance contract. All the contractor was required to do was grade and shape the existing soil material (this is what "prepare sub-grade" meant) and install the asphalt. Unfortunately for the contractor, the Court went on to note that while the contractor may simply follow the plans and specifications in a performance contract, the contractor still has a duty to point out to its customer when such plans and specifications are faulty. See also *Nordin Const. Co. v. City of Nome, 489 P.2nd 455 (Alaska 1971).*

Whose End is Sharpest?

At first blush, the *Spearin* Doctrine appears a wonderful weapon for a contractor. To keep the tip sharp, a contractor must do things right from the beginning. The multitude of *Spearin's* progeny have served to highlight some important and often skipped obligations of a contractor. Has the contractor examined and figured out obvious errors in plans and specifications? Has the contractor avoided entering into a "design" type of situation? Has the contractor timely notified its customer of problems with the contract plans and specifications? When contractors are careless, the trajectory the *Spearin* doctrine has taken since 1918 may hinder them rather than provide a weapon for getting paid.

If Alaska is in a boom, it is more likely that contractors, owners, architects or engineers may get sloppy. Keeping in mind the basic principals set out in the *Spearin* doctrine can keep all the parties involved in the construction process on the right track. If the boom causes some to mess up, then it will be the construction litigators who get to haggle over the concrete composition in the footings.

We are happy to haggle, even before taking out the trash and fixing that cracked windshield.

© Ken Wasche 2006.

New book promotes winter employee fitness

As the weather cools down, so does your employees' fervor to get fit . . . which could lead to an increase in sick days and health care costs. Author Tom Gilliam explains how you can help your employees (and your bottom line) stay healthy all year long, in a new book.

The warm, sunny days of summer are nearing an end. And as the days get crisper and shorter, you may notice your employees are slacking off on their workout programs. Swimsuit season is over, they rationalize. Or, It's too cold to exercise outdoors. Or, between helping kids with their homework and preparing for the holidays, "I don't have time to work out." If you assume their winter workout slowdown is none of your concern, think again, says Thomas B. Gilliam, Ph.D. Because your employees' health and fitness level affect your bottom line, it is up to you to make sure they stay on track.

"Your employees probably want to keep up their summer workout routines," says Gilliam, co-author (along with Jane Neill, R.D., L.D.) of "Move It. Lose It. Live Healthy.: Achieve a Healthier Workplace One Employee at a Time!" (T. Gilliam & Associates, LLC, 2005, $19.95). "And most likely their excuses do come from real-life problems. But everyone in the company suffers when overweight employees take lots of sick days and rack up high medical bills. Look at it this way: making it easier for employees to continue their fitness efforts on into winter is a very real way to boost your economic health."

In other words, if you pay health insurance for your employees, keeping your employees healthy is your business.

Here are a few ways you can help your employees put those workout excuses to bed and turn up the heat on their winter workout routines:

Encourage employees to adopt the buddy system. People are more likely to stick to a workout routine when they have someone right there with them fighting the same fight. Buddies provide one another with the encouragement they will need to successfully keep shedding the pounds. Whether paired off two-by-two or broken into small groups, co-workers make natural workout buddies, says Gilliam. "I've found that people are far more likely to stay on track with their fitness routine if they have others to share their ups and downs with," he says.

• Conduct a daily weigh-in. Keeping track of their pounds will help your employees know if their wellness effort is working. This is especially important during the holiday season, when most Americans can gain two to four pounds. Daily weigh-ins allow workers to see if there is an upward trend in their weight so they can make any necessary changes to reverse it. Make sure weigh-ins are private.

• Help employees avoid all that misinformation. Today your workers are exposed to lots of misinformation via many media sources. They are bombarded with commercials for pills that make losing weight look like a piece of cake, and gadgets that claim five minutes of exercise a day is sufficient for becoming a world-class athlete. Providing your employees accurate information about managing body weight and safely getting involved with physical activity programs is crucial to their health. Give your employees accurate information by subscribing to credible wellness programs that provide well-researched books, newsletters, tracking programs, and the like.

• Give exercise-oriented holiday gifts. Along with the traditional holiday bonus, give your employees a gift that will help them stay fit. If your company is large, you might kick in on a corporate membership at a local gym. Smaller companies can give more personal fitness gifts.

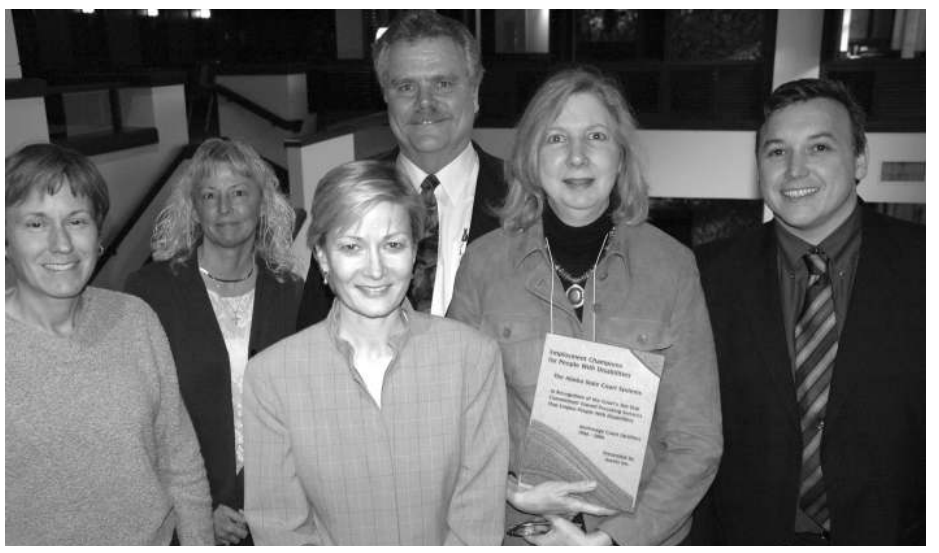
• Suggest your employees set up a mini-gym at home. Encourage your employees to purchase a stretch band, exercise ball, and a set of dumbbells for their homes (these items would make a great gift from the company). A mini-gym can be created for as little as $35. Also, let your employees know about the variety of exercise videos and CDs that can be checked out from the local library. Let them know that trying a variety of different tapes will help them stay focused on fitness. In fact, encourage your employees to include the entire family so everyone benefits--even the company, since you are probably paying benefits for spouses and children.

• Stock the breakroom with healthful foods. Implementing a wellness program while keeping the same old candy bar and potato chip vending machine options for your employees sends a decidedly mixed message. Work out a deal with a local grocery store to provide fresh fruits and veggies for your employees to snack on, and use the breakroom bulletin board to post healthy winter food options. "One of my favorite things to eat during the winter is a healthful soup that is low in sodium and calories," notes Gilliam. "It is the perfect meal for a chilly winter day."

• Always be a team player. Sure, as their boss you are trying to lead your employees toward a healthier lifestyle that will help improve your company's bottom line. But because your employees may not always appreciate your pleas to keep up the exercise, it is vital that you are also a team player. That means munching on healthful snacks, squeezing in lunch hour workouts, and weighing in on a regular basis right along with your employees. "When your employees see that you are right there in the trenches with them, trying to lose weight and stay healthy, they will feel more like the company as a whole is one big team," says Gilliam. "And hopefully they will want to do everything they can to ensure that their team is successful."

"The benefits to helping your employees stay healthy year-round are innumerable," says Gilliam. "Sure, your initial goal is to save money, but even more importantly, you'll affect your employees' well-being in a very holistic sense. Losing weight can be an incredibly life-affirming experience. People gain confidence. They see firsthand the rewards of working hard to meet goals. Ultimately, they will become better, happier employees. And that, in and of itself, is a good reason to encourage them to make the commitment."

-- Author press release



The Alaska Court System recently received an Employment Champion Award from ASSETS, Inc., an Anchorage-based non-profit corporation that provides employment training and support to persons with disabilities. The award was presented in recognition of the court system's hiring of persons with disabilities over the past ten years to perform janitorial services at its Anchorage facilities. Pictured at the awards presentation during the fall judicial conference are, L-R: Wendy Lyford, Area Court Administrator, 3rd Judicial District; Jola Morris, Director of Community Relations, ASSETS, Inc.; Presiding Judge Morgan Christen, 3rd Judicial District; Scott Dattan, Anchorage Attorney and ASSETS Board Member; Chief Justice Dana Fabe, Alaska Supreme Court; and Rick Simpson, ASSETS Contracts Director.

Alaska Bar Association 2007 CLE Calendar

Date	Time	Title	Location
January 26	11:30 a.m. – 1:15 p.m.	Managing Cases Involving Persons with Mental Disorders: The "Top Ten" in the Criminal Justice System CLE #2007- 1.0 general CLE credits	Anchorage Snowden Training Center
February 20	1:00 – 4:30 p.m.	2007 Medicaid CLE CLE #2007- 3.25 general CLE credits	Juneau Location TBA
February 22	1:00 – 4:30 p.m.	2007 Medicaid CLE CLE #2007- 3.25 general CLE credits	Anchorage Downtown Marriott
February 23	1:30 – 5:00 p.m.	2007 Medicaid CLE CLE #2007- 3.25 general CLE credits	Fairbanks Westmark Hotel
February 23	11:30 a.m. – 1:15 p.m.	Managing Cases Involving Persons with Mental Disorders: Psychological & Neuropsychological Evaluations CLE #2007- 1.0 general CLE credits	Anchorage Snowden Training Center

TALES FROM THE INTERIOR

Wandering with Wilbur

By William Satterberg

Like most young men, it was not until my mid-20s that I began to truly appreciate "the Old Man" or as he preferred to call himself, "Dear Old Dad." Both Mom and Dad, who have since passed on, were delightful individuals, who in retrospect, were quite patient with their recalcitrant son. Both had plans for me. Dad wanted me to be an oceanographer. Mom wanted me to be an attorney. Probably mainly to spite Dad, I decided to become a lawyer. By that time, Mom had wisely given up on trying to steer any direction into my life. Fortunately, in time, Dad reluctantly accepted the fact that I had gone over to the "dark side", and actually began to brag about my exploits. It was then that the father/son relationship began to develop in earnest.

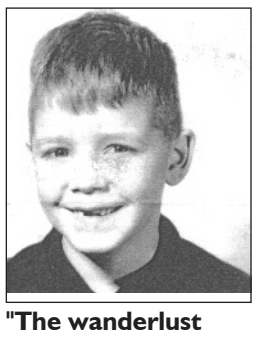
Mom passed away several years before Dad. Both of my parents during their lives had been adventurers, having immigrated from Seattle to Alaska in 1959 to begin a new life in the North. The wanderlust that had so consumed my parents was also inherited by myself. It did not come without a price, however. That price, which I was more than glad to pay, was that, after Mom's death, Dad decided to accompany me on many of my exciting trips.

It began innocently enough. Dad lived near Anchorage, Alaska. Fairbanks, situated approximately 260 air miles north of Anchorage, provided just enough separation between the two of us that our occasional father/son bouts could cool down. As such, when I would come to Anchorage, Dad and I would generally enjoy our time together.

After Mom's death, Dad alternated his roost between either the family homestead in Houston, Alaska, or at an apartment house which he owned in Peters Creek. Both of these locations were outside of Anchorage, which meant that Dad was actually able to look forward to his trips to Anchorage as a time to visit the "big city." In time, Dad developed a regular trap line in Anchorage, availing himself of the hospitality which his friends would offer. Dad's willingness to subject his friends to Dad's visits was a trait which I also inherited. As one of Dad's regular victims, I was to find myself studying at the feet of the master. The education was not lost upon me.

As one of Dad's regular victims, I was to find myself studying at the feet of the master. The education was not lost upon me.

Dad and a desk clerk at the Voyager Hotel in Anchorage, Ken, were to develop a symbiotic relationship over the years. Although I could never confirm for a fact that Ken was the source of the "leaks," Dad developed an uncanny ability to know when I would be staying at the Voyager Hotel. On more than one occasion, as I was entering the hotel lobby, Ken would inform me that my father had already checked in for me and was upstairs "taking a nap." Given such an alert, I would enter the room quietly to find Dad snoozing on the bed, television blaring, and scraps of his room service meal left behind. Invariably, I would sleep on the room's hide-a-bed. Dad would always claim the main bed. It was not that Dad did not offer to share the main bed with me. It was just that Dad was a "cuddler", and, although I was his loving son, I wanted to have no part of his lonely nighttime dreams.



"The wanderlust that had so consumed my parents was also inherited by myself."

Over the years, the Voyager Hotel tolerated Dad well. Since Dad had the same name as myself for some strange reason, Dad was always able to check into my room without any reservations whatsoever, either express or implied. But, the mooching did not start with the Voyager Hotel.

Rather, the year that my wife, Brenda, and I lived in Saipan was the start of it all. It was that honeymoon year that Dad decided he would come visit the newlyweds. Without needing much encouragement, Dad bought himself a ticket to Saipan on Japan Airlines from Anchorage. In route, Dad was almost mugged in Tokyo when he found himself being beckoned into a sleazy nightclub by the only streetside hawker. Dad survived his encounter session, none the worse for wear, and flew from Tokyo to Saipan, without further serious incident.

While en route from Japan to Saipan, Dad sat next to a young Chinese girl who was flying to the island to live with her new husband, Al. (For some strange reason, most Chinese men seem to be named "Al".) Both had been married about the same time as Brenda and myself. The young Chinese girl, Angela, was quite worried about living with her husband for the first time in a foreign in country. Angela's husband, Al Wong, (for some strange reason, most Chinese seem to have "Wong" as a last name.) was the manager for the Hyatt hotel chain. As a token of her love, Angela had given up her job as a Chinese flight attendant with Korean Airlines to come to stay with Al. Dad, seldom at a loss for conversation, apparently took the three hours of flying time to expound upon his many philosophies of life to the bashful, scared bride. Culturally speaking, Dad's bravado was definitely not Oriental in character. But, then again, Dad was a self-proclaimed Swede.

When Dad bounded off the flight, he excitedly announced to both Brenda and myself that he had met a delightful young girl on the flight who was scared about living with her husband for the first time in Micronesia. Dad said that he had taken the liberty of inviting both Angela and her new husband, Al, to our house for dinner the following evening. The time had already been set. All we needed was a menu. Needless to say, Brenda went into a panic over this dinner invitation. Attempting to add some "face" to the process, I lectured Dad about the niceties of Oriental culture. I explained that one did not simply force themselves upon strangers on a flight, especially Asiatic females. To Dad's credit, Dad would have nothing of it. He had already invited Angela and her new husband, Al to the Satterberg house for dinner. As far as Dad was concerned, that was the way it was going to be. In retrospect, Dad's indiscretion was one of the best things that ever happened to Brenda and myself. We soon made very good friends in Al and Angela Wong, who were more able than ourselves to overlook Dad's cultural indiscretions.

In retrospect, Dad's indiscretion was one of the best things that ever happened to Brenda and myself.

Dad was proud of his role of having been a Seebee in World War II. Dad served in the Pacific. As for his combat time, Dad used to boast that he would run around all day long with his shirt off on some tropical island, chasing nurses. Apparently, Dad decided to replicate his wartime exploits while on Saipan. In less than a day, Dad sported a ruby red sunburn which almost created an aloe vera crisis in the tropics.

Apparently, during the war years, Dad also fancied himself somewhat of a motorcycle rider, even though Dad had only ridden one once. One day, while I was at work, Dad decided to borrow my Suzuki motorcycle and go for a spin around the island. Dad did exactly that. In fact, Dad was scarcely 100 yards from the house when he spun out the motorbike, earning himself a nice case of road rash in the process. Still, experiences like those taught me that travels with Dad would never be easy.

After our return from the Pacific, during the 1990's, I began to do work in Europe and Russia. On more than one occasion, Dad would desire to accompany me on those sojourns, as well.

One of the most memorable trips took place when I was traveling to Russia via London. As I passed through Seattle, Dad announced, sua sponte, that he had always "wanted to see London." Dad had done his research. Dad knew that I was flying on British Airways, and that he could cash in valuable Alaska Airline miles for swell prizes, including a ticket to England. When I asked how Dad planned to go home, Dad insisted that he could safely return to Seattle by himself. At the time, I was traveling with a business partner, Bernie, but that had little effect upon Dad's desire to go to England. Dad asserted that he could "tag along" as a "third wheel", but assured us that he would not act as such. In a moment of weakness, I agreed to let Dad join up with us in Seattle.

When Dad, my partner and I arrived at the ticket counter in Seattle, we were met by a very cordial British Airways ticket agent. During the check-in process, Dad was proud to announce to all that I was his only son. Dad also made it clear to the ticket agent that he had known my business associate, Bernie, for quite some time.

Previously, while we were standing in line, we had met another client of mine, Martie, who was on his way to Ireland to visit some old family relatives. During the wait, I had introduced Dad to Martie. As expected, we had discussed that perhaps Dad and Martie could sit together if the seat assignments were compatible. After all, Bernie and I had purchased business class tickets, whereas Dad was cashing in his mileage for only a coach class ticket.

This juxtaposition in seating was not lost upon the alert ticket agent. Nor was it lost on myself, since I had my own plans to surprise Dad. Dad was not going to make any assumptions about his son's generosity, however.

During the check-in process, Dad continually returned to the fact that he was traveling for his first time ever to England. Dad told the agent that he was proud of his "lawyer son", who occasionally let Dad "tag along" on such journeys. Dad also made it quite well known that he was very excited about all the sights of London that he would see. In Dad's mind, it was like going to Disneyland.

Having set the stage, Dad next went into his time-proven sympathy routine, confiding to the ticket agent that he was getting older and was in the sunset of his years. As an aside, Dad remarked that it was difficult to walk to the back of long aircraft. Dad also complained that the seats in coach class were often narrow and hard. Dad then asked, innocently enough, if he would be able to recline his seat and sleep. Dad also wanted to know if he would have a difficult time watching the movie because of his failing eyesight. In response, the ticket agent politely assured Dad that he should have no problem with any of these issues from his assigned seat.

The crowning touch was when Dad announced that he and Mom had intentionally named me "Billy." According to Dad, one day, I would be able to take care of Dad, since we both had the same names. The ticket agent politely agreed. The agent then handed my Dad his business class ticket while handing me my coach class ticket and assuring me that I would enjoy my flight. After all, I was

Continued on page 19

TALES FROM THE INTERIOR

Wandering with Wilbur

Continued from page 18

conveniently seated next to Martie. It was not that I did not have the same plan. It was just that the ticket agent beat me to it and stole my thunder. Still, as I boarded the flight, I must admit that I was just a little bit envious to see Dad relaxing in his business class seat, playing like a ten year old kid with all of the pretty buttons on his entertainment console.

The second big overseas trip that I took with Dad was when Dad unilaterally decided to accompany me to Moscow, Russia. Once again, Dad and I traveled via London. The difference was that, whereas I had sent Dad back from London on the first trip, this time, Dad continued onward with me. It was to be a giant step backwards in time for Dad into Eastern Europe. Because there was serious business to do, I had to leave Dad in the Moscow hotel room on various occasions. Fortunately, as I expected, jetlag took care of babysitting Dad for the first couple of days.

Eventually, however I realized that Dad needed to get out on his own and see the city while I was working. As such, I let Dad take my female interpreter and male driver to be his dual chaperones. By then, Mom had long since passed away, and Dad had overcome his grief. In fact, he had completely recovered, from all appearances. It soon became apparent that Dad had a crush on my attractive, Russian interpreter. Simply speaking, they hit it off rather well. My driver, on the other hand, was an ex-Afghanistan war veteran of the Soviet era who claimed he was a vegetarian and had no romantic interest in Dad. American food was different, however. Before long, Dad had converted him to eating McDonald's hamburgers.

The high point of the Russian trip was when my client and I decided to take Dad to the Bolshoi Ballet. When I told Dad on the evening of the event that we would be going to the ballet that night, Dad stated to me "Billy, there is a Bolshoi Ballet right in the basement of this hotel." Rather than taking Dad seriously, I chalked the spontaneous disclosure up to Dad's advancing old age.

Upon our return to the hotel, Dad then declared to me, once again, that there was a "Bolshoi Ballet in the basement of the hotel". Recognizing that Dad had been required to stay at the hotel for some period of time while I was out doing business, I agreed to accompany Dad to the basement of the hotel to see the Bolshoi Ballet to which he was referring. It did not take long after I entered a darkened night club to realize that the ballet that my Dad was referring to was a much more modern dance version, wearing far different costumes, or lack thereof. Even more distressing was the fact that most of the performers apparently knew Dad by his first name, gleefully squealing "Beel!" as soon as we entered the premises. Dad obviously had been working on improving foreign relations.

Not that Dad was always that good at thawing foreign relations with the Russians. One night, after a business dinner which Dad was invited to attend at a swank Russian restaurant, Dad succeeded in stealing the moment by loudly announcing to all those present, "So who are all of you guys, really? KGB?" Fortunately, Russian culture has a special place in society for old people and their regular transgressions. Dad was excused from his cultural faux pas. Personally, I blamed it on too many vodka toasts.

My exploits with Dad were not always in foreign countries. In addition to Dad's regular cameo appearances at the Anchorage Voyager Hotel, Dad once accompanied me to Las Vegas, Nevada, ostensibly for business. During that trip, Dad insisted that we stay at the famous "Sands Hotel," the home of the "Rat Pack." Dad had always felt a certain kinship with Dean Martin and Frank Sinatra.

After depositing Dad in the hotel room to take his ritual afternoon nap, I left to conduct business. When I returned that afternoon, Dad immediately told to me that he could see why "they call Las Vegas Sin City." I asked Dad how he arrived at such a quick conclusion. Dad had presumably been in his hotel room all afternoon, except, perhaps, to visit the casino. In response, Dad announced that he had been watching television and that, "Every show has sex on it!" Needless to say, I was somewhat surprised over Dad's revelation. I conducted further inquiry. Dad stuck with his story. According to Dad, explicit sex acts had been on every channel which he had watched. Disgusted, he had finally turned off the television. I immediately put two and two together. I realized that Dad must have found the in-room movie channel controller.

I went to the front desk and asked if there had been any movies charged to my room. I was not entirely surprised to learn that Dad had briefly scanned 10 different porn films. I asked to speak to the assistant manager and politely explained the problem. The manager was quite understanding and determined that each film had only been watched for two to three minutes. Eventually, we compromised and arrived at my having to pay for only one X-rated movie. I also agreed to have a child control block installed on the pay-per-view movies for the remainder of my stay, in order to keep Dad off of the television. Needless to say, I took special care when sending the billing to the client to make sure that the room charges were appropriately screened.

Over the years, Dad and I regularly took trips together. Some trips were certainly more memorable than others.

Over the years, Dad and I regularly took trips together. Some trips were certainly more memorable than others. Given Mom's early passing, our travels were often the high points of the father/son bonding experience.

In 1998, Dad decided to take a trip without me. That time, I could not go with Dad. I was young, in good health, and had a family to raise. Even then, however, when Dad left to go be with Mom, his departure was memorable. Fortunately, I was there to send Dad off, even if he did leave unexpectedly. Still, our memorable father/son adventures are not over. Eventually, one day, I plan to show up at Dad and Mom's door unannounced, explaining that it is Dad's turn to show me the sights. After all, isn't that why they named me Billy?

Looking for a twin for Africa

State prosecutor Vera Ngassa, left, and Court President Beatrice Ntuba of Cameroon. Vixen Films/Women Make Movies (c) 2005.

Winter is here. You only see daylight when you work. Reading the Sunday paper, you spend more time in the travel section than the Outdoors section, and you see that Scott McMurren's article lists the Kenyan Savannah as the top must-see sight. What to do?

The Bar's International law section invites you to help us twin with another bar association in Africa.

Twinning is a successful English tradition that introduces us to an African bar association. Activities range from providing old lawbooks to helping jailed human rights attorneys to training & exchanging lawyers.

We are making a top-5 list of African countries and would like your input. Please feel free to join us at our section's January 10th noon meeting. It is at the office of the Federal Defender, Key Bank Building, 601 W. 5th Avenue, Suite 800, Anchorage. Or, send an e-mail to Andy Haas at yatra@xyz.net.

Mr. Nimi Walson-Jack and his wife, Didi Walson-Jack, in front of their home in Port Harcourt, Nigeria. Nimi was the Secretary General of the Nigerian Bar Association. Photo from Mary Bristol.

52 of 82 pass July Bar exam

Ahsoak, Joshua
Alber, Judith
Allen, Amy M.
Anderson, Scott L.
Bennett, Brent
Brecht, Christopher M.
Brennan, Carol A.
Broadwell, Michael S.
Buckingham, Carolyn L.
Buelow, Teresa E.
Bullard, T.L. Alpheus
Campbell, Kristen
Cardwell, Michael S.
Clark, Paul A.
Cook, Adam
Dick, Carol L.
Dickman, Dawn M.
Dunlop, Brittany L.
Elkinton, Monica C.
Foote-Jones, Alexandra G.
Gabriel, Gregory R.
Hanner, Dorothy E.
Hildebrand, Alexander
Hobart, Joy C.
Holley, Carole A.
Jabaay, Aaron D.
Jernigan, Robert C.
Kane, Brian J.
Katz, David S.
Kimbrell, Leila R.
Kompkoff, Noelle
Lawless, Eric J.
Miller, Rebecca Holdiman
Monkton, Sarah R.
Noblin, Rebecca L.
Noteboom, David
Polasky, Nicholas A.
Racette, Justin
Richards, Angelique R.
Ringer, Tanya R.
Robertson, Heather N.
Rogers, Catherine
Roghair, David L.
Sandberg, Peter A.
Schick, Nikole V.
Schlerf, David
Schultz, Barrett R.
Smith, Hanley R.
Smith, Samantha
Viccellio, Megan-Brady
Weeks, Mandy
Wilkson, Jim C.

Peter Brautigam

Robert Manley

Jane Sauer

Brautigam, Manley, and Sauer selected by peers

Peter B. Brautigam, Robert L. Manley and Jane E. Sauer of Manley & Brautigam, P.C. have been selected by their peers for inclusion in The Best Lawyers in America(r) 2007 edition. Peter B. Brautigam and Robert L Manley are included in the practice areas of Taxation, Trusts and Estates. Jane E. Sauer is included in the practice area of Corporate Law.

Listing in Best Lawyers is based on a peer-review survey in which 15,000 leading lawyers throughout the country cast more than half a million votes on the legal abilities of other lawyers in their specialties.

Davis Wright Tremaine acquires boutique firm

Seattle-based Davis Wright Tremaine announced Nov. 28 that it will merge with Washington, D.C. law firm of Cole, Raywid & Braverman, a 35-attorney boutique firm largely representing cable and telecommunications companies. Acquisition of the firm will more than double the size of Davis Wright's 25-attorney office in the capital and increase Davis Wright's firmwide staff of 420 attorneys in the U.S. and Shanghai.

Cole, Raywid attorneys will be part of DWT's communications, media and technology practice.

7 selected as Best Lawyers at Guess & Rudd

Guess & Rudd P.C. has had 7 of its attorneys selected for the 2007 edition of Best Lawyers in America including Gary A. Zipkin (insurance law); Dick Veerman (energy law); James D. Linxwiler (timber law); Janes D. DeWitt (creditor-debtor rights law); Joseph J. Perkins, Jr. (mining law); Joan Rohif (labor & employment law); and Michael K. Nave (transportation law.)

Bond counsel Marshall White joins Dorsey & Whitney

Dorsey & Whitney LLP announced that Marshall White has joined the firm's Anchorage office as a partner in the Public Finance practice group. White will concentrate on public and corporate finance, with particular focus on municipal bonds.

Formerly head of the public finance group of Cacheaux, Cavazos, & Newton LLP, Marshall has represented numerous issuers and underwriters of public debt, including all Alaska state agency issuers, many Alaska municipalities, and numerous underwriters, including Merrill Lynch, A.G. Edwards, First Southwest Company, Wells Fargo, UBS Financial Services, and RBC Dain Rauscher.

Marx joins firm as associate attorney

The Law Office of Baxter Bruce & Sullivan has announced that **Marie Y. Marx** has joined the firm as an associate attorney.

Marie, a-long time Juneau resident and Juneau Douglas High School graduate, received her J.D. from Tulane University in 2005, graduating in the top 10 percent of her class (magna cum laude). She was admitted to the Alaska bar in 2005. In addition to the Alaska Supreme Court, Marie is admitted to practice before the U.S. District Court, District of Alaska.

She began her law career as a law clerk for the Hon. Patricia A. Collins, Superior Court Judge in Juneau, clerking from September 2005 to September 2006. She worked for Baxter Bruce & Sullivan P.C. assisting with research projects during law school before joining the firm as an associate in September 2006.

Marie practices in the areas of real property transactions, civil litigation, corporate and business law.

Pierce-Hickerson Award goes to S. Dakota paralegal

The National Legal Aid & Defender Association (NLADA) announced Oct. 26 that Raylene Frazier, a paralegal with Dakota Plains Legal Services (DPLS) in South Dakota, is the 2006 recipient of the Pierce-Hickerson Award.

The Pierce-Hickerson Award is named for Julian Pierce and Robert Hickerson for their outstanding advocacy in pursuit of justice for Native Americans.

Pierce was a Lumbee Indian who served as executive director of Lumbee River Legal Services in Pembroke, North Carolina, from 1978 until 1988. Hickerson served as director of Alaska Legal Services Corporation for 20 years, and prior to that was director of the Oklahoma Legal Services Center.

The Award is given biannually to honor outstanding contributions to the advancement or preservation of Native American rights. Frazier, who is a member of the Cheyenne River Sioux Tribe in South Dakota, handles cases in all areas of Indian Law.

Merry Christmas!
Happy Holidays!
Happy Hanukkah!
Happy New Year

Bar People

It's been awhile since we've done a comprehensive Bar People, so though some of these changes may be not so new, we figure if it's news to us, it's news to others.

If you've changed firms, relocated to a new community, etc. please send us your information for Bar People, to info@alaskabar.org.

Julia Bockmon, formerly with Robertson Monagle & Eastaugh, is now with the Attorney General's Office in Anchorage in the Opinions, Appeals & Ethics Section..... **Benjamin Brown** is now with the Choate Law Firm in Juneau.....**Nelleene Boothby**, formerly with Guess & Rudd, is now a Sole Practitioner in Anchorage.....**Debra Brandwein**, formerly Of Counsel, to Amodio Stanley & Reeves, is now an Administrative Law Judge with the Regulatory Commission of Alaska.

Kelly Cavanaugh, formerly with the DA's office in Anchorage, is now with Davison & Davison.....Standing Master/Magistrate **Alicemary Closuit** is now Magistrate Alicemary Rasley.....**William Earnhart**, formerly with Lane Powell, is now with Richmond & Quinn.....**Lea Filippi**, formerly with Banston, Gronning O'Hara, is now with Sedor, Wendlandt, & Wang.....**Jim Gilmore,** formerly of Gilmore & Doherty**,** is Of Counsel to Clapp Peterson Van Flein Tiemessen Thorsness. Amy Menard & Brian Doherty are continuing as Doherty & Menard.....**Karen Jennings** has closed her private practice and is now with the Office of Public Advocacy in Palmer.

Kathy Keck, formerly with ALSC, is now a staff attorney with the Alaska Supreme Court.....**Michael Kramer**, formerly with Cook Schumann & Groseclose, is now with Borgeson & Burns.....**Robin Koutchak** is Police Counsel to the North Slope Borough Police Dept.....**Jan Levy** has retired from the Department of Law in Juneau.....**Judge Charles Pengilly** and **Marcia Holland** have relocated to Missoula, MT.

Galen Paine and **Donald Surgeon** are no longer working for the Alaska Public Defender Agency.....**Dennis Principe** has relocated from Wasilla to Kodiak.....**Bonnie Robson** has relocated from Anchorage to Norfolk, VA..... **Joel Rothberg** has relocated from Kenai to Ketchikan..... **Judge Richard Savell** has relocated from Fairbanks to Eugene, OR.

Judy Scherger, formerly with the PD's Agency, is now with the Attorney General's Office in Anchorage.....**Paul Tony** is now Indian Probate Judge with the Office of Hearings & Appeals, Dept. of the Interior.....**Venable Vermont** has retired from the Attorney General's Office in Anchorage.....**John Vacek** has relocated from Nome to Davis, CA.....**Geoffrey Wildridge**, formerly with the PD Agency in Fairbanks, is now with the Attorney General's Office..... Retired Anchorage attorney **Henry "Hank" Taylor** is now residing at the Mary Conrad Center. He would enjoy a visit by any of his friends and colleagues.....**Jill Farrell**, formerly with the Office of Public Advocacy, is now with Wade, Kelly & Sullivan.

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The law firm of Drew H. Peterson announced that **William S. (Steve) Labahn** has joined the firm in an Of Counsel capacity. Mr. Labahn has been admitted to the Alaska Bar since 1983. He is a 1975 graduate of the University of Alabama School of Law, and has also been admitted to and practiced before the bars of Alabama, New York, and Oregon. His practice was highlighted in the December 9, 2002 issue of the National Law Journal.

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In its fourth annual survey of the U.S. legal market ("America's Leading Lawyers for Business, 2006"), Chambers and Partners USA recognized **William F. Mede** of Turner & Mede, P.C. among attorneys practicing in Alaska. Mr. Mede was recognized as a leader in the field of employment law on behalf of employers.

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New legal services award

The Legal Sales and Service Organization (LSSO) is launching a new legal industry award. The Thomas H. Lee Award for Service Excellence in Law recognizes law firms that can demonstrate their commitment to the standards and leadership necessary to achieve continuous improvements in delivering service excellence.

Multiple award levels allow a broad variety of firms, both in size and program sophistication, to participate.

Firms interested in showcasing their achievements or benefiting from the self-evaluation process should contact LSSO at either www.legalserviceexcellence.com or by calling 617.726.1500. Applications are being accepted until January 31, 2007.

THE KIRK FILES

The debacle on 34th Street

By Kenneth Kirk

(Scene: the inner office of Fred Gailey, esquire, on a cold February afternoon. Gailey sits behind his desk; Mr. Kringle sits in a client chair).

GAILEY: Well, Kris, it's a pleasure to finally meet you. I've been wanting to sit down and talk with you for a long time.

KRINGLE: What do you mean? I've been calling to try to get an appointment with you for three weeks. Our hearing is tomorrow!

GAILEY: I'm sorry about that. But you know, you're not my only client.

KRINGLE: But you are my only lawyer. This is pretty important to me. They're trying to appoint a guardian over me to control everything I do. If they win, it will totally change my life.

GAILEY: So, you're opposed to a guardianship?

KRINGLE: Of course I'm opposed to a guardianship. I'm completely healthy and utterly sane. I've been taking care of my own affairs for many years, and I'm perfectly capable of continuing to do so.

This is pretty important to me. They're trying to appoint a guardian over me to control everything I do. If they win, it will totally change my life.

GAILEY: This is rather inconvenient. I had been hoping we could work something out with the other parties. I know the Division of Senior Services is pretty dead-set that you do need a guardian. Taking this kind of position could be a deal-breaker.

KRINGLE: Then let it be a deal-breaker! I don't care if we have to fight it. I need to get back home and get things ready for next December.

GAILEY: Have you considered the fact that they have a pretty good case? I mean, if we make a deal, then you have some control over the details. If we have to slug it out and the judge has to make a decision, then you have no control over the result.

KRINGLE: What kind of deal do you think we could make?

GAILEY: For instance, we could probably get them to agree that you can have access to all of your financial records. Or that they cannot put you on psychotropic medication without a separate order from the judge.

KRINGLE: Would they agree to let me go back to the North Pole, make toys for good little girls and boys, and deliver them on December 25?

GAILEY: Not a chance.

KRINGLE: Then I want to fight.

GAILEY: Kris, please understand that you have a terrible case. We're almost certainly going to lose.

I'm not going to waste a couple of days in court, on a case we can't win, when we can work out a perfectly satisfactory agreement with the other side

KRINGLE: But why? I took all those psychological tests they wanted. All the test results came back valid, and normal. (referring to document) 'psychological testing showed no evidence of abnormality or disturbance of thought.' So why can't we fight this?

GAILEY: Read the next line.

KRINGLE: 'However, the subject's insistence on his insane delusion is sufficient for a diagnosis of Delusional Disorder, Grandiose type.'

GAILEY: You see, the problem is that you keep going around telling people you're Santa Claus.

KRINGLE: But I am Santa Claus.

GAILEY: And there it is again. You're not going to have any chance of winning this case with an insane delusion like that.

KRINGLE: I am Santa Claus, and I want you to go into court and prove it. We can get evidence. The post office delivers mail to my address, so obviously the federal government believes I am Santa Claus.

GAILEY: They also deliver a lot of 'your' mail to a toy store near Fairbanks. That doesn't prove anything.

KRINGLE: We can get witnesses. I have a former elf who works in Anchorage now, as a dentist....

GAILEY: Okay, now see, this is getting us nowhere. I'm actually thinking we need to downplay the whole Santa Claus thing. Maybe go in and tell them you're better now, you no longer believe that, it was some kind of temporary post-traumatic stress disorder or something. Then we might just have a shot.

KRINGLE: A shot at winning the case?

GAILEY: I was thinking of a shot at working out a deal.

KRINGLE: But I don't want some stupid deal that lets them control me! I only have 10 months left in the annual cycle, and I need to get back and go through the design specs for next Christmas. Now fight this thing, win it, and I can get back on with my life.

I took all those psychological tests they wanted. All the test results came back valid, and normal.

GAILEY: Look, Kris, this is counterproductive. I'm not going to waste a couple of days in court, on a case we can't win, when we can work out a perfectly satisfactory agreement with the other side. And I'm certainly not going to waste that kind of time for the lousy $40 an hour the court system pays me for this kind of assignment.

KRINGLE: It's not my fault they started this thing in January, when I couldn't afford to hire my own lawyer.

GAILEY: Well, that's another thing we have going against us. Financial irresponsibility. According to these records, you've managed to make lots of money every year, and then you blow it around the holidays.

KRINGLE: The reason I raise that money is to manufacture and buy gifts for little children.

GAILEY: And you can't save a dime for your own retirement? C'mon, Kris, surely you can see that's not normal conduct.

KRINGLE: I never said I was normal. But I'm not insane. I'm doing what I enjoy, I'm not hurting anyone else, and I ought to have the right to go on living my life the way I want to live it.

GAILEY: Well, I still think we should try to make a deal. We can get you on Social Security benefits, and maybe they'll make a deal along the lines of giving you a small allowance out of your benefits each week for spending money.

KRINGLE: No deals.

GAILEY: That kind of hard and fast attitude isn't helpful at all. Why don't you just give it some thought, and we'll talk about it before the hearing tomorrow?

KRINGLE: I've made up my mind. No deals. I want you to be ready to fight this thing tomorrow.

GAILEY: I'm going to take that as a maybe. Try to get to the courthouse about 15 minutes before the hearing tomorrow, and I'll see you then.

KRINGLE: Mr. Gailey, I'm not going to change my mind. Now can we take a little time and talk trial strategy?

GAILEY: Can't, I have a date tonight. I can't decide whether I'll take her to see *The Legend of Bagger Vance, Lord of the Rings,* or *The X-Men.*

KRINGLE: I give up.

GAILEY: Great. I'll see you at 1:45, old courthouse, second floor, and we'll work out the details.

(Fade to black).

INTERESTED IN SUBMITTING AN ARTICLE TO THE ALASKA BAR RAG?

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

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

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

Bankruptcy preference experts: What to expect when you hire one and when you should

By H.A. Schaeffer, Jr.

Until recently, bankruptcy preference experts were rarely used when settling preference claims. However, within the last few years, as both trustees and creditors become more attuned to the possibilities of defending their claims or defenses, they are becoming more commonplace, especially when claims approach six figures. Yet, although trustees often have one of these number-crunching sleuths masterminding the financial analysis behind the scenes, creditors are sometimes reluctant to hire one. This is unfortunate as it often costs them in the long run, another case of being penny wise and pound foolish.

Preference Cases at Their Worst

Often time, representatives for the creditor and the trustee will negotiate a settlement based on what the trustee believes is owed and the zip the creditor believes it should pay. In a worst case scenario, the trustee's analysis may be based on as little as the debtor's checkbook. For the creditor, if the trustee has hired an expert who knows how to creatively build a case, the matter can get even uglier.

I've seen cases where all sorts of things are added back into the claim. In one example, the trustee asked for over two million dollars even though the checkbook showed that only $600,000 had been paid. The 'rational' behind this analysis was murky at best and I'm pleased to tell you that in this case our client paid nothing. There was no preference, despite the original demand for $2.1 million and other than our fee and the attorney's fee, our client paid nothing. Clearly this is an extreme example but it is by no means an isolated case.

On the other hand, again in this worst case scenario, the creditor already aggravated by the payments it did not receive, and will not receive, is enraged at the thought of now returning some of the money it did receive. It is in this frame of mind that the creditor approaches the negotiations. If no analysis is completed or if the creditor throws some stuff together it will sometimes be of little use or worse, occasionally it will actually aid the debtor in its claim. This is not to imply that all creditors are fools. Nothing could be further from the truth. A few do a fine job in defending themselves in these cases. But most are overworked and do not have the specialized expertise needed to prepare a defense in these cases.

Preference Cases at Their Best

In a best-case scenario, both sides perform an analysis of the facts and then reach a settlement. This is often easier said than done, especially for the debtor. Bankrupt companies often did everything under the sun to stave off the inevitable before the bankruptcy filing. Typically, this means that corners were cut all over the place, including the staff that kept the records. Thus, it is sometimes, but definitely not always, difficult for the trustee to come up with all the needed documentation to build a case.

While it should be much easier for creditors to come up with the needed documentation and facts, they too face an uphill battle. The main reason for this is that, as most readers are aware, preference claims are typically filed close to two years after the original bankruptcy filing. Memories of what actually went on have faded and many have to dig the needed documents out of cold storage—a task that, believe me, no one is lining up for. Yet, when the documentation can be compiled and an expert puts together a defense, creditors stand an excellent chance of paying no more than they absolutely have to in these cases. Without a strong numerical analysis and documentation, the creditor usually ends up paying some agreed upon percentage of the original claim—even when an analysis would demonstrate that no preference exists.

Let me take a moment to point out that in small dollar preference cases we not only think it is fine to negotiate a settlement without analysis, we recommend that action. It would be silly to pay an expert $3,000 to $15,000 or more to create a defense, along with legal fees and wasted staff time finding documents in cases under $50,000.

What to Expect From an Expert

Typically, when working for creditors, we are brought into a case by the attorney on the case. The expert should have a list of documents that are required to create the defense. This should be given to the creditor who will need to search its records for this documentation. The expert will also review the claim as presented by the trustee. Without a doubt this should be given to the expert for analysis. The reason is simple. Sometimes, they contain mathematical errors. This is an easy catch, if you are looking for it. The other side will have no defense on that regard.

The expert after reviewing the documents and putting together an analysis will tell you whether your client has a preference exposure, what it is, will recommend various approaches in negotiating a settlement and, if needed, prepare a report that can be used to negotiate the settlement, in mediation, or if it gets to that point, in court.

An often overlooked advantage of relying on an expert is his or her ability to give the attorney a heads up early in the case that they should negotiate a settlement quickly before the other side gets a chance to fully analyze all the facts. Because, let's face it, if the creditor was doing its job correctly, there is a chance that a preference does exist. If the credit manager in question began to have questions about the financial viability of the debtor, he or she may have taken steps that the courts would deem to be preferential.

A bankruptcy preference expert should be prepared to defend his or her analysis under rigorous interrogations, available for depositions, mediations and in extreme cases, court appearances.

In the long run, the few dollars spent to hire a bankruptcy preference expert will result in a lower settlement for your client. Now, all you have to do is convince them to hire one? If you need help with that battle (and believe me, we understand that it can sometimes be a battle) we have a white paper that some attorneys have given to their clients with positive results. Call or send me an e-mail (address at the bottom) and we'll get a copy out to you.

Hal Schaeffer is president of D&H Credit Services, Inc. a consultancy that specializes in cash flow improvements and bankruptcy preferences.

Alaska ALA elects officers, celebrates Professional Legal Management Week

The Alaska Association of Legal Administrators, Inc. announced in October the election of officers for the 2006/07 term. President of Alaska ALA is Susan Lamb, administrator of Turner & Mede, P.C.

Other members of the Alaska ALA board are Shirley Kelly, Matthews & Zahare, P.C., President-Elect; Mary Ann Holappa, Atkinson Conway & Gagnon, Vice President; Nikki Langford, Hartig Rhodes Hoge & Lekisch, P.C., Secretary; Yvonne Robinson, Clapp Peterson Van Flein Tiemessen & Thorsness, LLC, Treasurer; Mary Hilcoske, Delisio Moran Geraghty & Zobel, PC, Director at Large; Tom Murtiashaw, Dorsey & Whitney, LLP, Director at Large; and Lee Reed, Delaney Wiles, Inc., Past President. Alaska ALA is comprised of approximately 40 members, representing private law firms, corporations and government offices from around the State of Alaska.

Alaska ALA is a chapter of the Association of Legal Administrators, an international organization of more than 10,000 members in 30 countries. ALA is dedicated to improving the quality of management in legal services organizations, promoting and enhancing the competence and professionalism of legal administrators and all members of the management team, and representing professional legal management to the legal community and beyond.

ALA and its Alaska chapter celebrated Professional Legal Management Week (PLMW), October 2-6, 2006. In its second year, PLMW promotes awareness, understanding and education about the legal management profession and increases knowledge of the diverse roles within the profession.

"The week provides a forum for recognizing those in legal management for what they do and the role they play in the success of the organization, and in its service to its clients and those who work in the organization," said John J. Michalik, ALA Executive Director.

Professional Legal Management Week was organized by the Association of Legal Administrators and co-sponsored by the ABA Law Practice Management Section, the American Association of Law Libraries, Australian Legal Practice Management Association, the International Legal Technology Association, the International Paralegal Management Association, the Legal Marketing Association, Managing Partners' Forum (MPF) and NALP – The Association for Legal Career Professionals.

For more information on Professional Legal Management Week, visit www.alanet.org/plmw.

Helping Hand Committee

The Alaska Bar Association would like to know of any members who are sick, incapacitated, suffering the loss of a spouse, etc. so that we can alert the membership. We are a relatively small Bar and should be able to offer companionship and sympathy to our members and their spouses. Please assist us by informing the Bar Association or John R. Strachan at 345-4595, jrstdundas@aol.com or 5951 Alpine Wood Drive, Anchorage, AK 99516.

FAMILY LAW

Keeping contented clients

By Steven Pradell

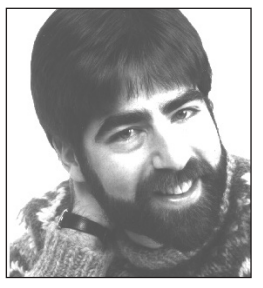
Family law practitioners frequently find their clients in some of the most stressful times in their lives. The process of losing a spouse or child in a divorce or custody battle may be similar to undergoing the death of a loved one. Some lawyers have taken one family law case and then promptly switched to another area of the law. So how can attorneys effectively work with these types of clients? There is no magic formula for success but the following ideas that can help to maintain good client/lawyer relations in areas that historically can lead to client unhappiness.

A good attorney client relationship starts from the beginning. By advising a client at the first interview or even before that time, in the first telephone call with the secretary, what the ground rules are, clients can know what to expect from their lawyer, and what their lawyer expects from them.

If your secretary tells you that just setting up the appointment or discussing preliminary issues with the potential client is an excruciating process, you may want to consider whether to undergo representation. If you experience a migraine in the middle of the initial client consultation, your body may be telling you that effective communication with this person is not occurring.

Similarly, if a client leaves his last lawyer and comes to you, exploring why the client changing counsel, whether funds are still owing to the former firm and other issues may help you decide whether or not to take the case. Yes, you do have a choice in what clients to represent, separate from their desire and ability to afford your services.

One successful Anchorage lawyer has a picture of his family on his desk, a clock right behind the client's chair, and the word "NO" in large letters on his wall near the clock. When interviewing his potential client, the lawyer can look at what is most important to him (family), see his most important asset (his time) and, if need be, say the hardest word in the English language to a potential client insisting on paying the full retainer immediately for services ("No").



Be sure to establish up front to avoid future problems financial issues such as the fee arrangements,

Be sure to establish up front to avoid future problems financial issues such as the fee arrangements, the retainer amount, the policies regarding replenishment of the retainer, and who the "collection" person in the law firm is that may call that client down the road if problems arise. It may be wise to delegate collection tasks to one employee who is not the lawyer responsible for the case so that, at least initially, discussions occur separately from your own meetings with the client where you are primarily attempting to assist with the litigation. Other suggestions include sending out monthly billings on a consistent basis, and ensuring that they arrive in the mail prior to the first of the month, when people normally open their checkbooks and write their monthly bill payments such as the mortgage, rent, etc. If your bill routinely arrives after the other bills are paid, it may have a better chance of being put in the "I'll get to that one later" pile. A client sent a bill only once in a while may be shocked by the amount of the bill, not realizing that it reflects many months of attorney's billable time.

Another area which is of concern is communication with the client. This can be difficult, especially if you are a busy practitioner in this area of the law, where there are many clients who often have "emergencies." Bar associations have historically reported that perceptions by clients of a failure of an attorney to communicate with them is one of the primary reasons grievances are filed.

There are things one can do to attempt to address this. Coming back from court and finding 50 messages asking for return calls can be overwhelming. Advising a client at the start of the process that if you are unavailable your associate, paralegal, secretary or other support staff person can assist with communication issues can ease the client's mind and allow you to delegate some of these matters. Using email or voicemail for some kinds of message relaying be effective. Also, having a secretary call the client back to either address the issue, get more information, explain why you are unable to immediately assist the client, or even to schedule a phone call on your calendar can put the client at ease to know that you or someone from your office is listening to them and caring about their important issues. Set aside certain times during the day on your calendar to look at all of your messages, prioritize them and return calls at one time, preferably when you have the most chance of reaching people (i.e. not at lunchtime, rush hour, etc.)

In a busy practice there may come a time when a particular client's case gets to the point, for whatever reason, when you have trouble picking up the file or returning the calls. This may have something to do with the personalities involved in the case, the issues being litigated, the frequency of the client's calls or the headaches you always seem to get each time you speak, meet with, or even think about the client. All of these are wake up calls for the lawyer that spell out that something may be wrong on a deep level. These are the files and clients who may need immediate attention. For these matters, calling the client or asking another lawyer or staff member to address these matters or take over the case may be wise. Putting the pleading to the bottom of the pile for later is not going to make the problem go away.

Finally, when an important decision comes in from the court, good or bad, clients appreciate a call directly from you giving them the news up front. Getting bad news in the mail from a lawyer afraid to directly convey this information can erode the attorney/client relationship in the long run.

Does it come gift-wrapped?

In response to the October 4 signing of the Department of Homeland Security's Fiscal Year 2007 Appropriations Bill authorizing the first stage in the construction of a $1.2 billion U.S.-Mexico border fence and Mexico's pending petition to the United Nations to halt construction of a border fence, a Southern California man is conducting a worldwide vote on the issue and selling commemorative border dirt from the proposed site of the wall for $9.95.

"This is world history in the making," says Michael Clark, a resident of Los Angeles who is conducting the vote and selling the border dirt on his website, borderdirt.com. "No more open border with our friendly neighbor to the south. No more 'Give us your poor, your tired, your huddled masses.' It will be officially them and us...this wall is kind of an Anti-Statue of Liberty."

When asked how he feels about having a security wall in his geographic backyard, Mike himself is clearly divided, saying, "On the one hand, I hate to see so many immigrants come across the borders and exploit our schools, hospitals, health care and job market without paying taxes, but on the other hand, we have to do something. The current plan just isn't working, but I don't want to live in a country that spends a billion dollars of our tax money on a wall that, by the way, has no historical precedence for working! The Great Wall of China didn't keep out the Mongols, the Berlin Wall didn't keep out the Western powers and I'm skeptical that this wall will keep out immigrants."

Dealing with this controversial issue will impact the lives of millions of Americans and Mexicans for generations to come, Clark figures. Will a $1.2 billion dollar border wall really stop the flow of illegal immigrants across the border?

Borderdirt wants everyone to cast their vote on building the wall at www.borderdirt.com Mike and a group of volunteers plan to tally the votes over the next three months and send a copy of the results to President Bush, Mexican President Filipe Calderon and every member of the U.S. Congress - They want to know how the world will vote! Interested parties can also visit borderdirt.com to learn more about border interest groups, find links to border related information, and get their own border dirt.

From: "Media PR Group"

One of the highlights of the "Success Inside and Out" program was a fashion show featuring what to wear to a job interview, and what not to wear. Fashions were provided by Out of the Closet, an Anchorage clothing shop owned by the fashion show director, Ellen Arvold. Here modeling the "fashion DON'TS" are, L-R: Trina Landlord; Paula Haley; Ellen Arvold; and Nicole Fanning.

Women inmates at Hiland Mountain Correctional Center present Chief Justice Fabe (4th from Left) with a quilt they sewed to commemorate the Success Inside and Out event. With them are Karen Jenkins, L, Educational Coordinator for Hiland Mountain Correctional Center; and artist Indra Arriaga, (5th from Left), who helped with the project.

Inmates coached on success "inside & out" of prison

National Association of Women Judges (NAWJ) members in Alaska hosted the first annual "Success Inside & Out" workshop on November 4, at Hiland Mountain Correctional Center near Anchorage. Chief Justice Dana Fabe of the Alaska Supreme Court, NAWJ Program Director, founded the workshop this year to bring professional women together to help inmates prepare for the transition to life outside prison.

Women in prison "don't get released and magically succeed," says Fabe. "They need steering and support, and professional women can give them that." Hiland Mountain Superintendent L. Dean Marshall, whose support was instrumental to the program, echoed this view: "We need to help them, because eventually they're going to be part of the community, working jobs and cheering their kids on at the hockey game, right beside you."

More than 80 inmates scheduled for release within 18 months participated in the day's workshops and plenary sessions, which addressed themes ranging from employment and housing to child custody and personal wellness.

A fashion show featuring the "dos" and "don'ts" of dressing for a job interview, and mock job interviews illustrating the common and often humorous mistakes job candidates make, and were among the day's highlights.

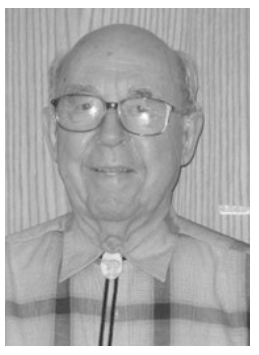
Responses have been positive, and Fabe hopes to continue the program and prepare a manual that can assist other NAWJ members interested in pursuing something similar in their communities. For more information, or to obtain copies of the program or workshop materials, please contact Chief Justice Dana Fabe (907-264-0622; dfabe@appellate.courts.state.ak.us <mailto:dfabe@appellate.courts.state.ak.us>) or program coordinator Brenda Aiken (907-264-8266; baiken@courts.state.ak.us).

Prominent Alaskan businesswoman Eleanor Andrews, L, conducts a mock job interview at Success Inside & Out while a volunteer presenter illustrates a major interview "don't"--answering a cell phone call.

Several Alaskan women judges participated in the Success Inside & Out event held at Hiland Mountain Correctional Center. Pictured in the Hiland gymnasium with prison officials are, L-R: Superior Court Judge Sharon Gleason, Anchorage; Chief Justice Dana Fabe; Hiland Assistant Superintendent Amy Rabeau; Hiland Superintendent L. Dean Marshall; Superior Court Judge Patricia Collins, Juneau; and District Court Judge Nancy Nolan, Anchorage.

Call for nominations for the 2007 Jay Rabinowitz Public Service Award

LANIE FLEISCHER
2006 Recipient

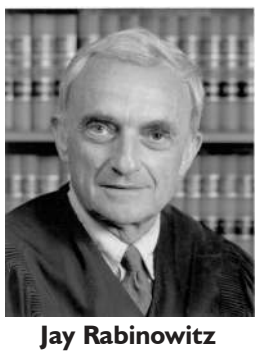


JUDGE THOMAS B. STEWART
2005 Recipient

Photo courtesy of the Juneau Empire.

ART PETERSON
2004 Recipient

MARK REGAN
2003 Recipient



Jay Rabinowitz

The Board of Trustees of the Alaska Bar Foundation is accepting nominations for the 2007 Award. A nominee should be an individual whose life work has demonstrated a commitment to public service in the State of Alaska. The Award is funded through generous gifts from family, friends and the public in honor of the late Alaska Supreme Court Justice Jay Rabinowitz.

Nominations for the award are presently being solicited. Nominations forms are available from the Alaska Bar Association, 550 West Seventh Avenue, Ste. 1900. P. O. Box 100279, Anchorage, AK 99510 or at www.alaskabar.org. Completed nominations must be returned to the office of the Alaska Bar Association by March 1, 2007. The award will be presented at the Annual Convention of the Alaska Bar Association in May 2007.

Since 1896
ALASKA BAR ASSOCIATION

ALASKA BAR FOUNDATION

Nominations sought for Robert Hickerson Public Service Award

The Board of Governors
is soliciting nominations for its
Robert K. Hickerson Public Service Award.
This award recognizes lifetime achievement for outstanding dedication and service to the citizens of the State of Alaska in the provision of Pro Bono legal services.

Nominations should be made by March 9, 2007. Please send your letter stating your nomination and why this person should receive the award to the Alaska Bar Association, attn. Deborah O'Regan, Executive Director, P.O. Box 100279, Anchorage, AK 99510 or via e-mail to oregan@alaskabar.org.

ALSC President's Column

Thanks to all, fund-raising, new staff, and new website

By Vance Sanders

Many thanks to all those of you who were able to join us for one or more of our 40th anniversary celebrations this year! We had our 39-plus-a-halfth reunion at the Bar Convention in May 2006, and then in September we had open houses in Juneau and Fairbanks, and a large reception at the Snow City Café in Anchorage. It was great to see so many old and new friends!

Also thanks to Gilbert Sanchez for hosting ALSC Vice-President Lisa Rieger, former Superior Court Judge John Reese, Director of Volunteer Services and Community Support Erick Cordero, and Executive Director Andy Harrington for an ALSC 40th anniversary retrospective on the "Intercambios" radio program in November. If you missed it, the program is archived on KSKA's Public NewsRoom page (look for Intercambios Nov. 14, 2006).

Guess & Rudd, CIRI Offer Fundraising Challenge

The Anchorage and Fairbanks law firm of Guess & Rudd P.C. is graciously and generously celebrating Alaska Legal Services Corporation's 40th anniversary by renewing the contribution challenge it made last year to Alaska law firms. In addition, ANCSA Regional Corporation CIRI has issued a separate $5,000 challenge to each of the other eleven Native Alaskan Regional Corporations to support ALSC. Both challenges will benefit ALSC through its Robert Hickerson Partners in Justice Campaign.

Guess & Rudd has pledged to donate $10,000 to the campaign if sixteen other Alaska law firms or members of the legal community will each make a $5,000 donation or pledge by Dec. 31, 2006. Last year, ten matching donations were obtained, resulting in more than $110,000 raised through the campaign challenge.

Similarly, CIRI has issued a challenge to all Native Alaskan Regional Corporations to donate $5,000 each before the end of the year. In an ALSC press release issued November 7, Margaret Brown, CIRI president and CEO, stated "CIRI understands the challenges faced by ALSC when serving our Alaska Native communities. We have issued this challenge because we are acutely aware of the obstacles confronting low-income Alaskans faced with civil legal problems."

Andy Harrington, ALSC executive director, notes "We are both honored and grateful that CIRI and Guess & Rudd are supporting ALSC's mission with these contribution challenges. Every staff attorney who has ever worked for ALSC has at some point felt overwhelmed by the extent of the need for legal aid. It means a lot to them to know that their efforts have this support from both one of Alaska's largest corporations and one of its most prestigious law firms."

ALSC receives about 40% of its funding from the Legal Services Corporation but also relies on other sources, including private contributions through the Robert Hickerson Partners in Justice Campaign.

The deadline for meeting these two challenges is December 31, 2006, with payment due by June 30, 2007. You can learn more about ALSC's annual campaign and planned giving opportunities by visiting ALSC's fundraising website at www.partnersinjustice.org.

ALSC Welcomes New Staff

I want to welcome and introduce several new staff members who have recently joined ALSC. Juneau supervising attorney Kate Burkhart resigned to take a position with the Ombudsman's Office in Juneau. ALSC has hired Holly Handler, who formerly worked with the Public Defender's Office in Bethel and Palmer, to serve as the new supervisor of the Juneau and Ketchikan offices.

Kotzebue staff attorney Jamy Patterson left ALSC October 1 to take a staff attorney position with Dakota Plains Legal Services in its Pine Ridge office. Lynda Vaughn has just moved up from Arkansas to take over the staff attorney position in Kotzebue. The Kotzebue office also has a new office manager, Saima Johnson. Saima is filling the shoes formerly occupied by long-time office manager Lottie Jones, who relocated with her family to Barrow.

The Fairbanks office is eagerly awaiting the arrival of staff attorney Laureanne Nordstrom from Indiana. Laureanne is scheduled to begin work, funded by ALSC's new Legal Assistance to Victims grant, on December 20.

In Dillingham, office manager Casey Laughlin relocated to Palmer, where her Trooper husband has a new assignment. By the time you read this column, we will have the office manager position refilled.

Recruiting and interviewing is ongoing for two vacant staff attorney positions, one in Nome and one in Bethel. We look forward to having these vacancies filled and improving ALSC's ability to provide essential legal services in the Yukon-Kuskokwim and Norton Sound regions of the state.

VAS Gets a Facelift

Thanks to the generosity and talent of graphic designer Jessica Marple, ALSC's Volunteer Attorney Support (VAS) pro bono program has a new logo. Ms. Marple, who lives in Salem, Oregon, and works as a graphic designer at a college, has a degree in communication studies and was eager to contribute her talent.

AlaskaAdvocates.org Offers Online Resources for Pro Bono Attorneys

Over the past few months, ALSC staff members have been putting the finishing touches on AlaskaAdvocates, a new web site that offers online resources for attorneys who participate in one of the state's organized pro bono programs (ALSC's Volunteer Attorney Support program, the Alaska Network on Domestic Violence and Sexual Assault Pro Bono Program, Alaska Immigration Justice Project, and Alaska Pro Bono Program, Inc.). Start-up funding for the site was obtained through a Technology Initiative Grant awarded by the Legal Services Corporation. The web site, www.AlaskaAdvocates.org, is part of a national network of advocate-oriented web sites designed to promote and support volunteer service by attorneys. Although some of the site materials are available to the public, access to the resource library section is restricted to attorneys and other advocates who are active panel participants on behalf of one of the above organizations. If you are interested in joining the AlaskaAdvocates online community, go to www.AlaskaAdvocates.org and click on the "Join this Area" button. You will be asked to complete a membership form and provide information on your interest in performing pro bono work. I hope you'll join me in supporting this worthwhile project.

VOLUNTEER ATTORNEY SUPPORT

'Collaborative practice' said to reduce divorce effect on kids

New findings promote "Collaborative Practice" as a means to decrease children's emotional difficulties after living through divorce. The findings were presented at the International Academy of Collaborative Professionals conference in California during October that drew more than 500 participants.

An analysis showing that non-confrontational alternative divorce approaches reduce the likelihood of long-term emotional damage to children; "Collaboratve Practice" is a process for resolving divorces and other disputes in which the contestants and their attorneys pledge to stay out of court and work to reach a mutually satisfactory settlement through respectful communication.

"Even though we often think of divorce as a couple's event, it is really a family event. Collaborative Law is today's best answer to family disputes, especially where custody of children is involved," said Sue Hansen, president of the IACP.

Dr. Constance Ahrons, Professor Emerita at University of Southern California (USC), and author of the bestselling books, "The Good Divorce" and "We're Still Family," presented the analysis on the long-term effects of divorce. An important element of the Collaborative Process is to help parents focus on research-based findings that contribute to increasing their children's resilience, said the IACP.

Forgiveness and transformation are central to the goals of the collaborative process, said conference presenter Azim Khamisa, who used his personal story as a catalyst to help professionals teach their clients to embrace forgiveness in the most painful circumstances. Khamisa's 20-year-old son was murdered by a 14-year-old boy in San Diego 15 years ago and Khamisa, a Kenyan native, reached out to the grandfather and guardian of his son's killer to make peace.

The growth of collaborative divorce calls for new fields of study, argued Janet Weinstein, JD and Ricardo Weinstein, PhD, who introduced the theory of "Neuro-Jurisprudence," which provides an opportunity to consider how the brain interacts with the law. The brain works differently during emotional times, and this presentation will help legal professionals play a therapeutic, rather than damaging role as relationships change as a result of divorce.

"Collaborative Practice requires a paradigm shift for all parties involved -- including collaborative professionals, clients, and society, which often makes one feel guilty for being cordial with their ex-spouse when the divorce was their fault," said Peggy Thompson, a psychologist and co-founder of the organization.

Hansen said more than 10,000 professionals in the U.S. and Canada have gone through the special training needed to successfully assist divorcing couples in reaching collaborative settlements, with practitioners located in nearly every state in the U.S. Five years ago, the annual conference had only 100 attendees, which highlights the "staggering growth of collaborative practice," said the organization.

Event seeks to elevate youths' civic IQ

Professor Paul Ongtooguk of the UAA College of Education leads a discussion on how to foster better opportunities for youth to learn about the political and legal status of Alaska Natives at the Civic Learning Policy Roundtable.

On September 22,in honor of Constitution Day, 50 community leaders and students gathered on the UAA campus for the Civic Learning Policy Roundtable, an event that brought key organizations and individuals together to help identify ways to elevate civic learning in Alaska's schools.

The program was sponsored by the UAA Strategic Opportunities Fund in conjunction with the Alaska Teaching Justice Network (ATJN), a coalition of educators and members of the legal community dedicated to advancing law-related education in our state.

Roundtable participants were asked to help develop final recommendations for the Alaska Civic Learning Assessment (ACLA) Project, a joint project of the ATJN and UAA's Institute of Social and Economic Research.

The ACLA project was commenced in 2004 in an effort to better understand the state of civic learning opportunities in Alaska's schools and the level of civic knowledge of Alaska's youth. Made possible by a grant from the national Campaign for the Civic Mission of Schools (CCMS), the ACLA project published a final report in November 2006 that will be used in a variety of forums to help ensure that civic learning remains an important goal of public education.

The Alaska Teaching Justice Network is an initiative to enhance law-related education for Alaska's youth that is sponsored by the Alaska Court System and the Alaska Bar Association's LRE Committee. For more information about the network or the ACLA Project, please contact Barbara Hood, ATJN Coordinator, 907-264-0879, bhood@courts.state.ak.us; or Barbara Jones, LRE Committee Chair, 907-343-4342, JonesBAR@muni.org.

The ACLA report, Advancing Civic Learning in Alaska's Schools, is available online through the CCMS website, http://www.civicmissionofschools.org/site/professionaldevelopment/profdevresources.2006-11-29.5484362456, or the ISER website, http://www.iser.uaa.alaska.edu/Publications/civic_learning06.pdf.

Chief Justice Dana Fabe of the Alaska Supreme Court presented closing remarks at the Civic Learning Policy Roundtable, stressing the importance of engaged citizens to our democracy. "Citizens will appreciate our system of government more if they understand it," she said. "Citizens who understand their role in government are more likely to participate and be engaged in their communities. They are the greatest supporters of democratic principles." With the chief justice at the close of the event were, L-R: Eileen Foley, Teacher, Service High School; Fabe; Pam Collins, Teacher, Goldenview Middle School; Pamela Orme, Teacher, West High School; and Barbara Jones, Chair, Alaska Bar Association's LRE Committee.

Lt. Governor Loren Leman and ISER Director Fran Ulmer each offered opening remarks at the Civic Learning Policy Roundtable, challenging community leaders to develop creative ways to ensure that civic education remains a high priority in schools across the state. With them, L-R, are: Nancy Andes, UAA Office of Community Engagement; Professor Letitia Fickel, UAA College of Education; Professor Diane Hirshberg, ISER/UAA College of Education; Lt. Gov. Leman and Ulmer.

Attorney Discipline

Attorney receives private admonition

Bar counsel issued a written private admonition to a lawyer who knowingly violated a court order.

The lawyer advised her client to retrieve some property from the marital residence even though a court order barred the wife from the property. The lawyer acknowledged that she acted in frustration and failed to take the appropriate steps because it would have delayed the wife's ability to obtain the needed property.

The court deemed the transgression to be minor, but under Rule 3.4(c) a client's interests do not take precedence to a lawyer's duty to obey a court order.

An area division member reviewed the disciplinary file and approved the issuance of a written private admonition by bar counsel.

Supreme Court suspends Fairbanks attorney

The Alaska Supreme Court suspended Fairbanks attorney Michael A. Stepovich from the practice of law for a period of three years, with one year stayed. The suspension took effect on October 15, 2006. Mr. Stepovich was suspended for failing to hold client funds in a separate trust account and for failing to account for and promptly deliver settlement funds to a client.

A client complained that Mr. Stepovich delayed paying her proceeds obtained after settlement of a wrongful death lawsuit. After delaying the payment several months, the settlement check bounced. Investigation confirmed that Mr. Stepovich did not properly maintain his trust account for a period of years; that he commingled his law firm's funds with those in the trust account; that he did not keep appropriate records; and, that on occasion he wrote checks for which there were not sufficient funds in the account. Mr. Stepovich had an arrangement with the bank to ensure that trust checks would be paid by the bank on the occasions when the balance was inadequate. No client lost any money.

Mr. Stepovich will be eligible to petition for reinstatement in two years if he meets certain conditions that include passage of the Multi-State Professional Responsibility exam; satisfactory completion of two credit hours of a legal ethics CLE; and completion of a CLE course in the area of client trust accounts and client funds. Mr. Stepovich must also retain an independent auditor or accountant to oversee his financial and trust accounting practices and provide to bar counsel quarterly reports of compliance with approved accounting standards for a minimum of two years.

Attorney receives private admonition

Bar counsel privately admonished Attorney X for a minor violation of Alaska Rule of Professional Conduct 3.5 which mandates decorum in the courtroom.

Attorney X filed court pleadings that contained language that was unnecessarily demeaning about a judge's decision made during the course of litigation. Attorney X's attack on the judge's decision was not grounded in law but rather was an emotional reaction to a decision that did not adopt Attorney X's strongly-held views.

Rule 3.5 requires a lawyer to present evidence and argument without being abusive or overzealous. An area division member who reviewed the file agreed that Attorney X's breach of decorum and meritless charges of judicial misconduct in court pleadings were acts that violated Rule 3.5. The area division member approved the imposition of a written private admonition by bar counsel.

ECLECTIC BLUES

Wired at childhood to be a fly fisherman

By Dan Branch

There is a scene from Norman MacClean's *A River Runs Through It* where two brothers, both skilled fly-fishers, are forced to take their sister's boyfriend fishing. One of the brothers predicts in a disdained tone that the boyfriend will probably show up with a Prince Albert can full of worms. He does.

Like many Americans who read the book, I wanted to identify with the cool brothers. With smooth easy motions they could perfectly present dry flies across a fast moving Montana stream. Mr. MacClean made them masters of the fly rod and the river. But MacClean was careful to show they were wired at childhood to be fly fisherman. Their father was a minister and fly fisherman who left his boys with the impression that Jesus recruited his disciples from Sea of Galilee fly fisherman. He once told his sons that the words of the great Izaak Walton were not to be trusted because he was an Episcopalian and a bait fisherman. After using many words to describe fly fishing MacClean had none left over to describe how to cook a fish.

My fishing ideals were formed at the feet of other Montanans --- the men of my family. They all fished with worms or grasshoppers or small spinners made in France. Many of the fishing trips of my youth started with a search for worms in a relative's back yard. There was one fly rod in the family---a dark old bamboo one that Cousin Ed bought from a guy who claimed that Teddy Roosevelt had used it on the Madison River. He never let us kids touch it. Guess he figured we would wipe off Mr. Roosevelt's fingerprints.

Cousin Ed, my dad and my uncles grew up during the Great Depression. They had to supplement the family's food supply with deer meat, potatoes and fish. They wouldn't handicap themselves with a fly rod when bait could bring home so many more fish. They taught me to eat what I catch and only catch what I could use. To do otherwise was wasteful. People who have known real hunger as children can't stand to see food wasted.

My fishing ideals were formed at the feet of other Montanans --- the men of my family.

I was hard wired as a bait fisherman when someone gave me a copy of *A River Runs Through It.* MacClean's words made me want to turn my back on bait. I didn't want to be the guy that showed up with a tobacco tin full of worms. This was in the 70's when I lived in Bethel.

Sneaking down to the Army Navy Store on Fourth Avenue during a winter visit to Anchorage, I bought a fly setup for $20 and a how-to book for another sawbuck. Since a 300-foot drift net was the preferred method of fishing on the Kuskokwim, I couldn't find anyone who would admit knowing how to fly fish. On summer evenings during dog salmon season I would skiff out to some pike-infested slough and try to figure out how to cast without wrapping the fly line around my Evinrude kicker. After an hour or so of frustration I would pick up a spinning rod and hook a pike or two.

They taught me to eat what I catch and only catch what I could use. To do otherwise was wasteful.

Decades later, in Juneau, I bought another fly rod at the Western Auto store and pursued the sport again. It was an eight-weight salmon rod with which I had the misfortune of catching a nice silver salmon shortly after purchase. Memories of the bait can faded and an obsession with all things fly fishing began. A month later I was fishing the outlet stream to Windfall Lake in heavy snow. By repeatedly flogging the stream with an olive wooly bugger I managed to hook an 8-inch cutthroat trout. Since it was too small to keep, I returned it to the stream and tried again. All the fish caught that day were too small to keep.

On the hike back to the car the words "catch and release" coursed through my mind. This ran counter to my childhood values. Was I just playing with my food? No, I was just following the law.

After a year or two of chasing cutthroats in Juneau roadside waters it became clear that they rarely reach legal length. It is just another form of catch and release fishing--one that provides the thin justification--the thin hope that this time I might bring home something big enough to eat.

There is no size limit on Dolly Vardens so I targeted them. They provide a tasty treat but you can only keep two fish a day. When they are biting you can catch a lot of dollies in a hurry. Unless you practice some form of catch and release, an outing for Dolly Vardens can be over after two casts of a sand lance pattern. The same is true of pink salmon but for a different reason. The state sets a generous limit on pinks but no one wants to exploit it.

Ed told stories of fish he had caught--none with a fly rod--while the boy and I buried our failures. Catch and release guys can't take it so hard. No one expects them to bring home dinner.

It's great to bring home an ocean fresh pink and eat its flesh for a couple of meals. After that you want something else. One fish is all you need. Since they hit the fly hard and put up a good fight, it's hard to stop fishing for pink salmon after you've taken one. This means more catch and release.

I was on this downward slide toward catch and release acceptance when I visited Cousin Ed at his place on the Missouri River. He lives just down river of Holter Dam. Cold water released from the dam usually makes the river running past his place a productive trout stream even in high summer.

One afternoon Cousin Ed and one of his grandsons watched me fishing from his front yard. After a half hour without me getting a strike the boy came over and offered to show me how to catch a fish. It was the hot dead time of day. A stream of small boats had floated past Ed's house while I was fishing, each carrying a guide and his frustrated customer. No one was catching fish. Still the boy, the child of a wheat farmer from Cascade and his former Miss Teen Montana wife, insisted on showing me how to catch a fish.

We headed up the road. The boy grabbed a K-MART bait casting rod and we headed up to road to an inner river bend lined with large rocks. He had caught a 20-inch trout there the day before. With a quick motion Ed's grandson grabbed a grasshopper, slid it onto a number 4 hook and eased the line into a deep hole between the rocks. While guide boats moved past us I waited for the Tom Sawyer ending--for the boy's rod to bend while he manhandled a 20-inch trout out of the water. He would bonk it on the head and say there were more grasshoppers if I wanted to catch my own fish. It didn't come.

We walked back to Ed's place and ate a supper of fresh picked corn and store bought meat. Ed told stories of fish he had caught--none with a fly rod--while the boy and I buried our failures. Catch and release guys can't take it so hard. No one expects them to bring home dinner.

For some reason the experience at Cousin Ed's stemmed my acceptance of the catch and release lifestyle. I now try to stop at the first pink salmon.

Arthur Snowden, longtime Administrative Director, conducts an oral history interview recently in the Boney Courthouse in Anchorage.

During his recent oral history interview in Anchorage, Judge Roy Madsen holds a childhood photo of himself and his siblings in front of a brown bear hide on Kodiak Island, circa. 1920's. Judge Madsen contributed many invaluable photographs from his life and career to the court's archives as part of the Court History Project.

Judges interviewed for court history

Arthur Snowden, Administrative Director of the Alaska Court System from 1973-1997, visited Anchorage recently from his home in Portland to conduct oral history interviews with retired judges and justices as part of the Alaska Court History Project.

Judge Roy Madsen (Ret.) of Kodiak, the first Alaska Native superior court judge; Judge Karen Hunt (Ret.) of Anchorage, one of the first women superior court judges; Judge James Hanson (Ret.), former Kenai superior court judge; and Justice Robert Erwin (Ret.), former supreme court justice from Anchorage, all shared with Snowden their stories of life on the bench during the early years of the Alaska Court System.

All interviews were videotaped and will be preserved as part of the court's archives. In addition, they will be used to help commemorate the 50th Anniversary of the Alaska Court System, which will take place in 2009. For more information about how to contribute to the Alaska Court History Project, please contact Barbara Hood at 907-264-0879, bhood@courts.state.ak.us.

Hints for holiday shopping...and a few haunts

If you feel shopped-out after rushing around to get Christmas packages in the mail, if you're fresh out of ideas, or just plain dread the prospect of shopping for family, friends & colleagues, this page is for you. As time marches relentlessly toward the Dec. 25th deadline, here are some tips to help preserve some of the traditions that once made gift-giving more personal--and pleasurable.

1. Imminent pre-deadline options: If it's that hot electronic gadget or the 2006 version of an Elmo doll, shopping online might be your only option. Remember that after the 15th, the clock's working against you--and the gremlin for online shopping is: Postage n' Handling. (Can you say "outrageous" charges? Can you guarantee timely arrival?)

2. Same-old, same-old stuff. OK, you know that Christmas List item is in town...somewhere. Cruise the Yellow Pages for stores that likely might have it. Call ahead to verify availability. Plan for an early-morning attack ("early morning," as in when the store opens on a weekday). It's just simpler to avoid after-work and weekend crowds.

3. Coming up with ideas. The older we get, the harder it is to think of what we might want for Christmas in a price range below a new SUV, a riding lawnmower, or 50-inch flat-panel television. This is a serious dilemma for loved ones on a budget, who must rely on finding a suitable substitute. Browse the Anchorage Convention & Visitors Bureau website (anchorage.net), for an array of ideas from the often-overlooked & offbeat--from shops and services to tours and activities.

4. A quieter, gentler shopping experience. Over the holidays, the malls & big stores are crowded, hot, short on supply, and short on (crabby) clerks. You will most likely be compelled to endure at least one incursion to the mall. Get it over with, and then relax and shop Alaskan-owned boutique-style stores. Here are three among scores that made us feel welcome (and would love to serve the legal community as well.)

Stewart's Photo. One of Alaska's oldest businesses is down on 4th Avenue in Anchorage, and it remains as the largest and only full-service, fully-stocked photo store in the state. Open 7 days a week, the store's staff

Current special: Olympus E300 digital SLR two lens kit at $749. A 7+ megapixel camera with 2 (two) interchangeable lenses.

taught us more about digital cameras and the demise of film than hours of Internet research and box-store cruising, combined. For one thing, they speak English vs. techno-ese down at Stewart's. For another, these guys have actually tested and used all the equipment they sell; in other words, their recommendations will increase the likelihood that the camera you buy is the best one for the purpose you wish to use it. You can actually try the digital (and non-digital) cameras in stock, without a steel tether cable that's attached to dead-battery sample cameras.

For a digital camera, both size and price matter. We found Stewart's prices competitive with both big stores and online stores' "low price" but high shipping cost.

Latest gadget at Stewart's: NEW PocketWizard PLUS II Wireless Radio Triggering device. The world's first auto-sensing wireless transceiver, this gadget will let your digital camera remotely capture critters or other subjects while you're hiding in the bushes, just like National Geographic (choose from numerous, in-stock tripod options, too).

Siri's Boutique. You've probably often driven by Siri's going down 9th Avenue. You might not have spotted Siri Schleif's very own parking lot for customers behind the store on F Street. If you are a female or shopping for one, you should stop in. This lady knows fashion, and she understands that we don't all want to pay like $2,000 for an outfit that looks like the one Julia Roberts wore in the latest paparazzi shot. There's an impressive selection of not only clothing, but accessories as well, at Siri's.

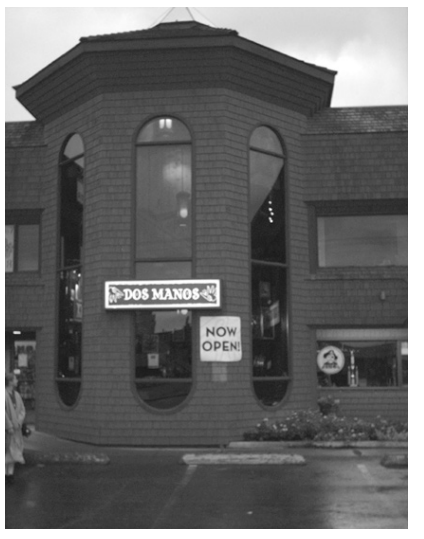
Want a lime sweater, a new suit, a casual jacket, or a sequin-studded evening dress? Siri's has it. Racks are stuffed with fun and fashionable duds, and if you don't see your size or style, just ask--it's probably in the back room. The collections don't stop at clothing; jewelry, handbags and other accessories are found throughout the store. If you'd given up on the notion that shopping can fun, try out this shop at 9th and F.

Siri's shopping hint: All the hard sizes to find, from 2 to 24. A discount for attorneys. Open noon to 6.

Interesting current items at Siri's: Yummy holiday sweaters, luscious angora sweater jackets & cruise/Hawaii wear for post-holiday escapes.

Dos Manos. Anchorage's newest art gallery is nestled in a small "mall" across from Title Wave books on Benson, and it's sure hard to miss the 3-story facade. Its name ("Two Hands") denotes the fact that all the art on display is hand-made by Alaskans. The gallery features an eclectic mix of items from stained glass & mosaic to jewelry, paintings, and sculpture. Climbing the massive circular staircase to the various levels of the store is an adventure in itself, and the fine woodworking offers a feeling of warmth amidst modern art.

New artists' creations appear regularly in the gallery, and you'll find the decorative and useful in a wide range of prices.



Dos Manos shopping hint: Heading west on Benson, watch for the Subway sandwich store on the north side, and pull into the gallery parking lot.

5. Your last resort. Missed all the holiday bazaars, eh? There's still hope: The Last Chance Bazaar at the Egan Center Dec. 23--50 booths of handcrafted arts and crafts, plus the Pampered Chef and other gifties. Or, there's always a gift certificate from the shop of your choice. "Our ladies just love gift certificates," comments Siri Schleif.