The Alaska
BAR RAG

VOLUME 36, NO. 4
October - December, 2012

Dignitas, semper dignitas

The Alaska Bar Association is settling into new offices at 840 K St., Suite 100 in Anchorage.

The relocation Dec. 6 was required when the State of Alaska informed the Bar that its lease would not be renewed; State space will be required for executive branch agencies. The new K Street location provides approximately the same space that the Bar used in the Atwood state office building. New in the move is a larger conference room and table for Section, Board of Directors, and other group meetings; a second, smaller conference room also is available.

The new offices at 9th Avenue and K Street below overlook the Anchorage Park Strip and are walking distance to downtown and courthouses; parking for visitors can be found on the street and nearby parking lots. The offices have elevator and staircase access.

Judges explore public pressure

By Michael Schwaiger

Four members of the Alaska judiciary spoke at the annual Bar Historians luncheon, which featured the introduction of a new website that presents the oral histories of judges and a panel presentation of several guest speakers. The luncheon, held on October 17 at the Captain Cook Hotel, addressed the problems that judges face when dealing with public pressure.

Before the presentation, Karen Brewster, a research associate at the University of Alaska Fairbanks, coordinated with members of the Bar Historians Committee to meet with Magistrate Arlene Clay, Justices

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Alaskan and Mr. Bunny fight war for peace in Afghanistan

On September 10, as terrorists were preparing to attack the U.S. Embassy in Benghazi, Libya, an Alaska lawyer and an unlikely bunny sidekick were fighting their own war--in war-torn Afghanistan--at the country's largest children's hospital in Kabul.

After the inspiring visit to the hospital, Will Sherman sent one of his Afghan Child Project's (ACP) news updates to his e-mail list, and it arrived at the Alaska Legal Services Corp's inbox, from which Erick Cordero forwarded it to his e-mail list (Sherman having once been an ALSC volunteer).

Founded by Sherman, ACP operates women's literacy and English classes in Afghanistan, provides solar-electric systems to remote clinics and villages, distributes medical supplies (and toys) to hospitals, plants trees, and reaches out to young Afghans.

How did an Anchorage attorney find himself in Afghanistan? And what are his experiences there?

The following are the comments he sent, after answering replies he received from Alaska.

My career in anything generally leads me to the most seemingly diametrically opposite career within a couple of years (read: short attention span). Actually, I think that practicing law as it should be done, like ALSC facilitates, is not all that much different from trying to help out the most downtrodden, powerless people anywhere, and here that is certainly women and children. To that end, ACP focuses on providing English classes to women and medical supplies and encouragement to sick children. Mr. Bunny is of course one of the more successful adjuncts of my regime.

I had long been a pilot in Alaska before getting into law, and my day job in Afghanistan is actually flying. Alaska and here are not totally dissimilar aviation environments. ACP is a part-time thing I started and incorporated 3 or 4 years ago. (And I note it is an Alaska nonprofit corporation).

I still have a case and client or two floating around in Alaska and will probably be more actively practicing there again before too long. War is like being a house guest--don't want to overstay your welcome or bad things tend to happen. I am already feeling the pinch of worsening security conditions here, despite all the hortatory information spun by the military and politicians in the US.

Mr. Bunny awakens a child from a 15-day coma.

So, the career in law probably led me more to get away to here than actually into this sort of work. And the reality of all this is far less quaint and heroic than it may seem in pics and e-mails (though a kid really did wake up from a coma, dammit).

Went hiking in the mountains yesterday up to about 12,000 feet and encountered an old Russian tank on a ridge partway up that I have seen from the plane many times. And gee, what's that piece of metal lying on the trail...sure looks like an old land mine. Managed to make it back with both legs intact. A little element of excitement we never found, but might have enjoyed, on nightly Flattop hikes with Jeff Jarvi after long days at the law firm in Anchorage.

The following may sound a trifle tabloid, but here are the facts on Mr. Bunny's trip to the Kabul clinic: Last weekend, ACP reached out to the children at Afghanistan's largest children's hospital, as we have a dozen times before with medical supplies and toys. Recent visits have been in the guise of Mr. Bunny, a 5'8" rabbit with a habit of charming smiles out of sick Afghan children and their attendants (as well as keeping white boys incognito).

On this particular trip, Mr. Bunny strode up to one of the hospital's 600-odd beds, this one appearing to contain a sleeping boy. Mr. Bunny lightly placed his fleece-covered paw upon the child's head and gifted a stuffed dog at his side. Said child immediately opened his eyes, lifted his head and curled his lips into the most spontaneous and genuine smile that Mr. Bunny, longtime purveyor of smiles, has ever witnessed.

But that was nothing compared to the smiles and tears on the faces of the boy's mom and doctors. Astonished

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PRESIDENT'S COLUMN

Celebrate traditions and create new ones

By Hanna Sebold

We have just rounded Thanksgiving and are approaching the December holidays.

Whether you are a person who buys gifts, gives donations in loved ones' names, volunteers your time as a family, or just celebrates with a nice meal as opposed to exchanging gifts: enjoy those around you. Cherish them. Let go of perfection, celebrate traditions, and create new ones.

The holidays are a time for reflection of the past, and what we can do better. As I reflect on what we have done as a Board, I am pleased. We found new office space. We passed a budget where we continue to achieve our mission, and did not increase our bar dues. We gave members the opportunity to get to know our Board members, created an Alaska Solace program, continued the mentoring program, and continued to support efforts to collaborate between UAA and Seattle University to begin to bring legal studies to Alaska. We contacted local businesses that will give discount to bar members (look on the website and in this Bar Rag for participating businesses), we provided free legal service through Martin Luther King Jr. events in four communities and the 2nd Annual Elizabeth Peratrovich Legal Clinic during the AFN convention, as well as the countless hours of volunteerism and assistance our members provide without recognition. Hats off to all of you for your service to Alaskans. Thank you on behalf of all of those people you have helped over the past year. Big or small, you have all made a difference in people's lives.

"The holidays are a time for reflection of the past, and what we can do better. As I reflect on what we have done as a Board, I am pleased."

And once we have reflected on the past, it is time to embark on the New Year and the inevitable resolutions.

A friend of mine picks awesome ones. Over the years she has memorized all the Presidents in order, became an expert in cheese (not really sure what that entails, but it sounded like a worthy endeavor) and next year she will shop at farmers markets without a list intent on buying only in season local items and commit to making something from that.

I think her choices are great because they are affirming. It helps her expand her horizons and try something new. For those of you who read this column (and there is bound to be a handful of you) I have been encouraging lawyers in prior columns to be "fit to practice law." We all know that lawyers are notorious for working too many hours, not taking care of ourselves, and putting ourselves at risk for mental and physical ailments.

Here is the challenge I set for you: Pick something this year as a New Year's resolution that will enhance your life. It could be weight loss, running a marathon, or stop smoking- but it could be to make time to read a book once a week, travel, reconnect with old friends, start a new hobby, take a class. Just do something that makes you happy, which in turn can make you a better lawyer and a better person.

The experts say we're more likely to stick to a new habit if we share it with others. Allow me to be a supporter. The convention brochure will have a check off box allowing you to declare your commitment to being fit. If you do so, there will be a pleasant surprise (and it won't entail public declarations or humiliations). If volunteering is on your list, Martin Luther King Jr. Day is January 21, 2013. We had four communities participate last year. Join one of them or work with the Bar and your community to start one where you live.

On behalf of the Board of Governors, I wish you the merriest of holidays and the happiest New Year.

EDITOR'S COLUMN

Silent Anniversary II: when GAP was not a store

By Gregory S. Fisher

One hundred fifty years ago the United States was slam bang in the middle of a national tragedy that shaped much of our social, political, industrial, and economic being. It was an epic beyond comprehension. Its effects are still evident. Yet, aside from an occasional batch of postage stamps, which in context are either a post-dotcom comment on life's irony or a quaint reminder of your Aunt Verda Mae, official recognition is silent. How sad. How horribly, terribly sad.

In December 1862 the first term enlistments (from June 1861) for the Grand Army of the Potomac (GAP) were drawing to a close. President Lincoln's political future seemed problematic, not unlike another more recent President from Illinois. George McClellan's terrible and deadly instrument was officially on the clock. Months remained before most of the Union Army would evaporate, or so went conventional wisdom. What fool would re-enlist to face massed ranks and that queer, hair-tingling wail from Confederates on the charge through an early morning fog? Needing action, the War Department ordered GAP forward to Richmond. Forward they went. Soldiers are like that.

On December 11, 1862, lead elements from the 7th Michigan began clearing Fredericksburg, Virginia house-by-house, street-by-street in the first major urban battle of the modern era. The urban tactics learned there became part of the Army's standard field manual later applied across the Rhine in Cologne. As December 13, 1862 dawned, GAP launched a massed assault on Marye's Heights. It failed. Badly. Really, famously quite badly. GAP limped home. Many (most) assumed the Union was doomed. The enlisted soldiers who had suffered heavy losses in battle after battle would certainly never stay. Newly recruited soldiers would never reach the combat readiness required to slug it out toe to toe with Confederate regiments. Lee would be in New York by the summer of 1863.

"President Lincoln's political future seemed problematic, not unlike another more recent President from Illinois."

The great mystery is that GAP never dissolved. Notwithstanding inept leadership, bad policy, worse tactics, and at times corrupt procurement officers, the overwhelming majority of common soldiers who had enlisted in the brittle sunshine of 1861 re-enlisted in the late winter and early spring of 1862-63. GAP evolved and then, ultimately, prevailed—led by a man society rejected as an abject failure. We know him as Ulysses Grant. Until a more capable voice steps forward, your Editor's Index:

- Average age of a soldier (North or South): 26.
- Average height and weight: 5'8" and 143 lbs.
- Occupation: Most soldiers were farmers or tradesmen from small cities, towns, villages, or rural communities.
- Background: The average soldier was White, native-born, with what would perhaps be the equivalent of an eighth grade education (sufficient to read, write, and calculate basic figures).
- Military occupational specialty: Eighty percent of Union soldiers served in the infantry or combat support roles (engineers, communications/signal, transportation, administrative, quartermaster or supplies). Six percent served in the field artillery. Fourteen percent served in the cavalry. No verified statistics exist for the Confederacy except that they fought really hard.
- Basic combat load: Each Union infantryman carried roughly 45 lbs. as issued, but veterans quickly learned to shed weight and bulk. A Springfield Rifle-Musket weighed 9 lbs. and was common issue throughout the war. Each soldier carried 7 lbs. of ammunition and between 9 to 15 lbs. in rations (enough for a 3 to 5 days march). The remaining weight was composed of a blanket, gum blanket or poncho, shelter half, extra shirt, extra socks, extra underwear, greatcoat (overcoat), rope, coffee, pipe, tobacco, cup, knife, bayonet, spoon, canteen, Bible, personal effects, and the knapsack. Confederate soldiers carried far less, but nearly always a Bible and whiskey.
- Muzzle velocity. The Springfield .58 caliber was the iPod of its day, and as with most technological advancements completely misunderstood. It could push a slow, heavy moving Minie ball (950 grains) nearly 300 yards at 950 feet a second. Think sledge hammer wielded by some angry biker-looking dude in Jerome, Arizona slamming into your chest. The effects at close range, such as Marye's Heights on December 13, 1862 were devastating.
- Average distance traveled by soldiers in the 34th New York (Infantry) (Old Herkimer). As they closed on Antietam in September 1862, soldiers in the 34th New York made roughly 33 ½ miles in a day's forced-march. That does not sound too bad. But put on heavy wool pants and tunic, strap a third of your body on you, and head roughly north and west in 78 degree humid weather over rutted dirt roads with no clear idea of where you are going

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The Alaska BAR RAG

The Alaska Bar Rag is published quarterly by the Alaska Bar Association, 550 West 7th Avenue, Suite 1900, Anchorage, Alaska 99501 (272-7469).

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October - December	Nov. 10

Board of Governors meeting dates
September 6 & 7, 2012
(Thursday & Friday)
October 25 & 26, 2012
(Thursday & Friday: July Bar Exam results & budget)
January 24 & 25, 2013
(Thursday & Friday)
May 13 & 14, 2013
(Monday & Tuesday)
May 15 - 17, 2013
(Wed. - Friday: Annual Convention)

Letters to the Editor

Will & the World Series

On Friday, October 5, the Atlanta Braves lost to the St. Louis Cardinals partly thanks to a disputed infield fly rule call. The Alaska Bar's connection to this is that one of our former CLE directors, Will Stevens, who died four years ago, wrote a famous law review "Aside" on this subject. It was "The Common Law Origins of the Infield Fly Rule," 123 Penn. L. Rev. 1474 (1975).

Will would have been all over this. For one thing, the umpire who called the infield fly rule did not do this "immediately," 123 Penn. L. Rev. at 1474 n.2. For another, the shortstop and left fielder were both far enough away from second and third that there would not have been any real "danger of an unfair double play," as the Aside puts it, 123 Penn. L. Rev. 1478, if they had deliberately let the ball drop. Finally, Major League Baseball's Joe Torre's reason for refusing to review the umpire's call, "I ruled to disallow the protest based on the fact it's a judgment call," cuts against the Aside's observation that there should not be "broad discretion in the umpire" in situations like this, 123 Penn. L. Rev. 1480.

We miss you, Will.

—Mark Regan

Alaska Bar Association MEMBERSHIP BENEFITS GUIDE

Bar staff has compiled a detailed guide to benefits & services for members.

Included in the guide are services, discounts, and special benefits that include:

- Alaska USA Federal Credit Union for financial services
- Alaska Communication wireless discounts
- Copper Services virtual conferencing
- OfficeMax partners discount
- Alaska Club health and fitness enrollment options
- Premera Blue Cross health and dental plans
- LifeWise group discounted term life insurance
- Hagen Insurance disability insurance discounts
- Avis and Hertz rental car discounts
- Professional Legal Copy ABA member pricing
- Kelly Services staffing services special pricing

Also included are Alaska Bar Association and partner services that include the Casemaker legal research platform, Lawyers Assistance, Lawyer Referral Service, Ethics Hotline resources, the ABA Retirement Funds program, American Bar Association publication discounts, and Alaska Bar publications (Bar Rag, CLE-At-A-Glance newsletter, and E-News).

For details on these benefits & services and how to access them, download the full Member Benefits Guide at www.alaskabar.org.

Silent Anniversary II

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except that you may not come back and 33 ½ miles suddenly takes on a different light.

- Daily ration: A Union soldier could look forward to a daily ration of 22 ounces of bread and 12 ounces of salted pork or beef. This was considered high living. Many Confederate soldiers subsisted on little more than dried corn, boiled peanuts, and good humor.
- Your odds: 1 in 8 soldiers died of disease or illness. 1 in 18 were killed or mortally wounded in battle. Statistics from three Upstate New York regiments reflect that losses ranged between 7% and 15%. The 34th New York (Infantry) (Old Herkimer) mustered 1,016 officers and men on June 15, 1861. Told they would likely be home before the harvest, they served two years before colors were furled on June 30, 1863 (the day before the first shots were fired at Gettysburg). Old Herkimer lost 93 killed in action (or of wounds suffered in battle) and 69 dead from other causes (accidents, illness, or disease). Most re-enlisted as term soldiers ("Lifers") "until cessation of hostilities" and were parsed out to other regiments as replacements. The 23rd New York (Infantry) (Southern Tier Rifles) was formed on July 2, 1861 and served until May 23, 1863. It suffered relatively light casualties, losing 17 enlisted in battle and 55 officers and men from disease or other causes. The 38th New York (Infantry) took colors on June 3, 1861 and disbanded on June 22, 1863. Initially composed of only 796 officers and men (200 under the typical 1,000 man regiment), they lost 4 officers and 71 men in battle, and 3 officers and 43 men to disease, illness, or accident for a total of 121 deaths.

When the war ended, GAP took life as the Grand Army of the Republic (GAR), a fraternal order of civil war Union veterans, and later their descendants. GAR chapters could be found in small villages and hamlets throughout Upstate New York and New England into the 1960s. If you know what to look for, you will see GAR emblems on headstones in cemeteries across the nation, including in Seattle.

Election of an Attorney General

By Talis Colberg

In the July- September,2012 issue of the Bar Rag, former Attorney General John Havelock wrote The Case for an Inspector General. General Havelock recommends the creation of a new position- an Inspector General. The proposal emanates from his aversion to the perceived alternative, the election of an attorney general. In the article, the notion of an elected attorney general is associated with "notorious embarrassment elsewhere in the nation" and requiring a governor to hire their own counsel which would be a "model of inefficiency."

I think the article is misleading to suggest that all serious discussions of the electing an attorney general in Alaska are somehow linked to three historical episodes of implied attorney general shortcomings. There is a reasonable case to be made for the election of an attorney general.

In his 1998 book about Alaska's attorney generals, Steve Haycox asserts that most former attorney generals opposed election of an attorney general. Haycox stated that only Edgar Paul Boyko and Donald Burr indicated to him that the position should be elected. General Charlie Cole was listed as expressing "reservations" about the idea. Before I was the attorney general I favored the election of the position. My experience as attorney general reinforced my belief that it would be better to elect people to the position.

Forty three states elect their attorneys general. States with elected attorneys general have far more stability in their departments of law than we have. In the fifty-three years that we have been a state we have had twenty-four attorneys general. There were actually only twenty-three different people who served, but Norm Gorsuch served two times. Incidentally, contrary to General Havelock's assertion in footnote 3 that "There have been no female attorneys general..." Grace Schaible did serve as Alaska's Attorney General for just over two years.

In any event,the math is simple, in Alaska there is a one in ten chance that an attorney general will actually finish a full term. Only two have done it: Avrum Gross and Bruce Botehlo. For a variety of reasons, twenty two of the twenty-four attorneys general, John Havelock and myself included, have never finished a full four year term. I served two years and two months, which means I outlasted thirteen who served even shorter periods of time.This is not a sensible system.

In contrast, in that same fifty three year period, Iowa has had six elected attorneys general. The current attorney general in Iowa,Tom Miller has served for more than twenty years. Yes, as General Havelock stated, elected AG's do tend to seek other offices and Tom Miller did as well. However, there is little evidence that his aspirations for another office made him a less effective AG. The reality is that it would be hard to find an example in any state with an elected AG that has turnover in the office as frequent as Alaska.

General Havelock correctly notes that it takes a while for anyone to learn the job. Appointed AG's who last on the average 2 years are essentially just learning how to be effective when they leave. I believe this is an argument for electing AG's. Steve Haycox suggests in his book[1] that employees in the Department of Law also generally support the appointment of an AG over the election. While I have never seen any formal polling I believe that is probably a correct assertion. I think many employees do believe that an elected AG would be more "political" than an appointed AG and therefore less likely to be a d isruptive force in transition for career employees. Maybe. However, elected AG's would be "new" on the job far less frequently.

Most of the elected attorneys general that I met from other states served out their entire four year terms, if not several terms. It is true that many have attempted to run for governor or senator, sometimes successfully. There is no objective evidence to suggest that elected AG's are less effective or efficient than appointed AG's. There is now a half century year record in Alaska that shows that appointed attorneys general usually don't last long enough to become effective. Some might argue that is a good thing. However, it is not an efficient system. Fortunately, the attorneys and staff in the Department of Law are more durable than the leader and manage to keep the institution intact while they wait to see who will be next through the revolving door.

While there are a variety of circumstances and reasons why most Alaska attorneys general leave office before then end of a full term,the problem often revolves around the relationship with the governor. I think the delegates to the constitutional convention did recognize there were some problems with not electing an attorney general. They did debate it. I think they made the wrong choice. Allowing the governor to appoint the attorney general and then house them in the cabinet creates an unnecessary set of problems. I think it was a mistake to make the chief law enforcement officer of the state an at will employee of the governor.

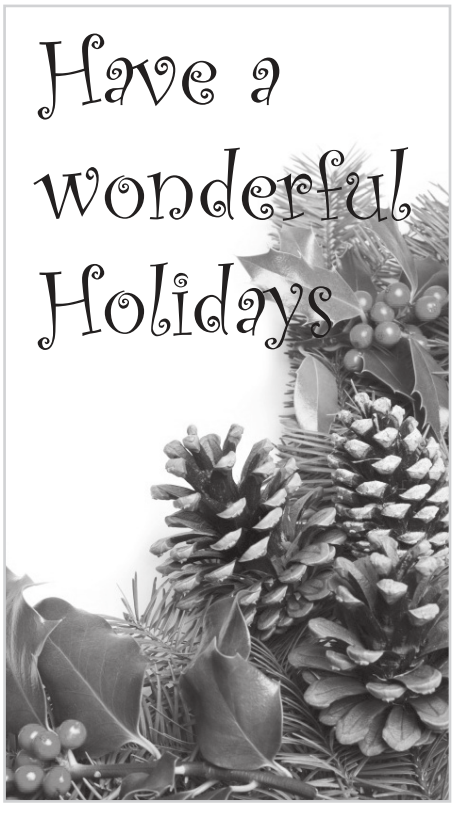
An Inspector General would not solve the attorney general turnover problem and more likely add to the inefficiency that General Havelock argues against. I believe Alaska would be better off with an elected attorney general.

— Talis Colberg

The author is a former Alaska attorney general.

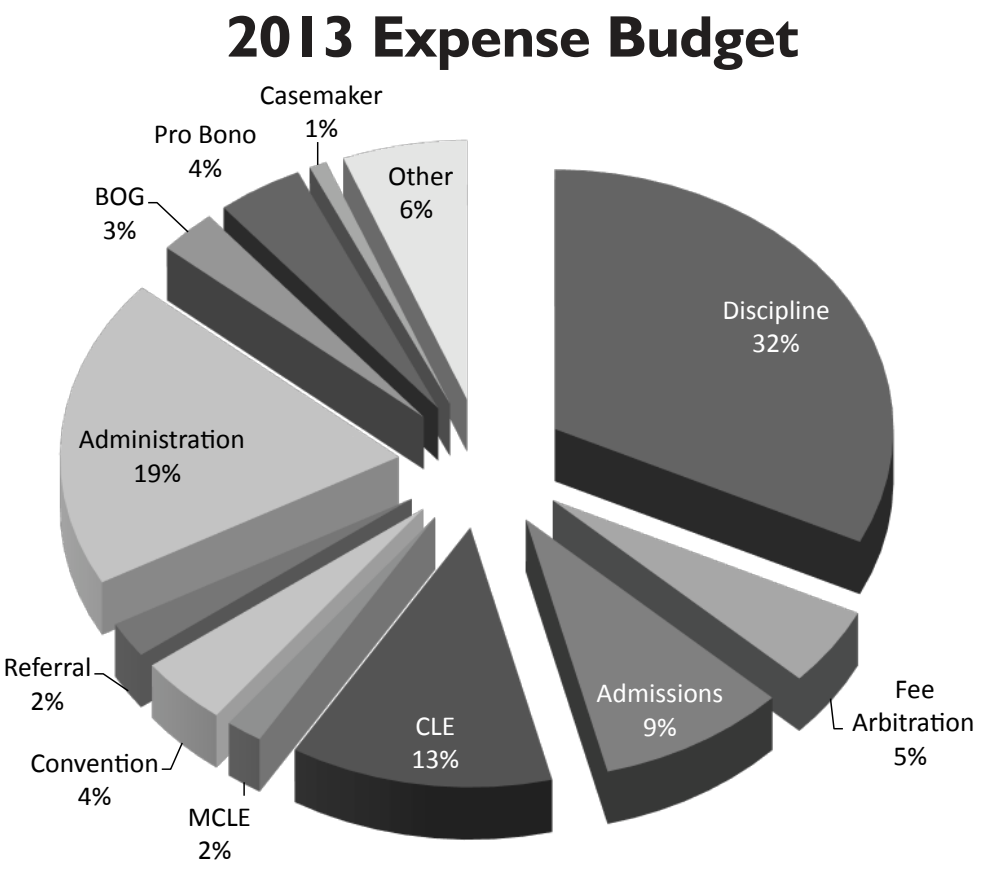
Footnote

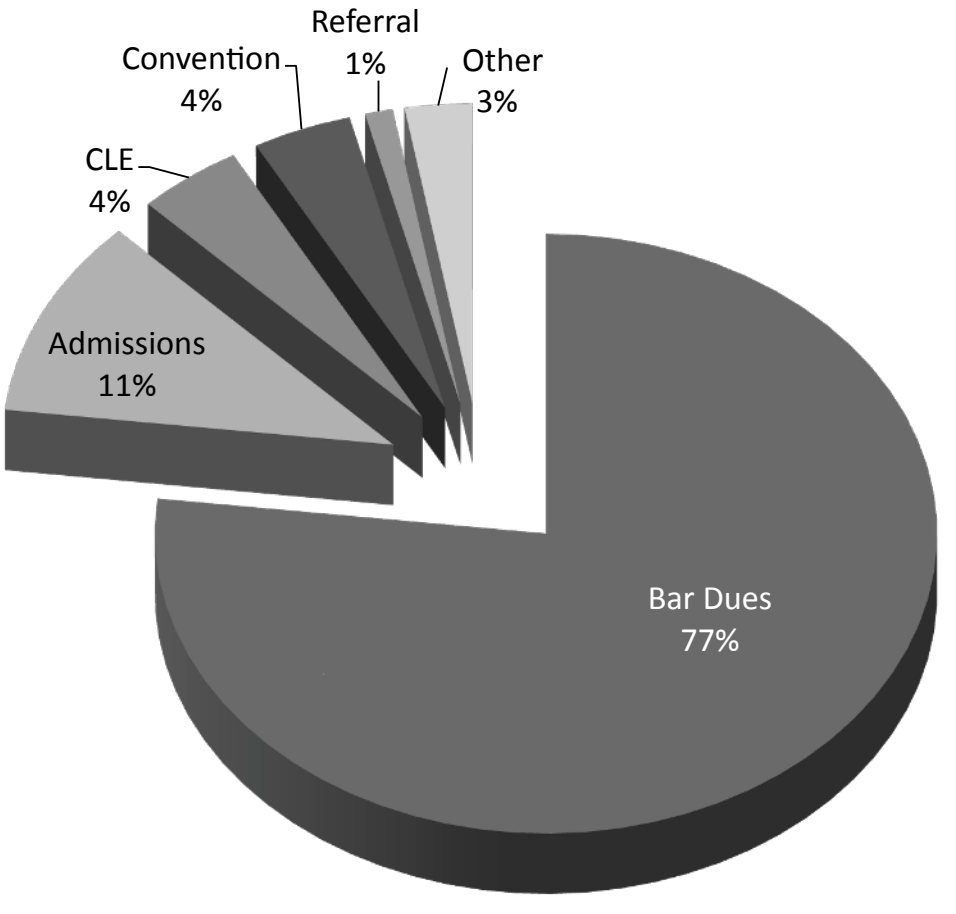
[1]The Law of the Land (Alaska Department of Law, 1998),188.



2013 BUDGET
REVENUE/EXPENSE

REVENUE	2013 Budget
Admission Fees	308,200
ContinuingLegalEducation	124,589
MandatoryContinuingLegalEducation	3,800
Lawyer Referral Fees	32,940
The Alaska Bar Rag	11,997
Annual Convention	117,456
Substantive Law Sections	23,045
AccountingSvc Foundation	14,717
Membership Dues	2,176,935
Dues Installment Fees	11,100
Penalties on Late Dues	14,140
Labels & Copying	1,733
Investment Interest	24,000
Miscellaneous Income	500
SUBTOTAL REVENUE	**2,865,151**
EXPENSE	
Admissions	247,325
ContinuingLegalEducation	341,559
MandatoryContinuingLegalEducation	47,743
Lawyer Referral Service	60,883
The Alaska Bar Rag	41,732
Board of Governors	75,551
Discipline	875,501
Fee Arbitration	132,779
Administration	526,249
Pro Bono	112,464
Annual Convention	117,456
Substantive Law Sections	56,618
New Lawyers Travel	3,000
AccountingSvc Foundation	14,717
MLK Day	5,000
Law Related Education Grants	5,000
ADA Member Services	1,500
Casemaker	18,000
Duke/Alaska Law Review	22,500
Miscellaneous Litigation	10,000
Internet / Web Page	15,021
Lobbyist	16,500
Credit Card and Bank Fees	46,529
Computer Training / Other / Misc.	7,500
SUBTOTAL EXPENSE	**2,809,673**
NET GAIN/LOSS	**55,478**





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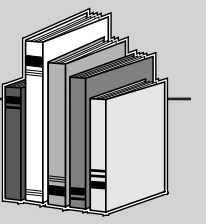
Update on the Anchorage Law Library remodel



By Susan Falk

The Anchorage Law Library staff will move into our new office space in the West Mezzanine in December, allowing the contractors to begin construction in the vacated area on the first floor. This move should not affect library operations. And, it's four months ahead of schedule!

The next big shift of books and equipment will happen this spring. In the meantime, we have treatises on the shelf and reference staff ready to help with your research projects. Although much of our collection is in storage, we can still help you find the materials you need. All major treatises are available. Current and superseded Alaska laws are available. Legislative history assistance is available. Interlibrary loan is available.

All five of the public computers in Anchorage have recently been replaced. The new PCs are much faster, and offer access to Westlaw, HeinOnline, CCH's Intelliconnect tax resource, and more. You can find a wealth of current and historical state and federal case law, statutes, and regulatory material on our public computers. Library staff members are happy to help you use these resources.

The Anchorage Law Library is open for business and will remain open throughout our remodel. We look forward to assisting you with your legal research projects.

FEDERAL PROBE

The substance and thinking involved in the Ted Stevens indictment

By Cliff Groh

The last *Bar Rag* column described how the Department of Justice ended up not charging U.S. Sen. Ted Stevens with the offenses of bribery, honest-services fraud, receipt of illegal gratuities, and conversion of government services prosecutors considered during a probe that ran at least 33 months.

This installment in a multi-part series on the Ted Stevens case looks at the counts of failure to disclose gifts and/or liabilities that **did** appear in the indictment handed down on July 29, 2008. This piece also includes an examination of some of the other factors involved in the indictment.

Charges: Items, Dollars, and Years

Recall that the indictment charged seven felony counts of failing to report gifts and/or liabilities on disclosure forms required annually from each U.S. Senator. The prosecution alleged that Ted Stevens failed to report such colorful gifts as a massage chair from Girdwood restaurant owner Bob Persons, a blue-eyed puppy and a stained-glass window from Alaska real estate developer Bob Penney, and a bronze salmon statue from the Kenai River Sportfishing Association. That first gift—a vibrating lounger that stayed in Stevens' home in Washington, D.C. for seven years while Stevens said he thought it was a loan—left a lasting image that hurt the defendant at trial.

Yet the great bulk of the unreported gifts and/or liabilities contained in the government's case came from the oil-services giant VECO and its long-time CEO Bill Allen in the form of renovation work, repair, and improvements at the Senator's Girdwood home. The indictment alleged that over a period of more than six years Stevens failed to report more than $250,000 in free labor, materials, and other things of value provided by VECO and/or Allen at the Girdwood residence. Items on the government's list of "freebies" included hardwood floors, work on one deck and all the work on another deck, a roof over the second deck, a professional gas grill, a Jacuzzi, and other furniture. The indictment included one more benefit going from Allen to Ted Stevens that was unrelated to the Girdwood residence, a car trade in which one of the Senator's children allegedly ended up with a vehicle substantially more valuable than the vehicle the Senator put up as his part of the trade.

The benefits from VECO and/or Allen were loaded into the early years of the period covered by the indictment handed down on July 29, 2008. The charging document stated that approximately $200,000 of those things of value came in the period between the summer of 2000 and the end of 2001 and that another approximately $55,000 worth of benefits came in 2002.

Six counts in the indictment covered the annual reports filed for the six calendar years 2001 through 2006, and alleged that Stevens had violated a federal statute (18 U.S.C. Subsec. 1001(a)(2)) criminalizing the making of "any materially false, fictitious, or fraudulent statement or representation." A seventh count alleged a scheme by Stevens running from calendar year 1999 through calendar year 2006 to conceal his receipt of things of value from Allen and VECO. That seventh count alleged that the Senator had violated 18 U.S.C. Subsec. 1001(a)(1), which targets one "who falsifies, conceals, or covers up by any trick, scheme, or device a material fact."

Limiting Elements of the Offenses Charged

This statute has two critical limiting features: a required mental state and a restriction on the statements covered.

The mental state on the counts differed. In the six counts for individual years it was "knowingly and willfully," and the mental state in the count for the alleged multi-year scheme was "knowingly and intentionally."

Except for listed exceptions, the statute covers statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Importantly for lawyers, one of those exceptions is that the statute does not apply to a party to a judicial proceeding or that party's counsel "for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding." More importantly for this case, as to any matter within the jurisdiction of the legislative branch, the statute applies only in a limited set of circumstances, including "a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch."

"Recall that the indictment charged seven felony counts of failing to report gifts and/or liabilities on disclosure forms required annually from each U.S.

The Source of the Requirement to Disclose: The Ethics in Government Act

The indictment alleged that the relevant false statements by Ted Stevens appeared in annual disclosure forms required by the Ethics in Government Act of 1978 (5 U.S.C. App. 4 Secs. 101-111). That Act requires various federal officials, including Members of Congress, to file annual disclosure statements detailing, with certain exceptions, their income, gifts, assets, financial liabilities, and securities and commercial real estate transactions. This statute was a child of the reforms adopted after the Watergate scandals (as was the Public Integrity Section that spearheaded the prosecution of Ted Stevens). Particularly because of its restrictions on outside income for Members of Congress, the legislation was highly controversial on Capitol Hill when adopted—one Member of the House told the *New Yorker* that the bill was so unpopular that the legislation would have failed 2-1 if put to a secret ballot.

As a statute, the Ethics in Government Act was not a favorite of prosecutors, either. In conjunction with the statute criminalizing some false statements, the adoption of the Ethics in Government Act made it possible to prosecute public officials for false statements on their disclosure forms, but such prosecutions were not common. According to James B. Stewart's 1987 book *The Prosecutors,* the Justice Department had adopted an informal policy that disfavored prosecution for disclosure violations "except in the most egregious cases."

The subjective state of mind required by the statute was the practical problem prosecutors often found with charging public officials with the crime of failing to disclose gifts, loans, and income. Prosecutors were worried that juries would be sympathetic to a defendant claiming he or she just forgot the matters that did not appear on the disclosure forms. As Stewart reported in 1987, prosecutors evaluating charges against a number of federal officials—including Attorney General nominee Edwin Meese—ended up declining to prosecute on disclosure violations based on fears of inability to approve the required criminal intent to conceal. And it was of course the mental element that turned out to be where all the action was in the Ted Stevens case.

Shorn of any charges of bribery or honest-services fraud, the indictment against Ted Stevens seemed to many observers to contain only technical violations. Alaska historian John Strohmeyer branded them "pussycat charges," and Fairbanks newspaper columnist Dermot Cole suggested after the trial that all the government had proved was that Stevens "may have failed to fill out the paperwork correctly to report such gifts as a gas grill, massage chair, sled dog and ugly artwork."

With Bill Allen pleading guilty to bribing Ted Stevens' son Ben—and given the very close personal relationship between Bill Allen and Ted Stevens over a number of years—the federal investigators and prosecutors on the Polar Pen probe would disagree. Although they would never say it this way publicly, it seemed like some of those prosecutors and investigators pursuing Ted Stevens saw the charges of failure to disclose as equivalent to the charges of income tax evasion that brought down notorious mobster Al Capone.

The indictment had some distinctive touches, including a number of official acts that Ted Stevens took to benefit VECO. Prosecutors could have inserted the list to offer a motive for why Stevens wanted to hide his receipt of benefits. The list also seemed to be a residue of the years the Justice Department spent investigating Stevens for crimes with a *quid pro quo* element, almost like spots left on a dish after a hasty handwashing.

One of those listed official acts reads particularly odd to Alaska eyes. The indictment's statement that Ted Stevens "received and accepted solicitations… from Allen and other VECO employees" for "assistance on both federal and state issues in connection with the effort to construct a natural gas pipeline from Alaska's North Slope Region" betrayed a certain cluelessness about political realities in the Great Land. Everybody with the slightest understanding of how things work on the Last Frontier knows that Ted Stevens would have strongly supported the gasline if Bill Allen had never been born and VECO had never existed.

Some Additional Factors in the Indictment

The Justice Department's motivations for bringing the charges against Ted Stevens triggered much discussion in Alaska and on Capitol Hill, both because of the big political impacts of the case and because decisions on white-collar crime cases involve more prosecutorial discretion than do blue-collar crime cases.

It was the Justice Department in the administration of President George W. Bush that brought the charges against the longest-serving Republican Senator ever. When the case melted down due to revelations of prosecutorial misconduct, however, some commentators pointed to the Democratic leanings of some of the government's attorneys to account for the Justice Department's handling of the case. The evidence suggests that any accusation of Democratic partisanship is a bum rap as an explanation for either the indictment or the discovery violations. Two of the biggest players—Public Integrity Section Trial Attorney Nicholas Marsh and Public Integrity Section Chief William Welch—were Democrats, but this shouldn't matter and did not seem to matter in this case.

A more relevant factor in the decision to indict Ted Stevens was a lack of focus and management by the Justice Department throughout the process. As one experienced Alaska lawyer observed, the Public Integrity Section and the higher-ups in Washington never seemed to understand what they had in the "Polar Pen" prosecution, treating Alaska as a backwater even after a Congressional powerhouse became a target. The best way to see this is to contrast the Justice Department's handling of the Ted Stevens case with how federal prosecutors dealt in the 1990s with another powerful politician, U.S. Rep. Dan Rostenkowski, D.-Ill.

There were a number of similarities between the cases of the two Capitol Hill titans. Each served in Congress for more than 35 years and ended up as legends at home. Both were long-time chairmen of critical Congressional committees—Rostenkowski helmed the tax-writing House Ways and Ways Committee, while Stevens had served for years at the top of Senate Appropriations. Each had their lengthy careers ended by charges arising out of investigations that initially did not target them (the probe of Rostenkowski was an outgrowth of an examination of irregularities in the House post office system, and he ultimately pleaded guilty to two counts of mail fraud and served 15 months in custody). Each faced charges brought by the executive branch under the control of the same party as that of the defendant (Rostenkowski was indicted in May of 1994 during the Clinton administration).

There were key differences as well between the Rostenkowski and Stevens cases. The Rostenkowski case was brought by the Washington, D.C. U.S. Attorney's Office, while that office was excluded from the Stevens case. Rostenkowski was charged with an unexpectedly wide-ranging 17-count indictment that covered fraud and embezzlement, conversion of public funds to private use, witness-tampering, concealing a material fact from Congress, wire fraud, and aiding and abetting a crime. Prosecutors charged Stevens, on the other hand, with an unexpectedly narrow set of counts alleging failure to disclose his receipt of gifts and/or his liability for debts.

Most importantly, prosecutors substantially experienced in high-profile public corruption cases seemed to pay more attention to the Rostenkowski case for a longer period of time than the Stevens case. As detailed in the *New York Times*, Eric Holder took over as U.S. Attorney for Washington, D.C. after the investigation into Rostenkowski had run on for a number of months. Holder had previously prosecuted a Congressman in an Abscam public corruption case. The new U.S. Attorney quickly instructed the chief of the office's public corruption section—a prosecutor who had successfully brought cases against a governor and a federal judge—to drop or re-assign other matters and work full-time on the Rostenkowski case, and the indictment came approximately seven months later.

Contrast that intensive focus of attorneys with extensive experience in high-level public corruption cases with that of the lawyers most actively involved in the Ted Stevens case before the indictment. The smart and hard-working Marsh had only been a prosecutor for about a year when he started working on the Polar Pen probe, and he had no previous experience being in charge day-to-day of a high-profile public corruption case. Assistant U.S. Attorney Joseph Bottini was a highly experienced federal prosecutor with a strong reputation for straight shooting, but had no experience in a case like the one against Ted Stevens.

Next installment: The indictment's curious timing and the false choice it represented

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2012-3

REPRESENTATION OF CLOSELY HELD ORGANIZATION AND ITS MAJORITY OWNERS WHEN THEIR INTERESTS MAY BE ADVERSE TO THOSE OF MINORITY OWNERS

Question Presented

What are the ethical duties of counsel for a small closely held organization when the interests of the organization and its majority owners are adverse to the interests of minority owners?

Conclusion

Counsel must make a fact-based analysis to determine whether a conflict exists and, if it does, whether it can be waived. As a general rule, representation of the organization does not also imply representation of an individual owner or owners. However, a conflict can arise if the attorney has represented an individual owner in other legal matters or in such a way that might cause that individual to believe that the attorney was acting on his or her separate behalf. The ultimate resolution of the question relies heavily on the specific facts of the situation.

Discussion

The Committee has been asked to review the ethical issues that arise when an attorney is asked to represent the interests of both a closely held corporation or LLC and the majority owner or owners of the company, in circumstances where their interests may be adverse to the position of a minority owner or owners. Because of the closely held nature of the business, there may be no "disinterested" owner from whom counsel or the company can obtain a waiver of any conflict. Under such circumstances, can the attorney represent the business and the majority owner or owners?

Alaska Rules of Professional Conduct address the ethical position of a lawyer who represents an organization. ARPC 1.13(a) states the general rule:

(a) A lawyer employed or retained by an organization represents that organization acting through its duly authorized constituents.

Rule 1.13 makes clear that the ethical duties of the lawyer are to the organization itself and not the "constituents" with whom the lawyer deals. Rule 1.13(f) provides:

(f) In dealing with the organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Nevertheless, the Rule also recognizes that the "constituents" of the organization may have interests that are closely tied to or identical to those of the organization itself. ARPC 1.13(g) allows dual representation of the organization and

> its officers, directors, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.7 deals with conflicts of interest between current clients. The Rule allows dual representation so long as the lawyer concludes that it is possible to represent both interests diligently and competently, the representation does not involve the assertion of a claim by one client directly against the other client, and both parties give informed consent in writing. See ARPC 1.7(a), (b).[1]

When conflict issues arise in the context of a small closely held business entity, for a number of reasons they can be very difficult to resolve. In a small, closely held organization, unlike a larger organization, each of the owners may have a direct and intimate responsibility for the operation of the business.[2] The attorney for the organization may have dealt directly with each owner on a regular basis on many matters, or even with respect to the particular legal matter at issue. The constituent may have used the legal services of the attorney on unrelated matters or in circumstances in which it was reasonable for the constituent to conclude that the attorney was acting as the constituent's attorney. When owners in a small closely held organization clash, there is a high likelihood that the attorney will previously have received information or given advice to all concerned that is relevant to the dispute. Finally, when the owners have equal or nearly equal ownership rights and responsibilities, and where each may have been directly involved in giving instructions to the attorney in the past, the attorney may find that it is hard to know who speaks for the business entity and thus who gives direction on behalf of the "client." Although ARPC 1.13(g) allows dual representation if the organization consents, it may be impossible to find an "appropriate individual" or shareholder who is genuinely disinterested and who can thus approve dual representation.

Resolving these issues requires the attorney to consider two issues. First the attorney must determine whether an attorney client relationship has arisen with the individual owners that would make representation of the business and the majority owners adverse to a minority owner a violation of the duty owed by an attorney to all clients. Second, if no attorney client relationship has arisen with the individual owners, then the attorney must determine whether he or she can satisfy the dual representation test of ARPC 1.13 (g). Some general observations are appropriate.

First, when an owner of a closely held organization, acting in a capacity as a representative or "constituent" of the organization, consults with the organization's attorney, receives legal advice or provides confidential information no attorney client relationship is formed with the constituent. No conflict of interest arises if the interests of the constituent and the organization later diverge.[3]

Second, and conversely, advice given by counsel to a constituent regarding the constituent's individual legal issues (including, for example, legal advice regarding the constituent's rights or claims against the organization) may create either an actual or an implied attorney client relationship that gives rise to an impermissible conflict that precludes the attorney from representing the corporation on an issue adverse to the constituent's interests.[4] Finally, to the extent that it is not possible to reconcile the conflict under the Rules of Professional Conduct, or it is not possible to determine who can make decisions on behalf of the client, the attorney must withdraw, rather than express a preference for one client over another.[5]

The attorney for a closely held business entity can and should make clear that the attorney represents the organization, and not the individual owners.[6] The attorney can and should make the implications of this clear as well. Any communications from one owner to the attorney regarding the affairs of the business are not likely to be protected from the other owner.[7] The attorney may not favor the interests of one owner over another during the course of representing the business.[8] If a conflict should arise among the owners the attorney may be required to withdraw from representing any party if the owners cannot agree on a waiver or some method of resolving the conflict.

Several examples illustrate these principles. An attorney prepares the necessary legal documents to create a corporation, including the shareholder agreement to be signed by the two shareholders of the new business. At no time does the attorney meet with either of the individual shareholders to discuss the shareholder's personal legal rights or responsibilities under the agreement. The corporation pays for the legal services involved and there was no prior attorney-client relationship with either shareholder. Later, the attorney, on behalf of the corporation, sues one of the shareholders for violation of the shareholder agreement. Disqualification is not required because there was no attorney client relationship with the individual shareholder. *See McKinney v. Means,* 147 F.Supp.2d 898, 901 (W.D. Tenn. 2001).

In contrast, a CEO of a corporation has a dispute with an employee. The CEO contacts a law firm and asks for representation in dealing with this dispute. The law firm interviews the CEO, and, in the course of the investigation, provides legal advice to the CEO. Eventually, the dispute results in termination of the CEO under a termination agreement. In litigation regarding enforcement of the termination agreement, the law firm enters an appearance on behalf of the corporation against the former CEO. The law firm is disqualified from representing the corporation. Regardless of whether the law firm understood it had previously represented the corporation or the CEO, the law firm provided legal advice to the CEO, was given confidential information by him, and failed to make clear that the firm was representing the interests of the corporation and not the CEO with respect to the incident. It was reasonable for the CEO to believe that the law firm was acting on his behalf as well as on behalf of the corporation. *See Home Care Industries, Inc. v. Murray,* 154 F.Supp.2d 861, 869 (D.N.J. 2001).

In resolving these kinds of issues, the attorney must refer to the provisions of ARPC 1.7, 1.9 and 1.13. To the extent that there are "independent

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NEWS FROM THE BAR

Board of Governors takes action on 12 items

- Voted to approve the results of the July 2012 bar exam, with 70 passing applicants.
- Voted to approve the admission of nine reciprocity applicants.
- Voted to approve the contract with Casemaker for a three year term; Alaska Bar members will be entitled to receive a minimum 20% discount for all purchases of subscription services.
- Remanded the Disciplinary Matter Involving Melinda Miles to the Area Hearing Committee after finding that the summary judgment was improperly granted as to Count 8.
- Voted to accept the Findings, Conclusions and Recommendations of the Area Hearing Committee in the Reinstatement Matter Involving Jon Wiederholt which recommended his reinstatement to the practice of law. The Board suggested that the Supreme Court consider requiring some oversight for three years.
- Voted to adopt the 2013 budget as amended (and printed elsewhere in the Bar Rag.)
- Voted to deny admission to an applicant based on character and fitness issues, without prejudice, based on the denial of admission in another state; that if the applicant can show that there is new evidence or evidence that should have been included, the applicant can request new consideration.
- Voted to send a letter of support of ALSC's grant application for the Domestic Violence Prevention Project (DVPP) through the Anchorage Mayor's Community Grant Program.
- Voted to approve Ethics Opinion 2012-3: "Representation of Closely Held Organization and its Majority Owners When Their Interests May Be Adverse to Those of Minority Owners."
- Voted to approve the minutes of the September 6 & 7, 2012 Board meeting.
- Suggested that the Law Examiners Committee meet to discuss the Uniform Bar Exam (UBE) and have this on the Board agenda for the January or May Board meeting.
- Voted to send the proposed amendments to Bar Rule 26 to the Supreme Court, regarding a respondent attorney's response to a motion for interim suspension.

— Oct. 25 and 26, 2012

New public member

Governor Sean Parnell has appointed Adam Trombley of Anchorage to fill the public member vacancy on the Alaska Bar Association Board of Governors.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2012-3

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decision makers" to whom the attorney can turn for guidance as to the best interests of the business, the attorney may do so pursuant to 1.13(g). However, if, a conflict is determined to exist, the attorney cannot ignore the conflict and must take steps to ensure that the interests of the clients are recognized and protected.

Approved by the Alaska Bar Association Ethics Committee on October 12, 2012.

Adopted by the Board of Governors on October 26, 2012.

Footnotes:

[1]An attorney also owes a duty to former clients as well as current clients. Conflicts can arise in the business context when a former owner or employee with whom the attorney has had a close professional relationship becomes adverse to the organization. ARPC 1.9 provides guidance for dealing with conflicts between current and former clients.

[2]"[A] closely held business is a business whose 'distinguishing characteristic . . . is that management and shareholding are not separated functions.' Other characteristics of closely held businesses include the issuance of private equity (stock or interests that are not publicly-traded) and the significant personal investment of both time and capital by shareholders." Darien Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses,* 56 Ala. L. Rev. 181, 188, Fall 2004 (quoting Michael P. Dooley, Fundamentals of Corporation Law at 1011 (1995) (footnotes omitted).

[3]*See*, e.g., *McKinney v. Means,* 147 F.Supp.2d 898 (W.D. Tenn. 2001) (lawyer not disqualified from defending close corporation in suit brought by one of two owners, since lawyer represents corporation, not owners); *Nilavar v. Mercy Health System-Western Ohio*, 143 F.Supp.2d 909, 913 (S.D. Ohio 2001) (mere exchange of confidential information between counsel and organization's officers and directors about matters of interest to the corporation does not create attorney client relationship with officer or director); D.C. Ethics Op. 2005-10 (2005) (lawyer may represent corporation against one of two 50% shareholders).

[4]*See, e.g. Home Care Indus., Inc., v. Murray* (154 F.Supp.2d. 861 (D.N.J., 2001) (attorney's receipt of confidences from and substantial dealings with one corporate constituent created an implied attorney client relationship with that constituent).

[5] *See* Alaska Bar Association Ethics Opinion No. 84-2 (attorney for partnership cannot represent one partner against another in partnership dispute); *In re: Banks*, 584 P.2d 284, 292 (Or. 1978) (only ethical position for attorney to adopt when substantially identical interests which he has represented become divergent is to represent neither the individual nor the corporation).

[6]*See* Alaska Rule of Professional Conduct 1.13, comment:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[7]*See*, e.g., *Cohen v. Acorn International Ltd.*, 921 F.Supp.1062 (S.D.N.Y. 1995) (motion to disqualify counsel denied; former client could not reasonably believe that an attorney client relationship existed when his only communications with counsel were in the course of managing the business; former client had no reasonable expectation that the communications would be kept confidential from the current business and its directors); *MacKenzie-Childs LLC v. Mackenzie-Childs, 262 F.R.D. 241, 254 (W.D.N.Y. 2009); Nilavar v. Mercy Health System-Western Ohio*, 143 F.Supp.2d 909, 913 (S.D. Ohio 2001) (mere exchange of confidential information between counsel and organization's officers and directors about a matter of interest to the organization does not, by itself, create an attorney client relationship with officer or director.)

[8]*In re: Banks*, 584 P.2d at 292 (Or. 1978); see also, *Morris v. Morris*, 306 A.D.2d 449-452 (N.Y. App. 2003).

[9]*Reed v. Hoosier Health Systems, Inc.*, 325 N.E.2d 408, 412 (Ind. App. 2005) (counsel may not resolve conflict by "firing" the disfavored client).

THE KIRK FILES

A legally-vetted Charlie Brown Christmas

By Kenneth Kirk

CHARLIE BROWN: Doesn't anybody here know the true meaning of Christmas?

LINUS: I know the true meaning of Christmas, Charlie Brown.

Lights please!

And there were in that country shepherds abiding in the field, in accordance with local ordinances allowing private use of public property...

LUCY: Wait a minute! That's not in the script!

CHARLIE BROWN: We have a new script, Lucy. It's been reviewed by the legal team and edited accordingly.

LUCY: Legal team? Since when do we have a legal team?

CHARLIE BROWN: They were assigned to us by the producers: Charlie Brown Christmas, a joint venture including Peanuts Productions, LLC, a wholly-owned subsidiary of Family Entertainment, Inc., a Turks and Caicos Islands corporation.

LUCY: Good grief!

CHARLIE BROWN: That's my line.

LUCY: It was spontaneous.

LINUS: **...keeping watch over their flock by night, as independent contractors of the flock owners, and not as employees thereof, nor do said flock owners assume responsibility for the actions of aforesaid shepherds or their agents, employees or assigns.**

LUCY: Is the whole scene going to go on like this?

CHARLIE BROWN: I'm afraid so. The legal team insisted on it, and the insurance people backed them up. We really don't have a choice here.

LINUS: ***And, lo, the angel of the Lord came into close proximity with said shepherds, flocks, or related parties as a business invitee...***

"Doesn't anybody here know the true meaning of Christmas?"

LUCY: I think we should get new lawyers.

CHARLIE BROWN: This firm was already on retainer.

LINUS: ***...and the glory of the Lord shone round about them: and they were sore afraid.***

LUCY: No editorial comment?

LINUS: In keeping with the reasonable man standard for fear and soreness commonly accepted in the jurisdiction applicable to said occurrence.

LUCY: When did we start getting the lawyers involved in everything?

CHARLIE BROWN: Actually it's your fault. Remember how you kept pulling the football away when I ran up to kick it? After my last worker's comp case, the company started consulting legal counsel regularly.

LUCY: In that case, next fall I promise not to pull it away.

CHARLIE BROWN: Really? You promise?

LUCY: We'll figure out later whether there's consideration for the promise.

LINUS: ***And the angel said unto them, Fear not, although this is not intended to induce reliance in any way and ordinary caution should be applied. For behold, I bring you good tidings of great joy, which shall be to all people.***

LUCY: All people?

CHARLIE BROWN: He said all people.

LINUS: Terms and conditions apply.

LUCY: Of course.

LINUS: ***For unto you is born this day in the city of David a Savior, which is Christ the Lord.***

And this shall be a sign unto you; Ye shall find the babe wrapped in swaddling clothes, lying in a manger. The term "shall" herein should not be taken as a guarantee of performance or condition, nor shall any heavenly party be liable should such events not occur as stated, as any variation in predicted events constitutes an "act of God".

CHARLIE BROWN: That makes sense.

LUCY: And again, good grief!

LINUS: ***And suddenly there was with the angel a multitude of the heavenly host praising God, and saying, Glory to God in the highest, and on earth peace, good will toward men.***

LUCY: Toward men? Isn't that sexist?

CHARLIE BROWN: I'm not sure that's the current script, Linus. My version has "men" crossed out and says "women and others" in the margin. We'll check on that. Are we done?

LINUS: Almost.

The above account is based on information available in the public domain, and the producers have no responsibility or liability for application or misuse of said material by any other person or entity, including but not limited to pogroms, schisms, or inquisitions.

LUCY: You blockheads.

Quotations from copyrighted material in this article are used as permitted under the Fair Use Doctrine of U.S. copyright law, for satirical purposes. As if you didn't know that. Have a merry Christmas and a happy New Year and don't text while driving.

Bruce Horton remembered by his colleagues

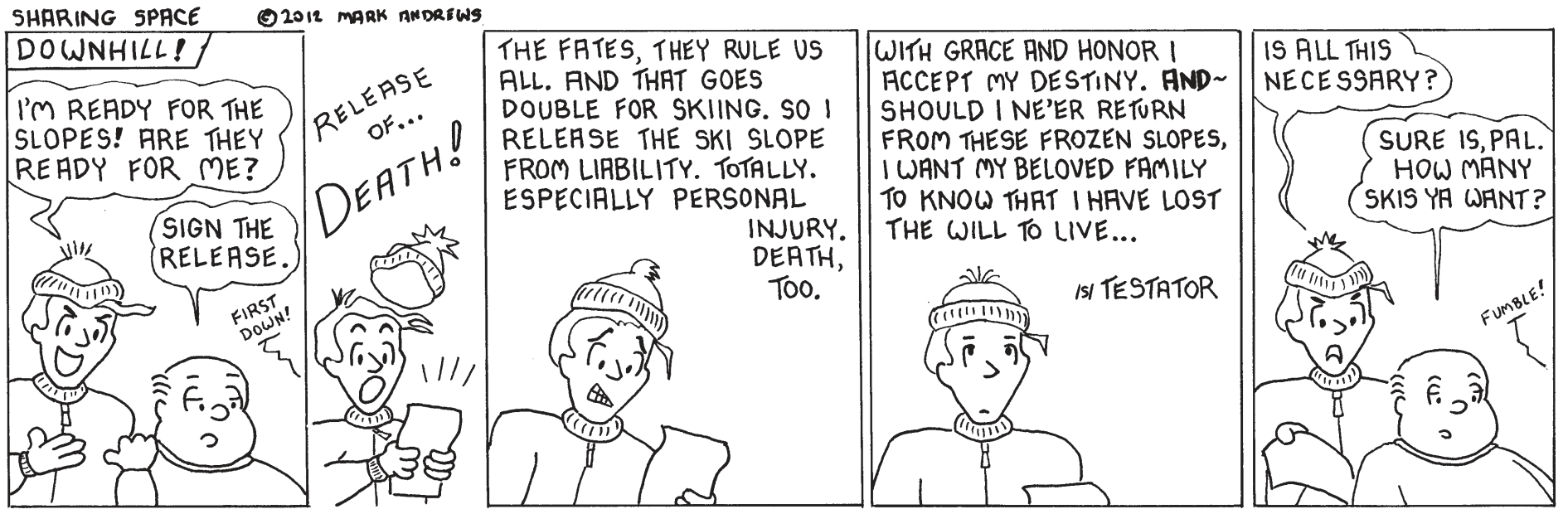
The Association of Alaska Magistrates and the Alaska Supreme Court recently honored the memory of the late Sitka Magistrate Bruce Horton during presentations held October 29, 2012, in Sitka.

Horton served the Alaska Court System for more than 20 years until his death in January 2012 following an accident in his home.

Born in Pasco, Washington, Horton graduated from high school in Spokane, received his undergraduate degree from Evergreen State College in Olympia, and earned his law degree at the University of Puget Sound. He moved to Alaska in 1986 and soon settled in Sitka, where he and his wife September raised their two sons, Gregory and Phillip. In 1990, Horton was appointed magistrate in Sitka, where he served with distinction and gained a reputation for being firm but fair. Over the years, he dedicated many volunteer hours to youth in his community, including serving as an adviser to Sitka Youth Court and as a friend and avid supporter of the students at Mt. Edgecumbe High School. He also contributed his time and expertise to assist his fellow judicial officers, who remember him with great fondness and admiration.

Mag. Mike Jackson of Kake, L, and Neil Nesheim, Area Court Administrator for the 1st Judicial District, C, present a memory quilt to September Horton, R, in honor of her husband Mag. Bruce Horton. The quilt was made by Horton's fellow magistrates and features one of his favorite T-Shirts. September Horton holds a plaque presented to her family by the Alaska Supreme Court.

Sitka Mag. Leonard Devaney, L, presents a plaque in honor of Mag. Bruce Horton to September Horton, R, during a recent ceremony in Sitka. The plaque was presented by the Association of Alaska Magistrates and will be displayed permanently at the Sitka Courthouse.



The arrival of toys and medical supplies in September left 400 children smiling, courtesy of ACP's usual cast of donors. Thank you all! Many of the toys distributed came from the New Canaan Rotary Club via Hobbs, Inc. and Chantal.

Mr. Bunny distributes toys & stuffed animals in the clinic Sept. 10.

Okay—maybe a couple of the inmates find Mr. Bunny a little creepy and don't smile, such as this girl with a draining abdominal wound. Nonetheless she leapt from her bed as Mr. Bunny approached. Doctors expect her to recover from the shock, said Sherman.

Alaskan and Mr. Bunny fight war for peace

Continued from page 1

physicians informed Mr. Bunny and his handlers that the boy had been in a virtual coma for 15 days since sustaining a head injury in an automobile accident and had not been expected to recover. And then, all of a sudden, the boy was trading thousand-megawatt smiles with ACP's masot.

Okay—nobody is trying to take anything away from God (or Allah, or any of the other names we force He or She to go by). But DAMN! This felt like hitting a lottery. The Afghan Child Project has spent years mired in terrorist attacks, killings and a war that seems driven more by defense industry profits than reason.

Of late, our spirits have predictably flagged. We will probably never get over all the useless killing and misery we have seen in Afghanistan. But now we will also never forget the moment we watched a left-for-dead member of Afghanistan's future suddenly wake up--smiling. Maybe the US and Afghanistan will follow suit.

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Help A Child. Help End A war: Visit www.afghanchildproject.org for more information on the project and the organizations contributing toys, supplies, books, and journals.

Bar Historians explore perennial political problem

Continued from page 1

Alex Bryner and Warren Matthews, and Judges Vic Carlson, Beverly Cutler, Michael Jeffery, and Gerald Van Hoomissen. Each meeting lasted a few hours and was recorded as an oral history. Brewster then transcribed and indexed the recordings, producing a "jukebox"-style website that allows anyone to watch the recordings, read the transcripts, and search the oral histories for any topic. Brewster also collected other materials related to the Alaska judiciary, including historical videos of Justice Jay Rabinowitz. Brewster gave a tour of the website to the crowd who attended the luncheon.

The luncheon featured selections from the oral histories of each of four guest speakers—Justices Bryner and Matthews and Judges Carlson and Cutler. The four speakers commented on their oral histories and answered questions on issues raised by their oral histories. Michael Schwaiger, a member of the Bar Historians Committee, moderated the panel's discussion.

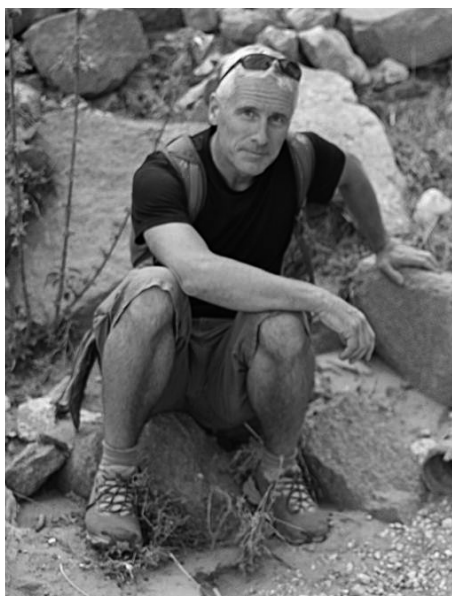
The speakers described their approaches to politically sensitive decisions and how their individual consciences governed the writing and issuing of opinions knowing that the reception of those opinions by newspaper editors, the governor, or the voters might have personal and professional ramifications for them. Judge Cutler explained how she arrived at a decision suppressing evidence in eighty DUI cases by testing her thinking by writing and re-writing her opinion. Justice Bryner explained how the Alaska Court of Appeal for years "felt the wrath" of trial attorneys, trial courts, and the legislature, especially after issuing the *Juneby* opinion.

Two speakers told personal retention election stories. Justice Matthews recounted being narrowly retained after writing a dissent in *Zobel* and facing election right after the Supreme Court of the United States stopped the distribution of permanent fund checks pending litigation in that case. Judge Carlson explained how anti-gay bigotry by members of the public and bar association had kept him from seeking retention in 1990.

The speakers addressed the threat to judicial integrity presented by moneyed campaigns against individual judges who have little chance to respond. Some speakers advocated stronger public-education campaigns to protect all judges from the risk of targeted campaigns.

DVDs/CDs of the luncheon presentation are available through the Alaska Bar Association.

Project Jukebox can be found at http://jukebox.uaf.edu/site7/project/70



Anchorage attorney Will Sherman fights his own war in Afghanistan.

Chief Justice Fabe receives NAWJ award

Chief Justice Dana Fabe of the Alaska Supreme Court was recently honored by the National Association of Women Judges (NAWJ) with its 2012 Justice Vaino Spencer Leadership Award.

Presented at the NAWJ conference in Miami, Florida, the award is selected by the NAWJ President and recognizes outstanding leadership in promoting the vision, core values and mission of the organization.

Chief Justice Fabe has been a member of NAWJ since she was first appointed to the Anchorage Superior Court bench in 1988, and she has served in many of the association's offices and board positions over the years, including a term as President from 2009-2010.

During her tenure with NAWJ, Chief Justice Fabe has been instrumental in fostering a number of special programs and projects that further the NAWJ mission, which is to promote the judicial role of protecting the rights of individuals under the rule of law through strong, committed, diverse judicial leadership, fairness and equality in the courts, and equal access to justice.

In 2006, she founded Success Inside and Out, a reentry conference conducted annually inside Alaska's women's prison, which is co-sponsored by NAWJ and has served as a model for reentry conferences in other states. More recently, she has been active in promoting NAWJ's MentorJet, a networking program created in Alaska in 2010 to bring diverse judges and legal professionals together with young people interested in legal careers, using a fun and lively 'speed mentoring' format. She has also provided strong support for NAWJ's Color of Justice program in Alaska, which is now in its 10th year.

Since her year as president, Chief Justice Fabe has remained active with NAWJ, serving on numerous committees and continuing to direct her enthusiasm, energy and leadership skills to the group's efforts. Here, NAWJ President Judge Amy Nechtem of Massachusetts, L, presents the Justice Vaino Spencer Leadership Award to Chief Justice Fabe, R.

What to do about Citizens United

By John Havelock

The Supreme Court's decision in Citizens United has ratified the takeover of the American political process by its oligarchic participants. The use of unlimited amounts of money to buy votes through advertising, particularly on TV, swamps or minimizes the room available for traditional methods of political persuasion based on facts, records, door-to-door campaigning, debate, etc.

The propaganda apparatus now available through campaign consulting and advertising far exceeds in quality and effect the machinery available just a decade ago. While Citizens United is hardly the sole reason this coup has taken place, it is certainly a dramatic topper, finally awakening a range of real citizens who might otherwise have scarcely noticed that politics had become just one more economic market.

Out of the alarm generated by Citizens United publicity, movements out of desperation are afoot to amend the Constitution of the United States by adding variations on a declaration that "corporations are not people." Most language choices under consideration are of doubtful utility in accomplishing the larger goal sought. It is not useful to make a general declaration that corporations are not people for all purposes. Many laws, including criminal statutes are specifically aimed at people, defined as including corporations. Also, given the Justices' point that publishing corporations spend money that influences the outcome of campaigns, it may not be wise to encase in constitutional language even the notion that corporations are not people for purposes of the First Amendment's protection of free speech.

If the gargantuan effort to amend the US Constitution actually gets underway, it should also reach to modify *Buckley v Valeo*, which established the principle, speaking roughly, that "money is speech," the first swing of the court's "one-two punch" upholding the rule of wealth in the substitution of modern advertising techniques for political discourse.

There are less strenuous ways of modifying the effect of Citizens United, loopholes, if you will, in the majority decision by Justice Kennedy which can at least provide substantial relief while the country sorts its way through to a constitutional amendment or awaits an opening on the Right in the court's membership roll. Much of the breast beating comes from people who live in states that have not taken full advantage of the Supreme Court's concession that governments may adopt rules that require full disclosure of the source of campaign expenditures.

The rule makers are legislators, long term incumbents for the most part, beneficiaries of the existing system. Reporting systems and limitations on advertising are a pain in a routine reelection campaign so there is resistance.

Remember that, not withstanding the uproar over the application of Citizens United to strike down federal laws regulating the financing of federal elections, the impact of disguised campaign money is spread much more broadly and with at least as great damage in localities. State and local elections are not regulated under federal law and commonly lack rigorous source disclosure laws. Very few states have adopted laws with the vigor of the rules left standing in the federal statute that became the subject of the court's peculiar expansion of First Amendment rights.

Does your state require that the message of sponsorship be clearly stated, with the same voice clarity, printed word size and allowance of time for digestion as is given the main message? What kind of enforcement authority is provided in your state and what kind of budgetary support goes to the enforcement agency? State legislatures have never been too keen on these kinds of laws and have used meager budgeting of enforcement to make them ineffective. The rule makers are legislators, long term incumbents for the most part, beneficiaries of the existing system. Reporting systems and limitations on advertising are a pain in a routine reelection campaign so there is resistance. No, we don't have the most rigorous system in place in Alaska, even though it may well be much better than the average for states.

So your first reaction to Citizens United should be, what are states in which I have an interest doing to require full disclosure of financing and advertising support systems? If your legislature is hopeless on the subject, maybe there is an initiative process in that state that allows the people to take over the job. If the will is there, the additional measure outlined below can be added to the initiative.

If you actually undertake to read it, it is not hard to be sympathetic with some aspects of Justice Kennedy's opinion that gave the court its frail 5-4 majority. Corporations are, after all, aggregates of individuals. If a bunch of people want to get together to broadcast speech, why is that any different from the same people doing it individually? Isn't the constitutionally protected right of the people to assemble and petition the government linked at the hip to freedom of speech? How about incorporated newspapers or magazines trying to influence the outcome of the election? Should we try to limit that too? Notice that the real problem is less Citizens United and more *Buckley v Valeo*, the case that long ago put the author at odds with the ACLU when that venerable defender of civil liberties agreed to support Mr, Buckley's assertion that the constitution requires that no limit be set on what he may spend to get himself elected with the same implication for what anyone or any corporation can spend.

While one might admire Justice Kennedy's solicitude for freedom of speech, in his Citizens United opinion, Justice Kennedy seems surprisingly unsophisticated in his thinking about corporations generally.

The business corporation is an entity allowed to be created under state law, for the singular purpose of making a profit for its shareholders. That is its history and the foundation of its success. We once thought that the sole purpose of the business corporation, as established under the state law of its incorporation, was to make a profit. This allowed shareholders to complain when management spent money on things that didn't quite seem to match that goal. Corporate law requires, at least in theory, that the extraordinary salaries of executives be justified, through the exercise of a business judgment, to attract and keep the talent that makes the profit. Contributions to charity, etc., are justifiable because they support the public spirited image of the corporation, allowing the corporation to sell more goods or get away with higher prices or lower wages, for example.

Originally, this was the justification for corporations getting into politics. Corporations do not lobby for objectives worthy in their own right. However high sounding their arguments, the point of corporate efforts is to persuade legislatures to adopt laws that will allow them to make higher profits or retain existing profit levels. If profits are at risk from some public policy or if an amended policy offers some advantage, the corporation contributes to the campaigns of individuals who will respond to the corporation's profit-making objective.

There is nothing sinister about this. Making profits in any way possible within the law is the purpose of a business corporation. But it remains something of a mystery why Justice Kennedy believes that when the people of a state authorize the creation of a profit making machine, it cannot protect the shareholders by prohibiting the use of the corporate form to influence elections. The rub, with respect to the publicly held corporation whose shares are traded among the general public, is that some shareholders may object to the use of their money to influence elections, particularly to favor a cause the shareholders disapprove of. If people want to organize to influence elections through buying speech, let them use a form of corporation designed for that purpose. But Justice Kennedy appears to insist that all corporations are constitutionally protected in a freedom to buy speech without check by the government. Presumably even a cemetery corporation, as organized under state law, to the surprise of the persons buried in the property of the cemetery, can finance campaigns among the living.

One wonders whether the freedom that the Justice so broadly espouses would extend to federally incorporated organizations. Probably not, since his foundation figure is likely the private individual or individuals who have chosen the form as a method of making a profit. That is, the freedom of speech protected by Justice Kennedy is derived from the freedom of speech of the shareholder.

State legislatures, the parents of all business corporations, realizing that the corporate form was useful for other purposes than making profits, set up laws allowing the incorporation of the LLC, the professional corporation, a railroad corporation, a religious corporation and non-profit corporations among other artificial persons.

Incorporation of insurance organizations is permitted with a wide variety of restraints on powers and purposes. Nonprofits are, under state law, committed to devote their efforts to the general welfare purposes set out as permitted in the law of the incorporating state. One might have thought that since corporations are creatures owing their existence to state laws which specify their powers and purposes, the states could restrict their powers and purposes with respect to financial commitments to influence the outcome of elections. But, no, the opinion makes it clear that once the state authorizes the creation of an organization, the state's powers are restricted by the First Amendment's prohibition of laws restricting free

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I am not a crank

By Vivian Munson

I am not a crank. I know this after reading *IDIOT AMERICA: How Stupidity Became a Virtue in the Land of the Free.* According to the author, Charles Pierce, a crank makes a great effort to develop a theory based upon absolute nonsense, and convinces the public to buy it, thereby expanding the limits of contemporary thought.

I have no theory to explain anything that is happening around me.

I just returned from Anchorage where I met with a client, a friend, and Don Young. I met with my client so that he could sign Social Security Disability Form HA-520-U5, the cover sheet for a brief that I'll be sending to the Appeals Council in Falls Church, Virginia, an area dense with mid-level government bureaucrats, consultants and lobbyists.

My client was able to sign his name on the form, nothing else. He suffers from mental illness which is obvious to a casual observer. Staff at Anchorage Community Mental Health told me that, prior to my arrival, the client had been circling in the lobby, "getting in the face" of other guests. He was responding to internal stimuli, as psychiatrists put it, speaking in a soft, high voice, unlike his normal loud, deep voice.

Sitting down with me, he ran his hands over his face repeatedly and patted his chest. I could not understand his earnest attempts to explain himself as I do not speak Tagalog, but from what I could gather, he was communicating with the Virgin Mary. He pulled out a tiny figurine or talisman from a place near his heart, inside the four layers of clothing that he wears as a homeless person, and nodded when I said, "Mary?"

I am beyond irritation with a system that finds him capable of landing and holding down a full-time job if he will just understand and accept what is happening to him, get to his medical appointments, pick up his meds and take them as prescribed while living on the street.

Next, while on the way into The Lucky Wishbone to meet my friend, I ran into Congressman Don Young. I am not a fan but greeted him politely. True, he is a Republican and a bit of a crank, but everybody knows where he stands from one day to the next. He is not a shape shifter and he was not placed in office by his father. This is hardly a ringing endorsement, but in the present political climate, it will have to do.

Lunch with my friend was depressing. A delightful, dedicated social worker with the patience of a saint, she was just fired, without warning, the day before her 60th birthday. As an additional act of meanness, her employer has challenged her application for unemployment benefits. What is going on in this world?

I am attempting to develop new friendships and new skills to cope with our wonderful changing times. Responding to invitations to dinners in Anchorage and afternoon get-togethers in Willow, I meet new people, listen to the ever-present political discourse, and strain to keep my mouth shut. Conversation always comes around to the economy, and true to form, the wealthiest people at the table rail against the poor, against entitlement.

Very nice friends and neighbors and colleagues sit there with the basics: a beautiful, big house, log-built or log-studded, with a view, a two car garage, an SUV and a pickup, a hangar, an airplane, a dock, a boat, an ATV, two snow machines, a trailer to haul them on, a greenhouse, and some chickens. Some have second homes in warmer places, some merely travel or set off on trophy hunting trips. The American dream, Alaska style, not entitlement.

I do not begrudge ultimate consumers their bounty. I do object to those ingrates who bristle with righteous indignation over the indolent poor, the elderly poor, the disabled, the 47%, the illegals, all of those lesser types of human beings who threaten the bounty that more successful citizens of our nation have earned through hard work and sacrifice, not entitlement.

When I look at my disabled clients and my more fortunate friends, I do not see the relationship between effort and wealth that others see. As a little girl, I asked my mother whether hard work led to money. She said no, look at waitresses. I think she was right. There is actually no relationship between effort and wealth. Who works harder than a Mexican migrant worker, or a meat cutter in a slaughterhouse? Or my best friend from high school who teaches 26 kindergartners in a ghetto school in New Jersey, and just had her pension cut?

The theory that wealth is based upon effort does not hold up to scrutiny.

It's a crank notion. Somehow, in the trying times ahead, we will have to develop a more careful approach, and cross-examine underlying assumptions, to answer the big question: Who gets to keep what in the future?

What to do about Citizens United

Continued from page 10

speech.

Under Citizens United, these organizations are constitutionally entitled to spend money collected as part of their pursuit of business profits to advocate for the election of individuals who may not be that supportive of the objectives set out in the section of their articles of incorporation devoted to purposes. Religious corporations offer a special case. If a religious corporation spends funds promoting some kinds of political purpose it loses a preferred tax status, which suggests yet another kind of limitation that might be imposed on corporations that engage in politics.

Justice Kennedy does reveal some indirectly, express reservation regarding the scope of constitutional freedom with which he has endowed all forms of state corporations. He does so by stating twice that correction of abuses can be made through the exercise of corporate democracy. "There is, furthermore, little evidence of abuse that cannot by shareholders be corrected through the procedures of corporate democracy." In saying this he underlines his artlessness concerning the nature of democracy in the business corporation but at the same time creates a window in Citizens United that indeed, allows for major corrections of abuses of the form.

It has been said that corporate democracy is to democracy as marshal music is to music. The government of a widely held corporation is analogous to that of a municipal corporation that allows the council members to finance their reelection out of the city treasury. Of course we don't let a municipality do that. Unlike the ordinary election, strict rules regarding the accuracy of what is said in a corporate directors election campaign prevent the kind of broad attack on the incumbent that we are used to in civil election campaigning.

The defense of "the truth" comes from the corporate treasury and failure to speak "truth" will disqualify a candidate. With rare exceptions, the incumbent members of the board of directors select who shall fill vacancies, even though the newly selected director nominally runs in an election in which shareholders are the voters. In the higher ranges of corporate life, directors know each other from company to company and hold directorships in several companies on reciprocal invitation.

The effect of these rules established in statutes and a long history of court decisions, is that corporate democracy is democratic in a very peculiar way. At least as to corporate participation in civic political campaigns, Justice Kennedy gives an indirect invitation to the legislative branch to improve the quality of corporate democracy. Nothing in his ruling suggests that legislation improving the quality or availability of corporate democracy is prohibited.

Improved corporate democracy is the key to prevent our election systems from being overrun by undemocratically controlled corporate money. Each state is invited to amend its corporate code to require that shareholders vote on whether the corporation should spend money with the intention of influencing the outcome of an election. States may have constitutional difficulty in applying this law to foreign corporations, that is those not incorporated locally, though the question is not closed. Accordingly, Congressional action is needed to require that corporations engaged in interstate commerce must provide for a vote of shareholders before spending money intended to influence the outcome of an election.

Absent Congressional action, foreign corporations can be required to disclose in their political advertising where they are incorporated and whether they are acting outside the boundaries applicable to corporations organized under state law. As an addition to the requirement of shareholder approval, consideration can be given to an additional requirement that a corporation whose shareholders do vote to spend money to influence the outcome of an election must give dissenting shareholders the option of taking their share of the expenditure in dividends.

None of this prevents the closely held corporation owned by one or a few individuals from spending on elections to the heart's content of its unanimous shareholders, but this is just a small extension of the ruling of *Buckley v Valeo*. We are left in this case to the permitted requirements of strict disclosure of just who owns the corporation that is indulging in this expenditure, including who owns the corporations that own the stock in the corporation ad infinitum until you reach real, warm bodied contributors. These requirements must make the shout out of true ownership as loud as the message itself.

In the end, the damage done to free elections by the Citizens United case can be corrected, leaving us only with *Buckley v Valeo*. The real problem in making these corrections is in finding the political will in the Congress or in state legislatures to mitigate the damage.

Alaska Bar Foundation
Jay Rabinowitz Public Service Award

By Susan Carney, Ken Eggers, Vance Sanders & Mara Rabinowitz

The Jay Rabinowitz Public Service Award carries the name of the former Alaska Supreme Court Chief Justice who was dedicated to the principle that all Alaskans are entitled to equal access to the judicial system, once observing in an opinion that "the judiciary in a multiracial jurisdiction, such as Alaska, must be peculiarly sensitive to racial discrimination."

He devoted much effort to improving the administration of justice in rural Alaska, overseeing the establishment of Superior Courts in rural areas and the expansion of the magistrate system for smaller villages. He also served as a mentor for countless attorneys, public servants and judges who can trace their roots to his Fairbanks chambers. Beginning in 2003, the Jay Rabinowitz Public Service Award has been given each year by the Board of Trustees of the Alaska Bar Foundation to an individual whose life work has demonstrated a commitment to public service in the State of Alaska in any realm, which may include, but is not limited to, the field of law. Nominees need not be lawyers or judges. The past recipients are:

2003 - Mark Regan
2004 - Art Peterson
2005 - Judge Thomas B. Stewart
2006 - Lanie Fleischer
2007 - Bruce Botelho
2008 - Judge Seaborn J. Buckalew, Jr.
2009 – Andy Harrington
2010 – Barbara J. Hood
2011 – Judge Mary E. Greene
2012 – Trevor Storrs

The Award is funded through generous gifts from the public in honor of the late Alaska Supreme Court Justice Jay Rabinowitz. Nominations for the award are solicited in the beginning of every year. The present members of the committee that reviews the nominations are Susan Carney from Fairbanks, Ken Eggers from Anchorage, Vance Sanders from Juneau and Mara Rabinowitz from Anchorage. The award is presented at the Annual Convention of the Alaska Bar Association.

The justices of the Alaska Supreme Court display their new Mt. Edgecumbe sweatshirts, which were presented to them by the school at the close of the Supreme Court LIVE program. L-R: Justice Craig F. Stowers, Justice Walter L. Carpeneti, Chief Justice Dana Fabe, Justice Daniel E. Winfree, and Justice Peter J. Maassen.

Attorneys and judicial officers in Sitka volunteered to visit high school classrooms in advance of Supreme Court LIVE to help students prepare for the program. Pictured with members of the court at the close of the program are L-R, front row: Mt. Edgecumbe Principal Bernie Gurule; Mag. Karen Hegyi (Ret.); Mag. Leonard Devaney; John Casperson, attorney for Appellants; James Brennan, attorney for Appellees; Rachel DeNardo, Law Clerk; Brandon Marx; Anneliese Moll, Student Timer; and Marilyn May, Clerk of the Appellate Courts.

Supreme Court LIVE in Sitka

On Monday, October 29, the Alaska Supreme Court heard oral argument at Mt. Edgecumbe High School in Sitka as part of the Supreme Court LIVE educational outreach program. During the first visit by the court to Sitka since Statehood in 1959, over 300 students from area high schools gained a first-hand look at the appellate process and an opportunity to question both the attorneys involved and members of the court. The Sitka program was the sixth presentation of Supreme Court LIVE since its inception in early 2010.

ALPS launches Cyber Response & EPLI

For almost 25 years, the Attorney's Liability Protection Society (ALPS), A Risk Retention Group, has anticipated emerging coverage needs of attorneys nationwide through its core Lawyers' Professional Liability Insurance policy. Today, ALPS is proud to more comprehensively protect law firms with the Sept. 27 launch of ALPS Cyber Response and ALPS Law Firm Protect (EPLI).

"With more state bar association partnerships than any other LPL carrier in the country, we have the good fortune of hearing what lawyers need, directly from them," said Robert W. Minto, Jr., CEO and Executive Chair of ALPS Corporation. "We are also a leader in addressing emerging risks – the ones lawyers may not even know are threats to their practice."

ALPS Cyber Response

Client data and case files are the most important information a law firm maintains. With new advances in technology, firms have more options of how they store this data. From document management software to Cloud data storage to the increased reliance on smart phones and tablets for interaction with clients, the options are endless; but so is the exposure. According to Verizon's 2011 Data Breach Investigation, small to medium-sized companies have become "attractive targets for hackers."

Small to mid-sized law firms face the same risks. With client data and case files on the line, the repercussions of a cyber-security breach could be financially devastating and a reputational blight to law firms and their clients. ALPS Cyber Response is designed specifically for attorneys, offering a single-stop, real time breach response solution.

ALPS Law Firm Protect (EPLI)

As with any business, law firms are subject to claims arising from an employment practices complaint. An EPLI policy offers protection against claims and lawsuits that are brought against a business, its officers or directors, or its employees and managers. Most standard business insurance policies don't specifically cover employment practices liability, and claims against employers are on the rise.

Dealing with this type of complaint is time-consuming and disruptive to the day-to-day functions of the law firm. Productivity lost combined with the financial burdens of such claims can be detrimental to the health of the firm. The reason ALPS is offering ALPS Law Firm Protect is so firms can continue to operate during adverse circumstances.

Education and Risk Management

ALPS has long provided Continuing Legal Education and risk management to our policyholders and the greater legal community. ALPS takes a preventative approach not simply to mitigate claims, but to help foster the betterment of the legal profession. ALPS is offering its Cyber Response and Law Firm Protect (EPLI) policies as an integral part of its insured firms' "lines of defense," but ultimately both ALPS and the firms it insures want to avoid claims altogether.

Through live CLE events, webinars and online education, ALPS is working to help all attorneys identify and safeguard their firms against cyber-security breaches. It is also building awareness of the inherent risks of being an employer. ALPS helps firms understand how to properly manage those risks by adhering to the best employment practices and the steps they can take to protect their firm.

Both ALPS Cyber Response and ALPS Law Firm Protect (EPLI) are now available to ALPS Lawyers' Professional Liability Insurance policyholders on an opt-out basis at a reasonable, flat per-attorney rate. For more information, visit http://protectionplus.alpsnet.com.

In the Supreme Court of the State of Alaska

In the Disciplinary Matter of	)	
	)	Supreme Court No. **S-14828**
	)	
Philip M Kleinsmith	)	Order
	)	Alaska Bar Rule 27(c)
	)	
	)	
	)	Date of Order: **10/1/12**

ABA Membership No. **8901001**
ABA File No. **2012D131**

Before: Fabe, Chief Justice, Carpeneti, Winfree, Stowers, and Maassen, Justices

On consideration of the Final Judgment and Order of the Supreme Court of Arizona dated 3/20/12, the Agreement for Discipline by Consent with attachments, the Response to Notice and Order served 8/14/12, with attachments including the Order Terminating Probation dated 6/18/12, and the Alaska Bar Association's nonopposition to the imposition of identical discipline,

It is Ordered:

Reciprocal discipline is **Imposed** pursuant to Alaska Bar Rule 27(c) as follows:

(1) Philip M. Kleinsmith is publicly censured under Alaska Bar Rule 16(a)(4) which is the equivalent to the reprimand imposed by the Arizona Supreme Court.
(2) Since Philip M. Kleinsmith has successfully completed the probation imposed by the Arizona Supreme Court, no additional probationary period is imposed.

Entered at the direction of the court.
Clerk of the Appellate Courts
/s/Marilyn May
cc: Supreme Court Justices

Bar People

In the spirit of the season, it's farewell to Erick Cordero

Erick Cordero

Erick Cordero will be working as chief of staff for newly elected Rep. Lynn Gattis from Wasilla's House District 9. They knew each other from serving on the Mat-Su school board together and Erick volunteered as her campaign manager.

Erick started with the Alaska Pro Bono Program Inc., a sub grantee of the Alaska Legal Sercies Corp. (ALSC), back in 2001 as its Operations Manager. He was then hired as ALSC's pro bono coordinator in May 2002 by ALSC's Executive Director, Andy Harrington. At the time, APBP faced some financial shortfalls and had to close its office. He continued working for APBP's board of directors as a consultant until 2010. Erick shared with us some of the funniest, scariest and proudest moments during his tenure with ALSC and APBP.

Said Cordero of these years:

Proudest moment — Getting an award recognition from the Center for Missing and Exploited Children for helping an ALSC staff attorney with a family reunification case. I had to research the Mexican Civil Code and recruited a law firm in Mexico City to help on a pro bono basis. I was also selected as a "Top 40 under 40" by the Alaska Journal of Commerce that same year (2005) for helping Spanish-speaking low-income Alaskans and served on the National Association of Pro Bono Professionals on their executive committee while doing all of that.

Funniest moment — Singing Christmas Carols with Christine Pate during a recruitment luncheon with attorneys from Jermain Dunnagan & Owens. It has been many years, but they still remember me for that. It was really Andy Harrington and Christine's idea.

Dumbest moment — Sending a volunteer attorney to the wrong location for a clinic, calling to make a correction and then learning that the first location was actually the right one!

Regretful moment — Making a joke about lawyers at my very first presentation before the Valley Bar Association members in Mat-Su. This was 10 years ago, I think they've forgotten.

Most Heart-warming moment — I received a card a few years ago from a former pro bono client (a victim of severe domestic violence). She wanted me to know that her pro bono attorney was an angel and had saved her life. That volunteer attorney is now a judge in Palmer (yes, Vanessa, that's you). I was not able to nominate Vanessa White for the pro bono award after she became a Judge, but she still deserves to be recognized for this.

Upsetting moment — Every time when not being able to do more for those who need the help. Resources are always limited, but we do what we can.

Thankful moment — Every day for our volunteers - hundreds of low-income Alaskans received help through the generosity of Alaska Bar Association members. The list is too long to print in here, but you know who you are. I will always be grateful to all of my volunteers.

Lawyers selected as Super Lawyers

Six lawyers from the Anchorage, Alaska office of Davis Wright Tremaine LLP have been selected by their peers for inclusion in the 2012 edition of Alaska Super Lawyers. The Super Lawyers list, published by Thomson Reuters Legal, is identified through an extensive research and survey process, starting with peer nominations. Only five percent of the lawyers in Alaska are named to this list.

Davis Wright Alaska lawyers named to the 2012 Super Lawyers list were:

Jon S. Dawson – Business/Corporate, Business Litigation, Intellectual Property; **Gregory S. Fisher** – Employment & Labor, Appellate; **James H. Juliussen** – Employment & Labor; **avid W. Oesting** – Business Litigation, Bankruptcy and Creditor/Debtor Rights; **Joseph L. Reece** – Business/Corporate, Real Estate; **Robert K. Stewart, Jr.** – Employment & Labor , Government Contracts, General Litigation.

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

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Stoel Rives LLP, also announced that **Joseph J. Perkins, James E. Torgerson** and **S. Lane Tucker** have been named to the 2012 Alaska Super Lawyers directory. The Super Lawyers® ratings are based on a peer nomination and evaluation process in combination with independent third-party research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis.

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Lane Powell Shareholders **Brewster H. Jamieson** and **Michael J. Parise** were named as 2012 "Alaska Super Lawyers" by Thomson Reuters' Super Lawyers magazine. Jamieson and Parise practice in the Anchorage, Alaska office of Lane Powell. They were chosen as "Alaska Super Lawyers" in the areas of General Litigation and Business/Corporate, respectively.

Lawyers named as Best Lawyers

Five attorneys of the Manley & Brautigam, P.C. law firm, Robert L. Manley, Peter B. Brautigam, Jane E. Sauer, Charles F. Schuetze and F. Steven Mahoney, have been selected by their peers for inclusion in *The Best Lawyers in America* 2013 Edition.

Peter Brautigam and **Robert Manley** are included in the practice areas of Taxation and Trusts & Estates. Mr. Manley is also included in the area of Litigation-Trusts & Estates. **Jane E. Sauer** is included in the practice area of Corporate Law. **Charles Schuetze** is included in the practice areas of Corporate Law and Tax Law. **F. Steven Mahoney** is recognized in the practice areas of Natural Resource Law, Non-Profit/Charities Law, Oil & Gas Law, Energy Law, Tax Law and Litigation & Controversy-Tax Law.

Stoel Rives LLP also announced that it achieved very high marks in the 2013 U.S. News – Best Lawyers "Best Law Firms" survey published In November. "Best Law Firms" evaluates more than 11,000 law firms located in the nation's leading metropolitan regions, using surveys of thousands of clients, lawyer peer reviews and law firm submissions.

Stoel Rives achieved a national first-tier rankings in Construction Law, Energy Law, Litigation-Environmental, Mining Law, Native American Law, Professional Malpractice Law – Defendants and Timber Law. In addition, the firm achieved 11 national tier-two and 12 national tier-three rankings.

All of the firm's eligible offices received metropolitan first-tier rankings, 96 in all. Metropolitan First-Tier Rankings in Alaska included Commercial Litigation; Litigation - Eminent Domain & Condemnation; Litigation - Environmental; Mining Law; Natural Resources Law, and Oil & Gas Law

"We take pride in our strong and enduring client relationships," said Bob Van Brocklin, Stoel Rives Managing Partner.

Stoel Rives recognized for workplace practices

The Stoel Rives LLP Anchorage office has been honored with the 2012 Alfred P. Sloan Award for Business Excellence in Workplace Flexibility for its use of flexibility as an effective workplace strategy to increase business and employee success.

This prestigious award, part of the national When Work Works project, recognizes employers of all sizes and types across the country.

"We are delighted that our commitment to work place flexibility is being recognized by receiving the Sloan Award for Business Excellence," said Bob Van Brocklin, Stoel Rives Managing Partner. "We are proud of our programs and policies which make our firm a successful, attractive, and vibrant place to work."

Workplace flexibility — such as flextime, part-time work and compressed work weeks — has been demonstrated to help businesses remain competitive while benefitting employees.

"Our research consistently finds that employees in effective and flexible workplaces have greater engagement on the job and greater desire to stay with their organization," said Ellen Galinsky, president of Families and Work Institute. In addition, they report lower stress levels and better overall health.

"As a recipient of the 2012 Sloan Award, Stoel Rives ranks in the top 20% of employers nationally in term of its programs, policies and culture for creating an effective and flexible workplace," said Galinsky.

The firm was also recently recognized by the American Heart Association as a Fit-Friendly Worksite gold award recipient. The award is based on fulfilling a specific set of criteria such as offering employees physical activity support, increasing healthy eating options at work and promoting a wellness culture.

Stoel Rives participates in the American Heart Association's Heart and Stroke Walk, giving incentives to those employees who choose to run, bike or walk to work, providing flu shots to all employees and ensuring access to fresh fruit in the lunchrooms.

New 9th Circuit Lawyer Representative

Darrel J. Gardner was appointed by the U.S. District Court to be the new 9th Circuit lawyer representative. Feel free to contact any of the lawyer representatives with questions/concerns regarding federal practice and procedure:

Darrel J. Gardner
Brewster Jamieson
Heather Kendall-Miller (appellate rep)
Greg Razo
Lane Tucker

Bar People

Foley & Foley celebrates 25

The law firm of Foley & Foley, P.C., celebrated its 25th anniversary in business with an open house and wine tasting event at its offices on September 27, 2012. More than 100 people attended the event and enjoyed a variety of wines provided by WineStyles and food served by Alaska Dream Catering.

"We wanted to mark the occasion with a special event," said Richard H. Foley, Jr., one of the firm's founding partners. "We feel fortunate to have had the opportunity to work together and succeed in a private business for so many years. We were pretty young when we started and didn't even think about the fact that Alaska was in a post-oil-boom recession when we took the leap."

The firm had its beginnings in January 1987 when Susan Behlke Foley left her employment as an attorney with the law firm of Birch, Horton, Bittner, Monroe, Pestinger & Anderson and started her own office for the private practice of law. Nine months later, in September 1987, her husband, Richard H. Foley, Jr., left his employment with Wade & DeYoung and hung out his shingle to practice law in the same office space. The two practices began as separate sole proprietorships that shared office space, but the firms were officially merged the following year and incorporated as Foley & Foley, P.C.

"In 1987, husband and wife law practices were a bit of a novelty for Alaska. Two lawyer couples are now fairly common, so being in practice together has become more mainstream," said Susan. "Like other 'mom and pop' businesses, it just makes a lot of practical sense."

The firm has been growing since 2004 when William M. Pearson joined the firm as an associate attorney. Bill became a shareholder in 2010. A fourth attorney, Nikki C. Martin, started with the firm in September 2011. The staff has also grown as well, and currently consists of two paralegals, three administrative assistants, and a receptionist.

In 1998, Foley & Foley decided to limit its practice areas to estate planning, business planning, and probate work. By focusing on a narrow area of the law, the firm has been able to improve the level of service offered to clients.

The offices of the firm have slowly moved ever southward over the years. Originally located in the 1400 Benson Building, the firm moved to the Denali Tower South in 1990; the Dimond Center Professional Tower in 1995; and to its current location in South Anchorage on O'Malley Centre Drive in 2006.

Richard and Susan Foley. Then and Now.

Northwest law firm opens Anchorage office

Garvey Schubert Barer is pleased to announce the opening of its Anchorage, Alaska office with the addition of Julia Holden-Davis and Barbra Nault. Both Holden-Davis and Nault join as owners.

Announced Nov. 1, he new office is located at 2550 Denali Street, Suite 1502, Anchorage, Alaska, 99503. The Anchorage office marks Garvey Schubert Barer's sixth location, complementing the firm's Seattle, Portland, New York, Washington, D.C. and Beijing, China, offices.

"Garvey Schubert Barer attorneys have historically provided services in Alaska, in areas such as healthcare, fisheries, business, estate planning, environmental litigation, labor/employment and white collar crime. We are excited to now have the ability to base those services out of a local office, with Alaska-licensed attorneys on the ground," said Anne Preston, chair of Garvey Schubert Barer. "As a firm, we constantly strive to better serve our clients' needs. Opening an office with experienced Alaska attorneys is one of the ways we are pleased to be able to continue this practice."

Four Garvey Schubert Barer owners will lead the Alaska office: Holden-Davis, Nault, Stephen Rose and Hal Snow.

Holden-Davis primarily works with construction and government contractors and will chair Garvey Schubert Barer's construction practice group. In addition, she provides general litigation services. Holden-Davis serves on the board of directors for the Association of General Contractors (Alaska chapter), co-chairs the education committee for the Associated Building Contractors of Alaska and is the vice-chair of the University of Alaska's construction management advisory board. Holden-Davis also is active at a national level, serving on the steering committee of Division 4 (Project Delivery Systems) of the American Bar Association's Construction Forum and on the Association of General Contractors of America's Federal and Air Force committees.

Nault's practice focuses on business and corporate transactions, healthcare, employment law and business litigation. She also counsels clients in oil and gas regulatory matters and serves as outside general counsel for small to mid-sized companies in Alaska. Nault began her legal career in Juneau, Alaska, as law clerk to the Hon. Larry R. Weeks, Presiding Judge, Superior Court for the State of Alaska, and then worked in private practice, before relocating to Anchorage in 2001. Nault is active in the Health Law Section of the Alaska Bar Association and serves on the Alaska Bar's mediation panel. She is a member of the American Health Lawyers Association and Garvey Schubert Barer's healthcare, business and employment practice groups.

Both Nault and Holden-Davis join from Anchorage-based Bankston Gronning O'Hara, P.C.

Rose, chair of Garvey Schubert Barer's healthcare practice group, is well known to Alaska healthcare providers and has represented hospitals, doctors and pharmacies for more than 25 years. Rose represented the Alaska State Hospital and Nursing Home Association in its successful Medicaid payment rate challenge in Department of Health & Social Services, Medicaid Rate Commission v. Alaska State Hospital & Nursing Home Association, and currently assists clients with Certificate of Need issues, HIPAA compliance and government audit responses.

Snow has 30 years of experience helping business owners and private individuals in the areas of business succession planning, asset protection and multi-national planning issues. He represents many of Alaska's larger homegrown businesses.

Garvey Schubert Barer is a business law firm focused on clients in the United States and abroad, with strategic emphasis on the Pacific Northwest. From six business-critical locations: Anchorage, Beijing, Seattle, Portland, OR; New York, and Washington, D.C., the firm serves as outside counsel to established market leaders and newly launched enterprises. Since 1966, Garvey Schubert Barer has worked with clients in virtually all industry sectors, including healthcare, technology, trade and transportation, hospitality, travel & tourism, maritime/admiralty, real estate, communications and media, entertainment, and manufacturing. The firm provides cost-effective, practical solutions to a broad range of businesses, including publicly and privately held companies, investment firms, financial institutions, not-for-profit organizations and individuals. On the Web at: http://www.gsblaw.com.

July 2012 Alaska Bar Exam Results

Total number of applicants: 102
Number passing: 70
Overall pass rate: 69%

Number of 1st time takers: 76
Number of 1st time takers passing: 59
1st time takers pass rate: 78%

Below is the list of passing applicants from the July 2012 Alaska Bar Exam.

Badgley, Cori
Bailey, Carlos Nicholas
Balderas, Joseph
Barrickman, Evan Andrew
Beard, Raymond E.
Bird, Mario Lincoln
Blackmarr, Ryan Parker
Boskofsky, Peter A.
Brown, Mamie S.
Calt, Shannon K.
Camozzi, Brian David
Carpeneti, Lia
Carpeneti, Marianna
Carroll, Shannon
Carruth-Hinchey, Casey Alexandria
Circle, Blake
Circle, Duke K.
Costello, Megan Jean
Crone, John Reily
Davis, Kyle Bartlett
Deitrick, Sean Soren
DeWitte, Claire Frazier
Dunbar, Forrest
Fang, Katherine
Fansler, Zachary J.
Fleming, Mary Clara
Gage, Jared K.
Gallo, Madeline Ariana
Gerard, Jonathan Michael
Goodnight, Brittany Ann
Hayes, Joseph Matthew
Hoke, Christopher
Klein, Noah
Klugman, Andrew James
Kopperud, Peter
Kramer, Leslie Jane
Krauza, Molly M.
Lockwood, Melony
McKay Jr., Patrick John
Merrell, Brooke
Michels, Aaron John
Morin, Paul Siler
Nauman, Nicholas Patrick
Norman, Vanessa Rae
Packer, Kimberly Trujillo
Peterson, Catherine Kelly
Rader, John Lafayette
Rose, Michael
Ruff, Kathryn Ann
Sand, William A.
Scheperle, Marie Constance
Schmidt, Karen Elizabeth
Scott, Gabriel
Sirak, Reed Wilson
Sommer, Lauren E.
Stanley, Sarah E.
Strong, Miranda L.
Suffian, Craig David
Swan, Andrew Edward
Toft, Ariel Jessica
Tsaousis, Kimberly A.
Van Patten, Rachel M.
von Gemmingen, Kevin-Ryan A.
Watts, Timothy R.
Weinstein, Samantha
Wilkinson, David Andrew
Woolfstead, Bailey Jennifer
Wright, Emily L.
Yarmon, Lionel James
Young, Julia Christine

Bar People

Jermain Dunnagan & Owens, P.C. is pleased to announce **Bill Wuestenfeld**, **Mike Corey** and **Peter Sandberg** are joining the firm. Bill, Mike and Peter have been practicing with Wuestenfeld & Corey, LLC. Wuestenfeld & Corey is the successor law firm to Camerot, Sandberg & Hunter, founded in 1977.


Wuestenfeld


Corey


Sandberg

Bill and Mike bring decades of trial experience to JDO. Bill represents clients defending personal injury, professional liability, wrongful death and other complex claims, defending professionals in administrative proceedings, and representing clients in fishery disputes. Bill has particularly deep expertise representing insurers in coverage disputes and bad faith claims. Mike also has spent over 25 years representing individuals, corporations and public entities throughout the state. Mike defends personal injury claims, handles insurance coverage disputes and litigates commercial disputes. Due to his expertise, he has been retained to lead significant recovery actions in various states. Peter Sandberg is joining JDO as a senior associate. Peter was raised in Alaska. His practice focuses on prosecuting and defending commercial cases, placing particular emphasis upon real estate litigation, corporate dissolution cases, class actions and cases involving the Unfair Trade Practice Act. He handles both defense and prosecution of class actions.

JDO offers experience, expertise and bottom line results for private and institutional clients throughout Alaska, with a particular focus in the following practice areas: Business and Commercial Law, Education Law, Employee Benefits, Labor and Employment Law, and Litigation, Arbitration and Appeals. Bill, Mike and Peter will advance the firm's mission to provide practical, experienced counsel for clients involved in complex disputes.

Jeffrey F. Davis has joined Manley & Brautigam, P.C. as an associate attorney. His practice focuses on probate, estate planning and litigation. Jeff has two years of prior litigation experience in Anchorage and was a law clerk to the Honorable Judge Esch at the Nome Superior Court.


Davis

International law firm Dorsey & Whitney LLP announced in November that **Sara Peterson** has joined the corporate practice as Of Counsel in Dorsey's Anchorage office. Ms. Peterson's practice is focused on corporate and transactional matters and she has developed significant expertise with the Small Business Administration (SBA) 8(a) government contracting program for Alaska Native corporations and other minority-owned businesses. Ms. Peterson was previously associate general counsel with Bristol Bay Native Corporation. She received a B.A. (International Business) from Alaska Pacific University and a J.D. from Hamline University School of Law.


Peterson

In addition, **Rachel Richards** has joined the litigation practice as an associate. Ms. Richards was previously an assistant general counsel with the federal government, where she worked in the areas of administrative law, ethics, and government contracts. She received a B.A. (French) from the University of Texas at Austin and a J.D. from the University of Michigan.


Richards

Commenting on the announcement, Jahna Lindemuth, a partner and head of Dorsey's Anchorage office said, "We are very pleased that Sara and Rachel have decided to join Dorsey. Sara's strong connections in the Alaska Native community will help us better serve our clients. Rachel has gained valuable experience in her time at the federal government which also will be beneficial to our clients doing business in Alaska."

Clients have relied on Dorsey since 1912 as a valued business partner. With 19 locations in the United States, Canada, Europe and the Asia-Pacific region, Dorsey provides an integrated, proactive approach to its clients' legal and business needs. Dorsey represents a number of the world's most successful companies from a wide range of industries, including leaders in the financial services, life sciences, technology, agribusiness and energy sectors, as well as major non-profit and government entities.


From left are Paula Jacobsen, Tonja Woelber, and Christina Passard

Tonja Woelber & Paula Jacobsen have formed a new firm with **Christina Passard**. Woelber, Jacobson & Passard, LLC was established Sept. 1 in Anchorage. Passard formerly was with Hartig Rhodes Hoge & Lekisch and practices in the areas of tax, estate planning, asset protection and probate.

2013 Upcoming Programs

February 1

Probate Litigation and Mediation
Sponsored by the Estate Planning/Probate Section

9:00 a.m. - 12:15 p.m. | Hotel Captain Cook | $99 Registration Fee | CLE # 2013-004

Presented by: Judge Mark Rindner, Third Judicial District Court, Judge Patrick McKay, Third Judicial District Court, Master Jack Duggan, Probate, Anchorage, Trigg Davis, Davis & Mathis, P.C., Tonja Woelber, Woelber, Jacobson & Passard, LLC

February 8

Tech Tips for Attorneys
Presented by: Jebez LeBret, Author, *How to Turn Clicks Into Clients*

8:30 a.m. - 11:45 a.m. | BP Energy Center | $79 Registration Fee - book included
3.0 Ethics CLE Credits | CLE # 2013-005

February 22

Advocacy for Individuals with FASD in the Civil and Criminal Justice Systems
Sponsored by the Law & Community Health Forum and the Alaska Mental Health Trust Authority.

Featured Speakers: Dr. Sterling Clarren & David Boulding

Friday, February 22, 2013 | 8:30 a.m. - 4:30 p.m. | Cook Inlet Tribal Council
$25 Registration Fee - includes evening networking reception
CLE # 2013-002

The Trust
The Alaska Mental Health Trust Authority

2012 MCLE Reporting Forms are due by February 1, 2013

For more information on these programs visit our website at:
www.alaskabar.org

FAMILY LAW

More tips for the solo family law lawyer

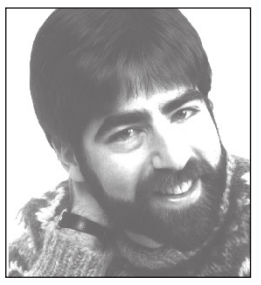
By Steven Pradell

Things may have changed for the 70 applicants who recently passed the Alaska Bar since I went to law school in the 1980s. Back then, there were no courses in how to run a law firm. I learned about the day-to-day practice of law from my secretary, a professional legal secretary (PLS) during my first year as an associate attorney.

For those who are thinking about hanging their own shingles and venturing on their own, I offer some more lessons learned along the way.

Marketing is an art. You will need to spend time asking yourself what your skills are, what you want to do, and how to get your message out there. There are many books available on the subject. Read them. With the advent of the Internet, there are many ways to market on a shoestring budget.

At some point a decision may be made about whether or not to be a jack of all trades and attempt to do everything asked, or whether to focus your practice into more of a specialty boutique. You may find that you actually do better by limiting your practice to a certain set of defined parameters than in trying to be everyone's lawyer for everything. Standing out among your peers may be a helpful marketing tool as well. Being a gatekeeper and serving as a resource to clients by referring them to other lawyers for certain projects may sound scary, as you are giving away business. However, if your clients see you as someone they trust to steer them in the right direction, this can cement a long term bond such that they keep coming back to you for advice over the long haul. Ultimately, referrals are the best marketing tool in your arsenal, and the price is right.



"For those who are thinking about hanging their own shingles and venturing on their own, I offer some more lessons learned along the way."

Choose your clients carefully. Depending on your practice area, especially with family law, you may be involved in a case for a long time. Ask a lot of questions during the initial interview. Whether or not a client can pay your fee is an important consideration, but not the only one. You and your office staff may have to work with your potential client for many years. Can you work well together? Is there effective communication going on? I recently shared my "migraine" test with some colleagues, and they were surprised when I explained that if I get a headache in the middle of an initial interview, I generally stop the meeting and send prospective clients on their way, candidly explaining that my body was telling me that I was probably not the person best suited to assist them with their legal needs.

Being forthright at the start of the relationship about your mutual expectations as client and attorney can go a long way toward forming a long lasting relationship.

If you decide to hire office staff to help you, the same advice applies. Spend as much time as possible getting to know the potential employee before you do the hiring. It is easy to get into relationships, and more difficult to get out of them.

Skladal

Skladal receives service award

The University of Alaska Anchorage has conferred its meritorious service award upon George Wayne Skladal, in recognition of his "life of distinguished commitment to community and university service."

The university cited his professional career that spanned the military, state government, and law. He served as an Army Airborne Ranger for 20 years,, serving in Vietnam and retired as a lieutenant colonel, earning a medal of commendation for his relief efforts during the 1967 Fairbanks flood.

Skladal also served on the state Alaska Pipeline Commission, the Alaska Division of Energy & Power Development, and the Prince William Sound Regional Advisory Council.

He has served as a volunteer for Anchorage community councils, the Arctic Winter Games planning committee, and the Anchorage Municipal Library.

A practitioner of law for 34 years, Skladal also has been active in the Anchorage Inn of Court and has participated as a judge in student moot court competitions. He has taught students on the subjects of constitutional law, trial advocacy, and at the UAA Student Constitutional Convention.

Color of Justice 2012

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

Sitka, Alaska October 29-30, 2012

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Mag. Leonard Devaney, Sitka
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Amy Stus, Sitka Tribe of Alaska
Judge David Voluck, Sitka Tribe of Alaska
Amy Wheaton, Alaska Court System
Christine Williams, Perkins Coie LLP
Justice Daniel E. Winfree

NAWJ-Alaska COJ Committee:
Chief Justice Dana Fabe, *2012 COJ Chair*
Judge Patricia Collins (Ret.), *Sitka Program Chair*
Judge Stephanie Joannides (Ret.), *Founding Chair*
Judge Beverly Cutler (Ret.), Founding Member

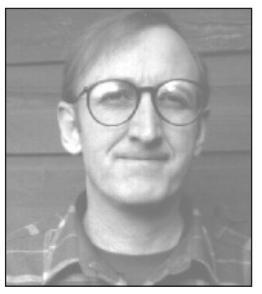
Football

By Dan Branch

It's 5:30 AM Saturday morning and I'm out of bed watching Chelsea Blues play the West Brom Baggies on an obscure cable channel. A younger guy would still be sleeping but my inflexible brain, trained by work day habits expects its first dose of caffeine at half past 5. I should be researching some law related subject for this column since most of its readers practice the profession. All I can think about is soccer.

I was born to baseball not this game invented by the English. The voice of Dodger broadcaster Vin Scully competed for dominance with my mother's show tunes records in our house. In grade school I believed in the magic of Sandy Koufax's left arm, that his curve and Drysdale's fastball would get the Dodgers past the hated San Francisco Giants and into the World Series. Nothing else really mattered.

Free agency destroyed American baseball. It is probably destroying professional European football too but having never experienced the game in its purest form I can't say. The LA Dodgers of my childhood were a family of guys that returned home every summer to play for our town. Today only Vin Scully and the uniforms of purist white and Dodger blue remain the same.



"Even without free agency, baseball would still be in trouble for most Americans lack patience to appreciate the game."

Even without free agency, baseball would still be in trouble for most Americans lack patience to appreciate the game. We were once satisfied with pitching duels won with good defense and a run scored in the late innings on a sacrifice fly. The day after a big game fans would rave about the poetry of a rally ending double play. Now its all about the home run.

The America version of football rather then that played in the rest of world threatens baseball. More war that sport, NFL games are played by men facing short careers that will leave them partially crippled by injuries. They and we accept this as part of the game. Each play is a choreographed 15 second battle followed by a delay for huddling that the TV producers fill with replays of the just ended play. Even my sports indifferent wife knows that with all the built in delays, a sixty minute NFL game takes a couple of hours to play. That's why I could never convince her to hold off dinner so I could watch the last two minutes of a game. If we ever tire of the managed violence of American football the delays and timeouts will kill the game. Maybe then Americans will turn to the beautiful game.

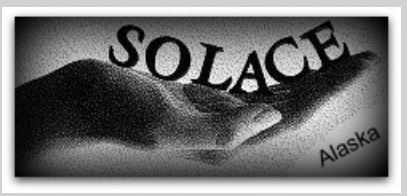
Nothing stops the clock in European football. Players dressed only in shirts and shorts move up and down the field, sometimes maneuvering around downed comrades and medics attending them. There is violence but it is inadvertent rather than intentional, happening during sliding tries for the ball or collisions during attempts to head the ball.

I marvel at the ability of top flight players to move down the pitch by sending a pinpoint pass of the ball to a teammate then moving forward to receive a similar pass from the recipient. In this fashion they approach their opponents goal only to be blocked by a wall of stubborn defenders or a spectacular save by the goal keeper.

In the best games the underdog team scores an early goal and then spends the rest of the game trying to hold on the lead as the favorites, a Manchester United or Barcelona attacks their goal again and again with its superior players. If the underdogs pay at home you hear the hope and fear of the fans grow as the game progresses. Most such games end as you'd expect with the better team pulling out a win in the final minutes. Even then the locals find some satisfaction in the result. It's not always about winning for the lower tier teams. Perhaps that is why soccer games can end in a tie.

America fields the world's best woman's soccer team, in part because Title Nine forces colleges to financially support women's sports. We can thank our former Senator Ted Stevens for that. The popularity of men's soccer has ebbed and flowed with the attention of the American sporting press. The signing of an aging International football star by a Major League Soccer team grabs their attention from time to time. Most of the time, without the Internet or the Fox Soccer Channel it is almost impossible to follow the sport in America.

A couple of wins by the USA team in the World Cup can draw our attention to the beautiful game. We are on course to qualify for World Cup 2014. in Brazil. Maybe a good showing there will convince the country's sport fans to make more time for soccer.



Do you know someone who needs help?

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

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

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

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

Thomson Reuters launches new website

Thomson Reuters has launched a new website called "Sustainability," to explore the common ground where business, communities and the environment meet. The website seeks to bring together relevant resources from across Thomson Reuters, combined with valuable partner content, into a single space.(http://sustainability.thomsonreuters.com.

"The website will enable dialogue and support customers and engaged citizens in their efforts to find a more sustainable pathway for their businesses and communities," said the company in September.

"Focusing on sustainability - for ourselves and for our customers - is good business," said James C. Smith, chief executive officer, Thomson Reuters. "This new Thomson Reuters website encompasses a broad range of issues, products and practices concerning the environment, economies, corporate citizenship and risk management. It is intended to serve and encourage sustainability initiatives across the global community of professionals."

Sustainability will provide multiple perspectives on energy and environmental issues, including on-topic news, analysis and opinion from Reuters news; content and analysis for professionals from Thomson Reuters businesses; insight from outside experts working in specialist fields such as climate, energy, health, law and corporate governance; reporting on the efforts of The Thomson Reuters Foundation and the company's own corporate responsibility initiatives; and aggregated news content from other sources. Future plans for the site include tools and unique resources, which will be introduced as they become available.

Thomson Reuters has a number of other products to support customers in their efforts to comply with regulations and grow their businesses in a sustainable and responsible manner, including BoardLink, Asset4, Accelus, World-Check, Point Carbon, and Lanworth.

According to Ryan Sheppard, vice president of Trademark Assets and a leading member of the development team for the site, "Sustainability is a huge and growing issue for all of us. We must all think in new ways about a world of finite resources and vulnerable systems to ensure a sustainable future and begin conversations that include individuals and corporations, citizens and societies. Sustainability will provide news and other resources to provide context for this new thinking."

Because justice has a price.

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

to the individuals, firms, corporate sponsors, and friends of legal services who contributed to the Robert Hickerson Partners in Justice Campaign. We are especially grateful to our 2011-2012 campaign co-chairs Charlie Cole, Saul Friedman, Ann Gifford, Andy Harrington, Jonathon Katcher, Dave Marquez, Susan Orlansky, Conner Thomas, & Jim Torgerson.

July 30 2011 to June 30 2012

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Challenging the community association in Alaska: So far, the reasonableness standard rules

By Daniel B. Lord

Suppose a disgruntled owner of a unit in a common interest community, such as a condominium or subdivision, brings suit against the association's board of directors that challenges a restriction or rule of the association. What approach will a court in Alaska take in reviewing the association rule?

In Alaska, a judicial review of a decision, rule and regulation, of a community, condominium or homeowners association, will likely be subject to the "reasonableness standard." Under that standard, the court will conduct a fact-intensive inquiry into the decision-making process to determine if the decision was reasonable. This contrasts with the business judgment rule, which is not in truth a standard so much as a principle under Alaska statutes -- and the common law -- that a court will not second-guess or substitute its decision for those of a corporate board of directors, unless it can be shown that the decision was made in "bad faith, a breach of fiduciary duty," or that it was an act contrary to public policy. *Henrichs v. Chugach Alaska Corp., 260 P.3d 530, 539 (Alaska 2011) (quoting Betz v. Chena Hot Springs Group, 657 P.2d 831, 835 (Alaska 1982)). Cf. Fred W. Trem, Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule,* 24 Alaska L.Rev. 23, 26-31 (2002) (expatiating on the business judgment rule and distinguishing it from directors' standard of care, the latter being an ex post "standard of review applied by the courts").

In Alaska, a judicial review of a decision, rule and regulation, of a community, condominium or homeowners association, will likely be subject to the "reasonableness standard."

Is this fair, -- given that community associations are often incorporated, and that the Uniform Common Interest Ownership Act (UCIOA), the state statute that governs common interest communities in Alaska, provides for the business judgment rule?

The Alaska Supreme Court, in the case of *Bennett v. Weimar* decided more than 10 years ago, made its position clear. "Although AS 34.08.750 appears to allow for the importation of business judgment rule into the law of condominium association," it said, "we favor a standard that includes reasonableness." 975 P.2d 691, 696 (Alaska 1999). The section of the statute that the Court referenced states, in part, "The principles of law . . ., including the law of corporations and unincorporated associations . . . supplement the provisions" of the UCIOA. AS 34.08.750.

In coming to its decision in Bennett, the Alaska Supreme Court reviewed two of its past decisions. In *O'Buck v. Cottonwood Village Condominium Ass'n*, it held that "a condominium association rule will not withstand judicial scrutiny if it is not reasonable" and concluded that in regards to an association decision to ban telephone antennae there was "little if any difference whether one uses the business judgment analogy in applying the reasonableness standard. . . . The rule at issue measures up to any standard of reasonableness." 750 P.2d 813, 817 (Alaska 1989). In *Dunlap v. Bavarian Village Condominium Ass'n,* it concluded that a condominium rule against storing "junk" cars in carports was reasonable because it had "a fair and substantial relationship to legitimate condominium purposes of improving aesthetics and marketability by eliminating junk cars." 780 P.2d 1002, 1016-17 (Alaska 1989).

The Alaska Supreme Court did not define its approach to determining what is reasonable under the reasonableness standard, though it did indicate that a balancing of the association's purpose of the rule and the unit owner's interests should be involved. In O'Buck, it held that in evaluating the reasonableness of an association rule, it would be necessary to balance the importance of the rule's objective against the importance of the interest upon which the unit owner is infringed, so that in a case where a rule seriously curtails an important civil liberty, a reviewing court would have to look with suspicion on the rule and to require a compelling justification for the rule to be upheld. 750 P.2d at 819. Application of such a balancing test is characteristic of the reasonableness standard. *See* Jeffrey A. Goldberg, Note, *Community Association Use Restrictions: Applying the Business Judgment Standard*, 64 Chi.-Kent L.Rev. 653, 674 (1988) (concluding that "equitable" and "constitutional" reasonableness tests "attempt" to balance "the interests of the majority of homeowners in stability, economic efficiency, and the quiet enjoyment of their property with the individual homeowners' interests in enjoying the prerogatives of home ownership"); *see also* Note, *The Rule of Law in Residential Associations*, 99 Harv. L.Rev. 472, 475-76 (1985) (also identifying reasonableness review under courts' equitable powers and position for constitutional review).

In *Dunlap*, the Alaska Supreme Court held that the reasonableness standard will require an inquiry into the "peculiar facts and circumstances", and that if a rule had a legitimate purpose of maintaining the "value and appearance" of the property, the rule would be upheld by the court, notwithstanding differences in aesthetic tastes. 780 P.2d at 1016-17. In *Bennett*, the court engaged in a similar inquiry, and found that marketability and aesthetics as reasons given by the board of directors for remodeling and renovations in the common interest community outweighed the objections from the unit owner on what evidence she produced on the increase in fees. 975 P.2d at 698. Such an "emphasis on, and sensitivity to, evaluating facts and circumstances" as demonstrated in these cases is similarly typical of the application of the reasonableness standard. Goldberg, *op cit.* at 658 (adding that the standard or "test" does not establish a "predicable guideline").

Nonetheless, it is not totally clear that the Alaska Supreme Court has jettisoned the business judgment rule for the reasonableness standard in disputes involving rules, regulations or decisions, of an association board. As one commentator on the *Bennett* case recently observed, "The court continues to leave itself an 'out' for ruling on the business-judgment rule by not taking a firm position and once again stating, '[T]he rule at issue measures up to any standard of reasonableness.'" Mark Nichols, *Reasonable Standard versus Business-Judgment Rule,* 19 Bus. Torts Litig. 25, 32 (2012). It is safe to say that the guidelines for judicial review of association rules under the reasonableness standard in Alaska remain under construction.

What does "measures up to any standard of reasonableness" mean in this context? In stating the phrase in *O'Buck*, the court cited a footnote a student Note for the notion that "there appears little if any difference whether one uses the business judgment analogy in applying the reasonableness standard." 715 P.2d at 817 ft. 4 (citing Note, *Judicial Review of Condominium Rulemaking*, 94 Harv. L.Rev. 647, 658-89, 667 (1981). The Note sets forth the argument that the reasonableness standard in the community association context should be grounded by analogizing associations to corporations, with the intervention of courts "ensuring fairness and stability by limiting the restrictions that can be enforced and *the procedures by which such restrictions may be promulgated."* Note, *supra*, at 667 (emphasis added).

Accordingly, this suggests that an Alaska court in determining if an association rule is reasonable, may not only engage in the balancing of the interests that are involved, but may also conduct a careful inquiry into the decision-making procedures of the board, as part of its examination into the particular facts and circumstances. Cf. Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention,* 31 John Marshall L.Rev. 303, 346 & 355 (1997) (concluding that cases that use business judgment rule or doctrine "are asserting a rule that defends the *procedure* under which the board has acted and the right of the board to be the sole arbiter . . . . The result is that if the procedure is valid, the court will not second guess the substance of the board's action." "The courts generally look at procedure and not outcome.").

There are several reasons for departing from an exclusive focus on the business judgment rule, as the Supreme Court has done. Among them are the following:

-- Community associations are usually incorporated as not-for-profits. Typically a lawsuit against a for-profit is brought by a shareholder in the name of the corporation against the directors to reimburse the corporation, while a lawsuit against a not-for-profit community association is typically brought by a disgruntled unit owner seeking recovery of a loss of enjoyment or use of the owner's property due to an association rule. That is, lawsuits against community associations are more personal in nature and not motivated by financial considerations in the main.

Indeed, plaintiffs filing suit in the community association context do not typically seek money damages; rather, injunctive relief or a declaratory judgment seems the norm. *See* Russell Zuckerman, *Using Good Judicial Judgment: Dispensing with the Business Judgment Rule in Mixed-Use Community Association Disputes,* 81 Temple L.Rev. 927, 955 ft. 257 (2008) (finding that "overwhelming majority of cases reviewed . . . involved plaintiffs seeking injunctive relief from an oppressive rule or regulation or declaratory judgment concerning the same, not money damages from board members").

-- A purpose of the business judgment rule is to protect the board of directors from personal liability for a decision when the decision does not result in an expected profit. The insulation seems justified in the association context when suit is brought by a third-party party arising out of an outside commercial transaction. Cf. Wayne S. Hyatt, Condominium and Homeowner Association Practice: Community Association Law § 5.03(b) (3d ed. 2000) (in community association jurisprudence, business judgment "rule" serves as a shield to protect directors and that the related business judgment "doctrine" has been broadened to justify board decisions and to defend associations on whose behalf the decision were made). It does not protect unit owners from decisions of the board that are overreaching in matters internal to the common interest community. *See, e.g.,* Susan F. French, *Making Common Interest Communities Work: The Next Step,* 37 Urb. Lawyer 359, 365 (2005) ("The community association governance structure, which is based on the corporate model, lacks the checks and balances that typically constrain cities from abusing their residents.").

This underscores that community associations are different from corporations in that their restrictions and rules can be considerably more invasive. For example, design controls administered by an association board "may be highly detailed or quite vague," leaving little room for individual autonomy of expression. French, *op cit.*, at 366. Such restrictions touch on matters of the home and lifestyle, moving one commentator to write, "What is appropriate for the boardroom may not be appropriate for the living room." Paula F. Franzese, *Common Interest Communities: Standards of Review and Review of Standards,* 3 Wash. U. J. L. & Pol'y 663, 681 (2000).

It is such considerations that should give pause to an across-the-board application of the business judgment rule to the community associations.

ESTATE PLANNING CORNER

Dignity and sportsmanship

By Steven T. O'Hara

From time to time it's appropriate to take a break from tax law and discuss something dignified – like boxing. My father, Jim O'Hara, worked in boxing for six decades. My attempt at recording his story is *The Jim O'Hara Story: Boxing, Dignity & Street Smarts* at www.60yearsofBoxing.org. The following is an excerpt.

Born a southpaw in December 1925, Jim resided during some of the Great Depression years in a Minneapolis orphanage with his brothers Mike and Dick and their sister Joanie. They were there because their father couldn't find work and their mother had health problems.

In the orphanage the good nuns made Jim right handed. Little did they know that his naturally powerful left jab would later surprise many a foe.

From the orphanage Jim and his siblings returned to the Mount Airy, Rice Street and East Side neighborhoods of St. Paul. Jim referred to his childhood neighborhoods as the badlands. "The farther you walked," he said, "the tougher it got. We lived in the last house, upstairs."

Jim and his brother Mike looked out for each other on the streets, literally fighting for their lives. On at least one occasion they faced each other in the ring in Duluth. When asked if they took it easy on each other, Jim answered with a smile, "We did until the first punch was thrown."

Tragedy struck in November 1951. Mike's body was found in downtown St. Paul's Jackson Bar, which was on 6th Street. Jim saw the unspeakable. A childhood friend was soon arrested and confessed to the fatal shooting. Mike was only 27. (Larry Millett, *Strange Days, Dangerous Nights*, 174 (Borealis Books 2004).)

At the time of his death Mike was unemployed with a wife and child to support. Mike had argued with the killer over a job, and it got physical. In anger the killer left and returned shortly with a gun.

Jim was 25 when Mike was killed. This tragic event changed Jim forever. If the framework for his mental toughness hadn't been completely formed, it was now. He faced his brother's violent death and ultimately concluded that you've got to forgive to better yourself. "Hate hurts you more than the guy you hate," said Jim. "He doesn't care. You need to forgive him for yourself."

One of Jim's life lessons was that there is a time to fight and a time to forgive. Years later he regularly supervised boxing events within the walls of Stillwater State Prison. As he sat there at ringside, he was reminded of his childhood friend who had killed Mike and had served his time there.

From Mike's death, he saw reality for what it is. He wasn't overly impressed with big shots. When told someone was so and so, Jim responded: "Is that right? Tell me, what happens when he gets hit on the chin?"

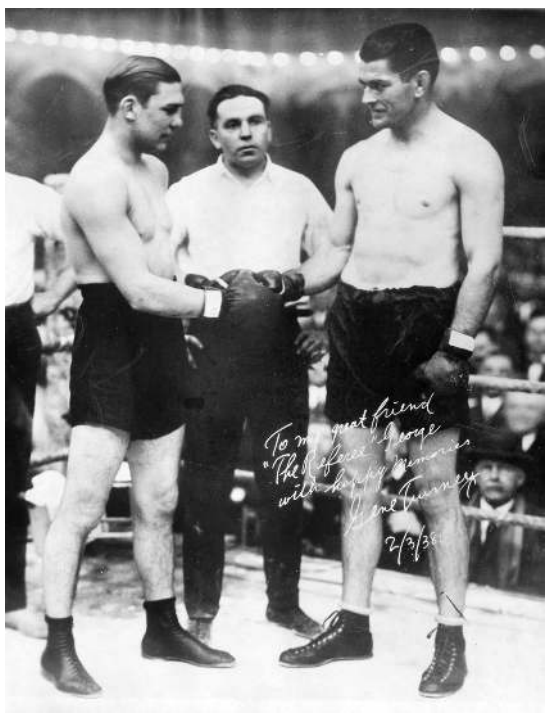
Jim didn't pre-judge anyone on the basis of race or religious belief. For him each man stood on his own merit. When he boxed in San Francisco in 1946, he made the trip from Minnesota by car with another boxer who happened to be African American. Later when others spoke of the supposed "good ole days," Jim responded, "Yeah, right. You mean the days when a man couldn't even eat in a diner if he had the wrong color skin?" He also no doubt thought of the night Mike was killed.

Jim had no time for oppressive people, phonies or loud mouths. He appreciated those who know what they're talking about, and he advised that whenever you encounter them, "Shut up and listen because you already know what you know." By the same token, he didn't tolerate flattery. "Cut it out," he said.

Tom Powers, columnist for the *St. Paul Pioneer Press,* said of Jim and boxing: "He was one of the very few men who brought dignity to the sport." (Tom Powers, *Boxing Lost a Friend with O'Hara's Passing, St. Paul Pioneer Press,* January 23, 2002, page D1, column 2.)

Jim would be the first to point out all that's right about boxing – past, present and future – including the countless individuals who donate their time for the welfare of underprivileged youth.

"Known as the St. Paul Phantom and the Wizard, Gibbons is the father of the St. Paul style of boxing, which Jim called the "School of No Get Hit..."



Harry Greb, referee George Barton & Gene Tunney, March 27, 1925, St. Paul, MN.

In terms of dignity within the ring, Jim was clear: he didn't favor the spectacle of tough guys standing toe to toe slugging it out where, and this is the critical point, neither fighter is sidestepping, slipping or deflecting punches to set up the counter. He favored the thinking-man's game where the boxer who outthinks the other gets the win, whether by points or knockout.

Jim compared boxing to fencing, and here the word parry, which means to deflect or block an incoming attack, is vividly applicable to both sports.

One of the issues for anyone considering a boxing career, according to Jim, is not whether you're tough but, rather, whether you're smart. By "smart" he meant the in-the-ring ability to think on your feet, manage time and space, and ultimately hit more than get hit.

He urged all boxers to plan long-term and practice self-preservation, as in the name of Mike Gibbons. Known as the St. Paul Phantom and the Wizard, Gibbons is the father of the St. Paul style of boxing, which Jim called the "School of No Get Hit," to set up the counter. Gibbons was elected to the International Boxing Hall of Fame in 1992. He also is ranked number 92 on the Bert Sugar list of the top 100 fighters of all time. Bert Sugar, former editor of *The Ring* magazine, put the list together in 2005. (Bert Randolph Sugar, *Boxing's Greatest Fighters* 314 (The Lyons Press 2006).) As a writer, Sugar was inducted into the International Boxing Hall of Fame in 2005.

There's a photograph showing Harry Greb and Gene Tunney on each side of referee George Barton before their bout in St. Paul on March 27, 1925, which Tunney dominated. Although the one-eyed Greb was arguably the toughest fighter of all time, Jim favored the boxer, Tunney. Of course Jim was partial to the Irish, especially since Tunney was arguably the greatest Irish *athlete* of all time. Jim also liked him because, as Bert Sugar observed, Tunney "drew on the style of that prince of the middleweight division, Mike Gibbons…." (Bert Randolph Sugar, supra, 40.)

This photo is one that Jim kept. On the left is the reckless fighter who was hiding the fact that he could see out of only one eye. On the right is the calculating boxer. Who's between them? Why integrity, Minnesota's George Barton himself. It's said that Barton still holds the world record for having refereed over 12,000 amateur and professional bouts.

In large measure this photo sums up the sport of boxing, with perhaps the puncher Jack Dempsey being the only missing part. When you consider that the year of the photo is 1925, you can almost see the long shadow of Dempsey, then the heavyweight champion of the world. So really you have a fighter, a fair-and-square ref, and a boxer – while the puncher is in the back of everyone's mind.

Jim also valued the photo for at least two personal reasons. First, the photo is interesting because from the toughest streets of St. Paul through the Ramsey County Home for Boys to the St. Paul Auditorium, Jim was a street fighter who became a boxer. Second, when the photo was taken in St. Paul in March 1925, Tunney's most ardent fans included some of Jim's older brothers, and even they couldn't have imagined that Tunney would take the title away from Jack Dempsey 18 months later.

At the time of the photo Greb was the world middleweight champion (160 lbs. max.) and Tunney the American light heavyweight champion (175 lbs. max.). Greb is ranked number five, pound for pound, on the Bert Sugar list of the top 100 fighters of all time, after only Sugar Ray Robinson, Henry Armstrong, Willie Pep and Joe Louis. Tunney is ranked number 13 out of the top 100. (Bert Randolph Sugar, supra, 14, 15, 40 and 42.) Harry Greb schooled Jack Dempsey when they sparred on a couple of occasions in 1920.

Jim and his wife, Kitty, raised four children. So what did he and Kitty teach their children from boxing and life? Foremost: perseverance and dignity – that is, learn a skill (whether in boxing or any other endeavor) and then try, and keep trying, to execute with integrity. Jim defined integrity as keeping to the high road.

Some other lessons don't take a lifetime to learn: punches need to pop (jab jab boom, jab jab boom). The chin is a "light switch." When it's hit the opponent "drops like a sack of potatoes." When you get a shiner, don't blow your nose. Don't quit your day job. Never let your guard down. Show no one your back, and be alert for the sucker punch – it could be a Sunday punch.

Jack Dempsey resorted to the undignified sucker punch, which also was the Sunday punch, in September 1920 when he put his title on the line against St. Paul native Billy Miske in Benton Harbor, Michigan. Miske had just gotten up off the canvas, and Dempsey was lurking behind him. (Clay Moyle, *Billy Miske: The St. Paul Thunderbolt* 124-125 (Win By KO Publications 2011).)

Before he was champ Dempsey had fought Miske at the St. Paul Auditorium in May 1918. Winning by a shade, Dempsey said later that night: "If I ever have to fight another tough guy like that I don't want the championship. The premium they ask is too much effort." (Clay Moyle, supra, 54.) Jack Dempsey is ranked number nine on the Bert Sugar list of the top 100 fighters of all time. (Bert Randolph Sugar, supra, 26.) Miske was inducted into the International Boxing Hall of Fame in 2010.

Dempsey lost the title to Tunney, a 10-round decision, on September 23, 1926, in Philadelphia. When Dempsey unsuccessfully tried to regain the title from Tunney on September 22, 1927 in Chicago he might have positioned himself to use the undignified sucker punch, but as *The Ring* magazine points out: "Just so long as Dempsey refused to go to a neutral corner so long did referee [Dave] Barry refuse to start counting [when Tunney was down]." (*The Ring*, June 1972, at 45.) Here the third man's integrity prevailed.

In the time it took Dempsey to submit to the farthest neutral corner after connecting with his vicious left hook in the seventh round, he had given Tunney precious extra seconds to rest and clear his head. Tunney is reported variously as having no less than 14 seconds and as long as 18 seconds before he stood to beat the official 10 count. (*The Ring*, June 1972, at 45.) Bert Sugar called this long count "perhaps the most famous moment in all of boxing." (Bert Randolph Sugar, supra, 41.) Tunney went on to get the decision in this 10 rounder, and they say Dempsey was gracious in defeat.

Imagine the golden age of boxing: 104,943 fans witnessing the Battle of the Long Count at Soldiers' Field in Chicago on Thursday September 22, 1927; and even more: 120,757 fans witnessing the shocking upset victory of Tunney over Dempsey at Sesquicentennial Stadium in Philadelphia a year earlier on Thursday September 23, 1926. (*The Ring*, June 1972, at 44 and 45.) Many of those fans knew a boxer personally or were boxers themselves at some level. In St. Paul, where both Dempsey and Tunney had fought on their way up, Jim's brother and future mentor John listened for reports on the fights and couldn't wait to test his own skills.

The Alaska Supreme Court gathers with participants in Sitka's Color of Justice program at the close of the court's workshop entitled "The Importance of a Diverse Judiciary." Members of the court shared their personal stories about the choices they made that led ultimately to their service on the bench and encouraged the students to achieve their own educational and career goals despite whatever stumbling blocks or challenges they may confront. They also urged students to set their sights on the bench, to ensure that in the future Alaska's judiciary reflects the diversity of Alaska's people.

Color of Justice returns to Mt. Edgecumbe

Color of Justice returned to Mt. Edgecumbe High School in Sitka on October 29-30 for two days of interactive workshops and programs designed to encourage students to consider legal and judicial careers.

An initiative of the National Association of Women Judges, Color of Justice promotes diversity in the judiciary through educational outreach to groups that are currently underrepresented on the bench. Mt. Edgecumbe is the state's oldest public boarding school, and its students are predominantly Alaska Native from more than 100 villages. It has been identified by U.S. News & World Report as among the best high schools in the nation, and about 75% of its students pursue post-secondary education.

The COJ program at Mt. Edgecumbe was founded in 2011 by Judge Patricia Collins (Ret.), former Presiding Judge of the First Judicial District, and Chief Justice Dana Fabe, COJ Chair in Alaska. The program has existed in Anchorage since 2003, when it was founded by Judge Stephanie Joannides (Ret.) with the support of Judge Beverly Cutler (Ret.). Over the years, the program has reached hundreds of Alaska's diverse young people with the message that the road to the bench is one that is open to them.

Judge Patricia Collins (Ret.), back row center, encourages students to earn spirit points during the game show she helped develop, "Constitutional Cranium."

Ketchikan Superior Court Judge Trevor Stephens, Presiding Judge of the 1st Judicial District, announces the winners of "Constitutional Cranium" at the close of the Sitka COJ program.

Sitka attorney Jude Pate, L, Sitka Magistrate Leonard Devaney, C, and Sitka Tribal Judge David Voluck, R, presented a workshop on the Indian Child Welfare Act that included a mock transfer of jurisdiction hearing from state court to tribal court and a mock tribal court hearing.

Mt. Edgecumbe students ponder a question about Alaska's Constitutional law during "Constitutional Cranium."

Juneau Superior Court Judge Louis Menendez meets with students during "MentorJet: A Speed-Mentoring Experience," held the first evening of Color of Justice.

Chief Justice Fabe, Alaska's COJ Chair, interviewed Anchorage attorneys Nicole Borromeo, L, and Peter Boskofsky, R, during the panel discussion "From MEHS to the Halls of Justice." Nicole and Peter are both graduates of Mt. Edgecumbe High School.

The erosion of protections to the rule against propensity evidence

(Part One)

By Daniel B. Lord

The well-recognized rule against propensity evidence is under audacious assault. Codified as Alaska Evidence Rule 404(a), the rule is that evidence of a person's character is normally not admissible when offered as circumstantial evidence that the person acted in conformity with that character on a particular occasion. It is supported by a structure of assumptions concerning the behavior of judges and juries in response to evidence of propensity or negative character, — a structure now threatened by findings of empirical and theoretical research.

Nowhere is the assault more clear than in the eroding of protections to the rule against propensity evidence. There are really three protections. The first is prohibiting the admission of other crimes, wrongs or acts, see Alaska R. Evid. 404(b)(1); the second, balancing between probative value and unfair prejudice, *see* Alaska R. Evid. 403; and the third, limiting instructions to the jury. *See* Alaska R. Evid. 105. *See also Huddleston v. U.S.,* 485 U.S. 681 (1988) (presenting a four-part test on admissibility of other crimes and acts, — a test including proper purpose and evidential relevance, Rule 403 balancing, and limiting instructions to jury).

The first protection is the first sentence of Evidence Rule 404(b)(1), which states in part, "Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith." It is an extension of Rule 404(a). *See Bryant v. State,* 115 P.3d 1249, 1253 (Alaska App. 2005). It also codifies the common law rule. *See generally* 22 C. Wright & K. Graham, Federal Practice and Procedure § 4242, at 487 (1978); 1 Graham, Federal Evidence § 404.5 (4th ed. 1996). *See also Old Chief v. U.S.,* 519 U.S. 172, 181-82 (2007) (citing 1 J. Strong, McCormick on Evidence § 180 (4th ed. 1992)).

As far as that protection is concerned, there is empirical evidence — notably from the recent large-scale study from the National Council of State Courts (NCSC) of 358 criminal trials conducted across four different urban jurisdictions -- showing that the best predictor of convictions are prior convictions, even when the jury is not made aware of the prior convictions. *See* Ronald J. Allen & Larry Laudan, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. Crim. L. & Criminology, 493, 499 (2011) (". . . jurors are much more likely to convict defendants with priors, even while the jury's being informed of the priors does little to increase the conviction rate"); Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted,* 42 Am. Crim. L.Rev. 1167, 1190 (2005) ("It is whether or not the defendant has a criminal record — not whether the jury learns about — that has the greatest influence on the acquittal/conviction decision."). Cf. Theodore Eisenberg & Valerie Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes,* 94 Cornell L.Rev. 1353, 1381 tbl.8 (2009) (also noting conviction rate for non-testifying defendants with priors unknown to the jury was about the same as that for defendants with priors known to the jury). This finding is "puzzling" in the sense that it refutes the widely-held belief that informing jurors of a defendant's prior crimes significantly increases their disposition to convict the defendant, as well as its corollary that such information places at unnecessary risk many innocent defendants with criminal records. Laudan & Allen, *op cit.*

How is it that jurors apparently are able to separate defendants with priors, even when none are mentioned? After all, if there is no character evidence, no witnesses, and no proof a defendant has ever been convicted previously for a crime, there would be no basis to assume that the defendant is free of prior convictions. There must be a feature of the trial that provides jurors with a basis for the assumption that the defendant has run into trouble with the law in the past.

Of course, a feature of a criminal trial where prior convictions may be involved is efforts to suppress evidence of the defendant's priors, for that is the regnum of the rule. As explained by Professors Laudan and Allen, this results in the defendant with priors taking on a "profile" different from that of a defendant without prior conviction, — and this is sensed by jurors. Laudan & Allen, *op cit.*, at 508-09. Data from the NCSC study and findings from a separate study of hundreds of mock jurors give empirical support for their understanding. *Id.* at 509-10 (citing Sally Lloyd-Bostock, *The Effects of Juries on Hearing About the Defendant's Previous Criminal Record: A Simulation Study,* Crim. L.Rev. 734, 745 (2000)).

The question arises, why are jurors with such knowledge more likely to convict, especially when that knowledge is based more or less from intuition? Part of the answer might reside in a peculiar manifestation of human nature -- people tend to have stronger emotional reactions for future events, and correspondingly judge future bad deeds more negatively than past bad deeds. Eugene M. Caruso, *When the Future Feels Worse Than the Past: A Temporal Inconsistency in Moral Judgment,* 139 J. Experimental. Psych.: General 610 (2010); *see also* Zachary C. Burns *et al., Predicting Premeditation: Future Behavior Is Seen as More Intentional Than Past Behavior,* 141 J. Experimental Psych.: General 227 (2011) (similarly finding that people's intuitions differ on underlying causes of past and future behavior, with later as deserving of more punishment). So, what may be disturbing to jurors is not so much a sense that there were crimes committed by a defendant in the past as the heightened probability, — even if only intuited, — of similar crimes being committed by the defendant in the future.

Professors Laudan and Allen further explain how jurors manipulate the standard of proof to convict such defendants, -- but under a balancing-costs-of-mistakes analysis. Laudan & Allen, *op cit.*, at 513 (". . . it would not be unreasonable for jurors to decide that the costs of falsely acquitting a potentially serial felon were greater than the costs of falsely acquitting a person without a record" and lessening the proof for conviction on that basis). Although cognitive in emphasis, their basic frame of analysis is applicable to the more affective tendencies in human nature described above. It is this: "Beyond a reasonable doubt" is a standard open to interpretive flexibility or "variability", *see* Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability,* 36 U.C. Davis L. Rev. 85 (2002), and jurors may conclude that the existence of prior crimes, instead of being relevant in the "technical sense" of increased probability of guilt in an instant case, goes to whether less proof is necessary to convict a defendant who is capable of committing the same crime as opposed to a defendant who is not. Cf. Laudan & Allen, op cit.

Enter Evidence Rule 403 -- which is intended to prevent evidence from inducing improper inferences of the jury. *See, e.g., Lau v. State*, 175 P.3d 659, 662 (Alaska App. 2008); *Ragsdale v. State,* 23 P.3d 653, 663 (Alaska App. 2001); *Anderson v. State,* 749 P.2d 369, 374 (Alaska App. 1988) (citing Wright & Graham, *Federal Practice and Procedure: Evidence* § 5249 at 531-37 (1978)). *See also Gulf States Utilities Co. v. Ecodyne Corp.,* 635 F.2d 517, 519 (5th Cir. 1981) (emphasizing that "Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against [the evidence's] probative value and necessity").

Alaska Evidence Rule 403 states,

> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

When considering the admission of evidence of prior crimes or bad acts under Evidence Rule 404(b)(1) a trial court is required to weigh the probative value of the evidence against its potential for unfair prejudicial impact. *See Bingaman v. State*, 76 P.3d 398, 416-417 (Alaska App. 2003) (when state offers evidence of a defendant's prior crimes or bad acts, trial court "*must* engage in a Rule 403 analysis") (emphasis in original); *Bennett v. Municipality of Anchorage,* 205 P.3d 1113, 1119 (Alaska App. 2009) (applying rule in *Bingaman* to prior bad acts evidence admissible under Rule 404(b)(1)).

What if the jurors, as previously suggested, use the prior convictions or bad acts evidence to justify a lowering of the standard of proof for conviction?

In the Rule 404(b)(1) context, the Rule 403 analysis required of the trial judge is that of balancing the probative value of the prior convictions or bad acts against their unfair prejudicial impact. The focus is on likelihood of guilt. The trial court is to prevent the admission of evidence that would result in a jury making an inference from such evidence that a defendant possesses the sort of character to commit the crime and deciding that the defendant should be convicted on that basis. *See, e.g., Getchell v. Lodge,* 65 P.3d 50, 57 (Alaska 2003) ("[U]ndue prejudice connotes . . . evidence that will result in a decision being reached by the trier of facts on an improper basis.").

But likelihood of guilt is not the same as lowering of the standard of proof for conviction. According to Professors Laudan and Allen, "There is a world of difference between 'priors make guilt more probable' and believing that 'priors lower the bar for conviction,'" that the former is "essentially a matter of inductive logic" while the latter is "a question of political morality" which "has nothing to do with relevance and probative value." Allen & Laudan, *op cit.*, at 514. In such a situation Rule 403 is inapplicable; it affords no protections to the rule against propensity evidence.

It could be argued, though, that lowering of the standard is the result of the jury coming to a conclusion on an emotional basis. According to the advisory committee note to Rule 403, "unfair prejudice" refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one". Alaska Evid. R. 403 cmt. para 5. For that reason, it could be further argued, a trial judge can conduct the Rule 403 balancing.

The argument fails, however, because juries tend to turn to emotions as a basis for decisions only after the "[fact-finding] process has already been confused or obscured." Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence,* 18 U.C. Davis L.Rev 59, 83 (1984) (citing H. Kalven & H. Zeisel, The American Jury 149-162 (1966)). As explained by Professor Gold, unfair prejudice is created by "that aspect of evidence that confuses or obscures . . . not by the emotions that such evidence generates." *Id.* Moreover, to engage in a Rule 403 analysis on such a basis would mean considering what has already been ruled by the judge as inadmissible under Rule 404(b)(1).

Governor Egan's Palette: From Monet's Water Lilies to David's Coronation

By Peter Aschenbrenner

"Wow," Abigail 'Abby' Adams enthuses. "So this is what fifty below in Fairbanks feels like."

"Allow me," a handsome gent in pharmaceutical whites approaches, "to introduce myself."

"Let us guess," the party at the Nordale Hotel pleads.

"We gather on the last day in which Territory of Alaska may claim existence," Thomas Jefferson hints.

"This must be," John Adams responds, "Governor William Egan himself."

"Servirla!" the aforesaid clicks his heels.

"But the timing is off," I garble my math. "By a few hours."

"We will party all night," Alaska's first Governor corrects me. "The State of Alaska comes into existence at seven ayem tomorrow morning, Alaska time. When the President signs the proclamation in Washington at noon, I'll become," the future Governor concludes, "a former druggist and Alaska's first Governor."

"But how often," I ask, "does a government in North America go out of existence?"

"When[ever] in the course of human events," Adams guffaws, "it becomes necessary."

"That would explain Mr. J's appearance at this final Territorial festivus," Sarah Palin declares. "The people's right to abolish government has brought about this negative accomplishment thirty-seven times. Allow me."

"We stand in awe," Jefferson and Adams wave 'palm fronds.'

"Three or four republics, a kingdom, a military government and, oh, a whole lot of territorial governments have been slagged into non-existence. Saving Hawai'i, Alaska was the last to go the way of the North American bison."

"But you?" Governor Egan turns to John Adams. "What was your contribution?"

"Adams is the patron saint of the creators of state governments," Jefferson answers.

"We served on the committee marking up the draft of Jefferson's Declaration," Adams recalls. "Franklin was appointed chair. He put his arms on our shoulders and said – I remember this like it was yesterday – 'I have just one word for both of you: Plastics'."

"Hey," I blurt, "that's from The Graduate."

"A political science joke!" Egan guffaws. "And as old as the hills."

"So how did you get on with each other?" I turn to Messrs A and J.

"Fought like cats and dogs," Jefferson signals for a tipple of more than apothecarial proportions. "John argued that his style was appropriate for the rules of government operations and, on the other hand, my style was best suited to memorialize rights."

"You reference my husband's resolution of May 10, 1776," Abigail speaks up. " 'Where no government sufficient to the exigencies of their affairs, hath been hitherto established,' Congress recommends that the states 'adopt such government as shall, in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular, and America in general'."

"The year was 1776," Adams studies his nails. "State constitution-crafting, indeed, state-making was all the rage. Except in Vermont," he ahems his footnote.

"It certainly explains why the Declaration of Independence has followed the path less travelled," Jefferson adds. "Speaking constitutionally, that is."

"It's supra-constitutional," Adams responds.

"It's merely extra-constitutional," Jefferson replies.

"You have to make this," Governor Egan cues the two of them, "mean something to me."

"Take Alaska's Article 1, at 1,117 words," Abby reaches for her Constitutional Catechism Abridged for Daily Use. "And compare that to your Article 2, at 1,324 words. With fifty to forty-eight words of Romance roots in the first four clauses, the language is nearly identical on that score. However, the Teutonic relation supplies merely fourteen words in the Declaration of Rights while twenty-six words appear when the Legislature is structured."

"When we drafted Article 2," Egan recalls, "we played a lot of Beethoven."

"And your motivational sound track for Article 1, the Declaration of Rights?" Sally Hemmings asks. "Henry Mancini? Claude Debussey?"

"Verdi," Egan answers. "Especially *Un Ballo in Maschera*. Italian patriots against the Hapsburgs."

"Another Austrian joke?" I ask.

"Now take painting," our first Governor warms to his topic. "John Adams' style is architectural. It celebrates the art of the salon. Louis David's *Coronation of Napoleon* exhibited under the vaulted ceiling of the Louvre."

"France is America's oldest ally," Sarah points out.

"Whatever Bonaparte's selling," Mr. J concurs, "I'm buying."

"Jefferson's an impressionist, on the other hand," Sally points out. "Al fresco. Everything taken at a glance. Claude Monet's ladies in white parasoling the beach at Deauville. Water lillies at Giverney. Spontaneous. Alive."

"It's the Louvre," Abby agrees, "versus the Musée d'Orsay."

"You see," Mr. A continues. "This is why we decided to try out each other's métier. You know, an artisanal swap. I become the designer of landscapes. I cite to my chef d'oeuvre at the White House. It was the summer of 1800 – "

"Designs both residential and academic," Mr. J intervenes, "were swapped my way."

"Hence, Jefferson's masterworks may be named as The University of Virginia and," Adams hesitates, "some house on a hill near Charlottesville. I forget the name."

"But," I stammer, "that would make a 'criss-cross.' Jefferson the maestro of structure and shape, with you the master of the verdant, the lush and the untameable. House and garden, artifice and nature. You two embrace all there is. Or could be."

The table of four seems thoroughly enchanted by this outcome.

"Do Americans in 2012," Gov. Egan asks, "have a sense of humour?"

The assembly falls silent.

"I didn't think so," Sally nudges Abby.

"They elected me governor," Sarah Palin coughs. "That should count for something.

"But you do realize," John Adams pats the moisture on his lips, "that we have a sense of humor. Our 'turn of the century.' This what I'm talking about."

"News to me," I study my shoes.

"In preparation for the crafting of the Alaska constitution," Gov. Egan explains, "I travelled back in time. To study from these two masters: one responsible for the shimmering premise – the people's right to create government sufficient to their exigencies – and the other: the people's right to alter and abolish government, whether they created or inherited it."

"Have we crossed into a land beyond semantics?" Sally asks.

"Surely there's a country beyond," Abby points out, "just listening to men argue about words."

"It's perfectly obvious," Mr J speaks up. "The rules which shape official operations – that is, which detail their responsibilities – must be complete and consistent. *Inter sese*."

"But the Wizard of Brno – "

"I did not yield the floor," Jefferson cuts me off. "Declarations of rights which are endowed (at our creation) are subject to no such paradox."

I flip through Jefferson's Manual of Procedure for the United States Senate. "Will the Senator yield for a question?"

"I will."

"Listing our rights against King George rendered your task complete, as soon as the ink dried on the Declaration of Independence. Right?"

"Quite so."

"While Adams commits constitution writers to a lifetime of hard labor, which effort is, on account of the Kurse of Kurt Gödel, the Wizard of Brno, imperfectable."

"On the other hand," Sarah Palin intervenes, "hasn't John Adams deployed a secret weapon?"

"Behold, my gift to the nation," says Adams. "John Marshall."

"Pretty cool," our most recent governor agrees. "He who has explored, not one, not two, but all three kinetic fallacies."

"In conclusion," Jefferson exercises the prerogatives of the chair, "like Claude Monet, all I'm doing is throwing colors at a canvas. I can never be wrong about anything."

"By the same reasoning," Adams moans, "I can never be right about everything. There's always some piece of my canvas that is perfectable. But isn't."

"On that note," William the First concludes our assembly, "I'll get Dwight D. Eisenhower on the line."

"I'm sorry," Ma Bell intones, "all circuits are busy."

"Authenticity," Jefferson shrugs off the inconvenience. "Now we know this wasn't all a dream."

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TALESFROMTHEINTERIOR

All the way with TSA

By William Satterberg

Since 9/11, the legal tenor of the United States has changed. Numerous restrictive pieces of legislation have been passed such as the Patriot Act. Previously unknown terms such as "waterboarding" have now become commonplace. President Bush's lawyer, John Wu, became a celebrity, turning the 2011 Fairbanks Alaska Bar Convention into one of the most lively exchanges ever. And an organization emerged in defense of our "homeland," known as TSA, under the also new, patriotic Department of Homeland Security.

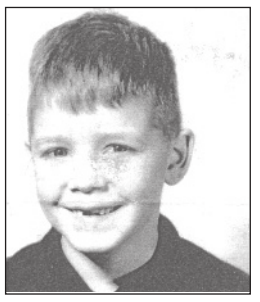
My fears were first aroused when President Bush coined the term "Homeland Security." Soon, a massive organization grew to promote our precious homeland security and a new cottage industry developed. One of my greatest concerns was that the United States, like Nazi Germany, would succumb to mother, God, apple pie concepts contained in phrases like "the Motherland" or "the Fatherland" and that rationale would develop for actions which we previously had viewed as legally reprehensible, such as torture, Guantanamo Bay prisons, and assassinations.

We are now all too familiar with the TSA. In any airport, passengers can see smartly dressed members of TSA marching abreast in their bright blue uniforms. Rest assured that our sacred borders are protected by many folks who should probably be "profiled," themselves.

Although I reluctantly recognize the need for security as an unfortunate outgrowth of the terrorist attacks, the "Homeland Security" concept terrorizes me as well. Although conservative by nature, I do not believe that my fears are irrational. Rather, I believe that, with time, we will find that the freedoms that we enjoyed prior to the beginning of this millennium will have eroded to the point that America effectively becomes a police state. In fact, in writing this article, I have probably labeled myself as the new equivalent of Joe McCarthy's "Fellow Traveler." Not that it necessarily matters, since I am over 61 years in age and thus entitled to be crotchety and opinionated like Fairbanks attorney Bob Noreen.

The first airline searches after 9/11 were hand searches. Baggage was laboriously scrutinized by agents while people had wands passed over them. TSA blossomed, and technology flourished. Special detection devices were developed, resulting in sophisticated surveillance equipment and scanning machines which went from basic metal detectors to some sort of X-ray mind control cabinets, similar in appearance to the first series of Star Trek transporters.

Homeland Security, having morphed into a powerful agency rivaling J. Edgar Hoover's notorious FBI, has now declared that select travelers can opt for an expedited clearance process by pre-registering with the government, disclosing their most intimate information, and receiving as a reward a swell pass which allows only the privileged elite to speed through not only TSA searches at airports, but also to bypass Customs and Immigration requirements at selected entry ports. Eventually, rather than being a discretionary option, it is my expectation that these registrations will become mandatory. Soon, like the Germany of the 1940s, "Ve vill all be required to carry our paperz".



"As a good American patriot, each time that I have had a TSA search, I have submitted voluntarily, hoping that the gross indignities that I have read about would not occur."

Technology is ever changing. In time, papers will no longer be the mode. We already can microchip our family pets. Similarly, I suspect that we will also someday each have a microchip installed in our body so that we can be quickly scanned as we pass through a cattle gate. Ideally, a readily visible chip will be placed into one's forehead. On balance, the Biblical prophecy of the "Mark of the Beast" may not be that far off, after all.

Technology is ever changing. In time, papers will no longer be the mode. We already can microchip our family pets. Similarly, I suspect that we will also someday each have a microchip installed in our body so that we can be quickly scanned as we pass through a cattle gate.

Admittedly, my Fairbanks paranoia is showing. But I do try to blend in. As a good American patriot, each time that I have had a TSA search, I have submitted voluntarily, hoping that the gross indignities that I have read about would not occur. But, I was not to be spared.

In December of 2011, I had my right shoulder replaced by a titanium ball joint. It was at that point in time that my life changed. Rather than being able to subtly slip through TSA airport scanners as I had in the past, I now regularly triggered the scanners, including not only the TSA devices, but all court scanners. (Fortunately, certified as crippled, the court system eventually issued me a pass.)

In April of 2012, I once again drew attention when passing through the latest TSA scanner at the Fairbanks Airport. Although, by then, I was used to alarming, this time, my concerns were raised. The scanner had centered a bright yellow dot directly on my groin area. Loud, official announcements were immediately made to all in the area that TSA needed "a male supervisor" to conduct a "groin search."

I asked the agent why I was being subjected to a groin search. I was informed that a suspicious "bulge" had appeared. Disclosing that I was Swedish, I asked if he would put that conclusion in writing, since everybody who has ever been with me at the local gym knows that the likelihood of a large bulge in my crotch sufficient to attract any attention was virtually an impossibility. My request was denied.

I then asked if I could pass through the scanner again. Most likely, the "bulge" had subsided. It was not an unjustified request. Usually, when I have had a bulge in that location in the past, especially at my advanced age, it has subsided rather quickly, and certainly within the critical four hours. To my dismay, the officious TSA agent would have nothing of the sort. I was told that I would have to submit to the search in a "private screening room." Perhaps, I would be entitled to watch a first release movie.

As we entered the room, I asked for assurances that no one would touch my genital region. In response, I was evasively advised that there was "going to be a search." I emphasized again that I did not want my genitals touched. I was told, yet again, that there was going to be "a search." This exchange went on several times. I then remarked that I was not getting a straight answer (probably a poor choice of words) to my question. Still, I had no success. In short, (again, perhaps, a poor choice of words), we were at a standstill. TSA was firm. So, I submitted, since my Alaska Airlines flight was actually going to leave on time.

The agent announced that he would be running his hand up each pant leg to the point where he "felt resistance." I reminded him that I was Swedish and that he would likely have to go up a long distance to find any resistance. My warnings went unnoticed. Humor was not with these guys.

The search began. During both leg pats and in three swipes across the front of my pants, my genitals were clearly touched. Moreover, the touching was not inadvertent. I remembered a rule that my father had taught me when I was a young man that one could only "jiggle three times." After that, it was considered to be bad, especially if one were Catholic. We were rapidly approaching the limits of decency.

I announced that I had been violated. I was told that I had been "searched." I then indicated that I wanted to file a complaint whereupon my baggage, which had not alarmed, was then subjected to a thorough search. I was told all of this was "procedure" and not retaliatory. Where was Don Logan when I needed him?

Eventually, I was able to depart the location for my flight, although the TSA agents were saying that they were now willing to discuss the matter, having seen my business card. I replied that, given the rare, on time, nature of the flight, I was not prepared to visit, but that I would be back in touch. (Again, a poor choice of words).

Two days later, I filed a formal complaint letter with the TSA. The letter found its way back to Washington, D.C., and a reply recently returned saying everything was done "per protocol." Hopefully, a copy of my letter may even be on President Obama's desk, since he likely would be counting on Alaska's electoral votes to win the 2012 election. If so, I am sure that Mr. Obama has gotten more than a few chuckles out of it. Still, I am hoping that, in the end, something may be done, but just not on my end. Ever since I was a kid, I was told that I could not touch myself like TSA did. So what gives them the right to start now?