IN THE SUPERIOR COURT OF THE STATE OF ALASKA AT KENAI

DAVID S. HAEG	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
BRENT R. COLE,	)	Superior Court No.: 3KN-06-844CI
	)	Ak Bar Case No.: 2006F007
Appellee.	)	
_____	)	

ADMINISTRATIVE APPEAL FROM THE ALASKA BAR ASSOCIAITION
THIRD JUDICIAL DISTRICT AT ANCHORAGE

APPELLANT'S REPLY BRIEF

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By: _____
David S. Haeg

Filed in the Superior Court
Of the State of Alaska at Kenai
on this ____ day of _____, 2007.

_____

Deputy Clerk

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INTRODUCTION

This is an appeal by pro se appellant David Haeg from an extremely chilling decision and award made after a 4-day fee arbitration proceeding David brought against attorney Brent Cole. Cole represented David in a criminal case against David that was prosecuted by the State of Alaska. The arbitration resulted from Cole's complete failure to represent David in accordance with the *Alaska Rules of Professional Conduct*. See Appendix #1. This failure stemmed from Cole's admitted conflict of interest that he "could not do anything to piss Leaders (prosecutor) off because I still have to make deals with him after you're finished." This conflict of interest manifested itself by Cole lying to David to deprive him of nearly all his rights and protections under rule, law, and constitution - even when David specifically asked about these rights and protections. It also included Cole failing, sua sponte, to inform David of these rights and protections so David could make an informed decision on which course to take; failing, sua sponte, to exercise these rights and protections; failing to correct, sua sponte, David's misconceptions of his legal rights and protections; failing to follow David's decisions concerning the objectives of representation; failing to oppose the prosecutions actions to ensure the adversarial system produced a just result; failing to show any knowledge concerning David's case; failing to investigate David's case to make up for this lack of knowledge; failing to act as an advocate for David because of a direct conflict of interest; failing to inform David of this conflict of interest before representing David; actively representing this interest that was in direct conflict with David's interests; and failing to appear to testify in McGrath in response to a subpoena and airline ticket to testify at David's sentencing about his representation of David.

At arbitration irrefutable proof of Cole's above conduct was presented. This proof consisted of tape recordings made while Cole was still representing David, Cole's own letters and itemized billing statements, devastating testimony by numerous eyewitnesses, and much

other documentation. To counter this Cole committed numerous counts of perjury. This perjury was irrefutably exposed through David's cross-examination of Cole.

Throughout this the attorney arbitrators displayed evident partiality toward Cole, actively advocated for Cole, and conducted the hearing to prejudice David.

The "decision and award" handed down by the arbitration panel, made up of 2 attorneys and a full-time court employee, was stunning in its complete denial of the facts and evidence presented. The "decision and award" ignored every bit of physical evidence, even that presented by Cole, ignored the overwhelming witness testimony that was in exact accordance with all physical evidence, and concluded the proven perjury by Cole to the arbitrators was the truth. The "decision and award" included known falsehoods and misrepresentations, included awarding Cole money that was not at issue and that Cole had testified to under oath was "wrote off", and could only be a product of fraud and corruption.

FACTS

While licensed for and participating in the Wolf Control Program big game hunting guide David Haeg was prosecuted by the State of Alaska for the game violation of a hunting guide hunting big game (wolves) same day airborne. Ex. 5-6, 20. To support these hunting guide charges Trooper Brett Gibbens claimed on the search warrant affidavits that the evidence found of taking wolves same day airborne was in a Game Management Unit (GMU) in which David was licensed to guide and in which David had a lodge for conducting guided big game hunts. Ex. 11. The evidence was in fact in the GMU in which the Wolf Control Program was taking place. Ex. 16 and Tr. 16, 120, 146, 163-4, 169. Violations of the Wolf Control Program are clearly and intentionally separate from any game, hunting, or guide violation. Ex. 20. When David told Cole about the fact the evidence was found in the Wolf Control Program GMU and not where he can guide Cole stated, "It doesn't matter", never told David he could ask to have all evidence

suppressed because of this, and never pointed this perjury out to the judge. Tr. 11, 16, 120, 163, 165 and Ex. 4. Cole never investigated and never found out violations of the Wolf Control Program were separate from game, hunting or guiding violations and thus could not affect David's guide business. Tr. 46, 61, 279, 378. At the time in question (winter) there was no guided hunts being conducted. Cole continues to claim David was correctly prosecuted for hunting guide violations. See Cole's oral argument and brief.

During their investigation and case the State seized, deprived, and forfeited David and Jackie's property (including their airplane), which was the primary means to provide their livelihood. Ex. 2 and Tr. 20, 256, 347. The State failed to inform David, Jackie, or Cole (who was hired weeks after the seizure) "within days if not hours of seizure" [See *F/V American Eagle v. State*, 30 620 P.2d 657, 667 (Alaska 1980)] that they had the right to a hearing to contest the seizure or seek to bond the property out. Ex. 23, Tr. 348-51, Appendix 2 - motion for return of property and to suppress as evidence in the Alaska Supreme Court, and Cole's brief. In addition, the State did not provide a statute, authority, or justification for forfeiture in any affidavit, warrant, charge, or information filed in David's case. Ex. 5-6, 11. Cole never told David of these protections or never investigated and found out these were violations of established constitutional due process that would require all the property to be permanently returned and not used as evidence. Cole continues to claim, even to this court, that the State was not required to provide any of this established due process.

Cole told David that the case was going to be a big embarrassment to the Governor (Murkowski) and that he would bring "immense pressure to bear on the prosecutor and judge to make an example of Haeg" Tr. 119-20, 237.

Cole told David that to "stop it before things snowball out of control" they should agree with the prosecution's "demand" for a plea agreement. Tr. 13, 16, 47, 48, 50, 99, 243, 245, 285,

351, and Ex. 1.

Cole told David that the prosecution required an "interview" for the plea agreement. During this 5-hour "interview" David told Leaders and Trooper Gibbens the evidence they claimed was found in the GMU where he guided was actually in the GMU in which the Wolf Control Program was taking place. See record (Haeg's opening brief) and Tr. 146-7.

Cole told David for the "open sentencing" plea agreement David had to quit conducting guided hunts for 1 to 3 years and that David and Jackie should immediately cancel the first years hunters. Tr. 18, 67, 154, 251.

After the plea agreement had been in place for months, the first guiding season was over, 5 witnesses had been flown in from as far away as Illinois, and just 5 business hours before the "open sentence" plea agreement was to be finalized before the judge in McGrath, prosecutor Leaders filed an amended information changing the charges agreed to in the plea agreement to charges far more severe. Ex. 6 and 19 and Tr. 10, 87, 110, 117.

Cole told David and the witnesses he "just received the bad news" on November 8, 2004 and then showed them a fax dated November 8, 2004 1:00 p.m. of the amended information from Leaders. Ex. 7 and Tr. 25, 87, 109-10, 117.

Both the original information and the amended information utilized David's statements, made during the "interview", as the only probable cause for most the charges and as primary probable cause for the rest. Ex. 5 and 6.

When David asked what could be done to enforce the agreement Cole told him and all the witnesses, "The only thing I can do is call Leaders boss, a women I worked with when I was a prosecutor." Tr. 28, 87, 106, 110-11, 117 and Ex. 17.

Cole then talked to Leaders and presented several different proposals to David, which David rejected. Tr. 57-58, 105-6, 114, 124-5. David again asked what could be done to enforce

the original agreement and Cole said, "I can't piss Leaders off because I still have to make deals with him after you're finished." Tr. 29, 33, 95, 380.

Cole cancelled the trip to McGrath by stating, "You can't go out there and plead to these new charges" David was arraigned on the amended information telephonically without Cole or Leaders saying a word about the broken plea agreement David wanted to be enforced. Ex. 4.

David talked to his business attorney Dale Dolifka (Dolifka) about what happened and Dolifka told David something was not right. Tr. 378. Because of this David started secretly tape-recording his conversations with Cole. Ex. 17-19 and Tr. 29, 281, 314, 378. These recordings provide absolute proof that there was a "open sentencing" plea agreement, that David had relied on the plea agreement to his immense detriment, that David asked what could be done to enforce the plea agreement, that Cole said the only thing was to "call Leaders boss", that he told Cole that he wanted the plea agreement enforced at any cost both money wise or sentence wise, that he asked Cole how the State could use his statements against him after they broke the plea agreement – including issuing them to the media, that he didn't understand how he could be charged with guiding crimes, that he wanted to oppose the prosecution in any way possible, that he never accepted any plea agreement other than the original one, and that he wanted to know all possible ways to get his airplane back. Ex. 3, 17-18 and Tr. 10, 21, 23, 25, 101-2, 129, 222.

These same recordings provide absolute proof that Cole failed to inform David of any rights or protections to the above gross prosecutorial violations – even when it was crystal clear David wished to know them. These same recordings also provide absolute proof that Cole was not willing to do anything to advocate for David that would jeopardize his "deal" making ability with the prosecution. Tr. 29, 33, 95, 380.

David fired Cole about a month after Leaders broke the plea agreement because he felt Leaders and Cole were trying to extort more and more for the same plea agreement that had

already been paid for in full.

David then hired attorney Chuck Robinson and investigator Joe Malatesta. Malatesta secretly taped a conversation with Cole discussing what happened to the "open sentence" plea agreement. Ex. 19. This recording provides absolute proof there was an "open sentence" plea agreement, that Leaders broke it or "reneged" at the last minute to get more from David, that Cole failed to enforce the agreement or tell David that it could be enforced, that both David and Cole were unhappy about what Leaders had changed, that David never agreed to any other plea agreement than the "open sentence" one, and that "One thing that the DA (Leaders) did back out on though is originally he said same counts that he was facing that are in that note that he sent to me 'open sentence'".

Robinson told David everything that happened while Cole was David's attorney was "water under the bridge", that everything was "between Cole and Leaders" and "there is nothing I can do." Ex. 27 and Tr. 33. Robinson recommended going to trial, not putting on any evidence, and to not ever inform the court about the plea agreement or everything David had done for it. Ex. 27 and Tr. 154, 381. Robinson told David he had a "tactic" that because the State had not supplied an affidavit when they filed the information the court failed to obtain "jurisdiction" over him. Robinson stated that telling the court there was a plea agreement or all David had done for it would admit the court's "jurisdiction" over him.

David asked Cole write a letter documenting that Leaders had broken a plea agreement by filing far harsher charges after David had relied on the agreement to his great detriment. Ex. 7. Cole would not write this letter until he had the transcript of the recorded conversation between himself and investigator Malatesta. Ex. 7. This letter, written by Cole, proves that there was a plea agreement. The letter then claims that the first information was filed in the middle of October 2004. The first information was actually filed November 4, 2004. Ex. 5. Then Cole

claims David asked for "open sentencing" after the middle of November and after the information was filed. Cole's detailed billing, made at the time in question, documents Cole asking Leaders for "open sentencing" on August, 27, 2004. Ex. 3. The letter documents that Leaders accepted the "open sentencing" plea agreement. The letter then claims "a week later [Leaders changed his mind]…I believe this happened on or about November 5, 2004." "A week later" than August 27 (which is when the billing statement documents Leaders being asked about "open sentencing") is September 3, 2004. Virtually all David and Jackie's guide season that they gave up would have happened during September and October of 2004. With no "open sentencing" agreement during September and October, as Cole tries to claim in his letter, it would more difficult to prove "detrimental reliance" upon it. If there was an "open sentencing" agreement during September and October, as Cole's billings prove, detrimental reliance requiring enforcement of the plea agreement is overwhelming. The letter states that Cole told David on November 8, 2004 that Leaders was going to break the "open sentencing" plea agreement, even though the letter admits he had known since November 5, 2004 and knew David was flying in numerous witnesses from as far away as Illinois in reliance on the "open sentencing" plea agreement. The letter states a "new agreement" was reached on the night of November 8, 2004. The secret recordings of Cole & witness testimony prove this false. Ex. 7, 17-19. A "new agreement" that David accepted would negate Coles obligation to seek enforcement of the "open sentencing" plea agreement.

David lost at trial to the worst charges a hunting guide could face - same day airborne hunting as a guide. To do so Leaders suborned the known perjury from Trooper Gibbens that the evidence was found in the GMU where David was licensed to conduct guided hunts. All David's statements, made for the plea agreement, were used against him at trial. Ex. 5-6.

In the months between conviction and being sentenced David researched Robinsons

"tactic" and found it non-existent. The last time an information had to be supported by an affidavit to provide jurisdiction was in two 1909 cases – *Salter v. State*, 2 Okla. Crim. 464, 479, 102 P. 719 (1909) and *Ex parte Flowers 1909* OK CR 69 101 P. 860 2 Okl.Cr. 430.

Rule 7(c) of Alaska Rules of Criminal Procedure specifically states,

> "Defects of form [in informations] do not invalidate" and "[The information] shall be signed by the prosecuting attorney." Rule 7(a) states, "Any information may be filed without leave of court." No mention of an affidavit being required is made anywhere in Rule 7 – "Indictment and Information".

After David pointed this out, Robinson came up with two "fresher" cases, *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *Albrecht v. U.S.*, 273 U.S. 1, 8 (1927). David researched these and they proved beyond any doubt an information did not have to be supported by an affidavit to provide the court with jurisdiction. When David pointed this out Robinson stated, "the court may have personal jurisdiction but they would not have subject-matter jurisdiction."

David researched this and found the only thing the court needed to obtain subject-matter jurisdiction was that he be charged with a misdemeanor crime in the judicial district in which the crime was alleged to have happened – which is exactly what happened. See *AS 22.15.060.*

Because of this David absolutely demanded Cole be forced to appear in person so, "I can look Cole in the eye as I get sold out." Tr. 149. and Ex. 26, 27, 34. David typed up 56 questions that he demanded Robinson ask Cole at the sentencing. Ex. 9. The questions were about all David had done for a plea agreement Leaders had broken and how Cole had said nothing could be done to enforce it. Ex. 9 and Tr. 34, 36. David paid for a subpoena, paid to have it served, paid for witness fees, bought a plane ticket to McGrath for Cole, paid for a hotel room for Cole, and then Cole never showed up in McGrath. Ex. 37 and Tr. 11, 34, 76, 111, 118-19, 149-50, 287.

Robinson never told the judge of the existence of the plea agreement Leaders broken by filing far harsher charges in an amended complaint, that Leaders got David's statement from the

promise of this plea agreement, or that David and Jackie had given up a whole years guiding for the broken plea agreement and the year given was already past. Tr. 11, 19, 32-34, 67, 117-18.

David was sentenced to a revocation of his guide license for 5 years, nearly 2 years in jail, $19,500.00 fine, and forfeiture of nearly $100,000.00 in property. The judge cited the very perjury by Leaders and Gibbens as justification for the sentence – "because most in not all the wolves were taken were Haeg hunts." Robinson never objected. 7/31/06 Motion to Supplement the Record-Tape & Transcription of Sentencing in Case #4MC-04-24 Cr. & Tape #4MC-05-28B.

After David was sentenced he found a letter Cole had wrote Robinson stating, "I don't plan on being available to testify." Ex. 37. David confronted Robinson about Cole not showing up and Robinson referred David to Cole's letter as the reason. Ex. 34. Also after David was sentenced Trooper Gibbens wrote a letter to Trooper Lieutenant Steve Bear (at David's request) admitting *all* evidence of where the wolves were killed was in the GMU in which the Wolf Control Program (WCP) was taking place.

> Gibbens, "Lt. Bear, I received the fax you forwarded to me with five sets of GPS coordinates circled from my case report involving case number 04-23593. I found that the coordinates were those of kill sites #1- #4, and of an additional location which was the first set of suspicious ski tracks I had seen. … I have once again plotted the coordinates and confirmed what we have all talked about many times now, that these five coordinates are within Game Management unit 19D. (The WCP was being conducted in Unit 19D). See record (Haeg's opening brief)

David fired Robinson and filed the fee arbitration proceeding against Cole. Four witnesses testified to the arbitrators who were present when Cole told David on November 8, 2004 "there is nothing I can do except call Leaders boss" after Cole was asked how to enforce the plea agreement. All these witnesses testified Cole made the statement, "there is nothing I can do except call Leaders boss, a women I worked with when I was a prosecutor." Tr. 87, 106, 110-11, 117. Witnesses testified Cole never told any of them he "could file a motion to enforce the plea agreement." Tr. 102, 105, 111, 117, 353. The secret recordings David made of Cole just

after Leaders broke the agreement also prove that Cole never said he could file a motion. Ex. 17. All witnesses testified Cole told them on November 8, 2004, "I just received bad news" and then showed them a fax from Leaders dated November 8, 2004 1 PM of an amended information changing the charges to far more severe ones. Tr. 87, 109-11, 117 and Ex. 6. Witnesses testified that Cole said the perjury changing the location of the evidence "didn't matter". Tr. 87. Witnesses testified this perjury was material. Tr. 163-65, 227, 228. Witnesses testified Cole never told David he could seek to suppress evidence. Tr. 16, 87 Witnesses testified Cole never told David or found out the Wolf Control Program was intentionally isolated from game, hunting, and guiding. Tr. 16 & 46. Witnesses testified this was material. Tr. 46 Witnesses testified Cole said the Governor was going to make an example of David by bringing "substantial pressure brought to bear on either the prosecution or the Judge with regard to a very serious sentence". Tr. 185. Witnesses testified Cole stated, "I can't piss off Leaders because after your done I still have to be able to make deals with him." Tr. 95. Witnesses testified David had absolutely demanded Robinson subpoena Cole so he could testify at David's sentencing in person about all David had done for the plea agreement Leaders had broken. Tr. 76, 111, 118-19, 149. Witnesses testified David had paid for all of them to travel to Anchorage on November 8, 2004 so they could fly to McGrath on the morning of November 9, 2004 to testify for David's plea agreement. Tr. 74, 81-82, 87, 95, 109. Witnesses testified this was an "open sentence" agreement. Tr. 102, 105, 129. Witnesses testified this "open sentencing' plea agreement was in place for months. Tr. 102. Witnesses testified that David had placed immense detrimental reliance upon this "open sentence" plea agreement. Tr. 18-20, 32-33, 117, 315, 379. Witnesses testified David never agreed to any other plea agreement on either November 8 or 9, 2004. Tr. 27-28, 72, 87, 110-11, 117. Witnesses testified Cole had told all of them they could not go to McGrath because Leaders had broke the deal. Tr. 113. Witnesses testified Cole did nothing to

keep Leaders from using David's statements after Leaders broke the plea agreement. Tr. 19 and Ex. 17. Witnesses testified, when cross-examined by Cole, that David never said he didn't want the plea agreement to be enforced because it would cost too much Tr. 105, 298, 300, or because he was afraid of the sentence that could be imposed during "open sentencing". Tr. 313 and Ex. 17 p. 10.

Cole committed perjury to the arbitrators when he testified under oath that he told David and all the witnesses, when he was still David's attorney, "I can file a motion to enforce the plea agreement." Tr. 268, 298-99, 320. Cole committed perjury to the arbitrators when he testified under oath that David did not want to enforce the agreement because it would cost too much. Tr. 298. Cole committed perjury to the arbitrators when he testified under oath that David did not want to enforce the plea agreement because he was afraid of the sentence that could be imposed under "open sentencing". Tr. 300-1. Cole committed perjury to the arbitrators when he testified under oath that the plea agreement that was supposed to be finalized in McGrath on November 9, 2004 was not "open sentence". Tr. 318, 332, 338, 341-2. Cole committed perjury to the arbitrators when he testified under oath that there never was a plea agreement. Tr. 322, 327. Cole committed perjury to the arbitrators when he testified under oath that he had told David before November 8, 2004 that Leaders was going to "change" or break the plea agreement. Tr. 262, 327-8, 330. Cole committed perjury to the arbitrators when he testified under oath that the "open sentencing" plea agreement was made months after August 27, 2004. Tr. 261-2.

Cole committed perjury to the arbitrators when he testified under oath that David had an "immunity agreement" before David gave the 5 hour interview to Leaders and Gibbens. Tr. 252, 283 and Ex. 5, 6, 33. Cole committed perjury to the arbitrators when he testified under oath that Robinson told him he didn't have to appear in McGrath to testify at David's sentencing. Tr. 286-287 and Ex. 37. Cole committed perjury to the arbitrators and this court when he testified under

oath that the State did not have to offer David a complete "ensemble of procedural protections" "within days if not hours of seizure" - including a hearing to contest or just bond when they deprived him of property used to provide his family's livelihood. Tr. 348-9. F/V American Eagle and Waiste and Appendix #2. Cole testified under oath three different times he had "wrote off" the money still owed David according to his itemized billings. Tr. 13, 233, 273.

The arbitrators refused to admit evidence from David Tr. 357 and Ex. 26, 27, 28, 30, 34, 38, 40, 42 & four motions to supplement the record, stopped his cross-examination of Cole when Cole was being forced into admitting perjury Tr. 221, 323-4, 326, limited David on time to put on his case Tr. 310-11, 326 and advocated and/or showed evident partiality for Cole. Tr. 295-296, 298, 281, 324.

Immediately after the 4 days arbitration David asked for a copy of the tapes made by the Alaska Bar Association and was informed nearly one-third of the tapes, including tapes in which attorneys Cole and Fitzgerald (Cole's one witness) were perjuring themselves, were blank. (Taped conversation) David asked to see the sign-in log to see if Cole or Fitzgerald entered the Bar office immediately after each days arbitration and was refused. (Taped conversation) David asked the Bar to supplement the record with his tapes (made with 3 tape recorders) and this was refused. (Taped conversation)

The arbitrators issued the current decision that is chilling in its complete lack of support and denial of the mountain of irrefutable evidence detrimental to Cole. David immediately called the chair of the arbitration panel to express his disbelief. When asked, chair Nancy Shaw refused to tell David who wrote the decision – even though she signed the decision 13 days prior to the other 2 arbitrators and her signature had the only date typed and not hand written. When asked, chair Nancy Shaw twice refused to tell David if she had any reservations about the decision and award. (Taped conversation)

The decision and award, supposedly written by two attorneys and a full time court employee, starts off "On March 29, ***2994***…" The decision and award fails to address the most important issues presented: Cole's lying to David and the other witnesses to intentionally deprive David of his rights and protections under law; Cole's perjury to the arbitrators to cover this up; Cole's failure to seek enforcement of the plea agreement; Cole's failure to show up and/or testify when subpoenaed; and Cole's failure to tell David that he could seek to suppress evidence, that he entitled to seek the return of his property used to provide a livelihood, that Wolf Control Program violations were intentionally separate from guiding violations, that he could seek enforcement of the plea agreement, that he had the right to and immunity agreement before giving a statement, and the he could seek to keep Leaders from using his statements after the plea agreement was broken.

The arbitrators falsely claim that David did not offer evidence of the points on which the search warrant application was defective, that the plea agreement was made in October, that the plea agreement was *not* "open sentencing", that David agreed to forfeit the PA-12 aircraft, that Cole asked Leaders to reconsider breaking the plea agreement, that a new agreement was reached in the evening of November 8, 2004, that everyone went out to dinner on November 8, 2004 to "celebrate" this new agreement, and that because Robinson did not file motions to enforce David's rights and protections it meant Cole did not have to do so either.

The arbitrators make the argument that since David's sentence after trial was worse than the plea agreement supposedly agreed to in the evening of November 8, 2004 that Cole is absolved from blame for his actions. They make no mention of the fact that Cole was responsible for David being convicted of guide violations and on evidence that should have been suppressed – precluding any conviction whatsoever or that the *maximum* penalty allowed for the "open sentence" plea agreement charges were far less than the sentence David was given, that the

prosecution utilized David's statements in direct violation of David's rights, that David had already given up a whole years income for the plea agreement Leaders broke, that the sentencing judge was never told of any of this and of the fact she stated on the record she was basing her sentence on perjury known to the prosecution. After all this the arbitrators found no evidence was presented that supported Cole owed David a refund.

The arbitrators award *Cole* $2689.19. The issue of David still owing money to Cole was never presented to the arbitrators. (Contract to arbitrate) Cole testified repeatedly to the arbitrators under oath that he had "wrote off" any money still outstanding according to his itemized billing after David fired him. Tr. $2689.19 is $1000.00 *more* than even what Cole testified was "wrote off". Ex. 3.

The arbitrators found no basis for referral of Cole to Discipline counsel – which is the case for violation of the Rules of Professional Conduct. See Appendix #1.

STANDARD OF REVIEW ON APPEAL

Appeals of Alaska Bar Association fee arbitrations are governed by *AS 09.43.120(a)* Vacating An Award (a) On application of a party, the court shall vacate an award if (1) the award was procured by fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of a party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown for postponement or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of AS 09.43.050 , as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under AS 09.43.020 and the party did not participate in the arbitration hearing without raising the

objection.

LEGAL ARGUMENTS

1. SUMMARY

Attorney Cole never advocated for client David Haeg in any way whatsoever and in fact joined the prosecution in convicting David of crimes for which he was not guilty – because he admitted acting on the conflict of interest that he "can't piss Leaders off." The arbitration panel, made up of two attorneys and a public person, corruptly and intentionally ignored the stunning evidence to issue a decision and award favorable to Cole. Cole didn't show any knowledge of the laws concerning David's case Tr. 127, 234, 348, Cole's brief and oral argument, failed to inform David of any of his legal rights and protections so David could know and decide whether or not to exercise them Ex. 17, 18, 19, 37 and Tr. 28, 87, 106, 110-11, 117, 348, failed to exercise any of David's legal rights and protections Ex. 17, 18, 19, 37 and Tr. 28, 87, 106, 110-11, 117, 348, and lied to David and others to hide these legal rights and protections from David. Ex. 17, 18, 19, 37 and Tr. 28, 87, 106, 110-11, 117, 348. It is irrefutable that Cole was required to inform David of or provide these legal protections – effectively abdicating his duty as David's loyal advocate, effectively joining the prosecution to convict David. See Appendix #1. During the Fee Arbitration in which David asked that Cole be required to return his money and pay for subsequent expenses Cole perjured himself numerous times to cover up the fact he never told David of his legal rights and protections, failed to exercise any of David's legal rights and protections, and lied to David and others to hide these legal rights and protections from David. It was proven to the arbitrators beyond any doubt David wished to exercise all of his legal rights and protections and had told Cole so. Ex. 17, 18, 19, 37 and Tr. 28, 87, 106, 110-11, 117, 348. All this misconduct by Cole was clearly presented to the arbitrators who corruptly ignored the overwhelming evidence presented them. The arbitrators also exhibited partiality, exceeded their

powers, excluded evidence, imposed time limits, failed to comply with the *Alaska Rules of Attorney Fee Dispute Resolution 40(q)*, and failed to recommend Cole to disciplinary counsel.

2. ANALYSIS

A. The award was procured by fraud.

Cole and his one witness, attorney Kevin Fitzgerald, misled and committed perjury to the arbitrators. The most blatant example of both Cole and Fitzgerald's perjury is where they both testify under oath that David and Zellers (whom Fitzgerald represented) had immunity agreements. Tr. 181-2, 187, 194, 252, 283.

Although Leaders actions in using both David and Zellers statements against them in all 3 informations filed unchallenged is proof enough of this perjury it is Fitzgerald's testimony on the record at Zellers sentencing that is the most chilling proof there was no immunity agreement for either David or Zellers. Ex. 5, 6, and 33.

Proof that Cole perjures himself numerous other times are as follows (proof of the perjury is most abundant in the preceding FACTS and in the included reference to exhibits): While representing David he stated he could file a motion to enforce the "open sentencing" plea agreement Tr. 102, 105, 111, 117; that David did not want to enforce the "open sentencing" plea agreement Tr. 298; that there never was an "open sentencing" plea agreement Tr. 322, 327 & Ex. 19; that David accepted a plea agreement other then "open sentencing" Tr. 342 and Ex. Cole's brief; that David should have been charged and found guilty of hunting, guiding, or game violations (see Cole's brief & oral argument, Tr. 297); that the "open sentencing" plea agreement was in place for only days Tr. 336 and Ex. 7, 19; that he told David far in advance of November 8, 2004 that Leaders was going to break the "open sentencing" plea agreement Tr. 337, 340 and Ex. 7; and that Robinson had told him he did not have to appear in McGrath in person to testify about how he had represented David and all David had done for the "open sentencing" plea

agreement Leaders broke. Tr. 286-287 and Ex. 37.

B. That there was Evident Partiality by the Arbitrators in Favor of Cole.

The arbitrators refused to let David testify about what Robinson had said but allowed Cole to testify about what Robinson had said. Tr. 90, 283, 285, 286-287, and Ex. 26 & 27.

The arbitrators saved Cole each time he was close to being forced to admit he was committing perjury. Tr. 221, 323-4, 326. Haeg specifically objected to arbitrator Metzger testifying in favor of Cole. "Is Mr. Metzger testifying?" Tr. 381.

C. There was Corruption in the Arbitrators.

The decision and award by the arbitrators is chilling in its complete lack of support by the record or reference to the mountain of irrefutable evidence against Cole presented to them. See decision and award. The arbitrators fail to address the issues presented. The issues presented but not addressed as required by *Alaska Bar Rule 40(q)(3*):

> *Rule 40. Procedure. (q)* Decision of the Arbitrator or Arbitration Panel. (3) the findings of the arbitrator or panel on all issues and questions submitted which are necessary to resolve the dispute.

The arbitrators make false statements in the decision and award. False statements and where in the transcripts and exhibits they are proven false are as follows: "Mr. Haeg did not offer evidence of the points on which the search warrant application was defective … or that the misstatement was material." See record in opening brief. "By October, a plea agreement had been firmed up … terms of the sentence were fixed, including forfeiture of the PA-12 aircraft." Tr. 34, 50-51, 114, 129, 131, 132, and Ex. 17, 18, 19. *Irrefutable* proof the arbitrators and Cole knew this was false is in the middle of page 3 of the decision and award. "In a recorded telephone conversation on January 9, 2005 Ex. 19, p. 6, Mr. Cole recalled the prosecutor's change of heart somewhat differently. On that date he said the prosecutor had threatened to amend the charges *unless* Mr. Haeg agreed to the forfeiture of the PA-12 aircraft."

"[I]n the evening hours of November 8, they eventually reached a new agreement." Tr. 114, 125, 128-29, 313-314, 321 and Ex.17, 18, 19. "Mr. Cole, Mr. Haeg, and Mr. Haeg's witnesses went out to dinner together after the re-negotiated deal was made with the prosecutor to *celebrate* the disposition of the case." Tr. 113, 125, 317 and Ex.

The arbitrators finally state that there are "two measures of the merits of Mr. Cole's services to David … the plea agreement that Mr. Cole presented to Mr. Haeg on November 8 was plainly more favorable to Mr. Haeg than "open sentencing" turned out to be…" and "Mr. Haeg argues that Mr. Cole should have moved to suppress the evidence taken pursuant to the search warrants and should have moved for specific performance of an 'open sentencing' agreement. But no evidence was presented that Mr. Haeg's second lawyer filed such motions."

David never received the "open sentence" plea agreement so how can the arbitrators possibly make this statement? The *maximum sentence* that could be imposed in the "open sentence" plea agreement charges was *less* than what was imposed on David after *trial*. No one ever told the judge that sentenced David that he had cooperated with the prosecution from the very beginning, that violations of the Wolf Control Program were intentionally isolated from hunting, guiding, or game violations [*5 AAC 92.039 and AS Title 16 Fish and Game*], that the prosecution had illegally made a Wolf Control Program case into a hunting guide case, that David and Jackie had *already* given up a *whole year* of guiding for a plea agreement the prosecution broke Tr. 11, 19, 32-34, 67, 117-18, Cole admitting this, that the prosecutions *whole case* was illegally based on David's statements made for a plea agreement (Alaska Evidence Rule 410 and constitutional right against self incrimination) and that the justification given on the record for David's sentence "since the majority if not all the wolves were taken in 19C [where David was licensed to guide hunts & had a hunting lodge] ... to kill the wolves in the area where you were hunting" was the very perjury the prosecution used to make a Wolf Control

Program case into a hunting case.

Robinson, David's second attorney, sated he *couldn't* file motions to fix what Cole had failed to do – so how can what Robinson *didn't* do mean Cole didn't have to do it either? Robinson claims it was *Cole's* actions that hamstrung him.

D. The Arbitrators Exceeded their Powers.

The arbitrators awarded *Cole* $2689.19 when this grievance was *never* submitted to the arbitrators. Arbitrators who award on grievances not submitted exceed their powers. *Sea Star Stevedore Co. v. International Union of Operating Engineers, Local 302* 769 P.2d 428 (Alaska 1989) the Supreme Court held "an arbitrator does not have the power to reach the merits of a grievance not submitted to him." Cole even testified 3 times under oath to the arbitrators that he had "wrote off" any money outstanding on his itemized billings. Tr. 13, 233, 273.

E. The Arbitrators Refused to Admit or Hear Evidence.

The arbitrators refused to admit or hear evidence material to David's case. Tr. 357 and Ex. 26, 27, 28, 30, 34, 38, 40, 42 & four motions to supplement the record. The arbitrators also placed strict time limits on David, which severely harmed his ability to put on his case (almost all were imposed off record & when nothing was recorded). Just one specific example is where arbitrator Metzger tries to eliminate David's testimony through the combined use of his partiality combined with the time limit is as follows:

> **METZGER**: "Which – now do you want to refer to those correspondence now and offer them?" **HAEG**: "If we can – I just – I think I only have 10 minutes here so I'll just keep grinding along here if you let me." **METZGER**: "If you want us to admit us we need to hear why and hear the objection and decide." Tr. 353.

F. Cole Affirmatively Misrepresented Himself to this Court.

In both Cole's brief and oral arguments he claims that he could not do anything to advocate for David because David was guilty of fish & game, hunting, and/or guide crimes. See

Cole's brief & oral argument. Yet David's brief clearly shows Wolf Control Program violations are intentionally separate from hunting, guiding, or game violations. See *5 AAC 92.039 and AS Title 16 Fish & Game:*

> *5 AAC 92.039*: Permit for taking wolves using aircraft... (h) In accordance with AS 16.05.783, the methods & means authorized in a permit issued under this section are **independent of all other methods & means restrictions in AS 16 & this title**.
>
> *AS Title 16 Fish & Game*: Chapter 5. **Fish & Game Code**; Chapter 10. Fisheries & Fishing Regulations; Chapter 15. Fisheries Experimental Laboratory; Chapter 20. Conservation & Protection of Alaska Fish & Game; Chapter 25. Stocking of Public Land; Chapter 30. Destruction of Big Game Animals & Wild Fowl; Chapter 35. **Predatory Animals**; Chapter 40. Commercial Use of Fish & Game; Chapter 43. Regulation of Entry Into Alaska Commercial Fisheries; Chapter 45. Pacific Marine Fisheries Compact; Chapter 50. **Guides & Outfitters;** Chapter 51. Alaska Seafood Marketing Institute; Chapter 52. Fishery Industrial Technology Center; Chapter 55. Shooting & Firearm Safety.

David's brief also clearly shows the prosecution committed perjury to move the evidence from the Wolf Control Program GMU to the GMU where David was licensed to be a hunting guide. Cole had an absolute duty to utilize the laws to minimize the impact on David – even if David was indeed guilty of something. See Appendix #1.

Yet Cole did absolutely nothing when the prosecution illegally charged a Wolf Control Program case (or minor speed bump in David & Jackie's life) to a hunting guide case (which destroyed David & Jackie's life). Cole didn't even find it fit to inform David of these protections – also a gross violation of the *Rules of Professional Conduct*. See Appendix #1.

Cole states in his brief numerous times David cannot appeal anything "since it is based on a factual determination". Yet *AS 09.43.120* clearly supports David's right to appeal every issue presented to this court because of fraud and corruption.

On page 3 Cole states David said he "could not lose his guide license for 5 years because of these violations of Alaska's Laws." Yet the *tape* of David and Cole, while Cole was *still*

David's attorney, prove this is perjury – along with proving his same testimony to the arbitrators was also perjury. Ex. 17.

On page 4 Cole states he "*later* confirmed in a letter to Leaders that [David's] statements could not be used against Haeg." Yet *every* information filed used the statements as the *only* probable cause for *most* of the charges. Ex. 5 & 6. Also on page 4 Cole states, "*On November 4, 2004*, the State filed an information and an arraignment/change of plea/sentencing was scheduled for November 9, 2004 in McGrath." Yet Cole's own itemized billing statements, made at the time in question, prove the November 9, 2004 hearing was scheduled on *October 15, 2004*. Ex. 3. On page 4/5 Cole states that both informations used David's statements to set forth his criminal activity. How can this be if David had the immunity agreement Cole testified to under oath to the arbitrators and cited just 2 paragraphs earlier on page 4? Tr. 252, 283 and Ex. 5, 6, 33.

On page 5 Cole states, "Prior to the arraignment/sentencing, and on the evening of November 8, 2004, the parties reached an understanding on all the terms of a sentence that would be imposed on Haeg." What attorney would schedule this hearing in advance of a deal being made and also let the prosecutor change the charges just *hours* before the hearing? It is obvious why Cole is claiming the November 9, 2004 hearing was scheduled on November 4, 2004 instead of October 15, 2004.

Cole states, "Because further approval was needed, the parties cancelled the change of plea/sentencing portion of the hearing." Why would Cole *buy a plane ticket to McGrath*, for the November 9 hearing, have David fly in multiple witnesses on November 8, 2004 from as far away as Illinois for the hearing in McGrath, *give up a whole years income*, *and not have the approval needed*? The answer is simple – the Division of Occupational Licensing had already granted the approval of not taking further action on David's guide license then what the court

took. Ex. 17, 18, 19. Cole's excuse there was no approval was to cover up his failure to force Leaders to go through with the "open sentencing" plea agreement in which David's plane was not required to be given up. This was the real reason no one went to McGrath. Ex. 17, 18, 19.

Everything else is a ruse, smoke and mirrors, and/or cock and bull story to cover up Cole's sell out of David to protect his deal-making ability with Prosecutor Leaders. Tr. 29, 33, 95, 380 and Ex. 17, 18.

Cole states, "It is unclear whether Haeg's statement was used in the State's case in chief." David Haeg's statement *was* the State's case. Without it they could have filed less then *half* the charges. Tr. 75-76 and Ex. 5 & 6.

On page 5 Cole admits, "Haeg requested Robinson file a motion to enforce a Criminal Rule ("CR") 11 argument but Robinson stated he could not do so." In other words Cole had David and his family gave up a 5 hour interview, a whole years income, and fly in multiple witnesses that *neither* of David's attorneys, paid over $50,000.00, would even try to enforce.

On page 6 Cole states Robinson agreed to have Cole testify telephonically. Yet in Cole's grievance response, written under penalty of perjury, he admits it only "seemed" Robinson agreed to him appearing telephonically. See Cole's Grievance Investigation. In a taped conversation Robinson tells David the reason Cole didn't appear in person was because of Cole's letter to him stating, "I don't intend on being available to testify." Ex. 37.

On page 10 Cole claims David's arguments contain no proof of fraud or corruption so they cannot be reviewed by this court. As shown there is overwhelming evidence of fraud and corruption. Cole claims, "whether Cole should have advised Haeg to move to enforce any agreement or should have done so was moot because Haeg fired Cole and hired Robinson." In other words Cole admits his service was so defective David had to fire him and hire someone else to do the job. Thus Cole admits David is entitled to his money back he had paid and was

cost by Cole.

On page 11 Cole states "Haeg next argues he was prejudiced by the failure of Cole to advise Haeg of a plea agreement that *never existed*." A mountain of irrefutable evidence, much by Cole's own mouth and hand, proves there was an "open sentence" plea agreement. The secret recordings of Cole are backed up by Cole's letters and itemized billings – proving this chilling perjury. Entire transcript & Ex. 3, 7, 17, 18, 19.

On page 3 of the decision and award even the arbitrators admit the existence of an "open sentence" plea agreement.

On page 12 Cole states, "Cole determined that Haeg had little to no defense to the several *hunting* violations which could lead to Haeg losing his guide license and business for five years, an outcome Haeg repeatedly refused to accept." Cole apparently ignores the fact that Wolf Control Program violations were *intentionally* isolated from hunting violations. See *5 AAC 92.039* and *AS Title 16 Fish & Game.* And that the *evidence* was in the Wolf Control Program GMU.

Also, the secret recordings of Cole prove beyond any doubt David was entirely willing to risk losing his guide license for 5 years. Ex. 17 & 18. In addition, if David "repeatedly refused" to accept a 5 year loss why did he tell Cole, while Cole was representing him, he would go to trial to get the same "open sentence" plea agreement? Ex. 18.

Cole states *David's demand* to go to trial to get a "complete acquittal … resulted in him losing his right to be a guide for five years which now forms the basis for his anger against Cole and the system." It was *Robinson* who said to go to trial because he could not file a motion to enforce the plea agreement. Thus David's anger is because no one told him he could file a motion to enforce the "open sentence" plea agreement that would no doubt have resulted in just a one-year loss of guide license. When you pay over $50,000.00 for advice and the people you

pay hide what you want to know you tend to get very upset.

On page 15 Cole states that David's argument, that he was entitled to seek the return of his business property, is "not legally correct." Cole cites AS 12.36.020 – which he claims "precludes the return of seized property if the property is in custody in connection with an official investigation of a crime or is subject to the forfeiture laws of the state." This statute states: "A *law enforcement agency* may not return property…". See *AS 12.36.020* It has nothing to do with the court returning property. To leave the decision in law enforcement hands would violate due process which guarantees an *opportunity*, "within days if not hours" to protest *to the court* the deprivation of property or even just *opportunity* to bond the property out so the defendant can *ask* to continue making a livelihood until charged, tried, or sentenced. See *Waiste v. State*, 10 P.3d 1141 (Alaska 2000) & *F/V American Eagle v. State*, 620 P.2d 657, 667 (Alaska 1980). If this "ensemble" is not complied with "within days if not hours" the defendant is entitled to the permanent return of his property – and to suppress it as evidence. See Motion for Return of Property in the Alaska Supreme Court – Appendix #2.

On page 16 Cole argues that not appearing in McGrath in response to the subpoena did not evidence a breach of duty or loyalty – because he was no longer David's attorney he "owned no duty of loyalty or advocacy." In other words Cole thinks David's constitutional right to *compel* witnesses in his favor does not apply to him after he sold David out. Robinson never told David that the court had to be told when Cole failed to show up at sentencing. Ex. 26 & 27.

On page 18 Cole states this issue between the parties was "whether Haeg was required to pay the fees he contracted with Cole to pay." This is false. The entire issue was whether *Cole* owed David the money David already paid Cole – not the other way around. See Fee Arbitration Petition. Cole even admits he waived the money, in his brief, "The *fact* Cole waived or did not ask for the amount that Haeg refused to pay does not evidence corruption or fraud." Cole then

makes a further unbelievable claim, "Whether Cole seeks to have this decision confirmed, ***which it does not intend to do***, was a decision that was not before the panel." Cole fails to inform this court *AS 09.43.120(e)* states that if an application to vacate is denied the court *shall* confirm the award.

CONCLUSION

David filed the Fee Arbitration Petition so he could obtain the return of the paid to, and wasted by, Cole's representation that was in complete violation of nearly every *Rule of Professional Conduct*. Cole himself states on tape the reason for these violations – he was actively representing his own conflicting interests of protecting his deal making ability with the prosecution instead of advocating for David. To avoid an adverse decision because of the overwhelming evidence against him Cole and his witness, attorney Fitzgerald, committed fraud by perjuring themselves to the arbitrators numerous times – instances of which were specifically pointed out in both of David's briefs.

Cole's fellow attorney arbitrators conducted the hearing to affirmatively prejudice David, instances of which are specifically pointed out in David's briefs. The subsequent decision and award was chilling in the complete lack of evidence to support it, the mountain of evidence against it, and its conspicuous refusal to address the issues presented – instances of which are specifically documented in David's briefs. Also chilling was the affirmative use of proven falsehoods as justification for the decision and award – instances of which are specifically documented in David's briefs.

Because of the gross and fundamental breakdown in justice caused by Cole's and the arbitrators affirmative wrong doing, David respectfully asks this court to carefully read the secret recordings made while Cole was still David's attorney, to vacate the award, and grant the specific relief at the end of David's opening brief.

This reply brief is supported by the accompanying affidavit and appendix. RESPECTFULLY SUBMITTED on this _____ day of _____ 2007.

_____

David S. Haeg, Pro Se Appellant

CERTIFICATE OF SERVICE

I certify that on the ____ day of _____ 2007, a copy of the forgoing document by ___ mail, ___ fax, or ___ hand-delivered, to the following party:

Brent Cole
745 W. 4th Ave., Suite 502
Anchorage, AK 99501
By: _____