



# Atlantic Legal Foundation

## Annual Report

April 2002

### Chairman's Review

The year 2001 was one of energy and celebration as the Atlantic Legal Foundation marked a quarter century of service to the principles that have enabled our nation to flourish – principles that were viciously attacked on September 11. And yet as the President said in his State of the Union Address, “it was as if our entire country looked into a mirror, and saw our better selves....” Going forward, we must ensure that our government’s national resolve and our response to the tragedy are consistent with the values being defended.

As I look into ALF’s mirror, and particularly how it reflects the broad scope of significant issues ALF has tackled in the past decade, I have no doubt that the Foundation’s mission and dedication to a properly limited government and an ordered, civil society has been served faithfully and effectively. ALF has played important roles in cases in federal and state courts throughout the country, challenging unlawful governmental interference in business and personal affairs, on behalf of many clients – some modest and some powerful – but all needing a responsible voice in the courtroom. ALF has been unique in its effective advocacy of sound science on behalf of some of the nation’s most respected scientists. It has done more than its part to rein in abuses of the tort system for which the plaintiffs’ class action bar is justly criticized. ALF has taken on cases touching on important due process concerns in the academic world and has fought to protect the rights of parents to choose to send their children to safe, challenging charter public schools which are free of a tight teachers’ union



**ALF Chairman Dan Fisk (second from right) received the Pro Bono and Community Service Corporate Counsel of the Year Award from the Southern California Chapter of the American Corporate Counsel Association. He directed the \$10,000 award to ALF.**

stranglehold. Also important have been ALF’s cases protecting private property owners’ rights against unwarranted government intrusion.

ALF is proud of the support it has received from some of our nation’s most prominent corporations, private foundations and individuals all of whom are concerned that our nation function under a constitutionally limited and balanced government. This year we are particularly pleased to welcome for the first time the generous support of the Castle Rock Foundation and The Anschutz Foundation, among others. Increased support from a growing list of individuals also has been gratifying. However, like many other 501 (c) (3) organizations, ALF is dependent on a funding stream over which it has little control and the need for new and increased funding is constantly with us.

ALF’s client list has grown this year as we have represented associations encompassing thousands of individuals from every walk of life. And, continuing a tradition in which

we take great pride, we have welcomed to our Board and Advisory Council new members of extraordinary accomplishment and vision. The resignations of Gary Van Graafeiland and Lee Loevinger were reluctantly accepted. Their participation and keen insights over many years will not be easily replaced.

ALF moves into its next twenty-five years with a solid reputation for quality advocacy of issues that are basic to the nation’s strength. We welcome your enthusiastic support. ■

*Hayward D. Fisk*

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**William H. Slattery has increased support for ALF from private foundations across the United States. He introduced Gregory Joseph, speaker at ALF's October dinner.**

## President's Report

It has been said that an organization gets the leadership it deserves. This observation fits ALF particularly well for the caliber of its Board of Directors and Advisory Council is not matched by any other public interest law firm. ALF's pride in its leadership was, in retrospect, a central theme of this anniversary year. At our June banquet, honoring former U.S. Senator and Secretary of Defense William Cohen, the long commitment to ALF of so many directors and advisors was appreciatively noted.

Just as deserving of celebration as the Foundation moves into its next twenty-five years is the roster of distinguished professionals who joined our ranks in 2001. We welcome each of them.

Stephen Whelan, a partner in Thacher Proffitt & Wood in New York City, moved to the Board from our Advisory Council. He was joined by Frank Burch, the co-chairman of Baltimore-based Piper Rudnick Marbury & Wolfe LLP.

We also are pleased to have four new members of the Advisory Council:

Susan Meade has a background in both state and federal government service and is now Senior Vice President in the Government Affairs Group at JPMorganChase & Co. in New York City.

Bob Juceam is a partner in Fried, Frank, Harris, Shriver & Jacobson. His practice focuses principally on insurance litigation, securities law defense, corporate internal investigations and professional malpractice defense and counseling.

Ron Gots heads the International Center for Toxicology and Medicine, in Rockville, Maryland. He holds a medical degree and a Ph.D. in pharmacology and for more than 25 years has focused on problems involving environmental medicine, toxicology, causation analysis and risk communication.

A partner in the Washington, D.C. office of Sidley Austin Brown & Wood, Alan Charles Raul has specialized in administrative and constitutional law, as well as intellectual property, privacy, consumer protection, Internet and e-commerce law. He has held important government positions and served as associate counsel to President Reagan.

During 2001, ALF strengthened and expanded its alliances with several national groups advocating goals which the Foundation shares. ALF is pleased to represent the National Federation of Independent Business in a suit challenging the EPA's burdensome lead-reporting regulations; the American Association of Small Property Owners in the important Tahoe regulatory takings case in the Supreme Court of the United States; and, the Community Financial Services Association of America in an Illinois court in which abusive state regulation is being contested. We were

privileged as well to represent the New York Charter Schools Association and the Center for Educational Innovation – Public Education Association in the fight to protect the kind of innovation in education afforded by New York's charter school legislation. While a decision in any important case reaches beyond the litigating parties, it is gratifying to know that our work contributes to the immediate interests of thousands of association members whose stake in the legal issues presented deserves protection. We expect that our commitment to school choice will be called on again in other jurisdictions where the public school establishment is moving to the courts in its continuing opposition to school choice.

I am proud of and grateful for the solid support of ALF's leadership, and equally proud that ALF will continue to serve an expanding client list with causes that demand effective representation that otherwise would not be available. ■

*William H. Slattery*



**Gregory Joseph, shown with Director Stephen Harmelin, discussed class action developments before ALF's October 2001 meeting in Philadelphia.**

## CASES & CONTROVERSIES

*ALF's docket in 2001 included cases representing virtually all aspects of the Foundation's mission.*

### Unlawful Government Takings

For more than twenty years, property owners in the Lake Tahoe area have not been allowed to build on their properties because of "temporary" zoning restrictions. For this interference with their right to enjoy their property, or to benefit as investors, the government has paid nothing. ALF has filed an *amicus* brief in the Supreme Court contending that "temporary" takings of more than a brief duration are covered by the takings clause of the Constitution. The President of one of ALF's clients, the American Association of Small Property Owners, commented:

"The *amicus* brief...is outstanding. I am confident that the court will be persuaded by your scholarly arguments....our member associations are heady about being able to participate in this piece of history."

ALF's efforts to protect family-owned business in the Harlem section of New York City from the demolition of their site to permit construction of a huge retail complex were rejected on various state procedural grounds; that case is now on appeal.

### Protecting Public School Choice



**Briscoe Smith, ALF Senior Vice President, has focused on charter school matters.**

More often than not, there are long waiting lists for admission to charter schools, solid evidence that parents want to free their children from the deplorable conditions found in too many failing public schools. ALF is representing charter school associations in New York and New Jersey courts working to defend state enabling legislation against attacks by those out to protect a discredited status quo. In one case, involving a charter in Roosevelt, Long Island, ALF's contentions were adopted and the charter school continues to operate while the State was compelled to take over district schools. At year end, courts have yet to rule in another appeal and in a New Jersey challenge to charter school regulation in the troubled *Abbott* Districts.

Charter school associations and other proponents of charters have limited funding and ALF's counsel and advocacy are particularly welcome. Charter opponents – seemingly capable of funding much litigation – move to the courthouse when their efforts in legislative halls fail.

### Sound Science



**ALF General Counsel, Martin Kaufman, has extensive appellate experience in cases applying scientific principles to the law.**

We know of no other public interest law firm with the scientific capability ALF enjoys as a result of its distinguished Advisory Council members. That capability was used effectively in 2001.

ALF's *amicus* brief on behalf of four Nobel Prize winners and a dozen other prominent scientists to the United States Court of Appeals for the Ninth Circuit in *Kennedy v. Southern California Edison Co.* (a case involving allegations that "fuel fleas" from a Southern California Edison Company's nuclear power station caused a fatal cancer in a worker's wife) was cited by the appellate court in its stunning reversal of its own earlier opinion. ALF's brief argued that the decedent's exposure was purely hypothetical because there was no evidence of any radiation in her home, no evidence of the amount of exposure, and no evidence of the radiation dose she received. In their petition for *certiorari* to the United States Supreme Court, the unsuccessful plaintiffs attributed the Ninth Circuit's about face to the brief of "a so-called think tank called the Atlantic Legal Foundation," once again demonstrating ALF's effectiveness in promoting sound science.

*continue on page 4*

## CASES & CONTROVERSIES *continued*

### Sound Science *continued from page 3*

In *National Federation of Independent Business v. Whitman*, ALF is representing an association of more than 500,000 small businesses in a “first chair” challenge to EPA’s “lead reporting rule,” first issued in the waning days of the Clinton Administration. The rule drastically reduces the threshold for reporting use of lead and lead emissions as a by-product of numerous industrial processes. The reduction in the reporting threshold imposes significant burdens on businesses, and disproportionately on small businesses. ALF is challenging the rule because it is based on a biological “model” that is not scientifically valid, and because EPA did not conduct the required “small business impact” analysis.

In *Castillo v. DuPont*, ALF filed an *amicus* brief on behalf of four prominent teratologists in support of defendants. The theme of ALF’s brief is that the testimony of plaintiffs’ experts should not have been admitted because those experts did not use acceptable scientific methodology. The appeal has not yet been decided.

In *Carrillo v. Lockheed Martin*, a case involving a claim that an action for the costs of “medical monitoring” of a large number of individuals who live in Redlands, California (near a Lockheed Martin facility that allegedly discharged potentially toxic chemicals into the groundwater) should proceed as a class action, ALF filed an *amicus* brief on behalf of numerous prominent scientists, in opposition to class certification.

ALF has submitted comments to the National Institute of Occupational Safety and Health on proposed regulations to implement the Energy Employees Occupational Illness Compensation Program Act of 2000. These comments pointed out that the proposed guidelines for evaluating exposure to radiation and its potential for causing occupational illness do not represent a scientific consensus and have no experimental foundation, and therefore it should be made clear that the guidelines should not become the basis for liability in civil litigation.



**Mark Deegan, with his youngster, wants to be a firefighter. But New Jersey firefighter applicants are subjected to testing that gives minority applicants an unfair advantage.**

### International Trade

The Federal Advisory Committee structure frequently is cited as a model for the efficient partnering of industry experts with federal trade negotiators. ALF thus was pleased to represent an industry sector advisory committee for chemical products when its meetings with U.S. trade officials were put on hold early in the last presidential election campaign – evidently to curry support from environmental activists.

ALF’s motion for injunctive relief was denied by a federal court in Washington, D.C., but only after the administration had resumed these important meetings.

### Government Discrimination in Employment/Contracting

2001 saw the end of the latest chapter in the interminable *Adarand* case which involved a non-minority firm’s inability to gain government contracting assignments. At the suggestion of Solicitor General Olson, the Supreme Court considered its grant of *certiorari* improvident. ALF had submitted an *amicus* brief, focusing in part on the Circuit Court’s reliance on the so-called Appendix A (which the government had drafted). Lead counsel for the petitioners wrote before argument:

“The brief you filed was first rate and placed before the [U.S. Supreme] Court very important legal and factual matters that the Court should have in ruling in our case. Particularly helpful was the information regarding how Appendix A came to be. What a stunner that was! Thank you for your generous assistance.”

ALF’s efforts to provide a level field for our New Jersey clients who want to compete for jobs as fire-fighters continues. We hope to establish that the “teamwork” or “biodata” portion of the most recent entry-level firefighter examination was not properly validated, that it was too subjective, and that it was used as an illegitimate method of achieving minority hiring quotas, and that the state department of personnel violated our clients’ due process rights by refusing to disclose information about the design and scoring of the “teamwork” part of the exam, rendering it impracticable for them to pursue their statutory right in the civil service system to appeal their scores.

On June 1, 2001, ALF filed a complaint in federal court challenging New Jersey’s Minority and Women’s Business Enterprise Program and the New Jersey Department of Transportation’s Disadvantaged Business Enterprise program as violations of the equal protection rights of GEOD, a white male-owned firm.

GEOD’s business is heavily concentrated in work as a “consultant” to either prime contractors or subcontractors on large-scale public construction projects, such as roads, rail lines, subway lines, etc. Because of existing affirmative action programs, a substantial portion of those contracts have been awarded to minority-owned firms. In many cases, GEOD is not even permitted to bid.

ALF asserts that New Jersey’s programs are unconstitutional because the state has no “compelling interest” in adopting a race-conscious program as there is no credible evidence that the state discriminated against minority or woman-owned firms in its contracting process. A key issue will be

whether the state’s programs are “narrowly tailored,” thus meeting the principal criteria established by the United States Supreme Court in the landmark *J.A. Croson v. City of Richmond* case. ■



**ALF client GEOD has been denied surveying work in New Jersey because of rules that unfairly favor minority firms.**



**Payday advance borrowers are working Americans who have been neglected by traditional lenders.**

#### **Payday Advance Regulation**

Late in the year, the Community Financial Services Association asked ALF to prepare an *amicus* brief in an Illinois appellate court, describing the consumer base for and credit void sought to be filled by the payday advance industry. Tens of thousands of employees have been ignored as commercial banks have withdrawn from the small loan market. These small, short-term loans are most frequently used in the fashion in which they are intended and the product is much in demand. Counsel for the appellants commented: “I commend you on your fine work – the brief is superb.” ■

## RECOGNITION OF ALF'S TWENTY-FIFTH ANNIVERSARY

*More often than not during its twenty-five year history, ALF has represented clients who found it necessary to contest governmental over-reaching and abuse. This history made proclamations received in advance of our June banquet even more meaningful.*



**Former Senator and Defense Secretary William Cohen joined a list of distinguished recipients of ALF's Annual Award, in June, 2001.**

"On behalf of the residents of New York, I congratulate all those associated with the Atlantic Legal Foundation... You have fought diligently for the integrity of the judicial process and have provided legal representation for individuals and organizations that otherwise could not afford it. I appreciate all that your organization has done to uphold the laws of our Nation."

Rudolph W. Giuliani  
Mayor of the City of New York  
June, 2001

"Your inspiring mission to provide free legal services stands as an emblem to the admirable service you have brought to your community...For 25 years, the Atlantic Legal Foundation has advocated principles that have enabled this nation to flourish – limited government, individual rights and free enterprise. Over the years, the Foundation has offered legal counsel and has brought cases in state and federal courts throughout the country on behalf of the corporate community, distinguished scientists, educators, and governmental leaders, as well as individuals stifled by overzealous regulation...I would like to personally commend the staff and supporters of the Atlantic Legal Foundation for your faithful and honorable service..."

Tom Ridge  
Governor of the  
Commonwealth of Pennsylvania  
June, 2001  
(Currently-Director,  
Office of Homeland Security)

"Your years of commitment to the community are an achievement for which many strive, but few are able to attain...best wishes for many more years of success."

Arlen Specter  
United States Senator –  
Pennsylvania  
June, 2001



**Rosemary Heckard-Webber was recognized at the October Board meeting for her twenty-five years of service to ALF.**

## BURCH ELECTED TO BOARD



**Frank Burch joined ALF's Board in October, 2001.**

Francis B. Burch, Jr., co-chairman of Piper, Marbury, Rudnick & Wolfe LLP, was elected to the Board of Directors in October, 2001. His nation-wide practice concentrates on securities, corporate

and commercial litigation. He has published widely on a number of substantive and procedural topics and lectures frequently in continuing education and other programs. Among many other professional distinctions, he is a Fellow of the American College of Trial Lawyers, a member of the American Law Institute and of the Judicial Conference of the U.S. Court of Appeals for the Fourth Circuit. Long active in Maryland civic affairs, in addition to other posts, Mr. Burch is a Trustee, Johns Hopkins Medicine, Chairman, Greater Baltimore Committee and member and former chair of the University of Maryland Law School Board of Visitors.

Mr. Burch is a Georgetown University graduate and received his J.D. from the University of Maryland where he was elected to the Order of the Coif. ■

## ALF WEBSITE

ALF's website, [www.atlanticlegal.org](http://www.atlanticlegal.org), is updated regularly to record developments in cases and other significant happenings. It also contains ALF's briefs dealing with important substantive issues which have been used effectively by other public interest foundations. ■

**Atlantic Legal Foundation, Inc. is a nonprofit public interest legal foundation. It is a Section 501 (c)(3) organization and contributions are tax deductible.**

**Atlantic Legal Foundation charges no fees for the services it renders. Your contributions will be used to help support the Foundation's mission. The Foundation is supported by grants from philanthropic foundations, contributions from corporations and donations from individuals.**

Contributions may be mailed to either office of

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