The Alaska
BAR RAG
Dignitas, semper dignitas
VOLUME 41, NO. 2 April - June, 2017

Speakers share a lighter moment at the Bar convention

Regular CLE presenters at Alaska Bar Association Dean Chemerinsky and Laurie Levinson share a laugh at the May convention in Juneau. (Photo by Bill Granger) See more photos on pages 13-15.

Alaska lawyer learns law Tunisia style

By Brant McGee

Brant McGee served as an International Fellow for the International Legal Foundation in Tunisia from December 2016 to February 2017.

It was a good day to plead before the three-judge panel at the Manouba court in Tunis. Our client, Saber (name changed to protect the guilty), was charged with administering a serious beating to a drunken and obnoxious victim.

I was a volunteer mentor for the only Tunis public defender office and we were concerned about one bad fact. First, the good facts: All the witnesses had seen the victim bang on Saber's front door, shout "words offensive to morality" in front of his mother, and push him in the chest.

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Ten tips for lawyers to get beyond the shouting

By Barbara Hood

May 1 was Law Day, the day set aside by Congress to celebrate the American legal system and our nation's commitment to the rule of law. Most years, commemorative events honor the U.S. Constitution and the many ways members of the legal profession defend constitutional rights and liberties. But this year, with the polarization of our political landscape and increasing threats to open and honest civic discourse, I think lawyers can offer something uniquely useful to a nation facing crisis: professional guidance on how to communicate through controversy.

To say that lawyers are adjusted to living in an environment of hostility would be an understatement. But over the centuries we've developed principles for navigating confrontation that protect us from mayhem in the courtroom, where the stakes are often high and personal.

As a retired lawyer, I offer these "Top Ten Lawyer Tips for Getting Beyond the Shouting." Perhaps if we all acted a bit more like (good) lawyers, we could elevate public debate, foster greater trust and confidence in our democratic institutions, and – most importantly – instill a deeper collective faith in ourselves.

1. Consider both sides of a story. Most of us have strong opinions, and there's nothing wrong with that. Dissent is healthy and essential in a democracy. But never yield to the temptation to assume your opinion is the only one worth considering. And remember: arguments are rarely resolved by telling your opponents they're wrong. Lawyers know that the best way to effectively represent their clients is to seek to understand – with sincerity – where the other side is coming from.

2. Take turns. One of the most valued principles of our legal system is the importance of having a chance to tell our story. We're all entitled to a day in court on matters that significantly affect our lives, without unreasonable interruption or interference. Screams and threats are not tolerated, and can lead to fines and even jail. Say your piece and let the other side say theirs.

3. Show respect. When the first word out of your mouth is an expletive, or a derisive name, check yourself. Courtesy and decorum aren't just old-fashioned rules for playing nice; they're key to the mutual respect required to solve difficult problems.

4. Rely on evidence. Much has been said about the proliferation of fake news and falsehoods. But untrustworthy information is not a new problem, at least for lawyers. Establishing the reliability of evidence – finding the facts – has long been at the core of how we prove our cases. We can't establish an allegation in dispute by saying we think it's true, or parroting others who say it's true. We must demonstrate it's true with painstaking attention to detail. Don't believe something just because you want to; demand good evidence.

5. Act ethically. Lawyers must adhere to strict rules of professional conduct designed to protect the public and the integrity of our legal system. One of our most prominent ethical standards is the duty of candor – the obligation to be honest. Nothing erodes effective problem-solving more quickly and devastatingly than lying. Don't take liberties with the truth to enhance your position. And when you hear something that you know is false or unreliable, call it out, and don't repeat it.

6. Consider conflicts of interest. Professional rules also require lawyers to recognize when our personal, professional or business interests may conflict with the interests of a potential client. To remove any risk of bias, we may be compelled to decline representation. Politicians and members of the public aren't governed by such strict restrictions. But when you're following a public controversy and forming your own opinions, it's worth considering the allegiances of those involved. And it's worth asking: What influences are they answering to, and for whose interests are they truly speaking?

7. Honor the rule of law. Most everyone offers opinions on the U.S. Constitution and the many other laws that bind us. Thoughtful interpretations by scholars, dating back centuries, fill law libraries across the country. Any lawyer knows that few legal issues are clear,

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PRESIDENT'S COLUMN

64th Bar president is first one born and raised in Anchorage

By Darrel Gardner

I have four Bar Rag columns to write as president in the upcoming year, so I have plenty of time to discuss serious issues faced by practicing lawyers in modern Alaska. For this first installment, however, I just want to introduce myself and wish everyone a fine summer filled with fishing, biking, hiking, gardening, traveling, relaxing, grilling or whatever other "-ing" you enjoy during our brief but glorious summer season.

First, I can't tell you how excited I am to become president of the Bar. In many ways it is the pinnacle of my professional career, and it has been a long, sometimes difficult journey for me to get here. There was a point in my early legal career when I wasn't sure if I even wanted to be a lawyer. I am tremendously honored to be selected to serve as your president.

Although I am the 64th president of the Bar Association, I discovered that I am the very first president to be born and raised in Anchorage, a fact of which I am immensely proud. My aunt and uncle were part of the original Palmer Colonization Project in 1935. My aunt's youngest brother —my father— followed her to Alaska in 1949. I was born shortly before statehood. I went to Airport Heights Elementary and Wendler Middle School, and here's a shout out to East Anchorage High School: In 1974, Carolyn Brennan, a 12th-grade history teacher with a deep commitment to civics and law-related education, sparked an interest in me that has since defined a very large part of my adult life. During my term as Bar president, I will do whatever I can to help encourage and facilitate civics education in our schools and communities across the state.

"I am tremendously honored to be selected to serve as your president."

After high school, I worked for a year on the Trans Alaska Pipeline project at camps in Fairbanks and Atigun Pass. I obtained my B.A. in English from Santa Clara University in California, and then attended Hastings College of the Law in San Francisco. After being admitted to the Alaska Bar in 1983, I started out in a small civil firm in Anchorage. In law school, I wanted to be a trial lawyer; I didn't realize that a "civil litigator" wasn't the same thing. After about nine years of civil practice and almost ready to quit the law, I took a two-week job filling in at the Office of Public Advocacy's criminal section. A few months after that, the section supervisor asked me back to second chair a first-degree murder case. That was my first criminal trial. I have been a criminal defense lawyer ever since, and have never looked back. I left OPA in 2003 to open my own office, and in 2012 I returned to public service as a Federal Public Defender.

As I mentioned, my journey to becoming a lawyer started in high school, and one particular incident essentially sealed the deal for my future. In my senior year at East, I was involved with student government as a class officer. A lot of the required extracurricular activities conflicted with the time period for an elective class I was taking, and I missed a number of classes — although the absences were officially excused. I completed all the required classwork, but my teacher didn't like the fact that I had missed classes. After the first semester, I received my grades, which included a "C" in that class. I visited the teacher to find out why I'd received a "C," because traditionally every student involved in that particular class received an automatic "A." The teacher told me that even though my absences were excused, he believed I should receive a lower grade than everybody else, because they attended class more regularly. To me that seemed unfair, but I didn't think there was anything I could do about it; I was just a student, and the teachers had all the power. However, due to my participation in student government, I learned from one of our faculty advisors that the Anchorage School District had just instituted a new student grievance procedure. The advisor encouraged me to be the first student to test out the new process. I filed a grievance, which included a hearing before a committee of teachers chaired by the principal, who ruled in favor of the teacher. I then appealed the decision all the way to the superintendent of the Anchorage School District.

Just before I graduated from East, I received a letter from the superintendent informing me that the district had reversed the principal's decision and ordered the teacher to change my grade to an "A." At that

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EDITOR'S COLUMN

'81 resolution may perpetuate the Bar Rag

By Ralph R. Beistline

"The challenge for our readers today is to see how many of the signators to this document that you recognize."

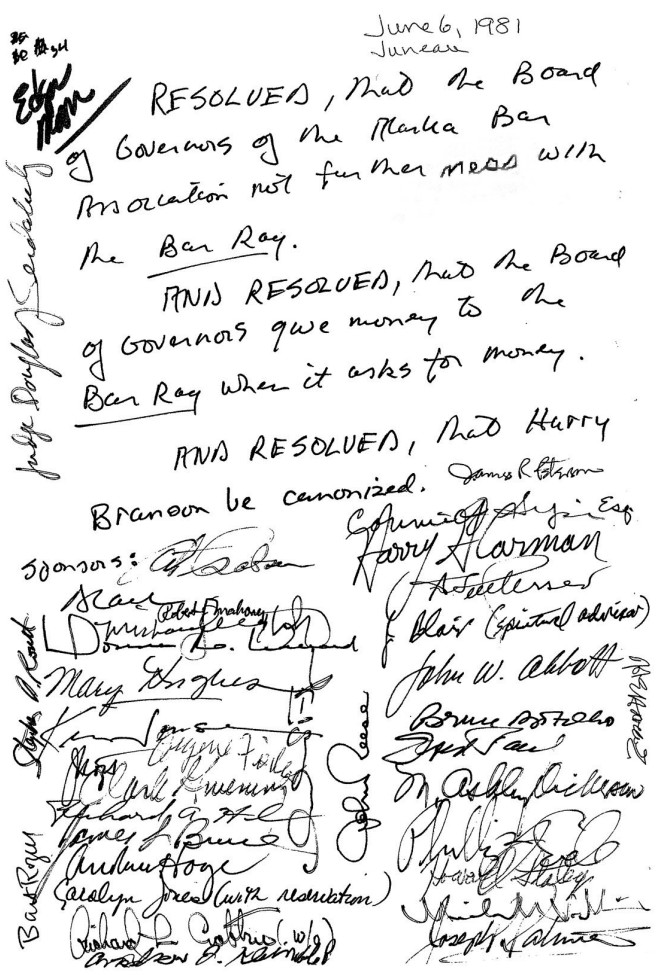
The weather in Juneau was beautiful and by all accounts the 2017 Alaska State Bar Convention, hosted by the Juneau Bar Association, was a roaring success. Although there were not as many judges in attendance as usual, there were enough, and the lawyers who attended were richly rewarded with quality CLE and educational opportunities. There were even donuts and milk served during the morning recess and everyone enjoyed meeting the governor at the welcoming reception at his home.

Southeast Alaska hosts the annual Bar convention every four years and has done so for as long as I can remember. Of special note, however, for those supporters of the Bar Rag, was the convention of 1981 that was held in Juneau 36 years ago. We recently located a handwritten resolution dated June 6, 1981, Juneau, Alaska, and presumably executed in the Hospitality Suite, wherein it was resolved that the Board of Governors give money to the Bar Rag whenever it asks for it. It was further resolved that **Harry Branson** [Editor Emeritus] be canonized. We had to clean up the language somewhat to meet Bar Rag standards, but have printed the resolution alongside this column. In the 36 years since this historical document was written, although likely imminent, Branson has yet to be canonized, but the Bar Rag is doing well. The challenge for our readers today is to see how many of the signators to this document that you recognize. And the list includes at least one former attorney general, several past Bar presidents, a couple of judges, a politician or two, and the spiritual advisor to the Bar Rag at the time. They are all now part of history.

On another note, we have had a volunteer assist with **Samantha Slanders** but are still seeking other particularly talented persons to assist. And we did receive a complaint about our cross-word puzzle in the last edition. Apparently one of the words was misspelled — but this is the Bar Rag. We'll try again next edition and use spell-check.

So, my friends, where ever you are, have a pleasant summer. We'll talk again in the fall.

Ralph R. Beistline is editor of the Bar Rag and a senior U.S. District Court judge.



June 6, 1981
Juneau

RESOLVED, that the Board of Governors of the Alaska Bar Association not further meddle with the Bar Rag.

AND RESOLVED, that the Board of Governors give money to the Bar Rag when it asks for money.

AND RESOLVED, that Harry Branson be canonized.

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The Alaska BAR RAG

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Advertising Agent:
Alaska Bar Association
840 K St., Suite 100,
Anchorage, Alaska 99501
(272-7469)

Publication Dates	Editorial Deadlines
March	Feb. 10
June	May 10
September	Aug. 10
December	Nov. 10

Board of Governors meeting dates
September 7 & 8, 2017 (Thurs. & Fri.)
October 26 & 27, 2017 (Thurs. & Fri.)
January 25 & 26, 2018 (Thurs. & Fri.)
May 7 & 8, 2018 (Mon. & Tues.)
May 9-11, 2018
(Wed.-Fri.: Annual Convention)

Alaska lawyer encounters criminal defense in Tunisia

Continued from page 1

The fact that Saber wore prostheses for his missing left arm and right leg was also helpful. Of course nobody saw the ensuing fight but it was clear that someone had beaten the victim about the head — perhaps with a plastic left arm wielded by Saber's good right arm. The bad fact was that someone had bitten off the top of the victim's left ear. The victim hadn't felt that injury until he saw the excised piece on the ground.

But Saber got 16 days — time served — so the insult to Saber's mother apparently trumped the maiming in the judges' sentence. We were pleased to tell his father, who was weeping with relief and gratitude, that his son would be home that afternoon.

Though not exactly typical, Saber's case was one of many interesting cases where we prepared defenses and release (bail) arguments at an office funded by the grandiosely named International Legal Foundation, a New York City non-government organization devoted to establishing the right to counsel for indigent defendants in Afghanistan, Nepal, the West Bank and Tunisia. I had previously found similar work both exciting and rewarding in Kabul, where the system was hopelessly corrupt and the judges were not lawyers, but, fortunately, they had no financial stake in our indigent cases.

Tunisia's important tourism economy has been wrecked by two ISIS attacks that murdered dozens of tourists. As an obvious foreigner, I was a curiosity in my court suit on the streets of the capital. Security was tight but I was only detained twice by the police—though once for three hours — before being rescued by our interpreter, an intrepid and imperturbable young woman.

Tunisia's criminal justice system is based on that of France so there are judicial panels rather than juries to adjudicate cases. A typical case begins with a street arrest followed by a police interrogation at the station. There is no right against self-incrimination. A prosecutor, who is a powerful part of the judiciary, is then called and decides on formal charges and further detention. Under the system's current interpretation, it is only at that point that the right to counsel attaches and then only for felonies and misdemeanors where a sentence could be more than three years. But the new 2014 Constitution and a law passed in June 2016 both support our arguments for a more expansive right to counsel and, equally important, right to free legal aid for indigents.

We had a police station project where the officers would call us when a suspect was brought to the station. There we were allowed a 30-minute consultation, prescribed by rule, before the client was interrogated by the police with us present. We were allowed to ask questions and enter other information into the formal record. In one case of domestic violence where our client had been called to the station about a week after the event, the interrogation was followed by a "confrontation" with his wife, the alleged victim. Our client repeatedly became agitated and even moved one chair closer to his wife. The wife was calm and provided a well-organized account of the alleged assault. Her statement was devastating and our client was detained.

We spoke later to the police officer, who had been involved in several of our cases. He favored our presence because he believed that it resulted in the development of more facts and assisted him in determining credibility. So, while our clients had a lawyer before questioning, the cases didn't necessarily turn out well for them — at least initially.

Procedures for misdemeanors and felonies diverge after the charging decision. Misdemeanors remain in the Court of First Instance where judicial panels make all decisions. In felony cases an investigating magistrate (whose work is well-described in the French television series "Spiral") is appointed and the case is then forwarded to an accusation chamber and then on to a trial chamber.

Misdemeanors are typically resolved within three to six weeks after only a release hearing and a trial or pleading. Witnesses rarely appear and affidavits and police reports of interviews are common. The defendant stands behind a small podium no more than 12 feet in front of the panel of judges who frequently interrogate him. The lawyers, who all wear black robes accessorized by white fur trappings, are arrayed in a line behind a wood wall and argue from wherever they are standing when their case is called. The prosecutor sits in a well and rarely speaks more than a sentence. The lawyers' presentations are commonly only three to four minutes so oral advocacy is concise and usually well presented. Every hearing is preceded by the submission of a written argument, which the judges usually do not review prior to oral argument. Decisions, especially sentences, can be handed down after brief conferences among the three judges, who confer behind files held up by the presiding judge. But most decisions can only be learned from the court clerks the following day.

The singular advantage enjoyed by the defense, and here I speak only from misdemeanor experience, is that the police don't do follow-up investigation after the initial arrest when they might interview some witnesses at the scene. Our defense investigation usually resulted in gaining more witness accounts whose perceptions often contradicted the prosecution's evidence. Such work resulted in some acquittals but, far more often, time-served sentences.

Appeals were a problem. Even those sentenced to the mandatory one year for possession of dakla (mild hashish) did not want to appeal because it would disqualify them for consideration for a pardon, which were issued wholesale by the president's office several times a year. Other client considerations often made it difficult to get good constitutional issues before the higher courts.

The Arab Spring of 2011, so called because it gave rise to many democratic movements, began in Tunisia and has only been successful in that country, where there is now a democratic government and a fine constitution. However, the institutions of the police, prosecution, and the judiciary are sclerotic, a universal characteristic, in moving toward compliance with constitutional and statutory improvements that recognize basic rights for criminal suspects.

I have struggled to describe a defining characteristic that I have observed in Islamic societies while serving as a volunteer lawyer. The word, I believe, is respect, and it was observed in personal relations across class boundaries and between those with power and those who had none. It was present between genders and women do not suffer the street indignities common in the West. Many Tunisians are not actively religious. When a colleague and I passed a man with a darkened callous on his forehead — a mark of dedicated prayer — she muttered, "Showoff." The long tradition of tolerance was exemplified by the synagogue and a Greek Orthodox church I passed on my way to the office and there is a huge old Roman Catholic cathedral downtown.

Our lawyers, all women, were hard-core, aggressive defenders who cared deeply about their clients and enthusiastically sought out new ways to prepare their cases. Working with them was a daily joy and a rewarding professional experience.

Since leaving Tunisia Brant McGee has worked as a pots and pans washer at the Veterans Kitchen at Standing Rock. He was admitted to the Alaska bar in 1977.

64th Bar president

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moment, I learned the power of law, and that through a system of justice, the weak and the powerless still had rights, and if their position was justified, they could obtain relief from wrongs. Years later, when I was finishing up my college degree, I decided, based in no small part on my high school experience of taking on an authority figure and winning my case, that I wanted to dedicate my life to helping other people who were in the position of feeling lost and powerless. I wanted to be a lawyer.

I am tremendously humbled to be elected to serve as your president, and I pledge to use this opportunity to help our Bar thrive and grow, and to do the very best job that I can in the upcoming year. I especially want to assist young lawyers, to help get them involved in volunteer activities, and to encourage them to participate in the Bar's sections and committees, pro bono work and CLE events, including the Bar Convention.

I want to thank the Bar staff (who do such a great job of running the day-to-day business of the Bar); Bar Counsel; and our incredible executive director, Deborah O'Regan. I also want to recognize my fellow members of the Board of Governors, all of whom give many days of their personal time to serve on the board, especially the board members from Fairbanks and Southeast, who travel to Anchorage for board meetings throughout the year. I especially want to thank and acknowledge our outgoing president, Susan Cox, for all of her hard work and leadership during the past year; we are fortunate to have Susan remain on the Board of Governors for another three-year term.

That's it for now. I hope you all have a great summer!

Darrel Gardner is president of the Alaska Bar Association and a past president of the Alaska Chapter of the FBA.

Attending the award presentation from left are Deborah O'Regan, George Skadel, Mara Rabinowitz, Stephanie Galbraith Moore, Bryan Schroder, Cynthia Franklin, Pam Orme, Brooks Chandler, Deborah Periman, Adolf Zeman and Krista Scully.

Layperson Service Award

On behalf of the Alaska Bar Association Board of Governors, the Law Related Education committee presented Pam Orme with the Layperson Service Award. Pam is the social studies curriculum coordinator for the Anchorage School District and has been a member of the committee for more than 10 years. Pam was not able to attend the Bar convention in Juneau to receive her award because she was working with students on the "We The People" program.

HI-TECH IN THE LAW OFFICE

Photo manipulation presents new legal complication

By Joe Kashi

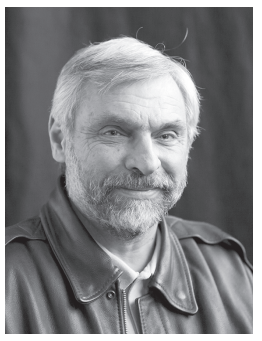
Third in a series

As digital photographs have entered the evidentiary mainstream, we're faced with new variations on the classic theme of whether an image offered into evidence actually and accurately documents what it purports to show.

Excessively manipulated, in some instances outright-faked images, have become an increasingly common and serious evidentiary problem due to easy digital manipulation. That places unfamiliar ethical and authentication burdens upon litigators, not only to detect impermissibly altered digital photos but also to authenticate legitimate images.

Over the past year, several attorneys have contacted me about questionable digital photos offered as evidence both by the opposing party and by their own clients. In my own recent experience, five altered photos submitted by a private complainant to police became the central evidence in a criminal trespass charge filed against my client, a respected local businessperson. That charge was dismissed after a basic analysis of each digital photo strongly suggested that all five were substantially altered afterward.

Each digital file's metadata was stripped out before the digital photos were submitted to the police. The files had been reduced in resolution and renamed as well. Without that metadata, we had none of the date, time, lens magnification and other basic photographic parameters needed to authenticate the images and to challenge their inaccurate depiction.



Joe Kashi

The central question in my recent case was whether a vehicle and driver were trespassing on private property or whether the vehicle was on a dedicated but undeveloped public right of way. If we could show that the image had been made with a magnified telephoto setting, something that the digital photo's inherent metadata should have shown, then our expert witness would have testified that the telephoto magnification's great compression of distance and distortion of spatial relationships made the truck appear in the photo to be on private property when it probably was not.

That sort of subtle but important information, and much more, is contained in the normally-hidden metadata of virtually every unaltered digital video and photograph, with the exception of a few older, lower-end cell phones. In the case of JPEG and other digital photos, the metadata is termed "EXIF" data. It's quite extensive and consistently made a part of every JPEG file by the JPEG international standard used by all camera makers.

What is metadata? In the simplest sense, EXIF metadata is the data describing all of the camera's settings when an image file was made by that camera. That includes color balance, focus distance, equivalent lens magnification, exposure data (shutter speed, lens opening, and ISO sensitivity), often GPS coordinates, the dates when the file was first made, and whether and when a file was later altered.

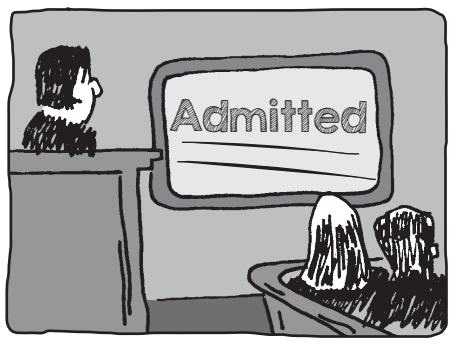
Normally hidden, metadata can be viewed with proper software. It can also be edited or deleted, unfortunately, by some programs. Despite that potential vulnerability, metadata remains one of the better approaches to authenticating and challenging digital images.

Digital photos are a special form of Electronically Stored Information (ESI) and particularly rich in accessible metadata as a result of the internationally implemented still photo and video file standards. Civil Rule 34 requires, as a default, that ESI be produced "in its native format," which the Ninth Circuit determined in 2015 to include EXIF metadata for digital photos.

In United States v. Lizarraga Tirado, No. 13-10530, a 2015 Ninth Circuit opinion written by Chief Judge Kozinski, the court held that the GPS coordinates found in the metadata of a Google Earth satellite photo were not hearsay but admissible factual evidence. By implication, the Ninth Circuit panel held that digital photo metadata as a general matter is documentary evidence upon which reasonable weight may be placed.

When making disclosures or propounding and responding to discovery, be sure that you demand and include digital photo files exactly as they come "out of camera", often abbreviated OOC. By doing so, you'll avoid potential allegations of spoliation, alteration and manipulation. Use that metadata to authenticate your own digital evidence and to scrutinize that offered by other parties. Your photographer or expert can later enhance images, so long as they can demonstrate to the trier of fact precisely what enhancements have occurred and that the enhancements are appropriate. More on that in a later article.

Failure to protect metadata from alteration or failure to disclose metadata may rise to level of sanctionable spoliation. *Hayman v.*



PricewaterhouseCoopers LLP, Case No. 1:01-CV-1078 (U.S.D.C., Northern District of Ohio, Eastern Division), 2004.

Several ethics considerations apply to the use and misuse of digital images. Rule 1.1 is now interpreted as requiring sufficient technology competence to advocate effectively. In our highly visual era, that likely includes understanding at least the basic principles affecting the use of digital imaging. Rule 1.3 requires diligence as part of our advocacy, here being alert to excessively altered "photo" evidence. Rule 3.3 (1) (3) mandates against the presentation of false evidence while Rule 3.4 likely precludes destruction of material facts, including the metadata found in every digital photo file.

Some level of digital photo enhancement is often useful to the trier of fact and legally appropriate, a topic that we'll explore in later articles.

Soldotna attorney Joe Kashi received his BS and MS degrees from MIT in 1973 and his JD from Georgetown law school in 1976. Since 1990, he has written and presented extensively throughout the US and Canada on a variety of topics pertaining to legal technology and served on the steering committees responsible for the ABA's annual TechShow and Canada's Pacific Legal Technology Conference. While at MIT, he "casually" studied photography with famed American fine art photographer Minor White. Since 2007, he has exhibited his photography widely in a variety of statewide juried exhibits and university gallery solo exhibits.

Two new magistrate judges appointed in Fairbanks

The Alaska Court System has announced the appointments of Melony Lockwood and Earl Peterson as Magistrate Judges at the Fairbanks Trial Courts.

Lockwood is originally from Anniston, Alabama, and moved to Alaska nearly seven years ago as an attorney with Alaska Legal Services Corporation. She received her law degree from the University of Alabama, School of Law. She also holds a Master's degree in International Relations from Schiller International University in Paris, France, and a Bachelor's degree in International Business from Oral Roberts University in Tulsa Oklahoma. Prior to law school, Lockwood taught ESL and Cultural Studies in Suwon and Gwangmyong, South Korea. She has supervised the Fairbanks office of Alaska Legal Services Corporation for three years and looks forward to continuing to serve the Fairbanks community.

Peterson comes to the position of Magistrate Judge from recent employment as a felony assistant district attorney with the Fairbanks District Attorney's Office. He has been with the District Attorney's office since September 2010, when he and his family moved to Alaska from Illinois. In that state, Peterson worked as a first assistant state's attorney in DeKalb and Ogle Counties. Prior to becoming a prosecutor, he worked in private civil practice for the law firm of Alvin W. Block and Associates in Chicago He is a graduate of Chicago Kent College of law, and before that Rice University in Houston, Texas. Peterson grew up travelling the world as the son of an oil engineer who worked internationally. An avid cyclist and writer, when he is not racing bicycles or writing short plays, he does all things outdoors.

ATTORNEY CONDUCT AND DISCIPLINE

New Supreme Court conduct rules address use of technology

By Nelson Page

After 38 years in private practice at the same law firm I decided that it was time to change my horizons. When the position of Bar Counsel came open I realized that this was the perfect job for me. My new position has several components to it. One is to be the "cop on the beat" with respect to attorney conduct and discipline. But the more interesting and fun part of the job is helping my colleagues avoid problems in the first place, and to make sure that the practice of law in Alaska meets the highest possible standards. Thus this column. I hope that discussion of emerging issues (and of perennial favorites that never seem to go away) will help. I look forward to working with you as we strive to be better lawyers and to bring justice to all that we do as professionals.

It's A New Day

In March 2017 the Alaska Supreme Court adopted a package of changes to the Rules of Professional Conduct. These changes were the result of efforts by the American Bar Association to revise the model rules. The effort was known as Ethics 20/20. Some of the most significant changes have to do with the lawyer's relationship with technology.

ARPC 1.1 requires the most fundamental thing: "A lawyer shall provide competent representation to a client." Under the Ethics 20/20 changes, for the first time, the commentary to ARPC 1.1 makes explicit that a lawyer must be reasonably knowledgeable about the technology used in the practice of law. Specifically, the commentary states that, "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in law and its practice, including the benefits and risks associated with relevant technology…." These nine little words open up a universe of concerns. There are a number of issues that lawyers ought to be thinking about. They fall into three broad categories: 1) safeguarding client information and protecting confidentiality; 2) using technology in your law practice; 3) competency regarding technology and the law.

There is nothing new about the lawyer's ethical responsibility to protect and safeguard a client's confidences. And there is nothing new about the idea that this responsibility applies to electronic information. In 1998 your ethics committee issued Opinion 98-2, which discussed the use of emails by lawyers. The committee's position was that the use of email to send and receive confidential information was ethically permitted. The rationale was that such communications were no more or less secure than a telephone call, and thus presented no substantially different concerns than talking over the phone.

Although the basic sentiment remains valid, the electronic world in 2017 is a very different place than it was in 1998. The internet is awash with viruses, malware and spyware. No lawyer who uses electronic communications can competently do so these days without taking steps to maintain up-to-date effective safeguards. These include the obvious, such as regularly updated antivirus and antimalware software, and adequate password protection. New additions to ARPC 1.6 are explicit about this.

Nelson Page

> (c) A lawyer must act competently to safeguard a client's confidences and secrets against unauthorized access, or against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client or by any other persons who are subject to the lawyer's supervision, or by others involved in transferring or storing client confidences and secrets. This duty includes guarding against unauthorized access to a client's confidences and secrets."

Passwords and antivirus software are just the beginning of the discussion. For example, Alaska has joined the jurisdictions that allow the use of "the cloud" to store client information. Ethics Opinion 2014-3 echoes the new ARPC provisions on the topic. That opinion requires that:

> A lawyer must take reasonable steps to ensure that the provider of cloud computing services has adequate safeguards to protect client confidences. Prior to engaging a cloud computing service, a lawyer should determine whether the provider of the services is a reputable organization. The lawyer should specifically consider whether the provider offers robust security measures. Appropriate security measures could include password protections or other verification procedures limiting access to the data, safeguards such as data backup and restoration, a firewall or encryption, periodic audits by third parties of the provider's security, and notification procedures in case of a breach.

Among other things, users of the cloud should review their agreements with vendors to make sure that there is an enforceable contractual obligation to keep client information confidential. Make sure that the vendors have an obligation to back up the data they store and that they are required to return the data if the vendor relationship is terminated.

The use of cell phones, notebook computers and tablets that are interconnected with law firm networks requires due diligence as well. No cell phone or other portable computing device that contains client information should ever be used without a secure password at a minimum. If these devices can remotely access the firm's network, extra precautions need to be taken to make sure that a lost or stolen device does not result in the corruption of the entire law firm data system. Consider making sure that the remote location software on your devices is enabled so that if the device is lost or misplaced you have at least a head start toward finding out where it is. You also need to make sure that outside IT vendors who work on the law firm's computers have agreed to maintain the confidentiality of the information on the devices they work on.

Metadata in documents has long been a recognized concern. Lawyers should also be aware of the guidance given in Ethics Opinion 2016-1, which prohibits the use of surreptitious tracking of emails and other electronic documents sent to opposing counsel.

In addition to the duty to protect the client's information, there is also the issue of how to use technology in your law practice. Choosing the technology to be used is not just a business decision any more, but may be an ethics issue as well. I am unaware of any decisions that require the use of any particular level of technology in order to be competent. However, the day is certainly coming when every lawyer will need to have the capacity to communicate by email, conduct basic research (legal and otherwise) on the internet and keep records and basic accounting data in a form that is accessible to modern technology. Every law firm needs to have policies regarding the storage and handling of emails and other electronic data. These need to be coordinated with the firm's policies on client file content, document and file retention and file closure. The personal use of the law firm's email and internet systems, and the issue of employee privacy also need to be addressed. There needs to be a robust back-up system for all of the firm's critical information and a disaster recovery plan that accounts for both electronic and physical destruction of critical information. Failure to have a plan in place is likely to implicate the ethical requirement of competency.

Finally, technology is clearly changing the standard of care for the practice of law. As just one example, any litigation practitioner should be conversant with electronic discovery. That means being able to make effective discovery requests relating to electronically stored information and being able to advise clients about how to respond to such requests. For a hair-raising hypothetical of what can happen to the unprepared, see Formal Opinion No. 2015-193 from the State Bar of California, in which a hapless attorney ends up being accused of spoliation of evidence, failure to properly supervise and improper release of highly confidential client information and trade secrets.

Discovery via social media is becoming a common approach in the right case. The use of technology to enhance presentations at trial or to catalog and keep track of voluminous information is also common. These and other issues are all implicated in the simple language of the new commentary to ARPC 1.1

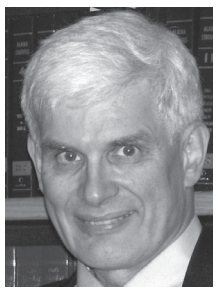
The good news is that competency does not require that each practitioner become a walking IT technician. The necessary expertise can be obtained through the use of consultants or association with knowledgeable counsel. However, the obligation to be competent in this area is personal to every attorney, at least to the extent that they need to know what they don't know

Nelson Page is the new bar counsel at the Alaska Bar Association, formerly of Burr, Pease and Kurtz and former Alaska Bar president.

For further information on the use of technology in practice see the regular column on the issue by Joe Kashi on Page 4.

Options for funding public employee retirement systems

By Cliff Groh



Cliff Groh

Unfunded liabilities in public employee retirement systems will continue to be a big issue in Alaska for decades, no matter what the Legislature does this year to address the state government's fiscal gap. The State of Alaska's consultant actuary estimated last year that the two largest public employee retirement systems operated by the state have $6.1 billion in such funding shortfalls, and the state is now embarked on a plan to pay off that debt in installments scheduled to run through Fiscal Year 2039.

This column reviews the status of the retirement systems operated by the State of Alaska, sets out the causes of the unfunded liabilities, lays out the coming conflicts, notes the constraints in dealing with them, and presents some options.

Status of unfunded liabilities

Let's start with some good news. Substantially aided by an injection of $3 billion made in 2014, the funding picture has improved over the last decade for the Public Employees' Retirement System (PERS) and the Teachers' Retirement System (TRS), by far the biggest of the five public employee retirement systems operated by the State of Alaska. While in Fiscal Year 2003 PERS was only 75.2 percent funded and TRS was only 68.2 percent funded, the state's actuary reported last year that PERS is 78.3 percent funded and TRS is 83.3 percent funded.

The plan to take those funding percentages to 100 involves the state making continuing infusions of cash into PERS and TRS over more than two decades — a total of more than $6 billion through Fiscal Year 2039, as stated above. The figure for the current fiscal year (FY2017, which runs July 1, 2016-June 30, 2017) is $216 million in all funds, with $125 million of that total coming from the Unrestricted General Fund (which is also known as UGF and what is usually meant when people in Alaska refer to "the budget"). Looking at UGF alone, that $125 million in "State Assistance"/ "Additional State Contributions" for PERS and TRS is larger than the capital budget, the budget for the Alaska Court System, or the budget for the Department of Natural Resources.

Causes of Unfunded Liabilities

The causes of the shortfalls in PERS and TRS are multiple. Studies have identified the following as factors:

--Inaccurate actuarial assumptions
--Bearish periods in financial markets
--Declining interest rates
--Overly optimistic estimates of future investment returns
--Lower-than-required contributions in previous years
--Rising costs of health care
--"Unfavorable demographic changes" (a euphemism for the facts that beneficiaries are retiring earlier and living longer than expected)

Health care costs deserve special mention here, as the state's public employee retirement systems provide health insurance as well as pensions and studies have shown Alaska to have the nation's most expensive or second most expensive health care. The monthly premium for a PERS retiree for health coverage was $57.64 in 1977, $806.00 in 2004, and $1,154.04 in 2016. (I'll save you a trip to the Bureau of Labor Statistics website: While health insurance under PERS costs 20 times as much as it did two decades ago, the Anchorage Consumer Price Index has increased less than four-fold over that period.)

Constitutional provisions protecting Public Employee Retirement Systems in Alaska and the history of steps taken to address unfunded liabilities

With the state facing a fiscal crunch, how much do PERS and TRS get squeezed?

The answer to that question must come with knowledge of the legal constraints, including two provisions of the Alaska Constitution. Article XII, Section 7 states that "Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired." Additionally, Article I, Section 15 provides that "No law impairing the obligation of contracts…shall be passed."

With those constraints in mind, the state has already exercised several options to deal with the unfunded liabilities and generally reduce its pension obligations since financial analysts first uncovered them in late 2003. The state has continued the process begun in the mid-1980s of adding tiers to PERS and TRS, progressively reducing the benefits for each later-generated tier — PERS now has four tiers and TRS has three. Effective in 2006, the state moved from a defined-benefit plan to a defined-contribution plan for new employees. The state sued its former actuary alleging actuarial errors and other misconduct, and received a settlement of $500 million in 2010 after initially seeking $2.8 billion in damages. As stated above, the state injected $2 billion into TRS and $1 billion into PERS in 2014, a decision that came during a relatively high-revenue period and just before oil prices started a steep slide.

What options remain for the State of Alaska to address the unfunded liabilities?

The continuing fiscal squeeze will probably lead policymakers to consider other steps to deal with the annual outflow of "State Assistance"/ "Additional State Contributions." A review of history and the relevant literature helps produce this list of options:

Pension Obligation Bonds. The state has repeatedly flirted with the idea of selling bonds to pay off some portion of the unfunded liabilities. The idea is arbitrage, with the state taking on debt at relatively low interest rates and paying off the debt with money earned from investments generating rates of return presumed to be higher than those interest rates. Independent of the business case for them, pension obligation bonds postpone and spread the costs of meeting pension obligations, making them attractive to politicians. Following criticism from legislators that included claims that the proposal involved too much risk, the Walker administration announced last fall it was dropping a plan to sell such bonds.

Bankruptcy. One time-honored way in the U.S. for debtors to deal with creditors is to declare bankruptcy and have the debts re-organized — and often reduced — in a court-approved plan. Federal bankruptcy law, however, prohibits states from filing for bankruptcy, and some scholars argue that the U.S. Constitution does so as well. With several state governments in financial trouble over the past decade — and the beleaguered Commonwealth of Puerto Rico filing this year for a form of court-supervised debt restructuring akin to bankruptcy — there has been repeated discussion of amending federal law to allow a state to file for bankruptcy.

Shifting some costs to local governments. Scores of employers other than the state of — mostly municipalities and school districts — participate in PERS and TRS, and the state and those smaller entities have argued about who will pay for the retirement systems' unfunded liabilities that might be attributable to those non-state employers. The Legislature has capped the employer contribution rates for PERS and TRS and made "on behalf" payments for non-state employers to cover the difference between the capped rates and the portion of the unfunded liabilities the State attributes to those non-state employers.

Legislators have discussed proposals in the last few years to raise the employer contribution rates to shift more of the burden of paying for the retirement systems' unfunded liabilities from the state to local governments, and it is likely that this concept will keep appearing. (Unlike states, local governments have clear authority under federal law to declare bankruptcy. In a widely noted decision in 2013, a federal bankruptcy judge ruled that provisions in the Michigan Constitution similar to the two provisions of the Alaska Constitution set out above did not bar the impairment of pensions owed by the City of Detroit: "The state constitutional provisions prohibiting the impairment of contracts and pensions impose no constraint on the bankruptcy process.")

Federal Bailout. Alaska is not the only state with unfunded liabilities in its public retirement systems. A Pew study identified more than a half-dozen states whose public retirement systems are funded at a lower percentage than Alaska's, with Kentucky, Illinois and New Jersey being the most underfunded as of 2015. Some commentators have raised the possibility of the federal government stepping in to help, perhaps through a federal pension reform commission that could provide bridge financing or guarantee pension restructuring bonds. Such federal assistance appears likely to be more popular in law review articles than in Congress, however.

Benefit reductions secured through collective bargaining. Public employee unions could presumably bargain away benefits for members in negotiations with the state, and this option might see more attention in future years. It is difficult to see, however, how this idea would work with those retirement system beneficiaries who are not union members, which would of course include current pensioners.

Buyouts of benefits. Commentator Eric Madiar has noted that legislators

Continued on page 7

Options for funding

Continued from page 6

in Illinois have considered proposals that would address current pensioners by paying them an immediate lump sum in return for those individuals foregoing recurring pension payments. If those lump sum payments were for amounts less than the net present value of the pension benefits, the government would save money. Implementing this proposal would require the consent of each individual beneficiary to take the smaller amount upfront instead of the larger amount over time.

Potential amendments to the Alaska Constitution. Some commentators have wondered whether if the pension protection and/or contract provisions of the Alaska Constitution set out above could be amended to allow the reduction of public employee retirement systems after such benefits have been offered. Let's look at some precedents.

The Alaska Supreme Court has interpreted the constitutional provision explicitly protecting public employee retirement system benefits to mean that "system benefits offered to retirees when an employee is first employed and as improved during the employee's tenure may not be 'diminished or impaired.'"

This provision regarding pension benefits in the Alaska Constitution, however, does not mean that benefits cannot be altered. "Reasonable modifications are permissible" even after rights are "accrued" (also described as "vested"). For a court to rule such modifications are reasonable, "changes that result in disadvantages in employees should be accompanied by comparable new advantages."

The Alaska Supreme Court has also noted its general agreement with the proposition that modifications may be made "for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." Additionally, the Alaska Supreme Court has twice stated that it has offered no view as to the appropriate legal analysis regarding the problem "presented by a pension fund that is insufficient to satisfy all employee claims brought under its provisions."

Alaska is one of apparently only seven states with state constitutional provisions explicitly protecting pension benefits, and it is instructive to look at recent judicial decisions from one of the other six. Illinois has both a provision in its state constitution substantially similar to Alaska's and a well-documented fiscal crisis that has stretched over years.

The Illinois Supreme Court relied on "the pension protection clause" in the Illinois Constitution to strike down in 2015 and 2016 legislative enactments that would have reduced benefits for public employee retirement systems.

In 2015, the court ruled that neither dire economic circumstances nor the state's "reserved sovereign power" (also called its "police power") could allow the state to reduce pension benefits. Regarding the fiscal exigency confronting the Prairie State, the court stated that the legislature "made no effort to distribute the burdens among Illinoisans" and noted that one alternative to cutting pension benefits was to seek "additional tax revenue."

The Illinois Supreme Court stated in a 2016 case that "the pension protection clause" "guarantees that pension participants will receive the money due them at the time of their retirement." This provision means, the court held, that the benefits of membership in public retirement systems "must be paid in full and that they must be paid without diminishing or impairing them." As the commentator Kirk Jenkins noted, this language suggests without expressly saying so that "there might be extreme circumstances someday in which the [c]ourt might be willing to order funding to enforce the employees' 'legally enforceable right.'" The commentator Amy B. Monahan has pointed out, however, that courts' traditional reluctance to appear to intrude on core legislative functions of spending and taxation might make it difficult for plaintiffs to obtain a court order that would provide the requested relief, particularly in circumstances of great fiscal distress. The consequences are unclear if a constitutional amendment were adopted that amended or repealed the provision in the Alaska Constitution explicitly protecting rights accrued in public pensions. As the commentator Jack M. Beermann has observed, other factors likely to play into future judicial decisions include the courts' recognition of the legitimate reliance of employees and retirees on their employers' promises and the fact that the members of many retirement systems (such as those in Alaska) do not participate in the Social Security System.

Unfunded liabilities in Public Employment Retirement Systems need to B\be considered in any discussion of Alaska's continuing fiscal challenge

The State of Alaska has a deep structural deficit which has generated substantial debates about Permanent Fund restructuring proposals, continued budget-cutting, changes in the oil and gas tax system, and possible broad-based taxes. As the columnist Dermot Cole has pointed out, these discussions often do not grapple with the full scope of Alaska's fiscal challenge, which includes pressures for increased capital spending (including deferred maintenance) as well as the Last Frontier's particular problem with health care costs that have for years escalated much faster than the overall inflation rate. Another unappreciated dimension is the overhang of old debts from unfunded liabilities of public employee retirement systems, which will be paid off in part by Alaskans now too young to vote, not yet born, and not yet resident in the Last Frontier.

Cliff Groh is a lawyer and writer in Anchorage as well as a Tier I beneficiary of PERS. He has conducted research into unfunded liabilities of the State of Alaska's public employee retirement systems for the University of Alaska's Institute of Social and Economic Research (ISER).

Senior Justice Fabe wins civics education award

From the Alaska Court System

Former Chief Justice Dana Fabe

Former Alaska Supreme Court Chief Justice Dana Fabe was named recipient of the 2017 Sandra Day O'Connor Award for the Advancement of Civics Education, presented annually by the National Center for State Courts. The award honors an organization, court, or individual who has promoted, inspired, improved, or led an innovation or accomplishment in the field of civics education related to the justice system.

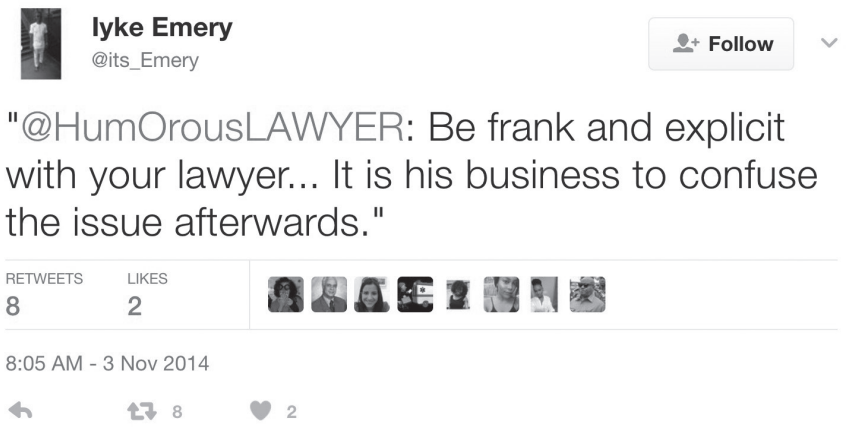
Justice Fabe was selected for her decades-long commitment to promoting, inspiring, nurturing and leading countless efforts in civics education. One of her many notable achievements was her role in promoting the Color of Justice program which encourages young women and youth of color to pursue careers in law and initiating the *Mentor Jet* program that has been replicated nationally.

Mary C. McQueen, president of the center said, "You can't think of Justice Fabe without thinking of the tireless work she has done in promoting education of the judicial system. She has literally devoted her career to it, and we are thrilled to honor her service with this award."

In a letter of support, Bruce Anders, vice president and general counsel for the Alaska Native corporation Cook Inlet Region Inc., who has worked with Justice Fabe in the Color of Justice Program, said, "she is a tireless advocate for improving civics education for Alaska's youth, and has dedicated and donated countless hours to the program, endeavoring to reach as many children as possible. Justice Fabe never tires, never dims, never backs down from an opportunity to educate and persuade one more student about what the legal system can do for him or her – and for his or her community, state, and nation."

The award is named for retired U.S. Supreme Court Justice Sandra Day O'Connor. Justice O'Connor, the first woman to serve on the U.S. Supreme Court, retired in 2006, and has since become a leading advocate for improving civics education in our nation. She established iCivics, a program that uses web-based educational tools to teach civ-

Legal tweets



Hwang vs. FurCo No. 7164, Wigmore missing in action

Peter J. Aschenbrenner

"Stop the presses!" Horace Greeley commands our attention.

"There is such an apparatus," I gesture the virgins of Spenard Road hard at work, "but it is devoted to the virtues of the grape."

"I may be history's most fatally defective candidate for the Presidency," the ill-fated publisher explains. "But I still know a missing 'wig' when I see it."

Jemmy and Dolley hove into the assembly and drop anchor.

Horace is showing off his death certificate. "In 1872 I was naturally dead by the time the electors cast their ballots. The Long Form is proof enough, right?"

"Are you going to redeem Jemmy's Seventh Amendment fiasco?" Dolley asides.

"Next to *Victory after Bladensburg*," our fourth President sighs, "it was my worst mistake."

"Professor Aschenbrenner's getting a book out of it," Dolley corrects her husband. "Your so-called 'Apology,' that is."

"The facts of the case are as follows," the quintessential Rutherford commences. "I refer to Supreme Court Opinion No. 7164, decided March 31, 2017."

"I read the decisions every night to put me to sleep," Governor Egan declares, "and I didn't even get past the first page. Whoever heard of a lease being subject to an option to purchase?"

"It's called the 'witness rejection program,' if I may drop into the demotic," the successor to U.S. 'Get Me A' Grant continues. "There you are, your life on the line, a defendant in a civil suit. The plaintiff's case is nothing but a farrago of lies, whatever the heck a 'farrago' is. But you can't testify on your own behalf," The Rutherford concludes.

"What does this have to do with appraisal issues swirling about the industrial access to Denali Park?" Horace growls. "If I may return us to the point."

"The court held," The Sarah explains, "that an 'after-the-fact affidavit does not demonstrate Alaska Fur's intent upon entering into the contract' because 'such self-serving statements are not considered to be probative'."

"So Bardell that, Brotherford," Governor Hammond guffaws, laying his *Complete Works of Pickwick* aside for the occasion.

"Text at n. 20," I ahem the citation.

"But this means that Jemmy was right!" Dolley is astonished. "The Seventh Amendment was not a complete waste of ink and watermarked paper."

"There's more," our nineteenth President continues. " 'Testimony as to parties' subjective intentions or understandings will normally accomplish no more than a restatement of their conflicting positions'."

"Ditto at n. 19."

The Governor elbows me onwards. "Mind your cue, Professor."

" 'No person could testify as a witness'," I refer to Lawrence Friedman's *History of Everything That Is or Was American Law*, 2d ed., note at 154: 'if he had a financial stake in the outcome of the case', or words to that effect. The footnote cites to Wigmore's *Treatise of a System of Evidence*, 4:3347-3348 (1905 ed., Sec. 2380)."

"You rang? Mrs. Bardell, at your service, if no one is going to introduce me."

" 'Chapter 34 does come to mind," Governor Hammond preambles. "The chapter is 'wholly devoted to a full and faithful Report of the memorable Trial of Bardell against Pickwick'."

"Of course, I wasn't allowed to testify," Mrs. Bardell explains. "But had Charles Dickens been reading his *Constitution II,* he would have discovered that Jemmy Madison unleashed American jurors on witnesses. So the likes of lil' ol' me would be obliged to trust our briefs to twelve good men and true!"

"This was the 1830s," Governor Hammond explains. "By then Jemmy was getting the recognition due for having written the first twelve amendments – going 10 for 12 in his lifetime, to be sure – on a cocktail napkin."

"I thought that they should be renumbered, as well," Madison explains. "For example, the text of the Seventh Amendment would be sandwiched into 'article 3d, section 2' as I explained to the House of Representatives."

"Annals of Congress, 1:400 at 452," I blurt. "8 June 1789."

"But my husband also proposed that the articles in *Constitution II* would be renumbered, right?" Dolley elbows me. "Now that was the fruitiest idea Jemmy ever had!"

"At 453," I ahem the cite. " 'That Article 7th be numbered as Article 8th'," I add. "But he won this point," I declare one for her husband. "Thanks to James Madison the Amendments start from 1 and go up to – wherever the heck they are now. The Amendments not the Articles have the new and consecutive numbers."

"The Twenty Dollar jury was designed to and did correct the injustice to Mrs. Bardell," Jemmy declares. "Mrs. Bardell was empowered to deliver the 'self-serving' testimony of her 'subjective intentions or understandings' – making out with Samuel Pickwick is what she had in mind – until the evil Wigmore – cursed be his name! – induced court systems to stop having fun!"

"I, for one, believe cross-ex of the ladies," Mrs. Bardell studies her nails, "is an medieval form of gender harrassment. The town paid good money in my day to see me testify, weaving my way (as I was wont to do) around perjury indictments threatened and thundered. And now! Nothing!"

"So the history of the jury trial in America breaks down into four stages," Governor Palin ticks them off. "In phase one, party-witnesses were rejected as unfit. In the second, the community took on all comers. Any anyone's sworn evidence was as good as any other. In phase three, what with motion practice and testimony-by-affidavit, party-witnesses were tossed back to the age of Dickens, Pickwick and Bardell."

"So that's it?" Governor Egan wants to know. "I thought there were four stages, right?"

"This thing could get out of control," Jemmy pleads with the assembly. "In Marbury's case, nobody asked me about the trial jurisdiction of the Supreme Court. Now party-witnesses – and this is an important case involving sales of dead animal skins next to Denali Park – have been silenced!"

"Could it mean the end of live witnesses?" Dickens asks. "That's no good for novelists."

"If the lawyers want to write the testimony, which they did in this case," Martha Bardell puts the question, "why not let the lawyers testify and exclude the parties?"

"Self-serving statements falling from the lips of counsel, sworn and so forth, will hardly be believed," Mr. R joins forces with Mrs. B. "Is there room up there?" he abruptly changes direction.

"On Mt. Ruthmore?" I blurt.

"On Denali," he corrects me. "I hear they're measuring the North Face for a quartet of *Men, Mountains, Great, Whatever*. Hairpiece or wig included."

Jay Hammond ticks off the names worthy of this pertrification. "John Tyler, naturally, Rutherhayes B. Ford, Calvin Coolidge and – "

Peter J. Aschenbrenner has practiced law in Alaska since 1972, with offices in Fairbanks (until 2011) and Anchorage. From 1974-1991 he served as federal magistrate judge in Fairbanks. He also served eight years as a member of the Alaska Judicial Conduct Commission. He has self-published 16 books on Alaska law. Since 2000 the Bar Rag has published 48 of his articles.

Race Judicata attracts more than 100 competitors

More than 100 people, 13 dogs and one miniature horse came out to race in this year's Race Judicata, an annual 5k race to benefit Anchorage Youth Court. Anchorage Youth Court is a nonprofit diversionary juvenile justice program. Race Judicata is organized yearly by the Young Lawyers' Section of the Anchorage Bar Association. This year's t-shirt featured a fabulous walrus design by local attorney Jeff Davis. The racers faced chilly temperatures and blustery winds, but they were cheered on by Youth Court members and rewarded with hot coffee and pastries donated by Moose a la Mode.

Racers gather at Westchester Lagoon.

Men's second place finisher Sam Severin and supporter.

The Young Lawyers Section would like to send a big thank you to all the race sponsors and donors:

- Ashburn & Mason
- Atkinson, Conway & Gagnon
- Big Dipper Construction
- Clapp Peterson Tiemessen Thorsness & Johnson (Winner of this year's Best Firm Participation Prize)
- Davis Wright Tremaine
- Foley Foley & Pearson
- The Gucci Gucci Yumas
- Jermain, Dunnagan, & Owens
- Landye Bennett Blumstein LLC
- The Law Office of Gavin Kentch
- Perkins Coie
- Stoel Rives
- Alaska Rock Gym
- Anchorage Yoga and Cycle
- Moose's Tooth
- Moose a la Mode/Midnight Sun Cafe
- Nouraesthetics
- Skinny Raven
- Snow City

TALES FROM THE INTERIOR

Trial flap ends in battle of the bellies outside Fairbanks courtroom

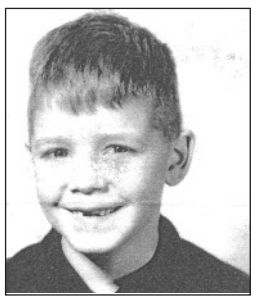
By William R. Satterberg Jr.

Litigation is both challenging and stressful. Trial attorneys especially realize that, in the fray of battle, zealous advocacy often exists. Moreover, it is expected and encouraged.

It was no different during the week of Oct. 20, 2014, in Fairbanks. I was involved in a challenging and hotly contested DUI trial with a young assistant district attorney. Having practiced law for 38 years, it is fair to say that I had a bit more experience in the ring. On the other hand, my opponent was well-trained, well-educated and zealously dedicated. A seriously confirmed advocate, she was having no part of my antics. Surprisingly, she was putting up a most formidable battle for a rookie. But she was not alone. Perhaps, due to the youthfulness of the prosecutor or out of some morbid desire to watch me once again perform my legendary antics in the courtroom, various assistant district attorneys had dropped by at times to observe the fracas. One attorney, in particular, who I shall call "Bill", was providing especially sagacious assistance to the young prosecutor. I was being double-teamed once again. But I had become used to such piling on. Indirectly, it was a compliment to be ganged up upon.

As the second day of the trial began, my opponent furnished me with some discovery which had become relevant during the trial. It was an audio disc containing a conversation between the trooper and my client's son during an unrelated traffic stop. Evidence had been introduced during my client's case that my client's son had alleged that the trooper had unprofessionally disrespected my client when issuing a ticket to my client's son. The audio disc held the answer. I was told that I was receiving the disc "as soon as it had become available." I also was told (correctly, perhaps), that the state was under no obligation to produce the disc, since it involved an unrelated police contact. Certainly, the purported conversation had distinct impeachment value to either the state, the defense or to both. Accustomed to surprises, I wanted to review the disc before I once again stuck my foot into my mouth, another one of my reputed legendary tactics. At the time the exchange over the timeliness of the discovery was taking place in the hallway outside of the courtroom, the jurors were fortunately already in the jury room and did not witness the event that follows.

I disagreed with the state's counsel as to the state's diligence. I stated that I could have been furnished with the discovery much earlier. The last minute disclosure smacked of a proverbial sandbag attempt by the state. As far as I was concerned, to furnish the discovery at literally the time that we should be entering the courtroom to commence the next day's trial was unfair. I stated that those tactics should never occur to me. Admittedly, it would have been fine as a defense tactic. But the Scott and Summerville decisions supported defense sandbagging. The state, however, was legally not entitled to similar luxuries and had a duty to play fairly. Ten minutes of audiotape now had to be reviewed. It could take all day. It was not fair to the jurors or my client for me to ask for a break during the trial in order to prepare. Furthermore, I feared judicial wrath. On the other hand, in retrospect, the assistant district attorney had a good point in that the state could have conceivably withheld the evidence and used it for impeachment. Moreover, given what I later learned, the tactic would have worked well for the state.



"In the end, all was well, although I did suggest to Bill that he should be much more careful in the future in his choice of opponents."

Like the proverbial punter on a football team, I repeatedly protested the late delivery of the discovery. The exchange escalated. More words were spoken between myself and the state's assistant district attorneys. The older of the two, Bill, pointed out again that the state probably did not have to furnish the discovery, but was magnanimously doing so anyway. I was again told that the State of Alaska was giving the discovery to me as soon as it was able to do so. On that point, I definitely disagreed. The discovery could have been furnished much earlier in the morning. And I was right on that point, at least. It could have been hand delivered or sent as an unreliable email attachment. I once again told Bill that I did not accept his representations of prompt diligence. Admittedly, I likely was not particularly tactful in my choice of words. Yet another one of my legendary tactics.

I wasn't Bill's parent. Nor his boss. Nor his spouse. Still, under the Constitutional guarantees of our Bill of Rights, I was publically exercising my right of Freedom of Speech.

At that point, rather than continue the verbal battle, Bill diplomatically began to depart the area. In the process, however, I felt I heard a slightly caustic closing rejoinder from him. Not wanting to be outdone, I responded, by saying "Go back to your office, 'Bill'!" True, I had no authority to issue such a command, even if Bill is a public servant. I wasn't Bill's parent. Nor his boss. Nor his spouse. Still, under the Constitutional guarantees of our Bill of Rights, I was publically exercising my right of Freedom of Speech. Having no authority over the assistant district attorney, however, I felt that most observers certainly understood, as well, that I had no legal basis to tell Bill to leave the court building, much less to return directly to his office. But Bill must have thought otherwise. He quickly spun around and rapidly descended upon me, clearly intent upon re-discussing the issues.

As the distance separating us closed, I braced myself for the obvious encounter to follow. At the time, I had a coffee cup in my left hand and a full briefcase in my right hand. As Bill approached, I realized that he was coming at me at such a speed that he might rocket right through me. It was obvious that we were going to get much closer than the normally acceptable American polemic distance of three feet. Soon, we were nose to nose, looking more like tattooed combatants psyching each other out before a cage fight. Then it happened.

I maintain to this day that Bill forcefully bumped my belly with his. Then again, my belly reputedly is rather large. So I may have bumped first or I may have bumped back. Either way, thus began the Great Billy's Belly Bumping Battle which lasted for approximately 10 seconds. Clearly, things were getting personal. Not wanting to make a scene, but still wanting to make my position known, I then loudly accused Bill of bumping my belly, saying "Don't touch me again!" Bill responded by saying that he did not bump my belly. A "Yes you did!" "No, I did not!" exchange ensued. Bill then unfairly escalated the event by summoning the assistance of a nearby trooper to referee our spontaneous encounter.

The trooper approached us. He then ordered "Bill, step back" in his best command voice. To this day, I do not know which Bill he was addressing. But I think we both stepped back a bit out of an abundance of caution and confusion. Me out of fear of a second arrest in my professional career and the other Bill likely out of fear that it might be a first arrest of his own professional career. In retrospect, we would have looked great appearing handcuffed together at arraignments the next day in our coordinated suits and ties, complete with matching black eyes, not to mention having spent the night together as reluctant cellmates because no other prisoners wanted to share space with us.

By then, a degree of excitement had developed on the second floor of the state court building. In short order, we had both judicial service officers and other attorneys watching our bullish exchange, as our sleeping testosterone levels surfaced from years of repression.

Next, as if hearing the ringside bell, we both retreated to a greater distance and went to our figuratively separate corners. Shortly thereafter, Bill magnanimously approached me as the trooper cautiously looked on. He stated that, as professional adults, we should not have engaged in such childish behavior. I agreed. After all, no one had ever called me a professional adult before. I was flattered. We were both suitably embarrassed. Mutual handshakes and apologies were exchanged, but not hugs. We again both recognized and confessed that it was immature for the two of us to be behaving in such a manner. I then pointed out to one of the female attorneys present that it was a show of male testosterone, trying to excuse our encounter. She dismissed our behavior as merely "showmanship." In retrospect, I think her statement was a veiled insult to our respective ages. After all, both of us were old enough to be her father.

The next day, Bill and I gingerly walked around each other, still profusely apologizing for our behavior and repeatedly and humbly bowing to each other like two foreign diplomats. Later, Bill, perhaps out of a sense of chagrin, gave me a very nice bottle of wine. In return, I gave him a present from the local Walmart known as "Poo Dough," a new form of Play Dough which can be molded into various shapes representing that which normally drops into the bottom of an outhouse. (Poo-Dough comes complete with a mold, along with fake corn and peanuts for creative texturizing. Poo-Dough quickly became the latest rage among young kids, but was later removed from Walmart shelves for undisclosed reasons.)

Later, my secretaries told me that my response was not that politically correct. After all, Bill had given me a very nice bottle of wine. And I had given him a bag of imitation crap in return. So, I also sent over a bottle of cheap wine to even the score.

For the rest of the week, our legendary battle was the talk of the town. In fact, it still comes up from time to time, mainly when I raise the subject. In the end, all was well, although I did suggest to Bill that he should be much more careful in the future in his choice of opponents. After all, if somebody is going to pick a fight, they should not pick on somebody who is bigger than them. In the area of bellies, I obviously qualify as a heavyweight. Fortunately, I don't think Bill has the stomach for another belly battle, so it probably will never become an issue.

Admitted to the Alaska Bar in l976, William R. Satterberg Jr. has a private, mixed civil/criminal litigation practice in Fairbanks. He has been contributing to the Bar Rag for so long he can't remember.

NOTICE OF PUBLIC CENSURE

By order of the Alaska Supreme Court,
entered March 10, 2017

GAYLE BROWN

Member No. 9411094
Anchorage, Alaska

Is publicly censured, effective
March 10, 2017, for

conduct falling below the minimum standard of competency of a criminal law practitioner and for ignoring an order of the Court of Appeals.

Published by the Alaska Bar Association,
P. O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules.

Ten tips for lawyers to get beyond the shouting

Continued from page 1

and few outcomes certain. Honoring the rule of law means committing to persistent inquiry and advocacy while abiding, ultimately, decisions with which we may strongly disagree. We recognize that losing a battle this way is not losing the war. Give us the rule of law any day over the rule of man – the arbitrary, unbridled and unaccountable whims of tyrants. When arguing about what our laws mean, do so humbly, and remember what a privilege it is to do so at all.

8. Promote civic engagement. It's quite possible to graduate high school in America without learning the rights and responsibilities of citizenship. But lawyers understand that our nation's founders, in giving ultimate power to the people, also created expectations. The opportunity for civic engagement is one of their greatest gifts to us, but also one of their boldest challenges. Each of us has a role to play, and we neglect it at our peril. When we're pointing fingers at those responsible for the sorry state of civic affairs, we need to include ourselves.

9. Play fair. Social media and talk shows thrive on "gotcha" moments – on catching people off-guard and unprepared. The more embarrassing and humiliating the slip, the more likely to "go viral." Too many of us are gleeful when acts of rudeness, ambush and sabotage serve our perspectives, then outraged when those with whom we disagree benefit from the same tactics. Again, lawyers can offer some insight. Deeply ingrained in our sense of fair process is the concept of notice. Shock and surprise may work for ratings, but they're deadly to careful deliberation. If you want to be taken seriously by those on both sides of an issue, be open and forthright about your concerns, and drop the drama.

10. Show compassion. To me, law has always been a helping profession. During any given year, lawyers across Alaska volunteer thousands of *pro bono* hours to serve the unmet legal needs of Alaskans facing hardship, and to help make our state a better place. While some efforts come from a sense of professional duty, most come from the heart. So here is the last tip for navigating these strange and fearful times: listen and speak to others with compassion, however difficult it may be to find. It doesn't take a lawyer to tell you that loving your neighbor is the ultimate answer, and always has been.

Barbara Hood is a retired attorney who worked at Alaska Legal Services Corporation, the Attorney General's Office, and the Alaska Court System during her 30-year career. She is currently a small businesswoman in Anchorage.

Samantha Slanders

Advice from the Heart

Dear Samantha,

Next month my husband's parents will make their annual summer visit to Alaska. They are from Texas. No more needs to be said about why I dread their arrival. How can I make sure that this is their last visit?

Not Again in Spenard

Dear Ms. Spenard:

If you have already tried slipping a fresh pork chop into each of their fanny packs as they walk along Campbell Creek during bear mauling season, I suggest you seek an injunction that prevents them from crossing the state line. Make your application in July and no Alaska judge will refuse you relief.

Dear Samantha,

During a recent consciousness-raising visit to Thailand I met an enlightened attorney from Willow. We fell in love during a salt-bath soak. He's invited me to share his Alaskan chalet. I have a sweet little rent-controlled apartment near New York's Central Park and don't want to give it up or abandon my chance for partnership in a Vault 100 law firm unless I know I can be happy in Alaska. I love the City and the guy from Willow. Should I make the switch?

Muddled in Manhattan

Dear Muddled:

Do you consider access to a decent shoe store necessary for your happiness? Would the sound of 1,000 howling dogs bother you? Do you have an allergy to salmon, moose meat, or funnel cakes? If you answered, "yes" to any two of these questions, stay put. If he loves you, he will move to New York.

Dear Samantha,

My new next-door neighbor asked me to add him to our family cell phone plan. I want to help but it seems a little risky given his history. A phone is no problem. Right after I lost mine, he found a similar Samsung while taking out the trash. But, after he makes monthly restitution payments to all the senior citizens hurt by his Ponzi scheme, he doesn't have enough money left over for a phone payment. Should I follow my head or my heart?

Bleeding Heart

Dear Bleeding:

It is rare to receive a letter from such a kind and generous person. But perhaps your charitable inclinations are better directed toward a more deserving recipient or at least one without a conviction for fraud. I have never been able to afford my dream to visit the orchid forests of Bali. If some decent, trusting person such as you would cover my phone bill for the next 28 months, I'd be able to save enough to cover the airfare to paradise and you could follow your heart.

Bar People

Donations made to Bean's Cafe in memory of attorneys

Kim Kovol with Children's Lunchbox; Jolene Hotho of Anchorage Bar Association with Shane Levesque, president of Anchorage Bar Association, present Lisa Sauder, executive director of Bean's Cafe with a donation of $1,000 in memory of our colleagues who died in 2016: Russell Arnett, James Babb, Craig Cook, Geoffrey Currall, Ben Esch, Tena Foster, John Hughes, Albert Maffei, Lucinda McBurney, Lionel Riley, Susan Thomsen, Charles Tunley and Theresa Williams.

Attorney closes office, limits practice

Lee Holen has closed her Midtown office and will be limiting her practice to consulting regarding employment matters and offering short-term assistance for employees, employers, and attorneys. Services for employees include guidance on dispute resolution options, claim analysis, review and negotiation of employment contracts and severance packages, representation in mediation/arbitration/administrative actions, assistance with internal complaints, and advice/representation before local, state, and federal discrimination agencies. Services for attorneys and employers include acting as a mediator or arbitrator, case analysis, employment-related investigations, witness preparation, drafting/reviewing policies and contracts, referrals to represent clients in administrative actions, and second opinions on litigation.

Maribeth Conway joins Manley & Brautigam

Conway

We are pleased to announce that **Maribeth Conway** joined Manley & Brautigam, P.C. as Senior Counsel in December 2016. Her practice focuses on estate and tax planning, probate and trust administration, business succession and asset protection planning. She also represents corporate and individual fiduciaries and other parties engaged in trust and will contests or construction disputes, and accounting actions. Prior to joining Manley & Brautigam, she practiced with Conway Law Firm for more than 10 years and more recently with the Anchorage office of Garvey Schubert Barer.

Manley & Brautigam has changed address to 1127 W. Seventh Ave., Anchorage, AK 99501.

NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,
entered March 29, 2017

KENNETH W. COLE
Member No. 9806034
Anchorage, Alaska

is transferred to disability inactive status
effective March 29, 2017.

Published by the Alaska Bar Association,
P. O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules.

Alaska's new and revised power of attorney rules and form

By Abigail E. O'Connor, Christopher J. Walker and Steven T. O'Hara

Third in a series – *The following is the last installment of a 3-part article on the new power of attorney rules and form – Part I was published in the December 2016 Bar Rag and Part II was published in the March 2017 Bar Rag. As mentioned in the prior articles, on July 28, 2016, the governor signed into law House Bill No. 8, titled "An Act relating to powers of attorney and other substitute decision-making documents; relating to the uniform probate code; relating to notaries public; and providing for effective date" (the "Act", see goo.gl/OjTHLg). The Act is found at: goo.gl/QdTC56. The new rules went into effect on Jan. 1, 2017 (Section 30 of the Act). Part I highlighted some of the procedural and substantive differences between the old rules and new rules. Part II provided some examples of language to include that address some of the concerns. This last installment – Part III will focus on two final thoughts: (i) third parties' acceptance of the grandfathered form; and (ii) a disconnect between the new form and the new statutes.*

Third Parties' Acceptance of Grandfathered Form

As a refresher, under law effective Jan. 1, 2017, third parties now have a statutory list of reasons why they may reject a power of attorney. AS 13.26… and AS 13.28…. The new law basically invites third parties to require a legal opinion before they will respect the client's power of attorney. This requirement may be costly and cause undue delay for an agent and its principal. In Part II, we gave the example of the 2008 financial crisis, and pondered the result if an agent needed to make quick financial decisions for a principal to preserve his assets, yet could not do so because he first had to obtain a legal opinion for the financial institution. We do not have a solution for this concern as of yet – but keep on the lookout for possible proposed legislation.

Recall that pre-2017 powers of attorney are grandfathered. Third parties may be hard-pressed to remember that they ought to respect immediately pre-2017 Alaska statutory powers of attorney or face a $1,000 civil penalty plus damages. They may need some nudging. If this becomes an issue, below is some language that clients or the counsel might use in applicable cases.

To Whom It May Concern:

Your company is not in compliance with Alaska law by refusing to accept the power of attorney for Jane A. Client. This letter is to make you aware of your statutory obligations under the Alaska statutory power of attorney dated December 31, 2016 in which Jane A. Client names Joseph A. Client as her agent.

Please be advised that by failing to honor a properly executed Alaska statutory power of attorney, you may be held liable to my client, Jane A. Client, and her heirs, successors, and assigns, for a civil penalty up to $1,000, plus the actual damages, costs, and fees associated with or arising from the failure to honor the document. Accordingly, if the market experiences volatility while you are refusing to honor this power of attorney, my client will seek damages from you in addition to the $1,000 civil penalty.

Effective for powers of attorney signed on or after January 1, 2017, Alaska has new statutes on powers of attorney. Significantly for purposes of this matter, Alaska law grandfather's my client's Alaska statutory power of attorney because it was signed before 2017. (Section 29 of House Bill No. 8, entitled "An Act relating to powers of attorney and other substitute decision-making documents; relating to the uniform probate code; relating to notaries public; and providing for effective date").

The former Alaska Statute 13.26.332, which applied to my client's power of attorney when it was created, was enacted to discourage the practice of certain institutions that routinely failed to recognize powers of attorney drafted in accordance with Alaska law. Apart from the fact that this practice imposed an unreasonable burden on a principal dealing with an institution through his or her agent, the practice violated Alaska law effective with respect to the Alaska statutory power of attorney that was presented to you.

You and your company will no doubt wish to avoid incurring civil liability arising from an uninformed company policy or decision not to honor the Alaska statutory power of attorney that was presented to you. Accordingly, I request you ask your legal department to review your institution's obligations vis-à-vis the grandfathered statutory power of attorney under Alaska law.

At your earliest convenience, please confirm to me that your company will respect Alaska law and therefore the Alaska statutory power of attorney dated December 31, 2016 for Jane A. Client.

Sincerely,
Attorney

Disconnect Between New Form and the Act

The new statutory form provides that certain powers, such as the power to create or amend a trust, create or change rights of survivorship, and a host of others, may be granted to the agent only by marking a corresponding box next to the language explaining the power. There is no corresponding statute, however, that requires that these specific powers be granted with specific language or affirmative designation. Hence, there is a disconnect between the new form and the new statutes. Section 201 of the Uniform Power of Attorney Act does require specific language to grant these powers, but it was not incorporated into the Act.

Due to this omission, generic forms or pre-2017 Alaska forms with general language may still grant the power to create or amend trusts, create or change rights of survivorship, etc. The provisions of AS 13.26.665 that interpret general powers granted by statutory powers of attorney would likely also be used to interpret other documents. Their broad language can be read to include powers over trusts, rights of survivorship, etc. Without additional provisions limiting the scope of general powers or statute like UPAA 201, a non-statutory power of attorney document arguably includes powers over trusts, rights of survivorship, etc.

For example, under AS 13.26.665(a) an agent may "(2) sell, exchange, convey, quitclaim, release, surrender, mortgage, encumber, partition … or otherwise dispose of, an estate or interest in land" and "(12) do any other act or acts that the principal can do through an agent with respect to any estate or interest in land". This interpretation of general authority with respect to real property transactions likely includes the power to create a trust. Therefore, a non-statutory document conferring general authority with respect real property arguably includes the power to create a trust of real property even if the document does not specifically mention creation of trusts.

Practitioners should be cautious when interpreting non-statutory and pre-2017 statutory power of attorney documents. Alaska's lawmakers should consider refining the Act to close the loop on requiring specific grants of authority and address non-statutory documents.

We hope this series of articles on the powers of attorney has been helpful to the community. The intent of the changes clearly was well founded and geared to protect principals from untoward agents acting beyond the scope of their authority. The unfortunate byproduct was that some of the new rules are very problematic and potentially expensive and damaging for the principal and agent. In other words, the new rules went too far. We can try to remedy some of the issues with additional language in the form, as discussed in Part II of this article. We can try to remedy other issues with new legislation. Otherwise, we just need to carefully navigate the new rules and the new form, and hope for the best.

Nothing in this article is legal or tax advice. Non-lawyers must seek the counsel of a licensed attorney in all legal matters, including tax matters. Lawyers must research the law touched upon in this article. The sample language in this article is for illustration purposes only and, in any event, must not be used without being tailored to the applicable law and circumstances.

Abigail E. O'Connor is a trusts and estates attorney with Holland & Knight LLP in Anchorage. Christopher J. Walker is a trusts and estates attorney and shareholder with Faulkner Banfield, P.C. in Juneau. Steven T. O'Hara is a lawyer working for Bankston Gronning O'Hara, P.C. in Anchorage.

ALASKA BAR ASSOCIATION 1988 - 2017

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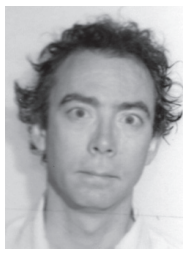
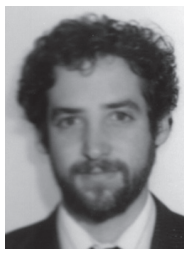
Karin Bagn


Daniel Bair


Leigh Ann Bauer


John Bernitz


F. Joseph Bersch


Kirsten Bey


Greg Bidwell


Craig Black


Ronald Black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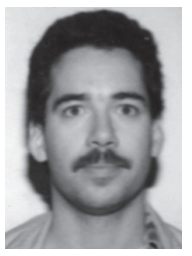
Cheryl Rawls Brooking


Jon Buchholdt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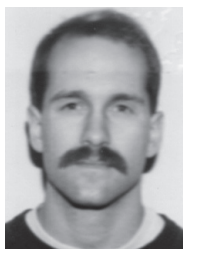
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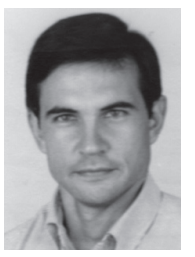
Maureen Dey


Kenneth Diemer


Margaret Dowling


Daniel Eldredge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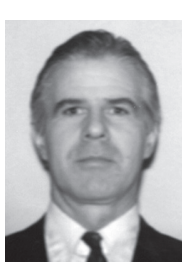
John E Hoag


Marcia Howell


William James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Heather Kendall-Miller


Jeffrey Killip


Jenifer Kohout


Cecilia Lacara

David Landry

Nicole Duarte Martin

Edward McNally

Mark Melchert

James Metcalfe

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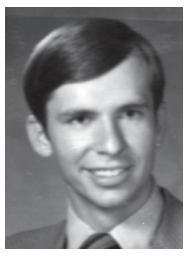
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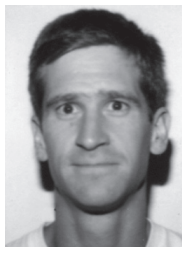
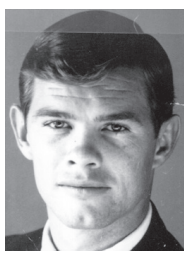

Douglas Wooliver


Joseph Wrona

Not pictured:
Nelleene Boothby
Sean Halloran
Kathie Brown Roberts

50 Years of Bar Membership


Jesse Bell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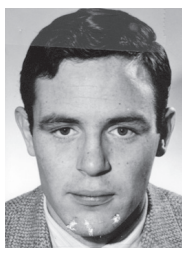
Thomas Blanton


Theodore Dunn


James Gilmore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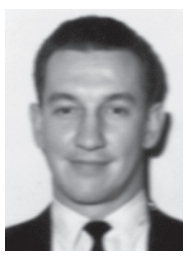
Paul Jones


Mary Kulawik

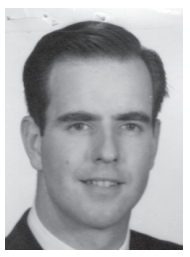

Richard Lytle


Robert Mahoney


A. Fred Miller


Peter Page


Robert Price


J. Justin Ripley


Mark Rowland


Vernon Snow


Milton Souter

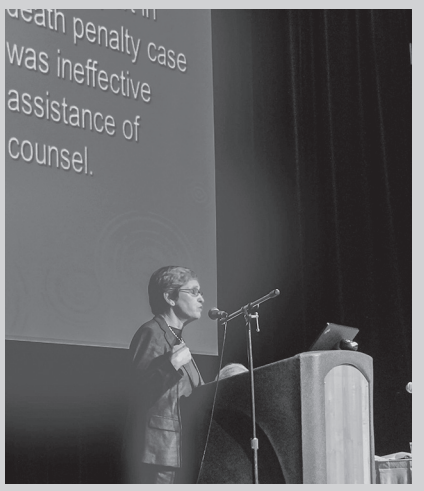

Eric Wohlforth

60 Years of Bar Membership


Donald A Burr

Retired Justice Bud Carpeneti introduces the Judicial retention panel CLE. Ryan Wright of the Kansas Values Institute is joined by Dean Erwin Chemerinsky, Maria Bahr, Justice Joel Bolger and Barbara Hood. (Photo by Lynn Coffee)

Maddy Levy and John Lohff concentrate on a presentation. (Photo by Bill Granger)



Laurie Levinson presents a slide during her talk on the criminal side of U.S. Supreme Court opinions. (Photo by Lynn Coffee)

Judge Herman Walker and BOG public member Bill Gordon enjoy the sunny day on the Governor's Mansion deck. (Photo by Lynn Coffee)

Bar Convention Hi

BAR'S ANNUAL AWARDS PRESENTE

Bryan P. Timbers Pro Bono Awards

Mike Lessmeier accepts the Pro Bono Award from Justice Sue Carney. (Photo by Bill Granger)

Amanda Compton accepts the Pro Bono award from Justice Sue Carney on behalf of her mother Sue Ellen Tatter. (Photo by Lynn Coffee)

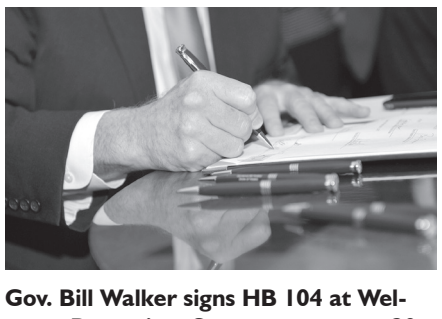
Pamela Orme, right, receives t Layperson Service award from Related Education committee c Stephanie Galbraith Moore.

The Alaska Bar Layperson Service Award a public committee or Board member for guished service to the membership.

Pam Cravez presents at the Law Day luncheon. (Photo by Lynn Coffee)

CLE speaker David Gross presents on the Lost Art of Cross Examination. (Photo by Bill Granger)

Gov. Bill Walker takes a selfie with Bar member Alisha Hilde. (Photo from the Office of the Governor)



Gov. Bill Walker signs HB 104 at Welcome Reception. See story on page 20. (Photo from the Office of the Governor)

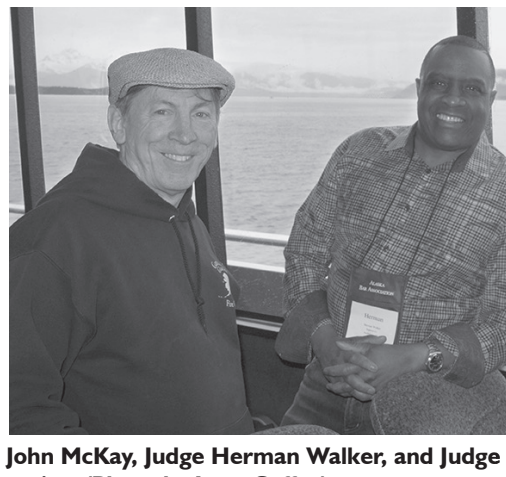
Nikole Nelson and ALSC staff celebrate her receipt of the International Law Section's Human Rights award. (Photo by Lynn Coffee)

Gov. Bill Walker congratulates retired Justice Dana Fabe on her recent award. (Photo from the Office of the Governor)

Retired Judge Elaine Andrews, winner of 2 ily. (Photo by Lynn Coffee)

The Alaska Bar Foundation gives th life work has demonstrated a commitm

Incoming Bar President Darrel Gardner celeb by visiting family. (Photo by Lynn Coffee)



John McKay, Judge Herman Walker, and Judge cruise. (Photo by Lynn Coffee)

GHLIGHTS — JUNEAU

D BY BAR PRESIDENT SUSAN COX

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Law

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honors
distin-

Holly Handler accepts the Robert K. Hickerson award from Susan Cox. (Photo by Lynn Coffee)

The Board of Governors' Robert Hickerson Public Service Award recognizes lifetime achievement for outstanding dedication and service in the state of Alaska in the provision of pro bono legal services and/or legal services to low income and/or indigent persons.

Zach Manzella accepting the Distinguished Service Award from Susan Cox. (Photo by Lynn Coffee)

The Distinguished Service Award honors an attorney for outstanding service to the membership of the Alaska Bar Association.

Jude Pate receives the Professionalism Award from Susan Cox. (Photo by Lynn Coffee)

The Alaska Bar's Professionalism Award recognizes an attorney who exemplifies the attributes of the true professional, whose conduct is always consistent with the highest standards of practice, and who displays appropriate courtesy and respect for clients and fellow attorneys.

2017 Jay Rabinowitz Public Service Award, is joined by her fam-

e Rabinowitz Public Service Award to an individual whose
ent to public service in the state of Alaska.

Board of Governors is joined by new members Brent Bennett, president-elect; Cam Leonard, and Mari Carpeneti; and outgoing members Bob Groseclose, Morgan Griffin, and David Wilkinson. (Photo by Krista Scully)

prates his new leadership surrounded

Susan Cox passes the gavel to Darrel Gardner. (Photo by Lynn Coffee)

Nikole Nelson of Alaska Legal Services Corporation holds a much-deserved recognition of ALSC's 50 year anniversary. (Photo by Lynn Coffee)

Sharon Gleason enjoy the whale

Many thanks to outgoing BOG members Bob Groseclose and David Wilkinson both of Fairbanks. (Photo by Lynn Coffee)

Gov. Bill Walker with Darrel Gardner, president-elect and Susan Cox, president (Photo from the Office of the Governor)

Judicial Profile: of Senior District Judge H. Russel Holland, District of Alaska

By Darrel J. Gardner

One of the most important, famous, and complicated federal cases in Alaska's legal history involved the Exxon Valdez oil spill on March 24, 1989, in Prince William Sound. The litigation actually involved thousands of individual claimants, and the multitude of cases were all eventually assigned to one federal judge in Alaska: Hezekiah Russel Holland.

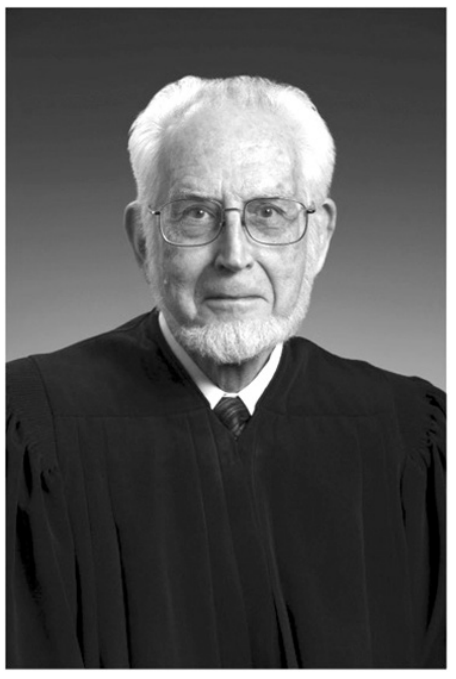
Born in Pontiac, Michigan, H. Russel Holland received a Bachelor of Business Administration from the University of Michigan's Ross School of Business in 1958, and a Bachelor of Laws from the University of Michigan Law School in 1961. Holland then began his legal career in Anchorage as a law clerk for Justice Buell A. Nesbett of the Alaska Supreme Court. Starting in 1963, he worked as an assistant United States attorney until he left government employment in 1965 to enter private practice in Anchorage. On March 6, 1984, Holland was nominated by President Ronald Reagan to a seat on the United States District Court for the District of Alaska. He was confirmed by the United States Senate on March 26, 1984, and received his commission on July 16, 1984. He served as chief judge from 1989 to 1995, before assuming senior status on Sept. 18, 2001.

Judge Holland's family history runs deep in America. The first Holland ancestor in America – Gabriel Holland from England – arrived in 1632. Holland's father, born in 1898, was from Virginia, and later moved to Detroit to teach high school, His mother, who was Irish, was also a school teacher. Holland's father took up an interest in the law and eventually earned a law degree during his summer breaks from teaching. His father practiced law in Pontiac, Michigan, briefly; he was quickly appointed a municipal judge, and then was elected to be a circuit judge in Pontiac, where he presided for approximately 30 years.

Judge Holland has one sister, a Catholic nun in Michigan who also became a canon lawyer in Rome, where she spent 20 years before retiring back in Michigan. She served as the president of an umbrella organization for Catholic women's organizations, and was instrumental in settling a contentious dispute between the Vatican and numerous Catholic women's religious organizations in the United States.

"Russ" Holland was born in Pontiac and attended high school there. As he puts it, he just "muddled through" high school. Pontiac was a very industrial town, with a good portion of the population employed by General Motors. The high school was almost purposefully segregated between industrial arts and pre-college. Russ pursued the academic track, although he did not like math. He became president of the senior class and was a member of the debate team. He played no sports in high school, although he did like to bike. A highlight of his youth was going to Northern Michigan to visit his grandmother, who had a hunting cabin in the woods on Lake Superior.

Judge Holland says his father was his greatest influence. His father believed everyone should know how to do things with their hands in addition to being well educated. Consequently, as a young man, Russ learned how to trim fruit trees, lay brick, work on a car and build a house (which he did in Anchorage in the early 1970s).



Judge H. Russel Holland

After high school, Russ Holland went to the University of Michigan, where he enrolled in a general liberal arts program. His favorite subject in college was geology, and he seriously considered becoming a geologist, but ultimately decided on the law. Geology is still an interest of his; he reads and follows it, and is fascinated by the volcanic action in the Aleutians. By the end of his second year at U.M., however, Russ had decided to pursue a career in law, so he transferred to the business school – a decision he never regretted. He says it was "one of the smartest things he'd done in his life," and that his business education really helped him succeed in law school. Although his father was a lawyer and judge, the senior Holland didn't really weigh in on Russ's decision to go to law school.

Judge Holland described his most memorable moment in law school at the University of Michigan: His contracts instructor, Professor Harvey, was the designated "hatchet man" for the first-year law school class; his job was to cull the unsuccessful students from the group. He was the one who was tasked with asking low-performing students not to return after the academic breaks at Thanksgiving and Christmas. Russ worked very hard in contracts, but he only got a "C+" grade, which was very disappointing for him. After the summer break, when he went back to register for his second year, there was a note with the registrar directing him to see Professor Harvey. With some serious concern about his academic future, he went to find the professor, who invited him into his office for some "news." The professor then explained that he had regraded the exams over the summer and changed Russ's grade to a "B." Russ's intense fear immediately turned to elation. The following year, Russ was "very glad to be done with law school." He received his Bachelor of Laws degree in 1961. Several years after graduation, he received notice from the university telling him that the law degree had been changed from "Bachelor of Laws" to "Juris Doctor," and that if he wanted a new diploma, to send them $100. "I have only the original Bachelor of Laws diploma hanging on my wall," he chuckled.

During the summer before law school, Russ decided that he wanted to find some fun "junk job," so he applied to become a counselor at a youth camp located near Everett, Washington. He drove to Washington in an old Pontiac (seriously) that his father had given him, camping along the way. Eventually he arrived in Washington and started looking for the camp. As he drove deeper into the woods, not sure where he was, he suddenly came upon a young woman walking in the narrow road. He asked her, "Is this Hidden Valley Camp?" She said, "Yes;" her name was Diane and she was also a camp counselor. She'd grown up in Hawaii and had just finished her first year at Pomona College. He introduced himself, and about 18 months later, after Russ's first year of law school, they were married. Diane transferred to the Michigan business college, and she finished up her degree at the same time Russ graduated from law school.

In 1961, on the very day that Russ finished his last law school exam, he and Diane packed up the car, and off they drove — to Alaska. Why Alaska? Russ had been friends with a classmate from law school, Jim Bradley, who became a lawyer in Juneau. Russ and Diane talked about it; they both liked the Pacific Northwest, but job opportunities were limited. They ultimately decided, "Why *not* Alaska?" Russ also wanted to make his own career path apart from his father's legacy in Michigan. Bradley had gotten a job in Alaska based on writing a letter, so while still in law school, Russ had written three letters of inquiry: one letter to the Alaska Supreme Court, one to the Alaska Superior Court, and one to the U.S. Attorney's Office. He was quite surprised to receive an almost immediate response from Alaska Supreme Court Chief Justice Buell A. Nesbett, offering him a position as a law clerk. There was no interview, and he hadn't even included a writing sample!

When the Hollands arrived in Anchorage, they didn't know anyone. They found a motel to stay at, and after Russ started his job, they found a little house to rent from a local schoolteacher. By the end of that first summer, they had saved enough money to put a deposit down on a house of their own. Russ and Diane had three children in quick succession. Judge Holland says that his proudest accomplishment is "my family, and building our family home on the mountainous hillside above Anchorage in 1972-1974."

While he was still working for Justice Nesbett, Russ received a long-delayed letter from the U.S. Attorney, who also expressed interest in offering him a job. So, as his clerkship with Judge Nesbett was winding up, he walked into the U.S. Attorney's office and asked to see Warren Colver, the U.S. attorney. Russ was wearing an Alaska sweatshirt with totem poles on it; he said, "Here I am!" Colver said, "I hope you didn't come all the way here just based on this inquiry." Russ cheerily replied that he'd already been in Alaska for 18 months, working for Justice Nesbett, and that he had passed the bar exam. Colver hired him almost on

Continued on page 17

Judicial Profile: of Senior District Judge H. Russel Holland, District of Alaska

Continued from page 16

the spot.

Russ went to work as an assistant U.S. attorney. About two years later, he was hired as an associate attorney at the law offices of Stevens and Savage. Russ quickly became a partner in the firm, which became Stevens, Savage, and Holland. "Stevens" was Ted Stevens, who soon was elected to represent Alaska as a long-seated U.S. senator, replacing Sen. Bob Bartlett after his death. Stevens took his seat in the Senate and left his caseload to Holland. It was a basic commercial practice. The firm went through several changes with different attorneys over the years.

Then one day Russ read in the Anchorage newspaper that U.S. Federal Judge James A. von der Heydt would soon be taking senior status. For the first time in his life, Russ considered being a judge; he thought it "might be interesting; it was just the right time and the right place," he said. He called Stevens' office, but he never had a direct conversation about the judgeship with Stevens. Instead, he spoke with Stevens' secretary and expressed his interest in the position. She called back a day or so later and said, "Go ahead and apply." The Alaska Bar Association conducted a poll to rate interested judicial candidates; Russ placed third. While he was undergoing the Bar poll, he heard through the grapevine that legendary Alaska trial lawyer Edgar Paul Boyco thought he was "a fairly decent guy, but naïve." In retrospect, Judge Holland says he was right, "at least with the naïve part." Then, in March 1984, Russ received notice that he had been nominated to become Alaska's next federal judge.

At the Senate confirmation hearings, Russ was among three judges who were up confirmation on the same day. Judge Holland described the process as "very amicable," but after the first nominee launched into a lengthy answer and was told afterwards that a simple "Yes" or "No" would have sufficed, Judge Holland, who was next, decided to "keep my responses brief." He was confirmed and received a congratulatory call from President Reagan. Judge Holland notes that "the whole process was much less political back then and it only took a few months." In short order, he left his practice to a former law partner, and moved into the Federal Building and Courthouse in downtown Anchorage. When he arrived, Judge von der Heydt was still in his chambers, so the court built Judge Holland a new office and courtroom. At the time, there were only two U.S. District judges in Alaska (there are now three); it was just him and Judge James Fitzgerald, who recently passed away in 2011. In 2014, the federal courthouse in Anchorage was officially renamed "The James M. Fitzgerald U.S. Courthouse."

Judge Holland says that his favorite thing about being a judge is that he "enjoys managing litigation." He doesn't have a least favorite thing about being a judge. He describes himself as "an introvert, which served me well as a judge." His three "career highlights" include the Venetie case,[1] which raised the question of whether lands conveyed to Alaska Native tribes under the Alaska Native Claim Settlement Act of 1971 were Indian country. He concluded that they were not Indian country, but the 9th Circuit reversed his ruling; on appeal, the Supreme Court unanimously reversed the 9th Circuit. The ruling was 9-0 in support of Holland's decision. This was a monumental decision in Alaska because the decision had the practical effect of prohibiting almost all Native tribes in Alaska from collecting taxes for activities conducted on tribal land.

The second highlight was the Katie John case,[2] which dealt with subsistence fishing rights for Alaska Natives. The dispute stemmed from a conflict between federal law, which gives a subsistence hunting and fishing priority to rural Alaska residents, and the state constitution, which calls for equal access to fish and game for all residents. The litigation lasted about three decades, and ultimately determined that the federal government will retain management of subsistence fishing and hunting on about 60 percent of Alaska's inland waters. In Holland's view, "The state missed a wonderful opportunity to reacquire the ability to do fish and game management for both state and federal lands. There was just too much antagonism between local folks and rural folks." His perception was that "the urban folks just couldn't abide by the rural folks having preference."

The third highlight, of course, was the massive Exxon Valdez spill litigation.[3] In his opinion, "the lawyering on both sides was absolutely superb. Both sides worked together to manage the litigation in an exemplary fashion. If that had not happened, it would have been a complete disaster. The lawyers really helped me do my work on that case." The litigation spanned decades and involved multiple appeals to the 9th Circuit Court of Appeals. He was "dreadfully disappointed" that the Supreme Court "picked that particular case to make some new admiralty law with respect to the amount of punitive damages that could be imposed."

On the day Judge Holland became eligible to take senior status in 2001, he was in the Australian Outback at an Aboriginal community consorting with the locals. He visited Australia twice, including one 6-week stint involving an overland trip from the west coast over the Kimberly Mountains, almost to the Northwest Territories border. They traveled on the back of a 5-ton Isuzu truck, driving through rivers. He says it was his most interesting travel experience. Judge Holland now spends a lot of time in Portland, but he's always happy to get home to Alaska. One person he holds in great respect is the Arctic explorer, Canadian-born anthropologist Vilhjalmur Stefansson. According to the judge, he was the last real "raise your own money to go on an expedition" Arctic explorer. Stefansson extensively explored and documented the Arctic in the early 1900s, and Judge Holland has "read pretty much everything Stefansson has written."

One of Judge Holland's law clerks from the mid-1980s had this to say: "He is the embodiment of everything a judge should be. Scrupulously fair, thoughtful and attentive to all aspects of judging, he is a no-nonsense hard working guy whom the Wall Street Journal once noted as being a lawyer's lawyer. No judge ever gave the taxpayers more for their money, and few have given as much."

During his time as a District Judge, Holland "enjoyed the criminal work," but once he went senior and reduced his case load, he wanted to concentrate on civil litigation. Since going senior, he enjoys traveling; he's helped out as a visiting judge with the Arizona District Court, which has experienced numerous vacant judicial positions and an overwhelming caseload in the recent past. At present, he plans to maintain his status as an active senior judge; however, having just turned 80, he is also cognizant that he would want to retire when the time is right - he "doesn't want to make the mistake of staying on too long."

When asked to reflect on his life and career, Judge Holland thought for a long moment and said, "The main thing that I've learned is that this world is full of a lot of decent people, and sometimes they get mucked up pretty bad. I hope that, through the process we go through here, we help some of them get straightened out, one way or another."

Darrel Gardner is an assistant federal defender in Anchorage; he is a past president of the Alaska Chapter of the Federal Bar Association, and the current president of the Alaska Bar Association.

[1] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)

[2] *Katie John v. United States and State of Alaska,* 247 F.3d 1032 (9th Cir.2001)

[3] *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)

ESTATE PLANNING CORNER

Alaska's act on disposition of human remains

By Steven T. O'Hara

Second in a series

By statute, Alaska has provided a safe harbor for clients to follow with the reasonable expectation that their wishes on the disposition of their remains will be enforceable. The statute is known as the Alaska Disposition of Human Remains Act (AS 13.75.195).

The statute creates yet another document for clients to consider as part of their estate planning. The statute calls this new document the Disposition Document (AS 13.75.010).

The previous issue of this column provided an example of a Disposition Document. This column provides an example of instructions clients may consider inserting into their wills.

It bears emphasizing that the statute is a safe harbor. Clients are of course free to continue to express their wishes on the disposition of their remains orally or in whatever written form they want. Yet unless clients convey their wishes in conformance with the statute, their wishes are in the open seas and enjoy no safe-harbor protection.

"Alaska has provided a safe harbor for clients to follow with the reasonable expectation that their wishes on the disposition of their remains will be enforceable."

Working in estate planning since 1984, I have not witnessed a client's family encountering trouble in the area of disposition of remains. A friend tells of his trying to work with a funeral home out of state and experiencing nothing but delay and expense and frustration until the decedent's wishes were carried out. Apparently the funeral home had difficulty identifying who was authorized to make decisions.

Alaska Statute 13.75.010(b) provides that a Disposition Document, to be in conformance with the statute, must (1) be signed, (2) be acknowledged before a notary public, and (3) contain the form and contents required by Alaska Statute 13.75.030 even if the document forms part of a client's Will. And the Disposition Document, once made, cannot be amended or revoked except by the execution of another Disposition Document.

The following Will provisions are offered as complementary to a Disposition Document and not in substitution of one. The following Will provisions are for illustration purposes only and, in any event, must not be used without being tailored to the applicable law and circumstances. Also, nothing in this article is legal or tax advice. Non-lawyers must seek the counsel of a licensed attorney in all legal matters, including tax matters. Lawyers must research the law touched upon in this article.

Suppose a hypothetical client named Jane A. Client is at all relevant times an Alaska resident with no property outside Alaska. She has previously executed a Disposition Document, expressing her wishes on cremation. In her will, she also might include the following provisions:

A. Pursuant to the Alaska Disposition of Human Remains Act, I have signed a Disposition Document under Alaska Statute 13.75.030, naming the following persons in the following order to carry out my cremation instructions: first Joseph A. Client, second Joseph A. Client, Jr., third Joseph A. Client III, and fourth Joseph A. Client IV. For purposes of this paragraph A, I refer to such person so acting as "My Person In Charge." In this connection, I direct:

1. The disposition of my remains shall be by cremation;

2. My Person In Charge shall make all decisions with respect to the disposition of my remains in accordance with what My Person In Charge considers appropriate under the circumstances then existing at and after my death. All decisions made by My Person In Charge with respect to the disposition of my remains shall be conclusive and binding on all persons;

3. My survivors shall not have the option of cancelling the disposition of my remains and selecting alternative arrangements, regardless of whether my survivors consider a change to be appropriate;

4. The determinations of My Person In Charge regarding the meaning of the words used in the Disposition Document shall be conclusive and binding on all persons;

5. The certificate of My Person In Charge that he or she is acting in accordance with my written instructions contained in the Disposition Document shall fully protect all persons dealing with My Person In Charge; and

6. My estate and the Jane A. Client Trust Dated January 2, 2000, jointly and severally, shall indemnify and hold My Person In Charge harmless from and against any damage, expense, injury or loss suffered or sustained by My Person In Charge by reason of any acts, omissions, or alleged acts or omissions, arising out of, in connection with or incident to his or her serving as My Person In Charge, including (but not limited to) any judgment, award, settlement, attorney's fees, and other costs or expenses incurred in connection with the defense of an actual or threatened action, claim, demand or proceeding, provided that the acts, omissions or alleged acts or omissions by My Person In Charge on which such actual or threatened action, claim, demand or proceeding is based are not adjudged (by a court of competent jurisdiction) to have been performed or omitted fraudulently or in bad faith or as a result of gross negligence.

[Included at end of Will:] CONSENT AS TO INDEMNIFICATION PROVISION OF SUBPARAGRAPH 6 OF PARAGRAPH A OF ARTICLE II:

JANE A. CLIENT TRUST

By:_____
Jane A. Client
Its: Trustee

In private practice in Anchorage, Steven T. O'Hara has written a column for every issue of The Alaska Bar Rag since August 1989.

My Five

This edition of My Five features three practitioners and music lovers from Southeast Alaska: Outgoing BOG President Susan Cox; BOG member Blake Chupka: and Juneau attorney and blogger @ One Hot Mess Libby Bakalar.

Susan Cox

- "Angel from Montgomery" – Bonnie Raitt
- "It Hurt So Bad" – Susan Tedeschi
- "California" – Joni Mitchell
- "I Was Here" –- Beyonce
- "Wonderful World" – Eva Cassidy

Blake Chupka

- "Ashes of American Flags" – Wilco
- "Time of the Preacher" – Willie Nelson
- "She Caught the Katy (And Left Me a Mule to Ride)" – Taj Mahal
- "It's Alright Ma, (I'm Only Bleeding)" – Bob Dylan
- "Street Spirit (Fade Out)" – Radiohead

Libby Bakalar

- "What I Got" – Sublime
- "Closer to Fine" – Indigo Girls
- "Intergalactic" – Beastie Boys
- "The Old Apartment" – Bare Naked Ladies
- "Untouchable Face" – Ani DiFranco

ECLECTIC BLUES

Corvid Congress functions similar to the human kind

Story and photo
By Dan Branch

Each winter they haunt Juneau's downtown streets. Even casual visitors to the state's capital notice them. Their tailored black suits and sharp haircuts make them stand out from the typical Juneau residents who usually wear simple but waterproof clothes. The well-coiffed exude charming avarice. Locals often check their valuables after passing one on Seward Street. I am talking about ravens, not lobbyists.

Crows nested in our neighborhood when the Branch Family moved to Juneau. Raven country started a block closer to the capital building. After a raven ventured onto the street with a pilfered peanut butter and jelly sandwich, a murder of the local crows forced it into the bristly interior of a spruce tree. There, squeezed up against the tree's trunk, the invader consumed the sandwich while the crows cawed for justification or at least a share of the PB&J. The raven, like a member of the legislative majority after a closed-door budget meeting, escaped without providing either.

Without the benefit of gerrymandering, the ravens eventually won our street from the crows. Only one pair of the big corvids is needed to keep the locals in line. The job requires so little that our raven representatives have time to learn useless things like how to mimic the twin beeps of a locking Subaru and are able to add to their collection of shinny, stolen objects. One likes to follow me around the yard, making negative comments about my carpentry and gardening skills.

Unlike the players in our two-party system, Juneau's ravens easily reach consensus. They work together to keep the Mount Maria eagles at bay. They even pool their strengths to improve the scavenging economy.

"Just before the Thursday trash truck pulls onto Sixth Street, members of the raven's finance committee convene near the Terry Miller Legislative Office Building."

Just before the Thursday trash truck pulls onto Sixth Street, members of the raven's finance committee convene near the Terry Miller Legislative Office Building. Having taken testimony from investigators, the committee members know that the jaws of the truck's compactor can't close while the building's garbage is being dumped into the truck. Afterwards, the jaws slam shut with corvid-crushing force. I don't know how many raven investigators, if any, died to gain this knowledge. But the committee members make good use of it by diving into the truck to snatch away tasty trash just before the jaws of death close on them.

The raven labor and commerce committee members demonstrated their excellent communication skills one winter afternoon as I walked down to the Law Library. I was shelling and eating salted peanuts as I moved. The honorable member from Seventh Street joined me on the Seward Street steps. He landed on a railing ten feet ahead of my position and watched me pop a peanut into my mouth. Then he flew further down the steps. I relaxed when the raven let me cross Sixth Street unaccompanied. But the honorable member from Capital School Park waited for me near the entrance to the Terry Miller Building. A little alarmed, I placed my last peanut on the railing and scuttled down the stairs. The sky filled with black wings as I reached the Capitol Building. A senate of ravens eyed me from perches on the building's roof and the parking lot railing. Showing them my now empty hands, I dashed to the safety of the Dimond Courthouse, feeling as fortunate as an oil company executive after the close of session.

During a recent visit to the great state of California, I ran into a pair of crows that taught me how fortunate I am to live under the benevolent rule of Alaskan ravens. Surviving in the land of big money, large populations and sun-sparkled smog has made these crows street mean.

Imagine me — pale and smelling of broad-spectrum level 70 sunscreen — in an outdoor restaurant about to chow down on an organic mushroom sandwich. The sandwich nests among French fries in a paper-lined plastic basket. Most of the surrounding tables are occupied with Californians who know how to tan. They also know not to order the mushroom burger. William Randolph Hearst's castle rises above us under full sun.

Two shiny crows land on my table. They try the old feint and grab where one dances the soft shoe while the other makes a dive for the fries. When I don't fall for this stale tactic, one of the Californian corvids distracts me by flying off as his buddy inches its way toward my lunch. But I tumble to the plan and move my food basket away from the cheeky bird. It freezes.

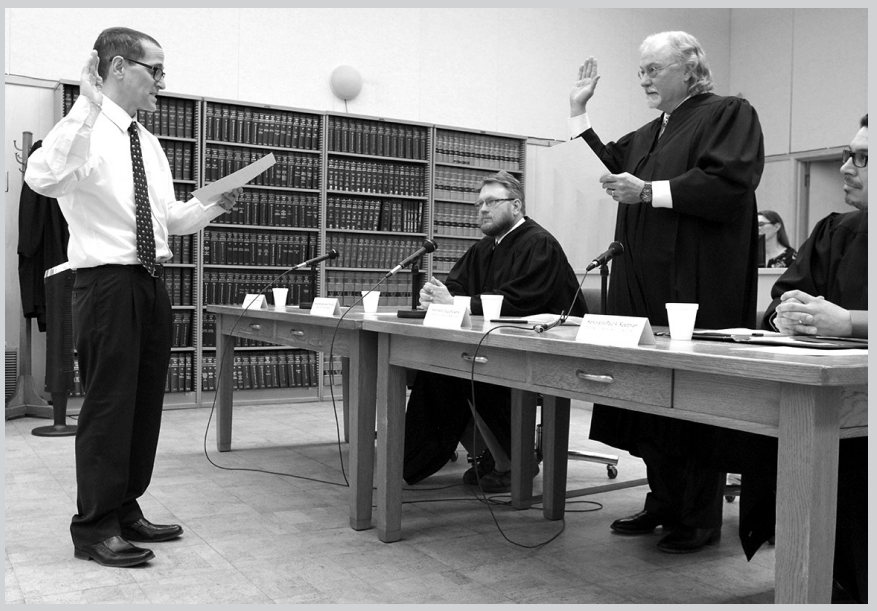
I'm three bites into my mushroom burger when the crow gives me the evil eye. Seduced, I return my burger remains to the basket and start focusing my camera on the crow's head and weapon-like beak. He strikes. Quicker than a lobbyist can call for the check, the crow grabs the paper lining of my lunch basket and snatches it away. More startled than that same lobbyist after the governor vetoes her bill, the crow realizes that my burger and all the remaining fries are still nestled safely in the now-unlined plastic lunch basket.

I huddle over my lunch until it is eaten. The crows fly to a table where a newly arrived family from the great state of Kansas is about to sink their teeth into some cheese fries.

Dan Branch, a member of the Alaska Bar Association since 1977, lives in Juneau. He has written a column for the Bar Rag since 1987. He can be reached at avesta@ak.net

Romano DiBenedito installed as Nome's Superior Court Judge

Judge Romano DiBenedetto was officially sworn in as Nome's new Superior Court Judge by Chief Justice Craig Stowers in April. Justice Stowers spoke to a packed courtroom about being a judge: "A good judge shows respect to all who appear before him; he learns to hear what they say both with his mind and with his heart; a good judge is humble; he labors hard and he thinks deeply; he strives constantly to apply the law in a just and timely manner; and he readily acknowledges when he makes a mistake." Second Judicial District Presiding Judge Paul Roetman performed the robing and also delivered remarks.



The Nome Nugget/Diana Haecker)

Superior Court judge appointed to serve in Bethel

Nathaniel Peters will be installed as a Superior Court judge June 9 in Bethel.

Peters graduated with honors from Ohio Northern University and has been practicing law in Alaska for almost eight years. He served as a public defender in Palmer and Bethel for six years.

He has served as Bethel District Court Judge since 2014.

Peters

DO YOU KNOW SOMEONE WHO NEEDS

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 the Alaska Bar Association or one of the following coordinators when you learn of a tragedy occurring to some one in your local legal community:

Fairbanks: Aimee Oravec, aimee@akwater.com

Mat-Su: Greg Parvin, gparvin@gparvinlaw.com

Anchorage: Mike Walsh, mike@wheeleslaw.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.

FamilyLaw

Take a moment to choose your clients wisely, avoid future problems

By Steven Pradell

There is an adage that 20 percent of your customers produce 80 percent of your sales. Finding good clients who appreciate what you do and pay their bills timely is often a difficult task, especially in family law matters where potential clients are under a great deal of stress when they first present themselves in your office seeking assistance with their pressing legal matters. This article explores some of the steps you can take to having a successful client base.

A lawyer who is too eager to sign up everyone who walks through the door may later regret having an overfull caseload of clients who are difficult to manage, have unreasonable expectations, and either cannot or will not pay for your services. Getting into a case is often much easier than getting out once you are in the middle of litigation and the client is way behind in keeping to the fee agreement you negotiated.

The first step in this process starts with the person who answers the initial phone call. This may be a receptionist, paralegal or a solo practitioner. Before setting the first appointment it may be important to take a moment with to gauge the temperature of the conversation. Train the person who answers the call to ask the right questions, which can be explored in further detail at your initial consultation, if you choose to set one.

These questions may include the following topics. What kind of matter does the potential client have? Is there litigation already filed? Who is the opposing counsel? Are they easy to deal with? Is there an active case that has a history between the parties that you can quickly review on CourtView to get some idea of how complex the matter is and how many pleadings have been filed? How did the potential client treat the support staff? Do you have time for this type of case on your current calendar? Is the caller already represented or are you one of many lawyers that a potential client may be unhappy with later? Can the potential client afford your services or is providing unbundled, pay-as-you-go service a better option?

Pradell

It is easy to feel good when someone first wants to hire you to do something that you can help with. As a result, it may be difficult to say no to the potential client. Learning how to say no may be one of the most important ways you can work toward having a successful practice.

Also, you may learn from your first consultation about the personality of the potential client. Do you communicate well? Can you get a word in edgewise? Does the person appreciate what you are saying? If you get a migraine during your initial consultation, your body may be telling you something about the dynamic that may itself be a good reason not to take the case.

Remember, the initial interview goes both ways. The potential client is interviewing you to see if you can help them. At the same time, you are interviewing the client to see if their problem is something that you are competent to handle and to determine if you actually are interested in helping this client with this problem in light of your existing caseload and other matters which may affect the amount of time you have to devote to the client's case. There are only so many toxic, drawn-out cases involving acerbic clients a firm can have at any one time without suffering from the stress load caused by the nature of the matters at hand. If you are willing to take these types of cases, try to find the proper balance so that you can have some time to work on other matters and have a life outside of the office too.

Once you decide to take the case, you will need to train the client about your billing practices to ensure that timely payments are made. But that is the subject of another article. Avoid the pitfalls. Don't follow the footsteps of the former Alaska lawyer who took hundreds of cases for a $500.00 flat fee, which ultimately arrived in garbage bags at bar counsel's office after he failed to show up at hearings and fled the practice. What sounds good in the beginning may haunt you down the road. Proper planning about the practice you ultimately want can, over time, result in fulfillment of that goal. Finally, with all the advertising available today, the best client is one who is referred to you by someone who had a positive experience with you in the past. Cultivate your referral sources and reward them for thinking about you. You'll spend less time trying to convince the referred person that you know what you are doing and more time doing the work.

 Steve's book, *The Alaska Family Law Handbook, is available for family law attorneys to assist their clients in understanding domestic law issues. Steve's website, containing additional articles, is located at www.alaskanlawyers.com tion, is located at www.alaskanlawyers.com*

Requirement to report civil settlement results eliminated

On May 10, Gov. Bill Walker signed into law HB104, a bill eliminating the requirement to report civil case settlements to the Alaska Judicial Council. The bill, introduced by the House Judiciary Committee chaired by Rep. Matt Claman, had passed unanimously in both the House and the Senate. The repeal went into effect the day after it was signed.

HB104 received support from Bar members and civil litigants. (Special recognition should be given to Bar members Ken Jacobus, who was a particularly active supporter, and Rep. Gabrielle LeDoux, who championed the bill last legislative session). Proponents successfully argued that the existing reporting requirement was burdensome for those who adhered to it and unenforceable for those who did not.

The law was originally passed in 1997, as part of a large "tort reform" legislative package. As part of that reform, the Legislature wanted the Alaska Judicial Council to receive and analyze information about the resolution of civil cases to help it monitor implementation and effects of tort reform. The council collected the requested information and released several reports in the years following passage of the law. All these years later, however, it is generally agreed that the information is no longer needed, and in any event the percentage of litigants submitting settlement information is now so low that the data is unreliable for analysis.

Thanks to those Bar members who followed the law and sent their information to the Judicial Council. Although it is disappointing that some Bar members did not comply with the law, the council was nevertheless able to publish important information about settlement amounts and fees in the aftermath of changes to civil litigation statutes in Alaska.

From Susanne DiPietro, executive director, Alaska Judicial Council

Wollenberg installed as Court of Appeals judge

Judge Tracey Wollenberg was appointed to the Alaska Court of Appeals in February by Gov. Bill Walker. With the appointment of Judge Wollenberg, for the first time in Alaska's history, there is a female-majority appellate bench. Judge Wollenberg was a deputy public defender for the Public Defender Agency's Appellate Division, where she oversaw statewide appellate litigation for the agency's criminal and civil cases. Judge Wollenberg graduated from Columbia University Law School in 2005, and clerked for Alaska Court of Appeals Chief Judge David Mannheimer. Prior to law school, she worked as a financial analyst for Morgan Stanley.

Tracey Wollenberg was installed as a Judge of the Court of Appeals May 19 in the Supreme Court Courtroom of the Boney Courthouse. Attending from left are: Chief Judge David Mannheimer, Court of Appeals; Judge Marjorie Allard, Court of Appeals; Judge Tracey Wollenberg, Court of Appeals; Chief Justice Craig Stowers, Alaska Supreme Court: Judge William Morse, presiding judge Third Judicial District; and Judge Patrick Hanley, Anchorage District Court (Photo by Margaret Newman, Alaska Court System)

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2017-1

In The Workers' Compensation Setting, May A Lawyer For The Employer Present A Lump-Sum Settlement Offer, Inclusive Of Legal Fees?

ISSUE PRESENTED

In Workers' Compensation proceedings, is it ethically permissible for an employer attorney to present a lump-sum settlement offer, inclusive of attorney fees?

CONCLUSION

Generally speaking, such offers are ethically permissible. It is also ethically permissible for employee counsel to advise the client of their intention to seek payment and address the possibility of lump-sum settlement offers within retainer agreements.

BACKGROUND

Under the Alaska Workers' Compensation Act (the "Act"), the employer is typically responsible for payment of employee attorney fees with disputes resolved by the Alaska Workers' Compensation Board.[1] The procedure for doing so is governed by the Alaska Administrative Code and may be separate from the resolution of other issues.[2]

Recovery of fees by employee attorneys under the Act is different from attorney fees awarded under Alaska Civil Rule 82. Unlike the traditional lawyer-client relationship, attorney fees for claims brought under the Act are typically paid directly by the employer, not the client, and the client may not review employee attorney fee billing; the Alaska Workers' Compensation Board reviews the attorney's affidavit concerning the work performed and determines the fee.[3] Attorney fee awards under the statutory scheme are to be "fully compensatory" and reasonable in order to encourage competent counsel to represent injured workers.[4]

Due to the fee model described above, the Committee is informed that employees may be advised that attorney fees are paid by the employer, not the employee, and are in addition to other workers' compensation benefits. The Committee is unaware of any fee arbitrations between an employee attorney and client.

As with many disputes, claims under the Act are often resolved through settlement negotiations. Employer lawyers periodically make lump-sum settlement offers to employees, inclusive of liability for employee attorney fees. To the extent that the employee attorney is paid, the employee receives less. The Committee's guidance is requested on the permissibility of this practice.

ANALYSIS

The Committee agrees that settlement offers inclusive of employee attorney fees create a conflict of interest between the employee attorney and the employee by virtue of the personal interest of the lawyer.[5]Similar issues arise in other claims arising under statutes providing for payment of attorney fees such as Unfair Trade Practices and Consumer Protection Act claims, Civil Rights Act claims, Voting Rights Act claims, and class actions. The ethical issue created by settlement offers inclusive of attorney fees for these claims is that there will be a trade-off between the amount of the fees the employer or defendant pays to the attorney and the amount paid for other benefits or relief owed to the employee, potentially creating a conflict between the attorney and client.

Historically, multiple courts and bar associations opined that it was ethically impermissible for lawyers defending claims under "fee shifting" statutes to make lump-sum settlement offers inclusive of attorney fees with some also opining that it was ethically impermissible even to simultaneously negotiate the underlying claim and associated fees because doing so created a conflict of interest between the opposing lawyer and his client.[6] However, this view changed with the United States Supreme Court Opinion, *Evans v. Jeff D.*, 475 U.S. 717 (1986). In Evans, the United States Supreme Court held that, under the statutory language of the Fees Act (42 U.S.C. §1988), the right to recovery of attorney fees in a §1988 action belonged to the claimant – not the lawyer – such that the client had the authority to settle his claim, including the right to waive attorney fees in their entirety. Three members of the Court vigorously dissented.

Since Evans, the majority of courts and ethics authorities considering fee-shifting statutes conclude that settlement offers inclusive of attorney fees are, generally speaking, ethically permissible.[7]

The Committee agrees with the majority of opinions holding that settlement offers, inclusive of statutory attorney fee claims, are generally permissible. Like any settlement offer, the employee attorney has a duty to communicate the settlement offer to the client and to explain the alternatives and consequences of the offer.[8] Unless otherwise provided by statute, regulation, or other law, the right to decide whether to settle a claim belongs to the client.[9]

The Committee acknowledges that, despite the general permissibility of these lump-sum settlement offers, each case is necessarily fact-specific and that additional facts relating to the settlement negotiations could demonstrate a breach of the Rules of Professional Conduct. It is neither practical nor useful to speculate on what types of settlement negotiation behavior could result in a violation of the Rules. Either the courts or the Committee will address any such scenarios as they arise.[10]

To be clear, this opinion does not preclude employee attorneys from asserting their right to be paid fairly for their work. Some courts and commentators recommend that attorneys address this potential conflict in the initial retainer agreement between the attorney and the Employee.[11] Despite the potential conflict of interest created by settlement offers inclusive of attorney fees, Rule 1.7(b) allows an employee attorney to continue representing the employee if he or she reasonably believes he or she is able to provide competent and diligent representation. In doing so, Rule 1.7(b)(4) requires that the affected client give written informed consent. The retainer agreement may provide this written informed consent.

Examples of these provisions in a retainer agreement include, but are not limited to, agreements asking the client to agree not to waive any statutory right to legal fees, agreements asking the client to assign any statutory right to legal fees, or agreements otherwise providing that the Alaska Workers' Compensation Board or some other entity will have the ultimate right to determine the fees in the event of a settlement offer inclusive of attorney fees.[12]

The Committee believes the initial retainer agreement is the best place to address this issue, clearly explaining to the client that such a settlement proposal may be made and explaining the consequences, along the lines of a provision similar to the following:

> Employee recognizes that Attorney will be seeking payment of attorney fees from the Employer pursuant to the Alaska Workers' Compensation Act. Attorney fees under the Act are paid by the Employer, and not by the Employee. Sometimes, Employers offer to settle these matters through lump-sum settlements that include attorney fees. Whether or not to accept a lump-sum settlement is the Employee's decision. In a lump-sum settlement, Attorney's fees are paid from the settlement funds. The Employee receives the balance remaining after Attorney's fees are paid and not the full settlement amount. Employee agrees that if he or she accepts a lump-sum settlement, Attorney's fees and expenses will be deducted from the settlement amount and paid to Attorney. In the event such a settlement offer is made, Attorney will advise Employee of the amount of fees and costs to be deducted and the expected balance to be paid to Employee after those deductions, so that Employee may make an informed decision on whether or not to accept the offer.

Otherwise, employee counsel must comply with Professional Conduct Rule 1.7(b)(4).

Approved by the Alaska Bar Association Ethics Committee on April 6, 2017.

Adopted by the Board of Governors on May 9, 2017.

[1] AS 23.30.145 (attorney fees related to claim to Alaska Workers' Compensation Board); AS 23.30.008(d) (attorney fees related to appeals to Alaska Workers' Compensation Appeals Commission).

[2] 8 AAC 45.180.

[3] 8 AAC 45.180(d)(2); AS 23.30.145(a) (noting that, for a controverted claim, "the board may direct that the fees for legal services be paid by the employer").

[4] *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002).

[5] *See* Rule 1.7(a)(2) (noting that a concurrent conflict of interest exists if there is a significant risk that the representation of the client will be materially limited by the "personal interest of the lawyer"); *see also* Utah State Bar Ethics Advisory Opinion No. 98-05 (noting that a settlement offer may create a conflict of interest when it is predicated on counsel's loss of fee).

[6] *See, e.g.*, *Jeff D. v. Evans*, 743 F. 2d 648 (9th Cir. 1984); *Moore v. Nat'l Ass'n of Sec. Dealers Inc.*, 762 F. 2d 1093, 1114 (D.C. Cir. 1985); Thomas G. Hungar, *The Ethics of Fee Waivers: Negotiation of Statutory Attorney's Fees in Civil Rights Cases*, 5 Yale Law & Policy Review 157, 161 & n.24 (1986) (collecting authorities).

[7] *York County*, 400 F. Supp. 2d 266, 272 (D. Me. 2005) ("[I]t is well established that a defendant may settle, for a single lump sum, all outstanding claims in a fee-shifting case, including claims for attorney fees."); *Wildearth Guardians v. U.S. Forest Serv.*, 778 F. Supp. 2d 1143, 1154 (D.N.M. 2011); *Pinto v. Spectrum Chem. & Lab. Prods.*, 985 A.2d 1239, 1248-50 (N.J. 2010); Paul D. Reingold, *Requiem for Section 1983*, 3 Duke J. Const. L. & Pol'y 1, 35 (2008) ("In fact, after *Evans*, the state bar ethics boards that had previously barred fee waivers or simultaneous negotiation of merits and fees immediately changed their opinions to permit such bargaining."). Some ethics opinions go so far as to say that a settlement offer that waives a claim for attorney fees may be permissible. *See* Utah State Bar, Ethics Advisory Opinion No. 98-05; D.C. Bar Opinion No. 207 (1989); New York City Bar Association, Formal Opinion 1987-4 (noting that such an offer is not unethical per se, but deferring a definitive finding on the propriety of any such offer until responding to further inquiry in specific cases). This "waiver" issue is beyond the scope of this opinion, other than to note that those authorities allowing a settlement condition on a waiver of attorney fees support the notion that a lump-sum offer is permissible.

[8] State Bar of California Formal Opinion Interim No. 98-0001.

[9] *Compton v. Kittleson*, 171 P. 3d 172 (Alaska 2007); Rule 1.2(a) ("A lawyer shall abide by a client's decision whether to offer or accept a settlement.")

[10] *See, e.g.*, Maine Prof'l Ethics Comm'n Opinion 95 (1989) ("[T]he Commission would prefer to leave the question of the reasonableness of the settlement behavior of either party in a case involving statutory attorney's fees claims to the courts, for resolution on a case-by-case basis."); New York City Bar Association, Formal Opinion 1987-4 (concluding that it is not unethical per se for defense counsel to propose settlements condition on the waiver of attorney fees in statutory fee-shifting cases, but "emphasiz[ing] that no inference should be drawn from the Committee's action that conduct previously deemed unethical by the Committee is now necessarily being sanctioned. Rather, in the future these questions will be dealt with on a case-by-case basis.").

[11] *See, e.g.*, *Pinto*, 985 A.2d at 1249 ("To the extent that lump-sum settlement offers present challenges to public-interest clients and their counsel on how to divide a limited pot between a client's damages and attorneys' fees, we believe that candid lawyer-client discussions about the value of the case from the outset will resolve many problems."); *see also Zeisler v. Neese*, 24 F. 3d 1000 (7th Cir. 1994) (assignation of statutory right to fees under Truth in Lending Act with potential claims against client and defendant in the event of breach of agreement); California Formal Ethics Op. No. 1994-136; New York City Bar Association, Formal Opinion 1987-4; Utah State Bar, Ethics Advisory Opinion No. 98-05; Restatement (Third) of the Law Governing Lawyers § 38 cmt. f (2000).

[12] *Cisek v. National Surface Cleaning, Inc.*, 954 F. Supp. 110 (S.D.N.Y. 1997) (better practice is to refrain from discussing attorneys' fees at all until an agreement is reached on the relief sought by client or to negotiate lump sum and the allow court to allocate the fund between counsel and client); *compare Compton v. Kittleson*, 171 P.3d 172, 177 (Alaska 2007) (if the client's actions unfairly deprive attorney of a reasonable expectation of compensation, attorney's proper remedy is to seek recovery of the reasonable value of services rendered under a theory of quantum meruit).

Interpreting intrastate crowdfunding under Alaska's law

By Julius J. Brecht

Second of two parts

Synopsis of Part 1

Intrastate crowdfunding is now available for resident Alaskans (Alaska Intrastate Crowdfunding).

What is crowdfunding? In essence, it is a method for funding a project or venture through raising monetary contributions from a large number of people, i.e., the crowd. Until recently, crowdfunding was limited in the United States to funding the project or venture and did not extend to investing in the issuer responsible for the crowdfunding offering.

The legislative bases for crowdfunding under federal law (primarily through a registration exemption as set forth in the Securities Act of 1933, as amended (Securities Act)) and, more specifically, for Alaska Intrastate Crowdfunding under Alaska law (ICE), are further described in Part 1. The state law basis for ICE is set forth in amendments to the Alaska Securities Act (AS 45.55, ASA) which became effective Oct. 16, 2016. So, ICE provides an exemption from registration for a security offering based in Alaska Intrastate Crowdfunding.

Since that effective date for ICE, the Alaska Department of Commerce, Community and Economic Development (Department) has adopted regulations interpreting ICE for its implementation (primarily, 3 AAC 08.810-08.895, ICR). The effective date of ICR was November 26, 2016.

To get the full impact of the interplay of ICE and ICR, one ought to review Part 1 before reading Part 2. In particular, a caution is in order to the issuer in considering ICE as the basis for exemption from registration under ASA (Alaska issuer) and his or her legal advisor. An offer to a member of the crowd of an investment in the project or venture is an offer of a security under ASA. Such an offer must first be registered under ASA, unless there is a separate registration exemption or other authority to avoid registration under ASA. All of the requirements of the exemption must be satisfied (including prefiling with the state, if any) prior to commencing the offering.

While not the focus of this article, such an offer would also be an offer of a security under the Securities Act. Registration of the offering would be required under the Securities Act, unless the offering otherwise satisfied an exemption from registration under that act.

Part 2:
Interpretation and Implementation of ICE—ICR

- ***What is the focus of ICR?***

The provisions of ICR interpret and implement certain portions of ICE, as required by the terms of ICE, as well as other matters relating to the administration of ICE by the department. In particular, ICR sets forth terms addressing Alaska Intrastate Crowdfunding in a separate new article entitled "Small Intrastate Securities Offerings."

ICR also addresses issues arising in the context of an *interstate* equity crowdfunding offering as allowed under the Securities Act and regulations adopted by the Securities and Exchange Commission in May 2016. However, this article continues to focus on ICE and ICR from the standpoint of an Alaska Intrastate Crowdfunding offering.

- ***What are the requirements to be satisfied by an Alaska issuer in an Alaska Intrastate Crowdfunding offering?***

An Alaska Intrastate Crowdfunding offering conducted in reliance upon ICE requires the Alaska Issuer to file with the Department a notice in conformance with ICE. The notice filing must be accompanied by payment of a nonrefundable notice filing fee. In this context, the Alaska Issuer must further provide with that notice file copies of any advertising or other materials directed to prospective purchasers in the offering.

The notice filing must include a copy of the offering document and disclosures to be provided to the prospective purchaser. In addition, the notice filing must include a copy of the escrow agreement between the Alaska issuer and the escrow agent. Also, the filing must include a copy of any agreement between the Alaska issuer and a third-party website operator, if any.

- ***What is the term of effectiveness for a notice filing with the Department in an Alaska Intrastate Crowdfunding offering?***

The notice filing is effective for a period of one year from the date the department receives all of the items required to be filed with the notice filing. The notice filing may be renewed (ICR does not specify for what period). However, such renewal requires the Alaska issuer to refile all of the documents as required by the filing of the initial notice. The Alaska issuer is also required to file any amendments to these documents not later than 30 days from the date of change.

To get the full impact of the interplay of ICE and ICR, one ought to review Part 1 before reading Part 2. In particular, a caution is in order to the issuer in considering ICE as the basis for exemption from registration under ASA (Alaska issuer) and his or her legal advisor.

- ***How must the Alaskan Issuer in an Alaska Intrastate Crowdfunding offering be licensed with the state?***

Importantly, to claim an exemption for an Alaska Intrastate Crowdfunding offering under ICE, an Alaska issuer must have an active business license. Such license issuance is administered through the department.

- ***What are the disclosure requirements associated with an Alaska Intrastate Crowdfunding offering?***

The disclosure requirements set forth by ICR include the following. Before an offer or sale of a security is made, the Alaska issuer must contemporaneously provide to each prospective purchaser the name and physical address of the Alaskan issuer. The list of required disclosures also includes "officers, directors and controlling persons," presumably of the Alaska issuer. In this context, the Alaska issuer must further provide a disclosure of its experience and qualifications and that of those others persons. The disclosure must include a description of the business, specifically addressing how long it has been in operation and the reason for the offering.

The disclosure must further include a discussion in plain language of the significant factors material to the Alaska Intrastate Crowdfunding offering. These factors must include identification of items that make the offering speculative or risky.

The disclosure must, in addition, identify the total offering amount and how the Alaska issuer expects to use the proceeds of the offering. Specifically, the use of proceeds disclosure must include identification of the compensation and expenses of the offering, the minimum target offering amount the Alaska issuer is seeking to raise through the offering and the deadline to raise that minimum target offering amount.

The disclosure must include the terms and conditions of the securities offered. It must also include the total amount of securities that are outstanding before the offering and the total amount of securities being offered or sold in the offering. The disclosure must further include a description of litigation or legal proceedings, if any, within the past five years involving the Alaska Issuer or any persons associated with the Alaska issuer.

ICR requires the Alaska issuer to inform all investors that the securities exempted under ICE are not registered with Alaska and that they are subject to a limitation on resale. Specifically, the disclosure must state that investors may not be able to sell their securities promptly or may only be able to sell them at a substantial discount from the offering price.

Specific text is required to be displayed on the disclosure document distributed to "investors" in an Alaska Intrastate Crowdfunding offering. This text relates to the restrictions on transferability pertaining to the fact that the securities have not been registered under the Securities Act or under ASA, that the investor ought to rely only on the investor's own examination of the Alaska issuer and the terms of the offering, and that the securities have not been recommended by any federal or state authority.

- ***What are the limitations on escrow in an Alaska Intrastate Crowdfunding offering?***

ICR, in interpreting ICE, sets forth specific conditions for an escrow, including the escrow agreement and the escrow agent, required for an Alaska Intrastate Crowdfunding offering. For example, the escrow agreement must provide that all offering proceeds must be maintained in an account controlled by an escrow agent.

The escrow agent must not be affiliated with the Alaska Issuer or a third-party website operator, if any, assisting with the offering. While the term "escrow agent" appears to be limited to a bank or other depository institution authorized to do business in Alaska, the terms "bank" and "depository institution" are not defined in either ICE or ICR.

One may wonder whether a private business formed to accept deposits, i.e., subscriptions, in the context of an Alaska Intrastate Crowdfunding offering could qualify under provisions of ICE to be a "depository institution." Such a business would, of course, have to be "authorized to do business" in Alaska.

- ***What are the limitations on solicitation and website usage by an Alaska Issuer in, and guidelines for determining residency of prospective purchasers in, an Alaska Intrastate Crowdfunding offering?***

ICR, in interpreting ICE, quantifies allowable public advertising and general solicitation in the context of an Alaska Intrastate Crowdfunding offering. The term "general solicitation" is defined by ICR as including, in part, an advertisement, article, notice or other communication published in a newspaper, broadcast over television or radio, or available on an unrestricted publicly available website. The definition also includes a seminar or meeting in which attendees are invited by general solicitation or general advertising.

ICR specifies conditions under which the Alaska issuer may maintain a website to advertise, offer and sell securities under limited conditions. These conditions include that the website must segregate all advertising materials and information relating to the Alaska Intrastate Crowdfunding offering from that which is to be accessible to the general public.

The website must also display a disclaimer explaining that access to the Alaska Intrastate Crowdfunding offering on the website is limited to residents of Alaska only. The disclaimer must, in addition, state that offers and sales of the securities in that offering are limited to residents of Alaska.

Should an Alaska issuer make use of a third-party to operate a website on which one or more Alaska Intrastate Crowdfunding offerings are made, ICR sets forth requirements as to the qualifications for such a person.

ICR provides guidance as to acceptable evidence of residency in Alaska. Examples of nonexclusive evidence of residency of a person in Alaska (unless the Alaska issuer has knowledge to the contrary) include a copy of a valid driver's license or official personal identification card issued by the state. Such evidence also includes a current voter registration issued by the state and a copy of property tax records showing that the prospective purchaser owns and occupies property in the state as the person's principal residence.

- ***Are there recordkeeping requirements for the Alaska Issuer or a third-party operator of a website in the context of an Alaska Intrastate Crowdfunding offering?***

The Alaska issuer in an Alaska Interstate Crowdfunding offering must, under ICR, maintain written or electronic records relating to the offers and sales of the offering. These records must be maintained for at least five years following the termination of the offering. The records include evidence of state of residency of each investor, acknowledgements of each investor and all other correspondence or other communications between the Alaska Issuer, and each prospective purchasers and with each such person who becomes an investor in the offering.

ICR further imposes recordkeeping requirements on a third-party operator, if any, of a website used in an Alaska Intrastate Crowdfunding offering. Such operator must main-

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A chance trip north turns into a lengthy legal career

By Peter J. Caltagirone

This past May brought with it the retirement of Bethel District Attorney Mike Gray, a longtime influence in the Alaska legal community. When Mike decided to leave the partnership of his thriving law practice in Virginia to move to Alaska in the early 1990s, he likely didn't expect that he would soon use a body bag to protect himself from the elements while investigating a homicide on Kodiak Island. But, more on that in a moment.

Adventure becomes a career

Like many of our colleagues in the Alaska Bar, once Mike visited Alaska he didn't want to go back to the Lower 48. For Mike, that initial visit was to some friends in the Brethren Volunteer Service, stationed in Anchorage. Waiting for his return flight to Virginia, he recalls looking upon the Chugach Mountains through the terminal's windows, thinking "there's no way I can go back home." When he returned to Virginia, his partners were going to purchase a multi-million dollar building in Roanoke, the mortgage for which Mike would be partially responsible. His qualms about that deal nudged him to find out just how different his life could be in Alaska. He left his practice, moved here and to this day has "never regretted the decision a minute."

A home on Kodiak Island

When Mike moved to Anchorage, he entered private practice but the Department of Law was soon recruiting him to enter criminal prosecution. Mike was given a choice among Kodiak, Ketchikan and Bethel, the only openings at the time. Having at least some familiarity with Kodiak, i.e. to say that he knew that rather large bears lived there, he chose that office. He fell in love with both the criminal law practice and the Kodiak community immediately. Within two years, he was promoted to district attorney. Mike recalls Kodiak as a place with incredible summers, so monumental in its beauty that it makes up for the dark winters with their intense storms that can last, literally, for months.

One of those winters, Mike found himself investigating a homicide off Larson Bay, on the rural, western part of the island. A United States Coast Guard helicopter transported Mike and an Alaska State Trooper out to the scene of the shooting. Initially thinking it was a day trip, Mike didn't bring his go bag. As the weather often does in Alaska, conditions changed quickly and turned to a cold, hard wind with blowing snow that prevented their return. The dead body, riddled with 12 gauge buckshot, was carried into a greenhouse on the property so it wouldn't get eaten by the resident bear population. Seeking warmth, Mike and the Trooper took shelter overnight in the shooter's cabin, using the wood stove and a spare body bag they had brought to keep warm. In Mike's words, "it was cold as s...t, and he had a stove!"

Mike recalls Kodiak as a place with incredible summers, so monumental in its beauty that it makes up for the dark winters with their intense storms that can last, literally, for months.

The next morning, with the weather clearing, the door of the cabin, which the shooter and host fired through, was removed for forensic analysis. It turned out the shooting was in self-defense; the decedent, while still alive, tried to break down the shooter's door with a chopping maul claiming he was going to kill him. Once removed, the door served as a stretcher to carry the body to the ride home, a Grumman Goose on the bay one mile away. Space limitations required that Mike and the Trooper sit next to the body, buckled in as though it were another passenger, the whole flight home. Everyone and everything flew together that day.

Mike spent a decade in Kodiak, after which he was asked to relocate and promoted to District Attorney of Fairbanks, where he spent another decade serving the state in the Interior. It is in Fairbanks that Mike chose to make his permanent home, where he currently resides with his wife, dog and three motorcycles.

Serving in Bethel

In 2015, Mike was asked to take over the Bethel DA's office. In that capacity, Mike supervised a team of excellent lawyers who prosecute cases in the villages throughout the Yukon-Kuskokwim Delta. Because the office is understaffed, these attorneys routinely dedicate 60-80 hours per week; all of it without overtime.

In Mike's estimation, the majority of crimes committed in that region stem in one way or another from substance use disorder. While SB91, signed into law last year by Gov. Bill Walker, has given District Attorneys more discretion not to pursue minor infractions that shouldn't be prosecuted, Mike sees the need for more drug and alcohol rehabilitation. Over his long career, Mike has watched the trend of drug abuse from alcohol to cocaine to methamphetamines to heroin and opioids and the roles each have played as a disinhibitor of criminal behavior. Although Mike doesn't believe everyone can be "saved" in rehab, more access to substance use disorder programs would mitigate a lot of the crime that occurs.

As Mike retires, he is confident that the Bethel office is in good hands with his replacement, long time Kodiak District Attorney Steve Wallace.

Legacy and retirement

I asked Mike what his "legacy" would be as moves on from his career as District Attorney. In his always humble way, he insists he is just an "average guy" who did his job to the best of his ability. When I pushed him on this, he said he hopes that mentoring new prosecutors has made an impact. Specifically, Mike referenced the mindset of some prosecutors who wish to charge everything they possibly can against a suspect and seek maximum sentences. Mike agrees that approach is sometimes necessary. But for many cases, the proper analysis is not "how long we can send them to jail," but rather "what is the right thing to do considering all the circumstances." Many times, the accused are otherwise good people that found themselves in bad situations. Sometimes, there is a mental illness involved. Mike likes to impart on young lawyers the importance of considering all the factors.

In his tenure as District Attorney in both Fairbanks and Bethel, Mike recruited and/or hired approximately two dozen attorneys into the Department of Law, many from out of state (including this author) and most of whom Mike believes have had a positive impact on the Department and the Alaska legal community.

Once he retires, Mike will take his motorcycle on a two-month, cross-country "cleansing ride" through Canada and the Lower 48 to visit friends and family. Though retired from state service, he remains committed to serving in the Alaska legal community. Once he completes his epic road trip, he will join the ranks of Fairbanks law firm Downes, Tallerico & Schwalm.

Peter J. Caltagirone is an assistant Alaska attorney general.

Interpreting intrastate crowdfunding under Alaska's law

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tain certain records for a period of five years from the date of the record document or communication. Those records include documentation of compensation received for acting as the operator, any agreement for such operation, correspondence and communication with the Alaska issuer and ledgers or other records reflecting that operation.

- ***Is the Alaska Issuer limited in making an Alaska Intrastate Crowdfunding offering to use of the internet, i.e., use only through a website on the internet?***

Neither ICE not ICR appear to limit an Alaska Issuer in making an Alaska Intrastate Crowdfunding offering to do so only through a website on the internet. It would appear that an Alaska Issuer in an Alaska Intrastate Crowdfunding offering may choose to make use of the internet or not to make use of it. However, if the Alaska issuer chooses to access prospective purchasers and investors via the internet, such access must be in conformance with other applicable provisions of ICE and ICR.

Furthermore, in accessing prospective purchasers and investors for the offering, the Alaska issuer must do so otherwise in conformance with ASA and existing regulations adopted pursuant to ASA. For example, the Alaska issuer may choose to carry out the offering making use of newspaper advertisements or television or radio broadcasts to announce the existence of the Alaska Intrastate Crowdfunding offering, e.g., through what has sometimes been characterized as a "tombstone ad."

The content of this form of advertisement is carefully prescribed by those existing regulations adopted pursuant to ASA. That is, the ad is in essence limited to announcing the existence of the offering and stating that the offering is in turn limited to Alaska residents, and to providing the contact information which the inquirer may use in providing residency documentation to, and subsequently getting further disclosure details on the offering from, the Alaska Issuer.

The Alaska Issuer would, in this context, have to abide by other provisions of ICE and ICR. For example, the Alaska Issuer would have to ensure to the Alaska Issuer's satisfaction in conformance with ICR that a prospective purchaser is a resident of Alaska before the details of the offering would be disclosed to the prospective purchaser.

How Might an Entrepreneur or Small Business Owner Make Use of ICE?

- ***An ambitious effort to allow access to capital through the internet and, at the same time, to protect prospective purchasers—***

ICE is an ambitious effort to bring the method of a securities offering within reach of an entrepreneur or small business owner in seeking equity capitalization, primarily using the internet. Because of the dollar limitations imposed by ICE on such capital raising efforts, they are likely to center on start-up ventures and small business activities.

At the same time, ICE is mindful of the protections to prospective purchasers and investors normally associated with a security offering under ASA. In addition, ICE takes into consideration the potential pitfalls of general solicitation and general advertising that come into play, especially with use of the internet in accessing prospective purchasers and investors.

- ***Understanding ICE and ICR—***

The prudent entrepreneur or small business owner considering involvement as an Alaska issuer in an Alaska Intrastate Crowdfunding offering in reliance upon ICE ought to become thoroughly familiar with its provisions and those of ICR. Alternative registration exemptions available under ASA may also be considered as the best fit for the issuer.

Best wishes in your entrepreneurial efforts.

Julius J. Brecht is an attorney in private practice and Of Counsel with the law firm of Bankston Gronning & O'Hara, P.C. with offices in Anchorage. Brecht's concentration of practice is in state and federal securities law and corporate and finance law. This article was prepared solely to provide general information about the topic. The content of this article was not prepared as, and must not be construed as, legal, tax or investment advice to anyone. Nothing in this article is intended in any way to form an attorney-client relationship or any other contract. The author may be reached at jbrecht@bgolaw.pro.

Book Reviews

When was the last time you laughed while reading a history?

By Mike Schwaiger

The Biggest Damned Hat: Tales from Alaska's Territorial Lawyers and Judges, by Pamela Cravez, was published this year by University of Alaska Press.

Pamela Cravez takes the title of her humorous new history, *The Biggest Damned Hat: Tales from Alaska's Territorial Lawyers and Judges*, from a tall tale about George Grigsby set in the 1920s. Told by the son of one of Grigsby's Ketchikan colleagues in 1982, the sepia story evokes a sense of nostalgia for a time that probably never was. But, as Cravez notes, the story itself shows how wit and a certain ethical flexibility were so prized among territorial lawyers of that era that they created, told, and re-told stories that featured them. Capturing character — if not historical fact — is the goal of this book.

Cravez has collected oral histories and conducted historical research for decades in order to compile a "greatest hits" of Alaska territorial legal history. The classics are all here. The collection starts off with Cravez' take on a Gold-Rush story of judicial scandal so good it was turned into a bestseller by Rex Beach and movies starring Gary Cooper and John Wayne. The collection includes a crisp re-telling of the infamous court-bar fight in which the bench seized the bar's bank accounts at gunpoint. And it ends with a Weekend-at-Bernie's story that is at least half-told at every late-night poker game at the annual Alaska Bar Convention. These are cracking stories.

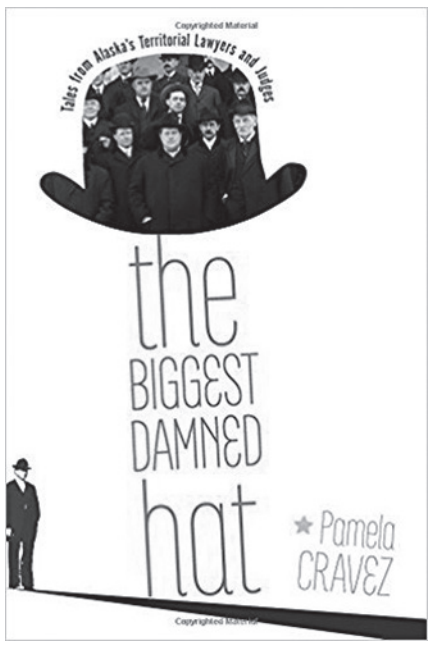
But it is in the less-told tales that Cravez really captures the character of the territorial bar and bench. Relying largely on oral histories and other primary sources, Cravez' stories show the grit and adventurousness of Alaska's pioneer lawyers and judges. Here are the stories of judges dogsledding and mountain climbing, the stories of young miners and merchants becoming lawyers and judges with little legal education or assistance, the stories of Alaska's first female, Alaska Native, and African-American lawyers. And here are the stories of lawyers and judges in sex scandals and simple cons to bilk clients and colleagues. The characters and character of the territorial bench and bar shine through.

Cravez accomplishes much more than she sets out to, though. While not an institutional history of the territorial bench or bar, the book's stories together explore important aspects of these institutions. Cravez touches on the assignment of criminal cases to each member of the bar as a societal expectation of each legal professional. Cravez shows how overt sexism and other prejudice hindered women and minorities from entering and advancing in the legal field. Cravez explores the professional tension between apprenticed and self-taught lawyers and judges and the formally educated lawyers who arrived later to practice with and before them. Cravez shows how the bench and bar policed and sometimes over-policed each other as they grabbed for more power in the institutional balance between them.

In her conclusion, Cravez remarks, "In a last hurrah, [Alaska lawyers] signaled their ability to still be roused as a group to challenge authority and be independent" during the 1964 court-bar fight to oust Justice Harry Arend from the Alaska Supreme Court by convincing their clients, neighbors, and friends to vote against him. She invites the question of whether anything today could unite the far-flung thousands of Alaska Bar Association members, each in their discrete practice areas. And this question is well worth asking in a time of increasing politicization in judicial retention elections. Might the bar today unite to convince clients, neighbors and friends to retain judges threatened by Outside political organizations just as it united to oust one in a fit of pique more than 50 years ago?

Cravez provides a lot to laugh about and a lot to think about. She captures the characters — the drunks and pimps, the pioneers and professionals. She captures the character of the bench and bar — the institutional forces that shape how and when justice was dispensed in territorial Alaska. And she accomplishes all this by capturing oral historians — modern professionals recounting territorial days from decades later with a sense of wonder at the tales they tell, tall or otherwise.

Mike Schwaiger practices in Anchorage. He is the chair of the Alaska Bar Historians Committee, which is collecting oral histories of Alaska lawyers and judges.



Alaska lawyer's memoir hits on state events, mental illness

By Jeff Carr

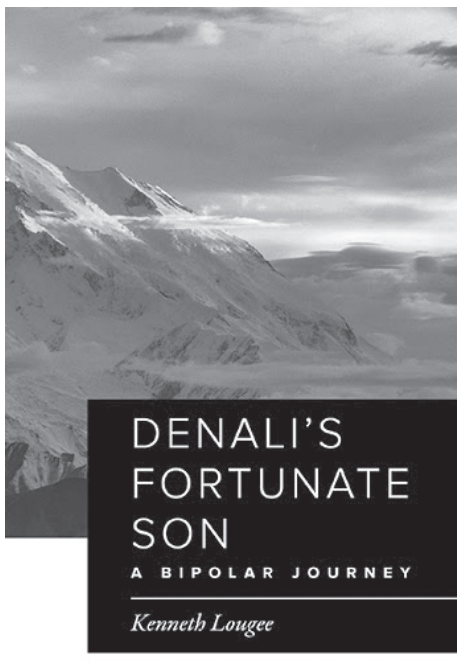
Kenneth Lougee's new memoir *Denali's Fortunate Son* is a story of faith, hope, adventure and perseverance against the daunting challenges of mental illness. In long-form letters to his parents in Africa interspersed with personal essays, Lougee negotiates conflicts between his Bipolar I diagnosis, his son's autism, and his adventures practicing law in the far corners of the Last Frontier, from Valdez to Point Hope. His love for the law and for Alaska, which he had to leave in 1996, permeates each chapter.

Lougee wins multimillion-dollar cases alongside a cast of the state›s most colorful characters. He raises four children (and several giant cabbages) and travels the country in search of answers following his baby's diagnosis with autism, at the time a little-understood affliction. Meanwhile, Lougee's own affliction makes itself increasingly known.

Denali's Fortunate Son is available in hard-copy and e-book editions from Friesen Press and Amazon. It will soon be available on Barnes and Noble and Google Books as well.

Lougee is also the author of *Pie in the Sky: how Joe Hill's Lawyers Lost His Case, Got Him Shot and were Disbarred*. Lougee is a trial lawyer admitted to the Alaska and Utah Bar Associations, where he is a member of the Ethics Advisory Opinion Committee. He lives in Sandy, Utah, with his wife, Jan, his autistic son, John Kenneth, and their West Highland White Terrier, Oliver.

Author Kenneth Lougee



OPINION

Litigation regrets and the issue of constitutional privacy

By John Havelock

As one looks back, sailing beyond a long career in the practice of law, the smoke of regrettable history rises from the receding shore. Sure there were victories, but the wounds from losses stay with you longer – or is that just me?

Now looking back at that horizon, smoke still emerges from cases that might have been won, with more or differently applied resources, arguments, tactics, witnesses, an expert, more artful jury selection and so on. I am not alone as an occasional screw-up. Famously, lawyer Ted Stevens, ignoring the advice of his far more talented trial counsel, miscalculated both the timing of the trial and his utility as a witness in his own defense with disastrous results. In my case, the issue that outranks all others in my mind today, is more academic and involved one evidentiary error made in litigating the development of Alaska's law of privacy that just might have made a difference.

In 2002, motivated in part by a personal interest in expanding the scope of the privacy amendment, I agreed to represent a Kenaitze Native man who had been fired from his employment in a liquor store by Safeway for refusing to cut his hair which he kept tied behind his head in a style Safeway's counsel referred to as a mullet. The management knew he was an Alaska Native and, from a local perspective, it didn't take much to understand that the hair style had some relation with his ethnic identification. But in originally disputing his termination, Mr. Miller did not say, "I'm an Alaska Native and my hair style is integral with my ethnic identity." If he had, Safeway would have reconsidered or the case would have been won, at least in the Supreme Court. Taking out "Native" and "ethnic" might have made an interesting case but probably still losing.

Safeway's hair policy seemed discriminatory on its face. Women were required only to have their hair "neatly styled." Notice that this would have included Miller's mullet. Men, to stay employed at Safeway, had to meet particulars of length including a prohibition on sideburns. But the Supreme Court ruled, "Safeway's legitimate interest in its grooming policy outweighs Miller's interest in working at Safeway with long hair." One wonders whether Judge Fabe might have had a different opinion if the policy had required men only to have their hair "neatly styled" while the Safeway policy had prohibited "long hair" beyond the shoulders or other specific women's styles.

But the first issue to be overcome was not fairness of Safeway's rule but whether the constitutional privacy amendment could apply to the case. In a 1989 case (Luedtke v. Nabors), the court had ruled that the privacy amendment to Alaska's constitution applied to state action only, adding, "we decline to extend the constitutional right to privacy to prohibited action by private parties after determining that the parties had not established that the history of Article I, Section 22 demonstrated an intent to proscribe private action."

So the court hinted that a different view might follow an exploration of constitutional history. I knew about Luedke of course and my personal intention was to seek to have the court overrule it. I thought that with Justice Rabinowitz's stirring defense of a schoolboy's right to choose his hair length, (Breese v Smith 501 P2d 159, 169 (1972)), I might have a winning case. That was not to be.

That specific, personal intention arose in part from a semi-proprietary interest in the privacy amendment. The 70s were a time of technological revolution. The electronic management of personal data was only beginning to reach the kind of totality of command that it has today with the potential for intrusion on personal information that exists today but the public was awakening, moved by nationally publicized examples from both the public and private sector. Public alarm spread to Alaska during a period when this writer was attorney general. The Legislature was moved to action, particularly as a result of a couple of examples which involved access to state records.

Terry Miller, a young Republican senator from North Pole already a recognized leader, and a friend, took an interest. He would undoubtedly have gone on to higher office and done well for Alaska but he died tragically young. Terry fiddled with more than one draft constitutional amendment to protect privacy. But the earliest, overly tangled drafts looked like they would create a bureaucratic mess for the state. I had to oppose.

My schooling in constitutional structure came from Tom Stewart, a judicial scholar and then judge in Juneau who had provided major guidance at Alaska's constitutional convention. His advice on matters of amendment was "brevity." Pick good language and let the courts take it from there. So I put out the word that the longwinded restriction that Terry then had in hand was unacceptable.

Within a few days, while I was walking down the hall in the small premises of the Capitol, bound I know not where, I recognized Terry walking toward me, also by himself. That moment is still vivid in my memory. We paused for barely a moment in passing and Terry said, "John, I don't care how you phrase it, but give me a privacy amendment." I said "OK" and we each walked on to our appointments.

Within 24 hours I had drafted a proposal and sent it down to Terry, a proposal of identical language with the amendment as it was finally adopted by the people. The amendment got kicked around a lot in committee but came out in exactly the form I had sent to Terry. It was designed to echo various amendments to the American Constitution which conclude, like the Thirteenth Amendment prohibiting slavery, "Congress shall have power to enforce this article by appropriate legislation." My choice, to add to the recognition of privacy in the Twenty-second Amendment to Alaska's Constitution, was "The legislature shall implement this section."

Of course, even if relevant, it was not for me to mention the personal history in the Miller litigation. I made some arguments, dismissed by the court. "Miller relies on folklore and literary texts." Perhaps predictably, the court declined to overrule Luedtke, no doubt with sufficient justification and considering the able representation Safeway received in the litigation. In rejecting Miller's appeals, the court said, "Miller must demonstrate that the voters of Alaska clearly intended that the privacy amendment should apply to both public and private action."

The mistake now grieved over is my failure to notice and then point out that in the same election as the constitutional amendment was voted on, the electorate, on another proposition, voted to add "sex" to the list of civil rights protections in a section which also concludes, "The legislature shall implement this section." Why would the voters have seen private application in this section and not in the privacy protection section? Maybe the justices knew and didn't think it was important. Maybe, and this is my personal opinion, the justices were privately aghast at the prospect of enforcing a constitutional provision relating to privacy between private parties. What a headache of interpretation.

There are other aspects of the case that stay with me as I wonder whether, if I had done this or that ,would the result have been different? This is just one example of how defeats stay with me longer than victories. Forgetfulness is slowly closing that door. Maybe I should be grateful.

John Havelock is an Anchorage attorney and university scholar. In a long legal career, he has served on the Bar Association Board of Governors, as delegate to the American Bar Association, Bar Association administrator (once it took only part of one person's time), professor and founder of University Justice programs and attorney general in Gov. Bill Egan's administration.

In Memoriam

50-year Bar member and judge, Herb Ross dies

By Judge Gary Spraker, Donna Ross and Amy McFarlane

Herbert A. ("Herb") Ross was a member of the Alaska Bar for more than 50 years, and served as a United States Bankruptcy Court Judge in the District of Alaska for more than 30 years. He passed away on Feb. 16 in Anchorage. He was a scholarly, well-respected judge, an extraordinarily effective mediator, and a kind and humble person.

Herb was born in Cleveland, Ohio, in 1935, to Irving and Marge Ross. When he was 8, his parents purchased a concession stand at Cedar Point Amusement Park in Sandusky, Ohio. Located on a peninsula that juts into Lake Erie, Cedar Point is the second-oldest amusement park in the United States, well known for its roller coasters. Every summer, Herb's parents operated "Rosses' Famous Original Foot Long Hotdogs" at Cedar Point from Memorial Day through Labor Day. Herb and his older sister, Sally, spent entire summers at their parents' concession stand. Before they were able to actually help out at the stand, a series of college students who worked at Rosses' would be assigned the duty of watching Herb and his sister, which often entailed afternoons of repeated roller coaster rides. Herb and his sister would try to ride the same roller coaster for an entire day, moving sequentially from the back seat toward the front with each subsequent ride. According to his niece, "Even as a kid on a roller coaster, Herb was organized and goal driven."

When Herb was old enough, he worked alongside his parents selling Rosses' Famous Original Food Long Hotdogs, ultimately becoming his father's right-hand man. Even after moving to Anchorage, he would return to the family business to help sell hot dogs at the concession stand until it was sold back to the amusement park in 1973. Herb's experiences at Cedar Point led to a lifelong fondness for hot dogs, which he considered a special treat.

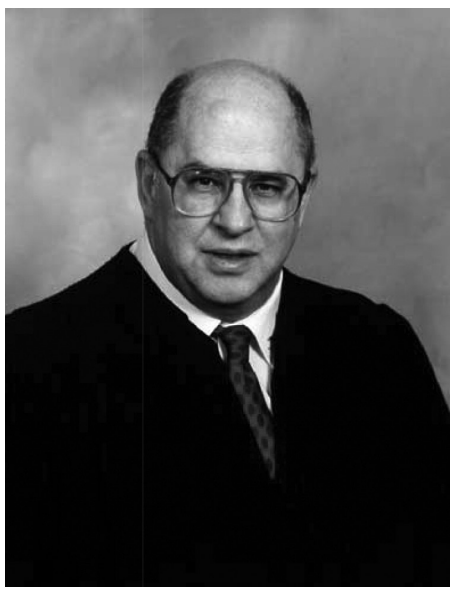
Herb was appointed bankruptcy judge for the United States Bankruptcy Court for the District of Alaska in 1986. He believed his appointment was serendipitous, feeling he had obtained "the best job he could have ever hoped to have." But, neither his path to this career, nor to Anchorage, was a direct one. Herb stayed in the Cleveland area after graduating from high school. He was the first in his family to finish college, obtaining his B.A. from Case Western Reserve University, where he majored in psychology. He also started law school at Case Western, but surprising to those of us who came to know him later, he dropped out after only a few semesters, deciding he didn't like it. He moved to San Francisco where he sold insurance for a while before returning to law school. This time, his legal studies "stuck." He started part-time with night classes at the University of San Francisco, before enrolling full time and obtaining his J.D. in 1964. He also served in the U.S. Army Reserve during this time.

After obtaining his law degree, Herb decided to move to Alaska. His Cleveland relatives considered the move to be about as far away from Sandusky, Ohio, as any point in the United States. Herb drove up the Alaska Highway by himself, in an old Chevrolet, arriving in Anchorage just after the 1964 Earthquake. While studying for the Alaska bar, Herb worked as one of two law clerks for a local Anchorage lawyer. When the lawyer fell on lean times, he called both clerks into his office to tell them he had to let one of them go. Herb voluntarily fired himself, concerned that the other clerk, who had a family, would be unable to feed them if he lost the job.

Herb was admitted to the Alaska Bar in 1966, and became a partner in the firm of Ross & Tunley, with offices in Anchorage and Seward. The firm's Anchorage office was located above the old Woolworth's Department Store on Fourth Avenue in Anchorage. Initially, Herb's practice did not cover bankruptcy. However, Woolworth's was located right next to a stationery store that sold bankruptcy forms. Herb used to joke that he learned all he needed to know about bankruptcy law from the instructions found on the bottom of those forms. Eventually, Herb opened his own office in Anchorage, where he specialized in commercial and bankruptcy law, until his appointment to the bench in 1986.

On moving to Anchorage, Herb embraced the Alaska hobbies of fishing and flying. He earned a private pilot's license, one time making a solo flight from Anchorage to Cleveland in a Piper Super Cub. Not all his flights were this successful, however. Found buried in his office was an old, but well-preserved, newspaper article detailing the time he crashed his plane and had to be rescued by the Air National Guard. Herb met his wife, Donna Tomsic, around this time. On their first date, Herb took Donna flying. Donna recalls that she had seen the newspaper article about Herb's plane crash, but she flew with him anyway. She and Herb were married in May 1969. Their happy marriage lasted to the time of Herb's passing.

Herb also took up long-distance running. He joined a local running club, and participated in several local races, including the Mayor's Midnight Sun Marathon. He qualified for the New York City Marathon in the 1980s, where he ran one of his personal best times. Donna accompanied Herb to New York for the race, where they were thrilled to be given a lavish hotel suite. The next morning, Herb plotted out the best point along the route for Donna to watch him run by, but Donna was delayed when the hotel directed her to move their luggage from their suite. As it turned out, the suite had been reserved by a famous movie director who happened to share Herb's name (the director for Funny Lady, The Goodbye Girl, Footloose). The hotel staff had erroneously checked Herb and Donna into the director's "usual suite," instead of the standard room the Rosses had reserved. As was characteristic of Herb, the room mix-up was handled graciously and with humor.



Herb Ross in judicial robes.

Herb Ross as a young man.

Herb stepped into the bankruptcy judgeship at an interesting time. The bankruptcy system had just been overhauled due to the landmark 1982 Supreme Court decision, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.* Also, oil prices had bottomed out, causing a dramatic decline in the Alaska economy. Bankruptcy filings had mushroomed. Herb presided over some of Alaska's most significant bankruptcy cases, including the Peter Zamarello, MarkAir, Inc., and RaeJean Bonham cases. Herb was the lone bankruptcy judge in Alaska until 1990 when the Honorable Donald MacDonald IV joined him as Alaska's second bankruptcy judge.

Herb took his judicial responsibilities seriously, and was famously well prepared in court. However, he was not so enamored of the judicial robe that came with the job. When first appointed to the bench, he asked the Honorable James Fitzgerald, then a United States District Court Judge, and former Alaska Supreme Court Justice, whether he really had to wear a robe. He did. Still, during his running days, it is said that Herb would wear his running gear under his robe in the summer months so he could hit the trails as soon as an afternoon hearing concluded. Even after his marathon days ended, you could regularly see Herb walking around downtown on sunny days, during his lunch hour.

While he presided as the chief bankruptcy judge, Herb got Alaska's cases under control and looked to help out in other districts. He was instrumental in developing the "Alaska plan," under which judges from Alaska and other jurisdictions would volunteer to take cases from busy districts inundated by bankruptcy filings. These courts were able to turn over some of their most complex, troublesome cases to volunteer judges from Alaska, Washington, Montana and Idaho.

The Alaska plan required Herb and his law clerk, Jane Pettigrew, to travel to Los Angeles frequently. The hours worked while in Los Angeles were long, and often spilled over into the evening, when Herb and Jane would continue their work using the hotel's new Internet connection. In those early days of the Internet, such connections were dial up only, often slow, and usually sporadic. Jane fondly recalls one trip when she could not access the Internet from her hotel room. Herb creatively solved this problem by dangling a cable from his hotel room, one floor above Jane's, out the window to her room below. Jane was able to pull the cable into her room and hook up her laptop, so she could continue to work.

In addition to the Alaska Plan, Herb also developed the mediation program for the Ninth Circuit Bankruptcy Appellate Panel. He had a passion for conflict resolution, and received a degree from the Straus Institute for Conflict Resolution at Pepperdine School of Law. In addition to the B.A.P. mediation program, Herb served as mediator for other courts throughout the Ninth Circuit. He was an accomplished and extremely persuasive mediator, always striving to get the litigants to see merits of compromise. For those who participated in mediations in the Anchorage bankruptcy court, he often brought wonderful cookies or other treats made by his wife, Donna. These were a great perk which helped smooth the road to compromise.

After his retirement in 2000, Herb was recalled to serve in Alaska, and later in the District of Nevada as well. He continued to work until the time of his illness, successfully mediating one of the largest and most complicated cases to come before him while on his last trip to Las Vegas, in September 2016. This case involved big companies, considerable amounts of money and sophisticated, highly capable attorneys on all sides. The matter was set for multiple weeks of trial, and the presiding bankruptcy judge strongly doubted that the parties could actually reach settlement. Judge Ross was in his element, and mediated the case for the entire day. He refused to let the parties leave at 5 p.m., knowing that any progress towards resolution would evaporate once the parties walked out the door. Around 6 that evening, the court staff person assisting Judge Ross asked him how much longer the conference would go on, because her dog, Sophie, was in doggie day care and was supposed to have been picked up at 5 p.m. Judge Ross proceeded to tell the parties that this poor person's dog was going to be kicked out onto the street at 7 p.m., so they had better get

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In Memoriam

Legislator, judge, Constitution delegate Seaborn Buckalew dies

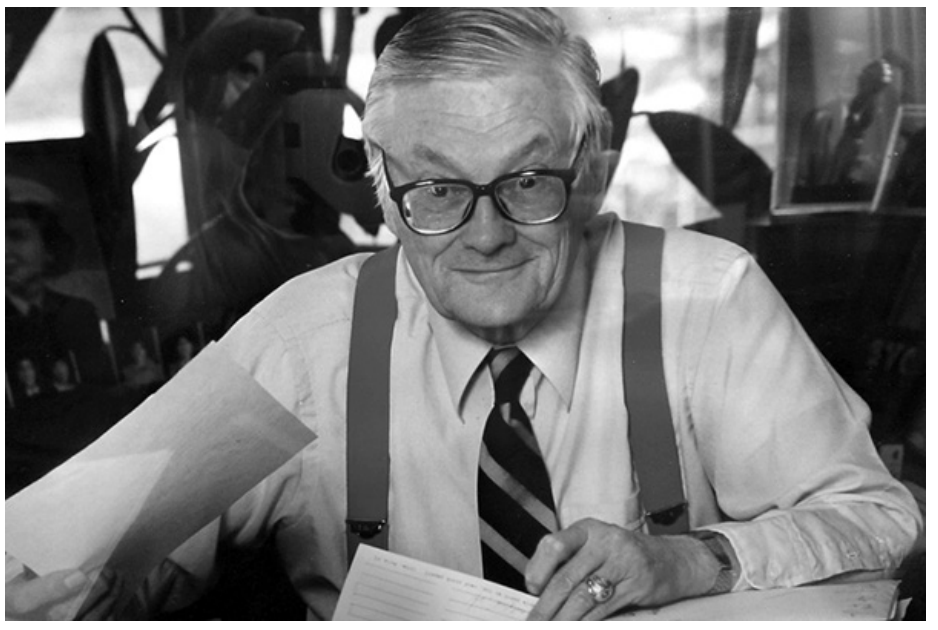
Long-time Alaska resident Judge Seaborn J. Buckalew Jr., 96, died Thursday, May 11, 2017. Gov. Bill Walker ordered Alaska flags flown at half-staff May 22 in honor of former Judge. Buckalew who served in the Alaska State and Territorial Legislatures as a senator and representative respectively, and was a delegate to the Constitutional Convention.

Buckalew was born in Dallas, Texas, to Lorine Beutel Buckalew and Seaborn J. Buckalew. After high school, he attended Texas A&M College receiving a Bachelor Arts Degree in 1942. On Dec. 28, 1946, he married his high school sweetheart, Marcella ""Marcy"" Hudel. The couple attended John B. Stetson University in DeLand, Fla. He graduated, in 1949, with a Doctor of Jurisprudence Degree and was admitted into practice in Florida. On a bulletin board at Stetson was a job offer for an attorney in Anchorage. Always up for an adventure, he applied for the job and positions in Texas. Receiving no job offers in Texas, he accepted the position in Anchorage. In April 1950 they began a journey of a life time to Alaska, driving their 1948 Plymouth and pulling a trailer. After several flat tires, being pulled out of ditch by truckers, they joined the convoy of truckers to Alaska, arriving in May. The following day he started his job with McCutcheon and Nesbett Law Firm. After arriving in Anchorage a letter was waiting at the post office, general delivery, with a job offer in Texas. Seaborn laughed, said they were staying. Seaborn and Marcy never moved out of Alaska.

The Buckalews homesteaded in the Stuckagain Heights area, building a log home and raising two sons. With no running water or electricity, on his way home from work, Buckalew would stop at a gas station filling up water jugs to take home. After a few years they moved to town for "modern conveniences."

In 1950, Buckalew was appointed territorial prosecutor; 1952, named United States attorney for the Third Judicial District, the youngest U.S. attorney ever appointed. From 1953 to 1971, he went into private practice. Buckalew was always willing to help a client; if the client didn't have money, a bartering system worked until the client had money. At different times he owned a sawmill, property, vehicles and had his home repainted.

In 1971, he was appointed Anchorage district attorney. One notable case was when actor Steve McQueen arrived in town. He decided to race his car down Fourth Avenue, resulting in a ticket and a court date. On the appointed date, Buckalew came out of his office and noticed there were no secretaries available, all had gone to the court house to see Steve McQueen. Unfortunately, only his attorney appeared in court.



Judge Seaborn Buckalew (State of Alaska photo)

Buckalew was elected from Anchorage as a delegate to the Constitutional Convention. The convention convened Nov. 8, 1955, at the University of Alaska in Fairbanks. In February 1956, the Constitution was signed by all 55 delegates to be submitted to voters April 24, 1956. As a legislator, in 1955 he was elected to the territorial House of Representatives and in 1959, served one year in the first state Senate.

Buckalew served in the military along with his professional and political lives. After graduating from Texas A&M, he entered the U.S. Army serving during World War II from 1942 to 1946, then transferring into the Army Reserves. In October 1949, he transferred to the Air Force Reserves and recalled back to active duty with the U.S. Air Force in 1951. In 1956, he transferred to the Alaska Air National Guard and was appointed legal staff officer. He was reappointed as assistant adjutant general in 1971, retiring in 1973. An article in the National Guardsman Newsletter stated, ""In December 1966 he was one of fifteen officers nationwide and the first Alaska guardsman, chosen by the United States Air Force to participate in a overseas staff visit to selected Air Force and NATO bases in Europe."

In 1973, Gov. Bill Egan appointed him to the Superior Court, from which he retired in 1988. His ability to remember each juror's name and addressed them by name during the course of a trial, was legendary. Larry Weeks clerked for Buckalew in 1973, and, in 1988, wrote, ""Judge Buckalew is the epitome of the True Alaskan. He is low key, doesn't have to tell you everything he knows, big-league competent and unfailingly courteous. His courtroom, even in the most tense civil or criminal case, always remains a place where the lawyers and litigants feel like they get a fair shake."

Buckalew is survived by his son and daughter-in-law, Seaborn J. Buckalew III and Lois of Anchorage; granddaughters and their husbands, Elizabeth and Brian Kirby of Damascus, Md., and Christine and Nathan Bucknall of Anchorage; great -grandchildren, Maria and James Kirby and Kiera, Keela and Blaine Bucknall; sisters-in-law, Shirley Hudel of Summerville, S.C., and Ches Hudel of Dallas, Texas; and many nieces and nephews. Seaborn was predeceased by his parents; wife, Marcella; son, Robert J. Buckalew; brother, William Buckalew; and brothers-in-law, Perry A. Hudel and William Hudel.

Memorial donations may be made to St. Jude Children's Research Hospital or Salvation Army. Arrangements were by Legacy Witzleben Chapel.

A service was held at All Saints Episcopal Church May 23,. Burial followed at Fort Richardson National Cemetery.

50-year Bar member and judge, Herb Ross dies

Continued from page 24

busy settling the case. This directive broke the impasse, and the parties settled. The presiding judge was so impressed that he wrote a glowing email to his colleagues on the bench, giving high praise to Judge Ross' mediation abilities. The day after the settlement conference, the attorneys involved in the settlement conference actually called to make sure the dog was all right.

Herb's colleagues will remember him as a thoughtful, caring, and compassionate judge, who listened carefully to each party's position before making a decision. He was always prepared for the day's calendar. In fact, often it seemed to those appearing before him that he was over-prepared. Court staff marveled at his case preparation and organization, especially since these skills were not readily apparent from the chaos of paperwork in his office. Many will also remember his quick wit. One successful local mediation required that one of the litigants be permitted to have one final moose hunt before surrendering a lodge out in the bush. While the deal was being hammered out, Herb mused, "Ah, my kingdom for a moose."

Herb was an avid, life-long learner, whose interests were expansive. He not only studied the law, he stayed abreast of evolving technology, keeping the Court's IT department scrambling. He was often seen with a book, and later, a Kindle, in his hand. He encouraged the bankruptcy bar to stay current on changes in the law, routinely sending emails to these bar members about new decisions that had just been entered.

Although he worked tirelessly as a judge, Herb also made time to take a personal interest in the lives of the attorneys, court staff, and others who knew him. Not only did he and Donna acknowledge the birthdays of court staff, they also remembered the birthdays, and recognized the graduations, of staff's children. Often, after dining out with Donna, he would bring in a doggie bag of treats for one local attorney's dog. One of Herb's neighbors remembers that her dog used to visit the Ross household, and that Herb would often drive the dog home, even though their house was just across the street and two doors down.

Herb did not forget his Cleveland family, either. Every year, for birthdays and during the holiday season, Herb and Donna would send large boxes of gifts for everyone in the family, including the pets. His nieces and nephews have very fond recollections of him. His niece Karen, now a lawyer herself, says Herb was "the original iPhone Siri," because you could pose any question to him and, after doing extensive research, he would share his findings with you. She recalls that Herb would send her articles relevant to her studies throughout law school, as well as during her clerkship in the Sixth Circuit, when Herb sent her articles on diversity jurisdiction, federal rules of procedure, and a plethora of other topics he thought would advance her career. He also sent her a large box set of tapes on the rules of evidence, once she passed the bar. His niece Deborah, who is a doctor, recalls that Herb frequently recommended books to her, as well, and often followed up the recommendation by sending her the books themselves. All his nieces and nephews remember that he was thoughtful, funny, and decent, and that, in addition to his books and jurisprudence, "he loved taking walks outdoors and eating grapes."

Herb will be deeply missed by his wife Donna, his family, and his friends, including his court families in both Anchorage and Las Vegas. He was preceded in death by his parents, his sister Sally, his father-in-law John Tomsic, and his brother-in-law William Mell. He is survived by his wife, Donna; his nieces and nephews, Karen Leizman Moses (Barry Moses), Debra Leizman (Keith Kerman), Marc Leizman (Nancy), and Geoff and Jon Schellenberg; his great nephews and nieces, Peter, Ethan and Sara Moses, Hannah, Eve and Sophie Kerman, and Emily and Ryan Leizman; his mother-in-law, Marge Tomsic; his sisters-in-law Carol Mell, and Margie Tomsic (Steve Schellenberg); and his best friend, Stan Ditus. He is also survived by many cousins.

To honor Herb's memory, Herb's nieces suggest that you "go read a book, tell a joke, make someone smile, or do a kind deed for a stranger, and think of Herb, who was such a kind, wonderful, thoughtful, and decent man."

Success Inside and Out program prospers thanks to the Juneau Bar

Story and Photos By Neil Nesheim

Neil Nesheim

Another chance. Ask any inmate at the Lemon Creek Correctional Center in Juneau what they would like when they are released and most would say, "Another chance." March 4, 2017, more than 50 male and female inmates gathered in the gymnasium to acquire tools, skills and resources that are available in the community so they can successfully reintegrate back into society once they are released.

The program, *Success Inside and Out*, which was originally developed by former Chief Justice Dana Fabe (Ret.), and carried out in Juneau by Judges Patricia Collins (ret.), Keith Levy (ret.) and now Kirsten Swanson, brings together more than 40 community volunteers who spend the day talking to participants about housing, employment, banking, treatment, relationships and spirituality. The day starts off with uplifting comments from guest speakers. On this day, Alaska Rep. Justin Parish and Revenue Commissioner Randy Hoffbeck spoke. Hoffbeck discussed overcoming obstacles and his comments were a great foundation for the rest of the day.

Up next was a panel of former inmates who have made it on the outside. Although each had their own story, the underlying theme shared by all was freedom. Freedom to make the right choices. Freedom to choose the right friends. Freedom to smell the fresh air whenever you wanted. And freedom to reach out and ask for help. One speaker said she often wears a yellow sweater or vest to remind herself of where she's been and why she doesn't ever want to go back to jail again. For the inmates, there was a strong sense of connection and trust as they listened intently to four people who used to be just like them.

After the talks, the agenda shifted to the breakout tables. Sessions were 30 minutes long and participants were eager to talk to the volunteers and ask questions once their release date arrived. How do I get public assistance to get me on my feet? How do I get a bus pass? What vocational programs are available? What do I need to do to survive probation? How do I escape the temptation of drugs or alcohol? How do I get help so that I can have visitation with my kids? These were just some of the hundreds of questions that were asked throughout the day.

The lunch program, which included a fashion show on how to dress for success, owes its thanks to the Juneau Bar Association. Bar members generously donated more than $700 so inmates could have pizza and subs brought in from the outside. Thirty pizzas and seven trays of subs were consumed by the participants and the volunteers. Many thanks to member Ben Brown for soliciting donations on behalf of the organizing committee.

The day ended with a stellar performance by local musician Collette Costa. Besides having a wonderful voice, Collette is a stand-up comedian whose humor ranges anywhere from "sort of" appropriate to "not really" too offensive. Fortunately for Collette, the planning committee keeps inviting her back. In essence, she is the epitome of what the program is all about: Another chance.

Juneau District Court Judge Kirsten Swanson meets with inmates at Lemon Creek Correctional Center (LCCC) in Juneau.

Michele Federico with Gastineau Human Services talks to an inmate.

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