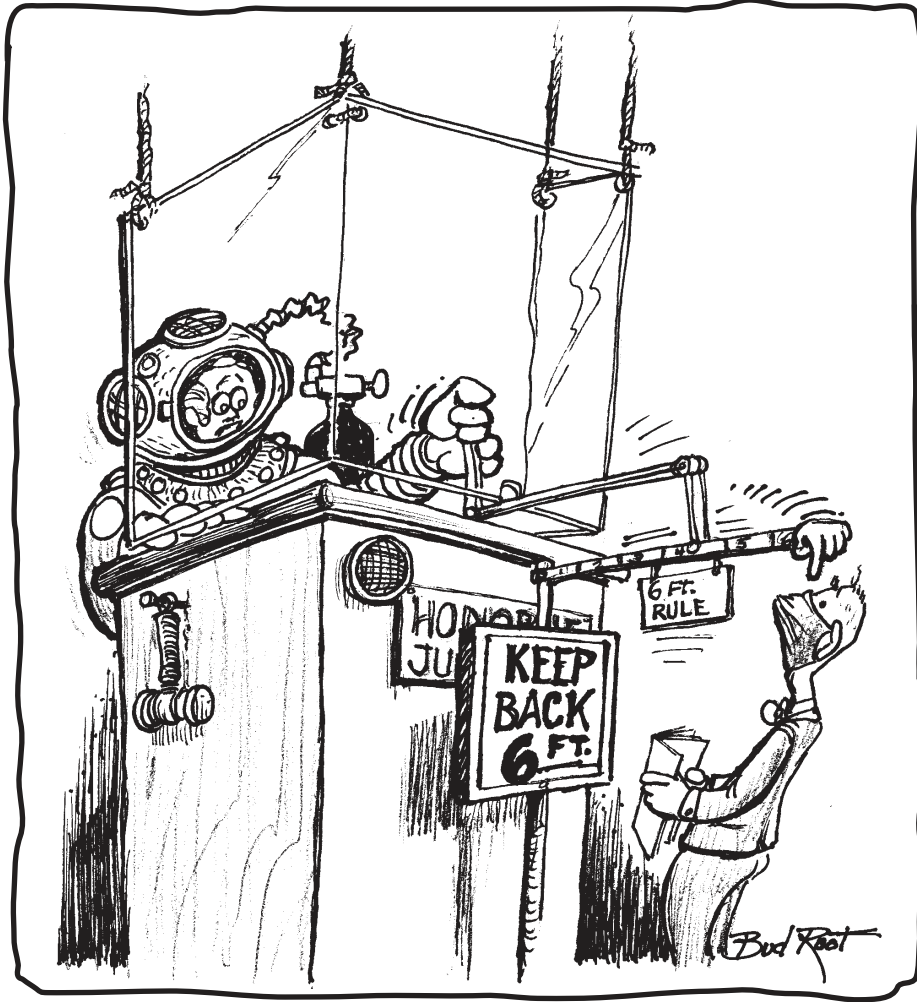


# The Alaska BAR RAG

Dignitas, semper dignitas

VOLUME 45, NO. 2 April - June, 2021



## Retiring Chief Justice recalls a rugged year

By Joel Bolger

Resilience and gratitude. As I prepare to retire at the end of June and think back on my 24-year career with the Alaska Court System, these two words are what come to my mind. As you know, the world has encountered unplanned challenges to face the COVID-19 pandemic starting early last year, and the court system was no different. More recently, we were hit with a major cyber-attack which required disconnecting all online services from the Internet to stop further incursion and damage. What has struck me most throughout these emergencies is the resilience of the justice system in Alaska and the gratitude I feel for the flexibility and hard work demonstrated by the court staff, judi-

cial officers, attorneys, other justice partners, and the public we serve.

Starting in February 2020, court system leadership activated our pandemic planning team as outlined in our Continuity of Operations Plan. At the end of our first meeting, when the earliest coronavirus cases were happening outside the United States, we jokingly said, "Well, hopefully we won't need to meet about this again." Needless to say, that was the first of weekly meetings that have occurred ever since to plan our COVID-19 response. The last 15 months have been humbling, frightening, confusing, encouraging, and inspiring — sometimes in quick succession. Despite having a pandemic response plan in place, none of us actually understood what it would

Continued on page 4

## A young lawyer leaves California for Bethel, Alaska

**EDITOR'S NOTE:** This is the first in a series of three parts excerpted from Dan Branch's upcoming book "Someday I'll Miss This Place Too," soon to be published by Cirque Press. He wrote in the book's dedication: Among others this book is dedicated to the Yup'ik people of Southwest Alaska, whose grace, kindness, and patience with my stumbling

still makes me homesick for Bethel and the Kuskokwim River. Readers should understand that while these essays share my impressions of Southwest Alaska from 1976 until 1989 when I moved away, they do not try to paint a picture of current life on the river.

By Dan Branch

### Part one of three

In 1972, I believed that Alaska, from Hyder to the Inupiat city then called Barrow, was buried in ice. That belief collapsed when my father and I visited the state the following summer. We drove to Alaska between my undergraduate and law school years.

During the trip we watched wild animals wandering free in Denali National Park. We drove across hundreds of miles of empty, beautiful ground. We sought more beauty in Canada by driving to Dawson City in the Yukon Territory. At the Canadian border at Chicken, Dad mumbled something in front of the Canadian customs agent. The agent stared at him and demanded we empty our VW Beetle. After all our camping gear, clothes and food supplies were laying on the road next to the car, the agent grunted, then walked back into his office. My dad, who had always treated law enforcement personnel with respect, didn't find the experience fun or educational.

Wanting to see a glacier near Hyder, we took the newly opened



When the paralegal brought children to the office, the author shared his LA Dodgers cap with one of them.

Cassiar Highway home rather than use the Alaska Highway. As I took a leak alongside the road leading into Hyder, the most southern town in Alaska, a brown bear, 30 feet away, rose on its hind legs. While I peed, the bear pushed its huge head seven feet into the air and watched me. As I zipped up my fly, the bear crashed off into the brush. The near-bear experience should have convinced a Californian like me to leave the state and never return. But my dad had to talk me out of grabbing my camera and following the bear into the Alaska woods.

Three years later, as I was finish-

ing my last semester at the University of San Francisco Law School, I decided to leave California for a year and spend it in Alaska. There were more lawyers than law jobs in the Bay Area and I had a debt to pay my old Native American law professor.

During my senior year at Cal Berkeley, I had promised the professor that after law school I would spend a year serving indigenous American families. The week before I made that promise, he had bused a class of us students out to a reservation boarding school in Nevada.

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# September Bar Association convention will be virtual

By Ben Hofmeister

If you have not already heard, let me share the news: The Alaska Bar Convention for 2021 will be virtual this year.

I know that statement might draw a lot of reactions from many of you. Some who have asked for this option will probably be relieved. Others might be angry or annoyed. More might be disappointed. And I am sure there is a good portion of you who are simply ambivalent.

Rather than try to craft a response to all of the many reactions out there, it is probably best to just explain how this decision was made.

Let's start with the obvious: This decision was made in response to the complications related to large indoor group gatherings and the continuing health concerns with COVID-19. We are not alone in making this decision. Several of our sister bar associations across the country have made the same decision. While the pandemic is subsiding across the globe and, more specifically, in Alaska, it is not over. COVID-19 is still prevalent in our communities.

The trouble with making a decision like this is that we all know things will change in the coming months. It is likely that social distancing requirements will be vastly

different in September when the Bar convention is scheduled to take place. In fact, those requirements changed considerably in the weeks after the decision to shift to a virtual convention was made. However, as the Centers for Disease Control altered masking criteria for social gatherings, several communities across Alaska were locking down in response to COVID-19 outbreaks. These outbreaks emphasized the fact that even in the face of changing guidance related to COVID-19, precautions still must be imposed for social gatherings. While those precautions are changing daily, they still exist and are onerous for larger indoor gatherings like the Bar convention. The reality is that the pandemic is not over despite the positive signs that we are returning to a normal routine.

Let me be clear — all of us would prefer a live convention. But like any large event, we need to plan now for the convention. At the time the decision was made to pivot to a virtual format, the venue selected for the



**"We are privileged to have Judge Diana Humetewa — the first Native American woman and enrolled tribal member to serve as a federal judge — as our keynote speaker."**

convention was limiting attendance and still imposing masking requirements. Not only would this impact the social nature of the convention, but it would also drive up costs because it would drastically limit the number of members who could attend. As noted above, COVID-19 protocols have changed since we have moved the convention to a virtual event. But those changes do not create overwhelming reciprocal changes in attendance limits or a corresponding reduction in cost. And while these protocols will likely change between now and September, we can only work with the information we have now. That information is pointing us to one conclusion — a virtual event.

We are hopeful that we might be able to incorporate some live components of the Bar convention throughout Alaska. Perhaps live watch parties with smaller groups that comport with any social distancing requirements in effect in September. We are contemplating having our keynote speaker deliver

her address before a smaller audience in Juneau. There might be some other possibilities out there as well. We are more than willing to incorporate ideas that comply with local guidance.

Again, a virtual event is not the preference. We believe that we need to have a convention after canceling the event last year due to the pandemic. There are no plans to make this permanent and we fully intend to go back to a live event in 2022.

Until then, we encourage you to attend our virtual Alaska Bar Convention this fall. Dean Erwin Chemerinsky and Professor Laurie Levenson return to provide their now fabled updates on both federal and Alaska law. Dr. Anne Zink will present on her experiences navigating public health in Alaska in the face of a pandemic. Author and presenter Jeena Cho will speak on topics related to mindfulness and wellness for attorneys. Many Alaska Bar members will present during the convention as well — including

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## EDITOR'S COLUMN

# On again, off again Spring and an Alaska institution

By Ralph R. Beistline

Due to the short time between now and the publication date, I thought I would engage in some automatism, or what others have described as stream of consciousness writing, and just see where we end up.

It's Springtime in Alaska, I think. In Fairbanks, just about the time we thought winter was over, we got eight plus inches of snow that closed down the streets, the schools, and just about everything else. This was immediately followed by a weekend of -30° temperatures, which was followed by +63° temperatures — a 93° temperature shift in less than a week — which was followed by another two inches of snow. One surprise after another.

I think most of us are now getting used to surprises — personally, pro-

fessionally, or atmospheric. Whether it be a blizzard, a bad Zoom connection or a breakdown of video equipment at the jail, we are learning to cope. And note, the BAR RAG kept going throughout. It was an essential service needed to educate, entertain and inform our membership, and also, as some have noted, to line bird cages and supply outhouses at which it serves a dual purpose. But speaking of outhouses and surprises, one cannot forget the woman this year who was bitten by a bear when she sat down on the toilet seat in her outhouse near Alaska's Chilkat Lake. That was a surprise! It was her brother who confirmed the source of the injury when he looked down the outhouse hole and



**"I think most of us are now getting used to surprises — personally, professionally, or atmospheric."**

found himself staring into the eyes of a large black bear. Another argument, I suppose, for indoor plumbing and the flush toilet. I am not against outhouses; in fact, I have one (see attached photo). I find them especially useful during lengthy power outages or at remote cabin sites. But I have a special affinity for flush toilets due, in part, to the fact that it was a distant relative of mine, on my grandmother's side, who invented the flush toilet. That was Sir John Harrington who, in 1592, invented this remarkable device. He built one for himself and for his Godmother, Elizabeth I, but the idea of committing such acts indoors was revolting to most and didn't catch on. It is generally believed that, roughly 268 years later, Thomas Crapper designed a flush toilet for indoor use that became socially acceptable and ultimately led to the conveniences we enjoy today.

And so you have it. Some rambling thoughts and a brief history, only available in the BAR RAG, that might help explain some of the phrases we use today. For instance, we go to the *John*, to take a (*ensored*). Anyway, I digress.

Thank you to all who contribute to this publication and welcome to those who wish to contribute in the future. We need you! Have a happy summer and may your surprises be pleasant.

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



The reason the name crapper became common is that the flush water tank for the original toilets was fastened to the wall above the actual toilet so the water was fed by gravity. This put the company name which was emblazoned on the tank at eye level.



## The Alaska BAR RAG

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# Australians win first-ever virtual Jessup Moot Court

By David L. Roghair

The Philip C. Jessup International Law Moot Court Competition wrapped up its virtual 2021 Global Rounds April 17, when the University of Sydney, Australia, defeated the National University of Singapore in the World Championship Round. The championship ended six weeks of competition, with 574 teams of law students from 90 countries, all taking place on a custom-designed online platform. I was one of more than 1,100 volunteer judges for 2,036 rounds, totaling more than 3,000 hours of argument. In addition, many teams competed in virtual regional and national “friendly” rounds before Global Rounds. The annual Jessup competition is the flagship event for the International Law Students Association (ILSA).

Each year’s Jessup involves a simulated argument between two fictitious countries in front of the International Court of Justice in the Hague, on multiple timely issues of public international law. Per an ILSA press release: “This year’s Jessup problem concerned a global pandemic, and the obligations and responses of states with respect to the outbreak. It also involved questions of the jurisdiction of the court, a claim for asylum, and state responsibility for a suspicious aircraft explosion.” Judges scored written briefs (“memorials”) and oral arguments that each team submitted for both sides to the dispute. The problem is released in September each year, and teams spend months preparing for the competition, typically on top of their full course loads.

Established in 1960, the Jessup is the world’s largest moot court competition. In previous years, in-person national and regional rounds took place all over the world, with International Rounds in Washington, D.C., every spring. The COVID-19 pandemic and the accompanying worldwide lockdown forced ILSA to cancel International Rounds for 2020. For 2021, ILSA

decided to open its first-ever virtual Global Rounds to *all* teams who registered and submitted their materials on time. Global Rounds took place nonstop, day and night, for several weeks in March and April, with a dedicated crew of volunteer administrators making sure judges and teams ended up in the right virtual courtrooms.

Tech issues were inevitable, and provided good teaching moments for future lawyers: Nearly every court in the world has learned to cope with faulty audio or video connections over the past year. Without exception, the teams that I judged handled technological challenges with grace, whether they or their opponents were the ones experiencing difficulties.

After a very brief career as a competitor, I have been a Jessup judge for several years now, grading a big stack of memorials every year by email and occasionally traveling to judge oral rounds, including a trip to Moscow in early 2020 before the lockdown. This year, I judged more oral rounds than in the previous dozen years combined, from the comfort of my own home. Through Jessup, I have formed many friendships and professional connections around the world, and I really enjoy seeing our future colleagues in action. In the years to come, Jessup will need more judges, and your specific legal expertise doesn’t matter. ILSA provides all judges with a bench memorandum that contains both an introduction to public international law, and a summary of the relevant facts and law for the current Jessup problem. You can commit to as many or as few memorials and oral rounds as you like. This allows plenty of time for sightseeing wherever the rounds take place. For more details, visit [www.ilsa.org](http://www.ilsa.org).

*David L. Roghair is a magistrate judge in his hometown of Utqiagvik. The views and opinions expressed in this article are those of the author and do not necessarily reflect those of the Alaska Court System.*

## Bar convention will be virtual

Continued from page 2

long time practitioner Jim Gilmore who will lead a panel to discuss the many trial tips he has learned throughout his distinguished career. And, of course, we are privileged to have Judge Diane Humetewa — the first Native American woman and enrolled tribal member to serve as a federal judge — as our keynote speaker.

We are also excited to offer Bar members other benefits that come with a virtual convention. With reduced travel costs for speakers and venue fees, we will be offering the convention at a significantly reduced rate. The Bar is also looking into making all the recordings available after the convention is over. This will mean increased flexibility of when members can tune in and get their CLE hours. If you previously had a deposition scheduled or needed to arrange for childcare during Dean Chemerinsky’s Supreme Court Update, no problem. You no longer have to worry about missing

out on any session offered at the convention. You can simply watch them later when it fits your schedule.

So there is a lot to look forward to with the convention. It will be both affordable and include many options for convenience not available with prior conventions. Importantly, it has been some time since our membership has come together to meet. Even though this meeting will be on a virtual platform, we look forward to having you attend and participate in the 2021 Alaska Bar Convention. See you in September.

*Ben Hofmeister is president of the Alaska Bar Association. He has been a member of the board since 2018. He graduated from the University of Notre Dame law school in 2001. He clerked for Mediator and Arbitrator John Reese after law school and then went on to the District Attorney’s Office in Anchorage. Since then he has worked as a prosecutor in Dillingham, an assistant attorney general in Anchorage and Juneau and has been the district attorney in Ketchikan. He has litigated cases from Ketchikan to Nome.*



The next issue of the Bar Rag will be a first, an edition dedicated to a single topic: Pro Bono. A team of volunteers that includes Justice Peter Maassen, Becky Kruse, Natalie Wicklund, Savannah Fletcher and Krista Scully is working to develop content that acknowledges, celebrates and highlights all the facets of how the justice community works to serve Alaskans with legal needs. *Watch for it in September.*

## A young lawyer leaves California for Alaska

Continued from page 1

Even suburban-raised students like me could sense that something was really wrong with the school and the way that it treated indigenous American families. The students seemed wounded by homesickness.

Three years after that visit to the Nevada boarding school, I found a little ad stapled to my law school’s “career opportunities” bulletin board. Alaska Legal Services Corporation, with the assistance of Volunteers in Service for America (VISTA) was offering a chance to lawyer for a year in the Alaska bush. I took it.

In late August 1976, after typing all my answers to the California Bar examination questions with my manual typewriter while a power failure forced the electric typists to use pens and ink, I flew to Seattle. There, VISTA bureaucrats hauled 10 or 12 of us volunteers to a nunnery. We spent each night cloistered in tiny sleeping cells and each day learning stuff that would never help me live or work in Alaska.

Near the end of training, the VISTA supervisor gave each of us a hundred dollars and a ride to the REI in downtown Seattle. There I bought a wool sweater, felt-lined Sorel boots and a pair of heavy wool pants. I wore the pants every day of my first year in Alaska until one of our Yup’ik secretaries gave me a new Yup’ik teasing name that translated into English as, “big eyes Branch who wears funny old pants.”

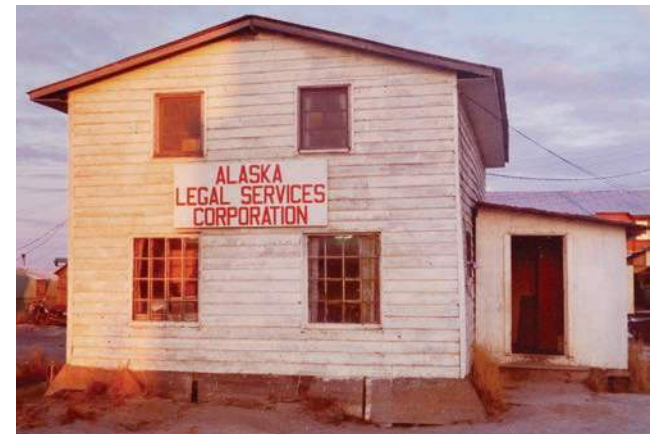
When I arrived in Anchorage, Jim Grandjean, the head of Alaska Legal Services Corp., asked me to serve my VISTA year in Bethel. They needed lawyers to defend more than 3,000 Yup’ik people who were fighting the federal government over homestead land claims. I worried that I’d screw up all the new and difficult cases. I had learned a lot while representing Marin County public defender clients at arraignments and sentencing during my last year of law school. But, my only civil law victory secured unemployment benefits for a man who wore a cape and tights to every job interview.

One of my last nights in Anchorage, I had dinner with Don, the legal services lawyer I would be replacing in Bethel. It would take me five years of legal lawyering to finish all

the cases that he started. He had arranged with his Bethel landlord to pass his rental shack over to me when he moved to Anchorage in November. Until then, I’d have to rack out in the Legal Services office.

In Mid-September 1976, I walked onto a Wein Air Alaska jet to Bethel and took a seat in the non-smoking section of the cabin. None of the other passengers stared at me even though I was wearing the magenta-colored parka that VISTA issued me in Anchorage. Many of them lit up cigarettes seconds after the pilot turned off the plane’s no-smoking sign. I waited patiently for the flight attendant to roll the drinks cart up to my seat row. Everyone at Legal Services warned me that Bethel had recently banned alcohol. I figured this would be my last chance to get buzzed.

*Dan Branch took a VISTA lawyer job in Bethel, which at the time had a decent library and a recently created public television station. Fearing insane-producing boredom,*



The Alaska Legal Services Corp. offices in Bethel.

*he brought with him an almost complete set of Russian classics. Between reading Tolstoy and working his law job, he started to journal. He lived in Bethel and Aniak for more than 13 years before moving to Southeast Alaska. During the past 25 years he has written quarterly columns for The Alaska Bar Association Rag, and articles for The Anchorage Daily News, including pieces about a Ketchikan grave digger, a chief on one of the Alaska Marine Highway ships, and a man who managed a remote salmon hatchery in Southeast Alaska. Once, one of his legal opinions was reported in newspapers in Alaska and the Lower 48 States because it declared that it was illegal for Alaska charities to raise money by soliciting bets on rat races. After retirement, Branch obtained an MFA degree from the University of Alaska, Anchorage. He now lives with his wife, Susan, and an opinionated poodle in Juneau.*

# Retiring Chief Justice recalls a rugged year

Continued from page 1

be like to steer 40 court locations through a pandemic. Many times we felt like we were navigating in the dark, trying our best to feel our way through public health information that changed by the week or even day at times.

As a system led by lawyers (not doctors), we have relied on the guidance of the state's respected public health physicians Dr. Anne Zink and Dr. Joe McLaughlin, local government public health doctors, and the U.S. Centers for Disease Control and Prevention. Always and to this day, protecting the health and safety of the court staff, the parties, the attorneys, and the general public has been a primary consideration.

For a court system known nationally for our commitment to providing access to justice, we felt challenged by our goal to stay open but try to keep the public out of our buildings. But we were much better situated than courts outside Alaska where participating remotely was not already integrated into their operations. We were able to quickly shift to telephonic appearances, which we had been allowing for decades due to our unique geography and occasionally severe weather. We set up Zoom videoconference accounts for each judicial officer, and (after months of waiting due to national shortages) we procured webcams for judges and staff. Hearings, bench trials, presumptive death trials, appellate oral arguments and grand jury proceedings have been occurring by videoconference, as well as rules com-

mittee meetings and most internal court system meetings. We enabled an email filing system to receive filings statewide by email, as well as to take payments online by credit card for filing fees and bail. The email filing is a bridge, as we are also accelerating deployment of our electronic filing system which had been piloted for criminal and minor offense cases in the Kenai Peninsula courts. Electronic filing for civil cases is now available in several courts, with all courts scheduled to move to electronic filing by the end of 2022.

Each court location shifted to require pandemic safety precautions, including social distancing, face coverings, visitor entry screening, quarantine requirements and return-to-work protocols for staff who contracted COVID-19 or were exposed to the virus. Each courtroom was outfitted with Plexiglas shields, placed where people would need to speak. We used floor plans to identify six-foot distances between individuals and to calculate how many people could safely be in a courtroom. We spent many hours and meetings discussing how to safely conduct a jury trial, including a guidance document, mock events and walk-throughs, and implementation of online juror screening questionnaires.

Large quantities of hand sanitizer and disinfecting wipes were shipped to our many locations, and hand sanitizer dispensers have be-



Chief Justice Joel Bolger (KTOO photo)

**I have been inspired by the hard work and dedication of court staff and judicial officers across Alaska.**

come new fixtures in our public spaces. Day cleaners were hired to sanitize high-touch areas in our larger courts throughout the day and in other locations for special events like grand jury proceedings, and special cleaners were brought in regularly to deep clean areas where a possible COVID-19 exposure occurred.

I am proud to say that we are not aware of anyone contracting COVID-19 due to an exposure at the Alaska Court System.

As vaccinations increased, the horizon lit up bright as an Alaska summer evening, with the prospect to reduce COVID-19 safety precautions and return to in-person court proceedings. But just when we started opening up misdemeanor jury trials, we learned we were in the midst of a serious cyber-attack. Without skipping a beat, court leadership met to pivot — to operate the court system with no technology connected to the Internet and quickly dismantle much of what we enabled to address the pandemic response. That meant no email filing, no email distribution from the court, no electronic filing through TrueFiling, no online payment of filing fees or bail, no Zoom videoconference hearings, and many other unavailable applications and services. I'm grateful we were able to engineer a quick and effective response. I'm hopeful that this crisis will be completely over by the time you are reading this article.

The Oxford Dictionary defines

“resilience” as “the capacity to recover quickly from difficulties.” I can confidently say that the Alaska Court System is very resilient. We have continuously operated since the start of the pandemic and throughout the cyber-attack. We have shown we can find creative workarounds to continue to serve the public and effectively provide access to justice during the most trying of times. Our judicial officers and staff have shown the toughness to persevere by innovating solutions that were unimaginable just a short time in the past. The members of the bar and our justice partners have all pitched in with cooperation, understanding, and flexibility to make sure this important work gets done. Clearly, our justice system can recover from the most difficult challenges.

In closing, however, I must return to “gratitude.” Over the years, it has been my great honor to enjoy a rewarding law practice in rural Alaska and to serve as a judge on every level of the Alaska courts. As chief justice, I have been inspired by the hard work and dedication of court staff and judicial officers across Alaska. The work the judicial branch does — including the advocacy provided by attorneys and the many services provided by other justice partners — is essential to a functioning democracy. Please accept my deepest gratitude for your collective commitment to preserving the rule of law in the face of a global pandemic and a malicious cyber-attack.

Joel Bolger is the chief justice of the Alaska Supreme Court.

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OPA is updating its regulations to raise case caps for both civil and criminal cases.

Please see the Online Public Notice System for more information.

# Anchorage Bar Association donates to Bean's Café



Anchorage Bar Association President relays the donation on Zoom.

Through the magic of Zoom, Anchorage Bar Association President recently presented Lisa Sauder, executive director of Bean's Café, a donation of \$1,000 on behalf of the association. The donation is in memory of the following attorneys who died during 2020:

- |                        |                   |                   |
|------------------------|-------------------|-------------------|
| Lawrence Aschenbrenner | Daniel Eldredge   | Philip Reeves     |
| Larry Berry            | Robert Erwin      | Mark Rindner      |
| Laura Bowen            | James Fisher      | Joyce Rivers      |
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|                        | Price Robert      | Michael Thompson  |



Lisa Sauder, executive director of Bean's Café displays the donation check.

## Bar People

### Pearce Joins Holland & Hart as government affairs director

**Drue Pearce**, an experienced energy policy and regulation advisor who provides strategic governmental affairs services, has joined **Holland & Hart** as its newest director of government affairs with a focus in Anchorage and Washington, D.C.

She helps clients in the energy, natural resources, and manufacturing industries navigate legislative, regulatory, and government relations issues with state and federal agencies as they implement resource development projects.

Drue's natural resources experience before joining **Holland & Hart** includes serving as deputy administrator of the Pipeline Hazardous Materials Safety Administration (PHMSA) at the USDOT and as a senior advisor to U.S. Department of the Interior Secretaries Gale Norton and Dirk Kempthorne, primarily handling Alaska Affairs. Drue also served in the Alaska State Legislature for 17 years, presiding as Senate president for two terms. She was nominated by President George W. Bush and confirmed by Congress to serve as the federal coordinator at the Office of Federal Coordinator for Alaska Natural Gas Transportation Projects.

She earned her undergraduate degree at Indiana University, her master's degree at Harvard University Kennedy School of Government, and completed The Executive Program at the University of Virginia Darden School of Business.



Drue Pearce

### Two take up positions with Reeves Amodio

**Larry Hartig** has become of counsel with **Reeves Amodio** where he will focus on environmental and natural resource matters. Hartig is a 36-year member of the Alaska Bar Association and former co-chair of the Environmental and Natural Resources Section. Most recently, he served as the commissioner of the Alaska Department of Environmental Conservation (2007-2018). He is a graduate of the Lewis & Clark school of Law.

**Colleen Moore** is also joining **Reeves Amodio**. Colleen is a lifelong Alaskan who has devoted her career as a lawyer to helping Alaska and Alaskans work through various legal issues that are unique to our state. For the last 15 years, Colleen has worked in the natural resources section of the Alaska Department of Law, including several years as the section chief. During that time, she advised the Department of Natural Resources on a wide range of issues, including land sales and leasing, trust land, easements, R.S. 2477, water rights, mining, oil and gas issues, contracts, and the development of associated statutes and regulations. Colleen graduated with a degree in industrial engineering from Arizona State University before attending law school

at the University of Puget Sound where she was a member and research and technical editor of the law review. Outside of practicing law, Colleen and her husband Bruce raised two children who are both working in Alaska.

**Clemmer Law Office LLC**



## Samantha Slanders Advice from the Heart

### Dear Samantha Slanders

Last week I met the woman of my dreams. She was standing in front of me in a covid vaccination line. Everyone, including the lady and I, were wearing masks. Gold and red butterflies decorated hers. This proved that she had good taste and could operate a sewing machine. Since I heard her give her phone number to the covid clerk, I memorized it. Now I am trying to get up the nerve to call her. Maybe, I should wait until the day we both must get our second vaccine shots. That would give me time to work up a little speech to knock her off her feet. Samantha, what do you think?

Sincerely,  
Two Weeks Away from Heaven

### Dear Two Week,

Thank you for sharing your story of unsubstantiated love. I am afraid that you are heading for a fall. You know nothing of this woman. She might have snatched the mask from a friend. It might cover hideous teeth or the frown that formed on them every time she caught you looking at her. At the second vaccination, she might get her shot at a different pharmacy. If I were you, I'd try to think about something else from now until the date of your second shot. If she shows up you can ask her to go out for coffee. But remember, you will have to postpone that coffee date for at least two weeks to give the vaccination time to kick in.

Sincerely,  
Samantha Slanders

### Dear Samantha Slanders,

The first months of the pandemic quarantine were great. Since I worked from home while holding business meetings on a Zoom-powered computer, the stress level dropped like I was drunk on St. Patrick's Day. Of course there was no real St. Patrick's party last year so I didn't have to worry about the "dropped drunk" thing. If I keep close to my computer screen it only broadcasts the upper half of my body. That allows me to always wear the PJ pants that I slept in the night before. (I hope no one invents smell transmitting computers.) Now all grownups and most of the teenagers in our 49<sup>th</sup> State can snatch a needed pair of vaccinations. The upside, I think, is that they will again be able to make out with their dates. But is that worth it? I am not ready to give up the joys of my enclosed space. You are probably a lawyer. Can I get a court order allowing me to work from home even after the last covid case is cured?

Sincerely,  
The Computerized Monk

### Dear Monk Guy,

Can I send your name and address to the director of a social-converting institute in the Lower 48? I know they are looking for someone to study who flourishes while always isolated in front of his computer screen.

Sincerely,  
Samantha Slanders

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# A justice recalls the friend who was Jay Rabinowitz

*EDITOR'S NOTE June 16, 2021 marks the 20<sup>th</sup> anniversary of the death of Alaska Justice Jay Rabinowitz (2/25/1927 – 6/16/2001) What follows here are remarks by Justice Walter L. Carpeneti at a Memorial Tribute to Justice Rabinowitz Sept. 21, 2001.*

This is a daunting prospect, to talk about Jay Rabinowitz, this incredible judge and magnificent man, to a group composed of so many who have known him longer and been more intimately involved with him, professionally and socially, than I have. As a *pro tem* judge, I sat with the court for two months in 1995; Warren Matthews was Jay's colleague for more than two decades. I sat in for two or three administrative conferences with Jay; Art Snowden worked day in and day out with him for years to make Alaska courts a paragon of administrative excellence. And while I have known him as a friend for some years, Charlie Cole's friendship goes back almost 50 years. And, of course, his family knows him so much better

than any of us. I asked what could I possibly say to shed some light, give some insight, add some perspective. Maybe nothing . . .

But then I thought, there's really not that much heavy lifting here: I was not required to assess — in five minutes no less — a judicial career that spanned over 40 years. I was not called upon to capture a legacy that will be analyzed by scholars for years to come (and that will contain volumes more than the *New York Times* and the *Los Angeles Times* limited themselves to in their fascination with the *Ravin* case (as important as that case was). All I have to do is talk about friendship, and that should be easy. Because Jay Rabinowitz wrote the book on friendship.

"Friendship." Didn't it just seem that *everyone* was his friend? Why was that?

First, I think it was because he cared about people. When you saw Jay, he asked about you, and your spouse, and your kids and your dog. And it wasn't just polite chatter —



Justices Everett Hepp, Harry Arend, and Jay Rabinowitz

he really wanted to know. And when he found out, he took steps to accommodate the needs of others whom he had learned about. For example, there was a standing offer from Jay to the Carpeneti kids (and to me, too, come to think of it), deprived as

we were of cable TV by an autocratic dictate from somewhere in our house, to come over any time and watch NBA and college hoops on the Rabinowitz TV. (And we took him up on it.) I mentioned our dog — when he escaped from our house, which he too frequently did, he always ended his escapes at the Rabinowitz house between 2 a.m. and 4 a.m., and Jay would always walk him over to our house. It drove me crazy. "Jay!" I'd say, "you don't have to do that — just give me a call and I'll come get him." But he almost never did, so we just had an extra key to our house made and gave it to him. (No need for all of us to have to get up!)

Second, he had an unbounded delight and joy in life. To everyone this was readily apparent. And people responded to this, and to his warmth and concern. We all did. (As an example, when my wife and I tried to find someone to care for our dog because our family would be in Anchorage today for this memorial, we had no luck because everyone we called was planning to be here.)

But perhaps most of all, it was his sparkling humor that made Jay Rabinowitz such a friend. And I believe I am particularly well-qualified to discuss *this*. After careful analysis, I have come to understand that I was his unwitting straight man. So, for example, when I earnestly asked him to administer the oath of office at my induction, I really did not expect that Jay, knowing my love of all things Italian and perhaps making his own editorial comment on the recently approved "English only" ballot initiative for governmental actions — which would go into effect the month after my induction — would conspire with my wife to obtain an Italian translation and administer the entire oath of office to me in Italian! (As a PS, Annie Rabinowitz later divulged that she had, (thankfully I say this), vetoed several of his more outlandish plans for that day, although I think most folks in the audience were happy that she allowed him to wear the robes with the three silver stripes on each arm, no doubt his silent tribute to Chief Justice William Rehnquist.)

At least with the oath in Italian, Jay had the courtesy to say quite clearly before the oath that I had no inkling of what he was going to do. I was not so lucky with regard to the "2000 Juneau Ski Challenge." As some of you may know, the Supreme Court in Anchorage sponsors a ski race yearly at Alyeska. Jay appar-

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*Continued on page 7*

# A justice recalls the friend who was Jay Rabinowitz

Continued from page 6

ently noticed that it was open only to appellate judges and their current clerks, and decided to do something about this perceived violation of his sense of openness and equal opportunity. (I say “apparently” to emphasize I had no prior knowledge of any of what I am about to tell you.) One day I arrived at work to find a notice posted on the door of the Supreme Court offices in Juneau. It advertised something called “The Carpeneti Challenge,” a ski race, and it was open to, quote, “all court system employees, former employees, their spouses/partners, children and grandchildren.” This concerned me, because I thought it might be construed by my colleagues on the court as an implied criticism of the Anchorage event. That greatly worried me. As the new kid on the block, I certainly did not want to give any offense or be seen as criticizing my colleagues. Gathering my courage, I knocked on Jay’s door, explained my concern, and asked that he change the notice. His eyes grew wide as saucers: “Do you really think anybody will take it that way?” I was starting to doubt myself when I noticed the footnote (a footnote on a public notice of a ski race!) placed after the title “The Carpeneti Challenge.” The footnote read: “Also known as the ‘You don’t need a J.D. to Ski’ Race.” I flipped out. Jay immediately assured me: “I can see you are concerned, so I’ll

have them cross out ‘Carpeneti’ and write in ‘Rabinowitz.’” I was grateful, felt warm and fuzzy about his kindness in resolving my distress, and went off to work. The next day I found this notice posted on the door (and learned that Jay had already had Rone’ Tromble, who allegedly works for me, send it off to court offices in Anchorage!): [This is the actual notice; I’m sorry I don’t have an overhead projector to display it better.] It says “The Carpeneti” — and “Carpeneti” has a strikeout line through it with “Rabinowitz” written in above it — “Challenge.” And every other word on the original notice — including the footnote — is still there. And if that weren’t enough, Barb Hood came down from Anchorage and, with the Rabinowitz daughters helping with the lettering, made a sign about 30 feet long and three or four feet high, that hung up at Eaglecrest during the race, that said the same thing: “The Carpeneti Rabinowitz Challenge.” So I was called upon to explain, innumerable times, a story that I had only tried *not* to be associated with. I’d like to take this public moment to address my colleagues and finally set the record straight. This is the truth and the whole truth: I had *nothing* to do with the planning for that event, other than to try to dissociate myself from it. I should add, however, that it was a great day of fun racing, and everybody who participated got a medal (which, of course, Jay supplied).



Justices John H. Dimond, Roger Conner, Buell Nesbett, Geroge Boney, and Rabinowitz.

And so, despite my initial misgivings, I conclude that talking about Jay Rabinowitz and friendship is very easy, because he made friendship so very easy. And we were all so lucky to have known this wonderful

man and his magical family. And we are all so honored to say that they were, and they are, our friends.

— Justice Walter L. Carpeneti



Justices John H. Dimond, Buell Nesbett, and Rabinowitz

## Law Review seeking submissions for fall volume

The *Alaska Law Review* (ALR) is accepting submissions for its Fall 2021 volume. We welcome submissions from attorneys on any topic related to law in Alaska. Submissions may take the form of traditional law review articles, essays or comments on recent developments in case law or at the Legislature. ALR is committed to serving practitioners in Alaska, and we strive to publish practicing attorneys within the state. Please send your submission to [alr@law.duke.edu](mailto:alr@law.duke.edu) by August 1. If you have any questions or have interest in writing for the Journal, please reach out to the Law Review staff at [alr@law.duke.edu](mailto:alr@law.duke.edu) for further information.

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## *In Memoriam*

# A friend recalls Rodger Pegues, retired Superior Court judge

By Donna J. Goldsmith

Rodger Warren Pegues, 87, retired judge of the Juneau Superior Court, died Nov. 21, 2020. I have no idea how to convey the depth of a man's contribution to the world, and fear that any attempt on my part might fail to convey the full measure of the man we have lost. It was an absolute privilege to know Rod and be a part of his world. Out of my love and profound respect for him, I will attempt to do his legacy justice.

Rod Pegues was born and raised in Juneau. I used to pass his family home during my daily runs, and often imagined Rod's dreamy childhood in one of the most stunning playgrounds in the



Rodger Pegues

world. Growing up with Mount Juneau and Mount Roberts as his backyard fueled Rod's lifelong love of, and passion for, the beauty of Southeast Alaska.

Upon graduating high school, Rod joined the Air Force, attending a Russian language immersion program in upstate New York. Several years later, he attended college at the University of Washington, where he again immersed himself in Russian studies.

After college, Rod returned to Juneau where he worked for the Legislative Affairs Council. Gov. Bill Egan hired him as director of the Local Affairs Agency in the Office of the Governor, where Rod remained until he decided to attend law school. He attended the University of Washington Law School, where he served on law review. He published an article in 1965 addressing the need for constitutional safeguards in juvenile justice proceedings to ensure due process throughout the entirety of the proceedings. Rod maintained that given the nature of juvenile proceedings and the possibility that juvenile proceedings could be transferred to adult criminal court, constitutional protections were essential. While this idea might seem *de riguer* in today's world of juvenile justice, at that time it was a new concept effective in only a few states.

Upon graduation, Rod devoted several years as Northwest Conservation Representative for the Sierra Club, and subsequently as assistant to the director of the National Park Service in Washington, D.C. A few years later he accepted a position as assistant NW regional director of the National Park Service for Region X. One of his most satisfying accomplishments there was working with colleagues to establish the Klondike Gold Rush National Historic Park in Skagway, near the beginning of the famous Chilkoot Trail — a vital component of Alaska's storied history.

In 1973, Attorney General John Havelock hired Rod as an assistant attorney general in the Department of Law. Rod's fierce intelligence and adroitness as a litigator soon became apparent. Lawyers and judges who worked closely with him refer to his "Mensa" and "whip smart" intelligence. His colleagues also admired his astonishing fount of arcane facts about history and politics, including his breadth of knowledge and deep understanding of the machinations of Alaska's government. When Gov. Jay Hammond took office in 1975, Attorney General Av Gross retained Rod within the Department of Law, where Rod ultimately served as an advisor to Gov. Hammond on numerous issues. Colleagues in the Department of Law relied upon him as the constitutional law and governmental affairs expert. His colleagues and friends often looked to him as a mentor in one way or other, seeing Rod as a wonderful colleague who always had time to assist.

In 1981, Hammond appointed Rod to the Superior Court, where he served as one of two Superior Court judges for nine years. Rod became known as a judge who did not suffer fools lightly, but one who was fair. I cut my trial teeth in front of him in an involuntary commitment hearing. When he asked if we had managed to resolve the matter so we could discuss an appropriate sentencing remedy, I did not miss the not-so-subtle suggestion. My client, however, wanted a trial, and we went through our paces. Rod was respectful and kind to my client throughout. I never forgot his compassion during that moment, and admired him for it until the day that he died.

Rod was also a feminist before his time — hiring female law clerks to give them a start in a legal profession that he believed was all too dominated by men. Most telling of all, Rod fell deeply in love with, and married, one of the most intelligent, talented, and compassionate women in Alaska — Donna Spragg — who became a well-respected attorney in her own right.

While Rod was typically an understated and private man of many skills and few words, one of the things I admired most about him was his willingness to stand up for the principles in which he believed. He was equally unafraid to stake out independent, even unorthodox, positions during his tenure at the Department of Law.

Rod Pegues was a fine man with a wickedly dry sense of humor, an easy laugh, and an infinite devotion to his family. He gave effortlessly of himself — to his family and to his community. His deep love for Donna gave me a road map for my own hopes in marriage. He was proud of his children Cynthia, Gwendolyn, Jack and Matt; and eight grandchildren, all of whom grew up being loved by a supportive, respected, and accomplished man who cared for the vulnerable, always helped his friends, and lived by his convictions.

*Donna J. Goldsmith is a retired attorney who began her legal career as a clerk for the Honorable Walter L. Carpeneti, Retired, in 1986. She worked throughout the country in the fields of federal Indian law, family violence, juvenile justice and child abuse and neglect. She lives in Anchorage.*

## Fairbanks outdoors enthusiast, attorney dies

Barbara Powell, 68, died Saturday, March 20, 2021, at home with her friends by her side. She was born in Pittsburgh, PA, in 1952. She graduated with honors from Boston University in 1974.

Alaska was Barb's home state for more than 50 years. After graduating from college, she was drawn north for the wilderness and the friends she found here. She became close friends with Ginny Wood and Celia Hunter, who hired her to work for them at Camp Denali in Denali National Park in the early 1970s. She later worked for several years as a wilderness guide in the Brooks Range, taking tourists on kayaking, rafting and backpacking trips.

She spent several years teaching swimming, cross-country skiing, downhill skiing and ski mountaineering for Tanana Valley Community College in Fairbanks. Her students were people of all ages and skill levels, and included many elderly people she taught through the Senior Citizen Swimming Program.

In the 1980s, Barb was actively involved in mountaineering and the Alpine Club. She was part of a three-woman team that attempted to summit Mount Foraker in the spring of 1983, and she was the only woman on a four-person team that attempted the southeast ridge of Mount Hayes a year later.

Barb was also a scientist. She received a master's degree in Natural Resources Management from UAF in 1984. While she was in graduate school, she conducted willow research on the North Slope with her friend Mike Masters. Barb and Mike later spent an entire summer traversing the Brooks Range. After receiving her master's, she worked as a land management technician for the Fairbanks North Star Borough's Division of Land Management.

Eventually Barb became a lawyer, graduating with honors from the University of Tennessee law school in 1991, and she briefly worked in private practice in Fairbanks. After that, she worked on the Mental Health Lands Trust litigation as a law clerk to Judge Mary Greene. When that lawsuit was over, she spent the rest of her career working for Judge Greene and for several other Fairbanks judges.

She is survived by her brother, Tom Powell, wife Debbie; nephew Wade Powell, wife Christina; nieces Lori Noble, husband Mike; Jennifer Powell; and five great-nieces and -nephews Sebastian, Nathan, Madison, Katelin and Allison. She is also survived by her Alaska families, the Harbisons and the Matthews, and by her faithful dog, Andy. She was predeceased by her parents, Edward and Marjorie Powell, and by her three golden retrievers, Nick, Taiga and Molly.

A memorial celebration of Barb's life was scheduled for June 3, 2021. In lieu of flowers, donations can be made to The Nature Conservancy or to the Ovarian Cancer Research Alliance. Online condolences can be made at [blanchardfamilyfuneralhome.com](http://blanchardfamilyfuneralhome.com).



Barbara Powell

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## *In Memoriam*

### Anchorage attorney worked with Native corporations

William "Bill" Timme, 78, died April 9, 2021, at his home in Anchorage.

Born and raised in Houston, Texas, Bill graduated from Rice University in 1965, followed by Columbia University Law School in 1968. Shortly after graduating, he joined the recently created VISTA Volunteer Program and was placed as an attorney serving Alaska Legal Services Corporation in Fort Yukon, and later Ketchikan and Fairbanks. Bill went on to serve as general counsel for Doyon Ltd. supporting that Native regional corporation, along with numerous village corporations, through the implementation of the Alaska Native Claims Settlement Act. For the next 40 years, Bill continued to counsel primarily Alaska Native regional and village corporations on a broad range of issues through his own private practice in Anchorage, Middleton and Timme, and later, at Stoel Rives LLP.

In addition to being a dedicated lawyer, he was also a loving and supportive spouse, father and grandfather. Bill loved visiting his children and grandchildren across the country and developed quite the taste for Biscoff cookies at 30,000 feet. He found joy in browsing in bookstores, drinking his lattes with cinnamon, teasing his family members and providing love and support to the countless people his life touched.

Although Bill was always modest about his contributions, he will be remembered for his deep generosity and for his strong dedication and commitment to supporting Native communities throughout Alaska.

He is survived by his wife, Denise; by his children and their spouses, Laura and husband Carlos; Andrew and wife Becca; Matt and wife Kiera; and niece, Elizabeth and husband Hank. He will always be remembered with great love and affection as Paka to an entire generation of grandchildren: Katya, Miles, Maya, Wallis, Harrison, Valerie, Robert and William.

Bill was preceded in death by his parents, William and Noema Timme; and siblings, Kathryn and Robert; his late wife, Linda, mother of Andrew and Matt; and former wife, Carol, mother of Laura.

A virtual memorial service was planned in his honor for May 15, 2021, through Janssen Funeral Homes in Anchorage. In lieu of flowers, donations can be made in Bill's honor to Alaska Legal Services Corporation or the Alaska Center for the Blind and Visually Impaired.



Bill Timme

### Anchorage attorney dies after long illness

Born in Cheyenne, WY, Dec. 17, 1957, and raised in Chicago, Deborah "Shocky" Greenberg, died May 5, 2021, of fallopian tube cancer. Even in the wake of her illness, Shocky lived life to the fullest and took advantage of every opportunity and experience presented to her. She was a warrior her whole life, fighting for the environment, social justice, her family and herself. Shocky spent the last weeks of her life surrounded by her husband, Leonard, and sons, Zack and Josh.



Shocky Greenberg

Shocky earned her undergraduate degree in Conservation of Natural Resources from UC Berkeley and her law degree from Northeastern School of Law. She used her vast and diverse skills and expertise in a host of arenas, including the Alaska Department of Fish and Game, the House Research Agency in Juneau and the Alaska Legislature. She helped establish a set net operation in Yakutat, was an advocate for solar energy and climate change issues and traveled extensively through the back country of Alaska.

She married Leonard Steinberg in 1997. She and Leonard raised their boys in Anchorage and introduced them to a range of activities and adventures in Alaska to instill in them an appreciation for the outdoors. Her sons quickly surpassed both parents in their skills with every activity. As a family, they went skiing and biking throughout many regions of the U.S. They traveled across the globe to such places as Costa Rica, the Galapagos, Norway, Sweden and many European countries. Often their favorite place was to be at home overlooking the Anchorage Coastal Wildlife Refuge.

Although Shocky battled cancer for more than three years, she never let it define her life. Indeed, many of her most treasured days and outings came during her illness: snowmachining with Josh, skiing the flats with Zack and traveling with Leonard. Although Shocky will be sorely missed by her family and friends, her life will always remain an enduring inspiration to all who were blessed to have known her. She is survived by her husband, Leonard; two sons, Zack and Josh; three sisters, Rachael, Sharon and Rebecca; and many close loved ones.

### Anchorage attorney dies in California

Brian R. Shute, 71, of Anchorage, died April 4, 2021, after a long illness. He spent the last seven months of his life with his family in California.

He was born in Palmer Aug. 6, 1949, son of the late Carl and Lois Shute.

Brian graduated from the University of Oregon with a bachelor's degree in business administration and then completed his law degree at the University of Idaho in 1976 in the top tier of his class. He became a member of the Alaska Bar Association, and practiced civil, corporate and real estate law in Anchorage for 44 years, becoming an expert in secured transactions.

In addition to his law practice, Brian was a real estate developer, builder and entrepreneur. His legal knowledge furthered his business ventures. Brian loved nature and the beauty of Alaska. Skiing at Alyeska and summer fishing trips around Homer were seasonal favorites. As a teenager in Cold Bay, some memorable moments were finding a dead walrus on a beach (with tusks fully intact) with his Fish and Wildlife buddy Bob Jones, glass ball hunting, and watching from afar as Kodiak bears gorged on salmon from Russell Creek.

Brian loved playing baseball and basketball, gardening, fishing, camping and traveling. His basketball playing was like he lived life — tough, aggressive, and fair. Following in his dad Carl's footsteps, Brian was a lifelong San Francisco Giants fan, an avid stamp collector, a ham radio operator and successful stock market investor.

His two sisters, Eileen Shute and Carol Grace Shelley; and his two nieces, their spouses, and their children survive him.

The date for a memorial service in Anchorage was yet to be set. In lieu of flowers, donations can be made in the name of Brian R. Shute to Habitat for Humanity, (907) 272-0800, 900 Benson Blvd., Anchorage 99508.



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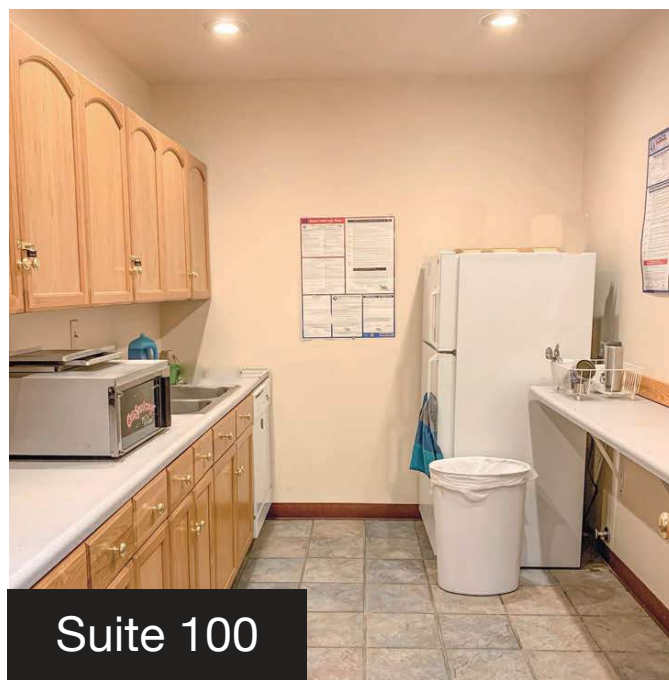
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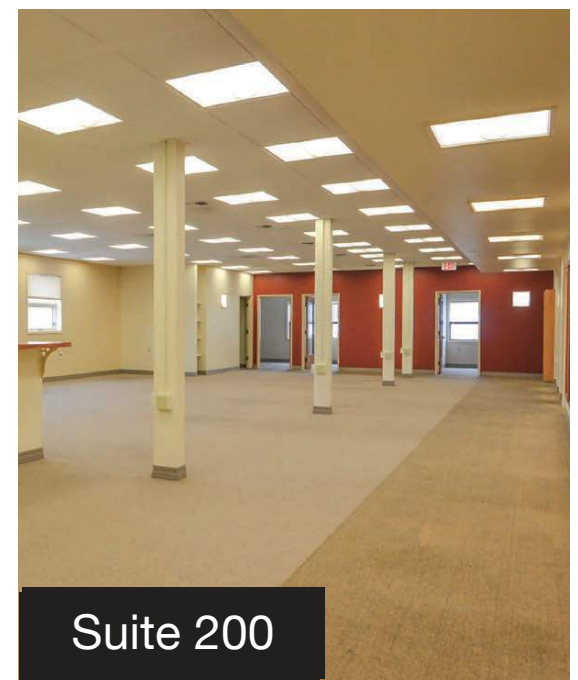
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# 10 ways to constructive conversation with clients

By Mark Bassingthwaighte

In the context of a conversation between an attorney and a client, effective communication occurs when both the attorney and the client feel they have been heard. For example, at the outset of representation, a client is often looking for confirmation that their lawyer understands what the problem and desired outcome are. Similarly, a lawyer is often looking for confirmation that the client has a clear understanding of what the lawyer can realistically do for the client given the circumstances at hand. The challenge here is that an effective communication can only occur by way of a constructive conversation, which requires both participants to enter a mutual conversation. There must be a balance between talking and listening.

This balance thing can be harder than it might seem. Suffice it to say, that while I can be a good listener at times, having a constructive conversation every time I open my mouth remains a challenge and it's all about my being unable to find that proper balance between talking and listening. In fact, in my personal life I have been told more than a few times by my lovely wife that if I would just listen, it would become apparent that she isn't looking to have me solve her problem. Sometimes she just wants to be heard, to get it out, so to speak. Unfortunately, the lawyer problem solver in me just can't shut up. I suspect I'm not the only lawyer who suffers from this conversational shortcoming. I don't know about you, but law school taught me how to solve problems.

I never had any law professor pontificate on the virtues of being an effective listener. Quite the opposite in fact, I was taught how to debate and how to put forth a compelling argument.

If any of this is striking a chord with you, following through with even one or two of the following tips will enable you to have a more constructive conversation with your clients. All 10 tips come from a Ted Talk by noted author, journalist and speaker Celeste Headlee. The following are a summary of her points coupled with my trying to put an attorney-client conversation spin on them. If you care to view the entire Ted talk, and I encourage you to do so, you will find it at <https://bit.ly/3b47MEf>. In sum:

- 1. Don't Multi-task** — Simply be present and pay attention. No texting, no thinking about other matters, no working through your email. You are in your client's employ and this is his or her time.
- 2. Don't Pontificate** — Enter every conversation with an assumption that YOU have something to learn. Remember, the matter being discussed is the client's matter. The more you learn, the better your advice will be.
- 3. Use open-ended questions** — Questions like "Will you tell me more about that?" invite your client to think and provide a more informative response. You don't want to make it easy for a client to sit back and just confirm what you think you know or want to hear.
- 4. Go with the flow** — Don't get stuck on what you want to say next. To do so requires that you miss half of what your client has just told you because it's quite difficult to concentrate on an important point you want to make and also listen at the same time.
- 5. If you don't know something say so** — Honesty instills trust. Faking it fosters doubt. It's as simple as that.
- 6. Don't equate the other person's experience with yours** — For example, as a client shares his or her story during intake, don't try to relate by telling your story. Worse yet, don't respond by talking about how many times you've heard this story before. Again, you are in someone else's employ. These conversations are not to be about you.
- 7. Try not to repeat yourself** — If you feel you haven't been heard or understood, ask your client to make sure. Continuing to repeat yourself risks your coming across as condescending.
- 8. Stay out of the weeds** — Most people really are not that interested in the minutiae or the nitty gritty details. Clients just want to know they're in good hands.
- 9. Listen, truly listen** — This does take a lot of effort and energy. According to Steven Covey, most of us don't listen with the intent to understand, most of us listen with the intent to reply. The only way to maximize the relevancy of any reply is to first listen well.
- 10. Be Brief** — Share your thoughts and advice in a succinct manner. Demonstrate that the client matters to you as a person by confirming that he or she understands what has been discussed. Invite questions.

written extensively on risk management, ethics, and technology. He is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

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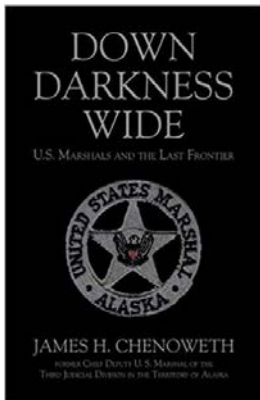
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# Floating court sails to Nome and points to the North

The following article is from *Down Darkness Wide*, a book written by James Chenoweth about his career as a lawman in territorial Alaska. We reprint this chapter with his permission. In Part I (*Alaska Bar Rag*, April-June, 2020), the young Mr. Chenoweth boards the Coast Guard Cutter *Wachusett* on its journey from Seward to Barrow during the summer of 1957. It was the last time a federal "floating court" put to sea in Alaska waters. In the previous installment, we left the *Wachusett* in Mekoryuk on Nunivak Island. This, the last in the series, takes him to Nome and beyond.



By James H. Chenoweth

## PART III OF III

"Nome" is an odd name. It's not derived from any English, Russian or Eskimo words but it began appearing on British charts around the middle of the 1800s.

Research shows that when the British chart of the region was being composed, the cape in that area had no name. A "?" name" was penned onto the chart. That question mark was later interpreted as being a "C" and because the "a" in "name" also looked like an "o", the original notation was read by the next draftsman as "C. Nome," and the town that grew there was named after the cape.

Though I had occasionally sent radio messages to Fred, this was my chance to chat with him on the phone. I was curious about what was going on in my own bailiwick, and whether or not Fred thought I should continue on with the Coast Guard. He reassured me. "Nothing much going on here," he told me. "We're all taking advantage of your absence by developing our talent for letting sleeping dogs lie." And when I phoned Dennie, she insisted that she and our children, Pam and Geof, were just fine, were having a good summer and that my continuing on the cruise posed no problem for them.

Leaving the matter of duration somewhat open-ended, I was aboard the *Wachusett* when it sailed around midnight in a heavy, "pitch and roll" sea. For the most part, I spent the next day trying to keep from being seasick. Sometimes I was successful. But as we headed back to St. Paul Island in the Pribilofs, the weather started to clear. We landed around noon on Aug. 2 and spent the rest of the day touring the processing plant and visiting a seal rookery. In talking with Roy Hurd, the manager of St. Paul, there seemed to be little work there for us. The village had a six-man police force whose elected chief picks his own crew. Fines were imposed whenever possible although a local jail was maintained "just in case." The Fish and Wildlife Service, which manages the Pribilofs, had wisely placed emphasis on

community responsibility.

We left that same evening, pushing toward Adak through a storm center with rough seas and a high wind and arriving there late the next day. Adak is one of the Andreanof Islands in the Aleutians but when Alaskans referred to Adak, they were talking about the Adak Naval Base. There was nothing else there at the time, aside from the "Adak National Forest" (a handful of evergreens planted for fun and carefully nurtured) and the Adak Totem, a pole carved by the Seabees during World War II which has the bust of an officer at the bottom, a sailor just above it, and a bee at the very top. Lt. Commander Gottshall was waiting for me with papers from Anchorage. We spent some time discussing the naval problems relating to jurisdiction over civilian criminals. I don't know what the Coast Guard did during the next two days. I sent a wire to Fred saying I would stay with the *Wachusett*.

After serving some civil writs in the case of *Broussard v. Broussard*, I just visited and wandered around with my camera. Small world. The bartender at the Chiefs Club in Adak had been born in Clifton, NJ, where Dennie had lived and gone to school. And at the Adak bank where I cashed a check Dennie had sent me, the teller recognized Dennie's handwriting because she had previously worked at our bank in Anchorage.

The Aleutians are really tough. That's where warm waters from the Pacific clash with colder currents from the Bering Sea. Wind and sea battle the volcanic islands constantly. In spite of winds that forced everyone to walk doubled over, military construction engineers in World War II built Adak into the base from which we would attack the Japanese, dug in on Attu and Kiska after their invasion of Alaska. Told they needed four months to build the base, the engineers did it in 10 days. "See the landing strip over there? Back in those days it was the only level spot on the island but it was at the bottom of a tidewater lagoon. Those guys penned in the lagoon, let the receding tide drain it out, and then closed the intake gates. That's how they got a dry landing strip."

Living aboard the *Wachusett* was really quite pleasant for me. Except for climbing up the mast to where the radar was installed, I had the run of the ship and was made to feel right at home. I dined a couple of times with Captain Applegate in his cabin but took most of my meals with the chiefs. (In my opinion, they ate better than anyone else aboard, probably because they were in charge of the galley. And their habit of a late night snack with freshly baked bread, toasted and spread with peanut butter, is still a habit with me.) The chiefs answered questions, pointed out areas of interest, and saw to it that I stumbled safely into and out of the surf boat.

Around midnight on the fifth we moved a bit eastward to Atka, a small village with little community activity. Most of the males worked in the Pribilofs during the summer but there seemed to be no activity during the winter and no boats arrived then. Apparently it had been some years since the Bureau of Indian Affairs visited Atka and the inhabitants of the town were quite

content to exist on whatever government largesse was available. The water was calm and smooth when we arrived. There was much talk about a planned reindeer hunt, but I decided to abstain. Since there was little for me to do and eagles were easy to spot, I climbed a few craggy cliffs and took some photos. Then I skinny-dipped in a shallow area, but only briefly. The spirit was willing but the flesh was weak. The reindeer hunters returned about 8:30 p.m. — no reindeer.

Our schedule called for us to return to Adak and transport mail and supplies from there to Attu, but as we neared Adak on Aug. 8, our orders were changed. Instead, we scooted back to St. Matthew Island, picked up the two Fish and Wildlife agents we left there earlier, and relocated them to a small island, right next door. They went ashore to get soil and plant samples. The captain went along to pick up ivory on the beach.

The operational plan for our patrol included a swing through Russian waters in the area near Wales. However, diplomatic clearance had been denied for that action so we had a few extra days for other things. I talked to the captain about using the time to reach Barrow a few days earlier. He had similar thoughts as did the crew. By 8 p.m. Aug. 9, we were underway back to Nome. Taking advantage of the warm and bright weather the next day, I found it would not be too difficult to get sunburned at sea. We paused at Nome just long enough to pick up mail and more water, then headed up the western coast to Teller and Teller Mission.

The two villages are right across the bay from each other. Teller Mission was almost unoccupied at the time. Only two women, two children and two dogs greeted us. The Natives wanted to go to Teller so we took them aboard. The dogs elected to stay behind. Teller Mission had a small population, a school and a church. It was led by a five-man council, two of whom were town marshals. People there worked in Nome or in mines and between May and October, they hunted and fished. No wonder the town looked empty. We crossed the bay and anchored outside Teller in the early afternoon of Aug. 11.

Teller became a town in 1864. It looked like a frontier town except for several freshly painted buildings. Teller was where the lighter-than-air dirigible *Norge* (with Roald Amundsen aboard) landed after having made the second aerial crossing over the North Pole in its 1926 "Rome-to-Nome" flight. I talked with some Natives at Teller who could still recall seeing the *Norge* come down through a stormy sky, looking like "a great seal riding through the clouds." Teller was also the doorway to mining locations east of the bay. And the telegraph line which was to be the communication link from North America to Europe through Russia got as far as Teller before the completion of the Atlantic cable ended the project.

In spite of its happy face, Teller suffered from commercial problems; two aggressive merchandising companies had split the town into factions. There was a landing strip and a good — although shallow — harbor. With a population of 300, Teller

had a U.S. commissioner, a school, a church and a National Guard unit, but no local council. People managed a reindeer herd, picked berries or worked at fishing and mining. In five years, the town had gone through four teachers but aside from an occasional drunk or brawl, there seemed to be little need for a peace officer.

While ashore we discussed the possibility of going up-river 20 miles to hunt reindeer but decided against it. Just as well because we had a rough trip back out to the ship. The wind was at 17 knots with a high surf. For the first time, I had worn my parka and was glad I did.

While I was asleep, the ship had moved into quieter waters around 10:30 that evening, getting ready to leave. There were still two boats ashore, along with the medical team. They were recalled and the 15 residents of Teller who were still on the *Wachusett* were taken back to Teller. Though an eye bolt broke on the last boat as it was being hoisted up, the ship was ready for sea again at 3:30 a.m.

Suddenly we had new orders. An alert had been issued about Russian submarine activity off the southeast cape of St. Lawrence Island. A patrol plane had spotted the sub around noon the previous day. When the plane made a second pass at the submarine, it slipped under water. We joined the search, coordinating our efforts with several military "hunter-killer" planes. Depth charges, looking like 50-gallon drums, were hoisted on deck and locked into K-guns on both sides which would hurl them out into the air. It was unlikely that the sub had lingered, once spotted. Under instructions, we circled the St. Lawrence area until midnight, and then resumed our patrol. I wondered if the presence of the Russian submarine had been the reason we were refused permission to cruise through Russian waters near Wales.

By mid-morning on Aug. 13, we were again anchored outside of Teller. Dr. Thompson, ashore with the medical team, radioed the ship, asking for permission to fly to a mine 60 miles away where someone had suffered a heart attack. According to scuttlebutt around the ship later, the captain had been highly annoyed at the request since it didn't fit within the parameters of our mission and we were now one day behind schedule. If so, he must have relented because he did approve the request. The preacher at Teller flew Dr. Thompson to the mine. It was the doctor's first flight in a small plane. The medical and dental teams finished their work and around midnight we moved on to Wales.

Once there, the violent wind, heavy swells and shallow beach made things quite difficult. I decided not to take the first boat ashore so the medical-dental teams could get squared away before I went in. Just as well I did since they were the only ones to make it that day and had to remain on the beach until 7 that evening. Some dental patients came out by skin boat but only one boatload made it. The next day the captain thought he'd give it a go. He took the motor launch and a small boat, planning to anchor the launch out from the beach and ferry

Continued on page 13

# Floating court sails to Nome and points to the North

Continued from page 12

personnel and patients to it, using the small boat on ropes. Tried to get ashore twice but succeeded only in losing an anchor. We did manage to bring a new passenger aboard. He was a technician from the U.S. Navy Electronics Laboratory at Wales who was conducting a study of the currents in the Bering Strait. Our job was to transport him from Wales to the International Date Line and return him to Wales.

The Bering Strait is the narrowest part of the Bering Sea, separating Russia from Alaska by only 53 miles. Early piratical adventurers like Max Gottschalk crossed regularly to traffic illegally with Siberian natives, bring back to Nome rich pelts and ivory tusks. The International Date Line runs down through the Bering Strait, squeezing snugly between two islands, Russia's Big Diomedes and our own Little Diomedes. They are only three miles apart. The naval technician had

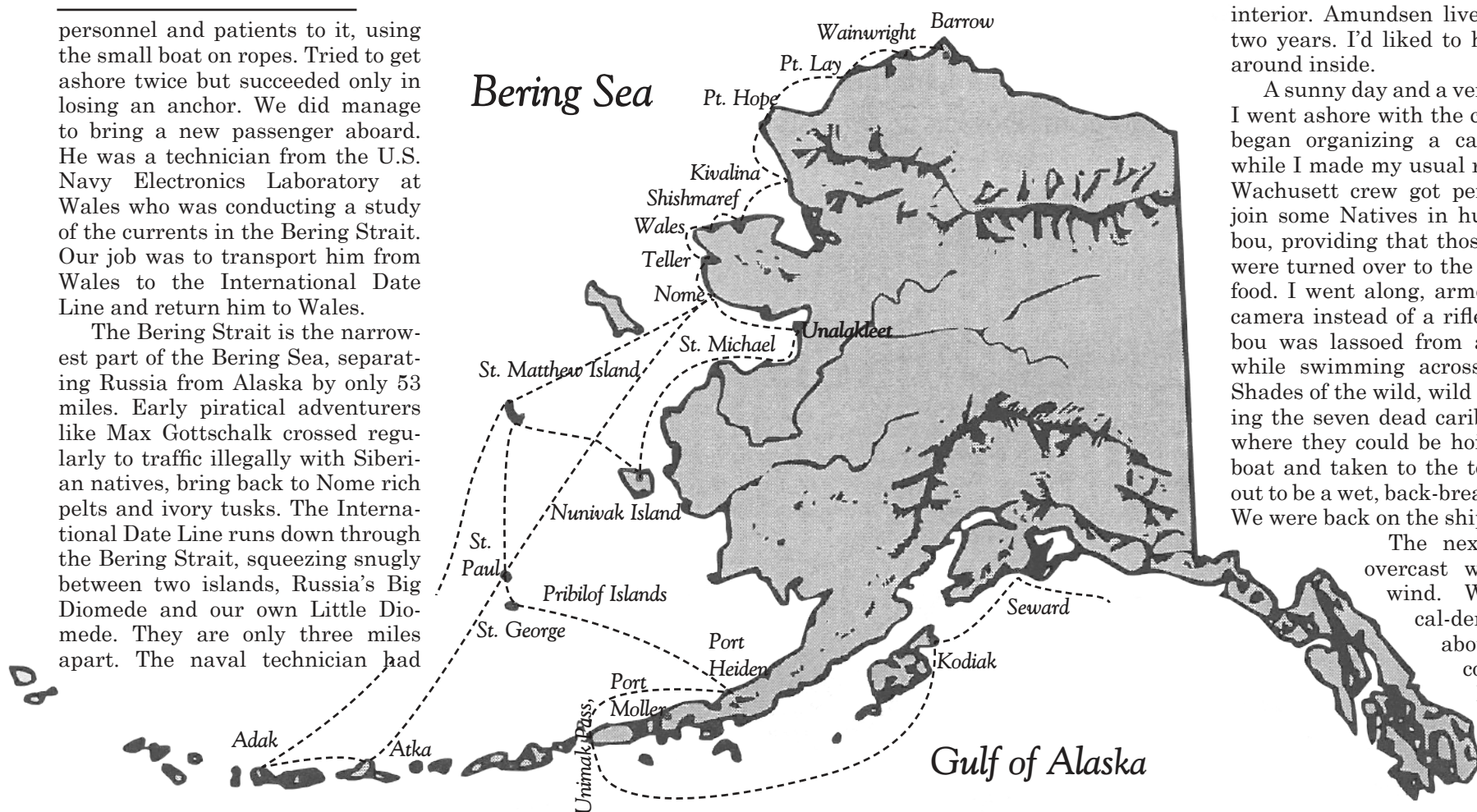
been taking current measurements all the way from Wales. He kept right on as we passed down between the islands, but I stared at the land mass that was Russian.

It was a memorable event for me. Between 9:15 and 11 that evening we crossed the date line twice, passing from Aug. 16 to Aug. 17 the first time and back again into Aug. 16 the second time. I had done time-travel before but never twice in two hours. "Backward, turn backward, O time, in our flight." And when it happened, we were only one-and-a-half miles away from Russian territory. In 1957 that was close enough.

We returned the technician to Wales in the morning via skin boat, a skeletal frame over which walrus skins had been stretched and fastened. (He took correspondence from me to Fred, wrapped in foil.) In the turbulent weather, it was still impossible to take the surf boat to the beach so medical and dental patients came out to the boat in their own skin boats, called "umiaks." Chatting with them, I learned that the isolated winter conditions and constant importing of liquor sometimes resulted in violence. Six months earlier one man had been shot and wounded seriously by his own brother. Aside from such incidents, there seemed to be no other crime patterns. The Arctic Field Station of the U.S. Navy was located there, and the non-com in charge of the National Guard unit was also the Alaska Department of Health representative. The Natives bartered skins and ivory for supplies. An elected council met monthly.

With two passengers aboard who had to be dropped off, Shishmaref was a brief stop the next day. It was a long village, set low on the beach, and quite exposed to northern storms. A registered and incorporated village, with about 200 Natives and 10 whites, it was governed by a five-man council. The residents were apparently semi-nomadic. Some worked at Nome, some carved ivory, and some hunted seals. The medical and dental teams finished

## THE ROUTE OF THE U.S.S. WACHUSETT



around 8 p.m.

Kivalina, our next stop, lies north of the Arctic Circle. Sailors who cross the Circle for the first time (dubbed "Ice Worms") are traditionally hailed before a hideously whiskered and magnificently enthroned "King Neptune" (usually enacted by the most formidable member of the crew) and subjected to a humiliating hazing in honor of the occasion. There had been some discussion about conducting a King Neptune initiation on this leg of our journey but it was quietly rescheduled to take place after I left the ship. My ubiquitous movie camera probably inspired those second thoughts.

However, as we crossed the Circle at Longitude 165 degrees, 49 west, I had qualified. Certification arrived by mail some time later. I am now a member of the "Order of the top of the world, Bering Sea Patrol," and an honored citizen of the "Auroral Arctic Empire in the Silent Realm" by order of the "Boreas Rex, Emperor of the realm of Eternal Whiteness." The certificate is countersigned by Captain Applegate, but Chief Louis Steyskal, self-proclaimed "Arctic explorer," applied the seal of authenticity.

We arrived at Kivalina in a fairly calm sea early on Aug. 19. It seemed to be a pleasant, well-adjusted community with a population of about 130. The temperature can drop to 70 below in the winter. Liquor problems were rare; Kivalina had a strong local council. A 9 p.m. curfew was imposed during the school year. Boy Scout and Girl Scout chapters were active, as was a National Guard unit. The Natives fished and hunted caribou, ducks and seals. They also did long-shoring and lighterage when work was available. Many worked in Fairbanks or Nome during the summer.

The next day we were at Point Hope. (Personally I still prefer the older name, Tigara.) Like many other coastal villages, it sat on a long peninsula with a wide beach between it and the sea. The earlier village had been slowly eaten away by

waves so newer buildings were being built a bit farther inland. It had a happy, active population of about 275 with a town marshal who was seldom needed. The 11-man council, elected for three-year terms, was strong and aggressive. Under its leadership, the village had acquired two defunct diesel engines, repaired them, and began constructing lines to supply electricity to village houses. Poles were floating timbers, rescued from the sea, or brought in from Kotzebue. Piping water to the houses from existing communal wells was being studied. When not busy improving the village, whaling and hunting polar bears were their major occupations. Whaling season closed in the early part of June, and whale feasts were held by rival whaling groups. Whale bones were construction material. The fence surrounding the cemetery was made of upright whale bones. Some years previously an old village site was found about a mile inland and for a while Point Hope was flooded with scientists, probing the old ruins.

I'd like to have stayed longer at Point Hope but we had to push on. In the morning of Aug. 23, we dropped anchor off Point Lay in a surf rough with heavy on-shore breakers and high winds. Sixteen DEW Line workers and 28 Natives called it home. I thought it would be the most remote village I would visit; however, I never got ashore. Neither did the medical-dental teams. With only 16 patients to treat, they came to the ship instead. Done by noon, we sailed on to Wainwright, arriving early Saturday morning, Aug. 24.

It was a somewhat scattered village built on a boggy tundra overlooking a narrow beach. Drainage was poor and mud was plentiful. Roald Amundsen used Wainwright as a base during polar explorations. Moving toward our anchorage, I caught a slow, distant glimpse of his house, "Maudheim," three miles before we reached Wainwright. It was a long, low building parallel to the beach and at the mouth of a lagoon

that stretched for miles into the interior. Amundsen lived there for two years. I'd liked to have looked around inside.

A sunny day and a very calm sea. I went ashore with the captain who began organizing a caribou hunt while I made my usual rounds. The Wachusett crew got permission to join some Natives in hunting caribou, providing that those they shot were turned over to the Natives for food. I went along, armed with my camera instead of a rifle. One caribou was lassoed from a surf boat while swimming across a lagoon. Shades of the wild, wild west. Hauling the seven dead caribou back to where they could be hoisted into a boat and taken to the town turned out to be a wet, back-breaking chore. We were back on the ship at 11 p.m.

The next day was overcast with a cold wind. With medical-dental work about done, we could be in Barrow the next day. Mail for the ship was still in Fairbanks.

Timing for arrival in Barrow was tricky. The ice pack was only seven miles offshore and the captain wanted to be sure the icebreaker North Wind was available to cut us out if the ice closed in. I ate lunch with the chiefs and supper with the Captain, Haislip and McDowell. (The chiefs eat better than anyone.)

We moved from Wainwright to Barrow, arriving about 10 a.m. Aug. 27. The sea was extremely rough. Getting me ashore was only possible by using a landing craft from another vessel there. I made my sincere but hasty farewells to the hospitable crew of the Wachusett. The ice pack was slowly moving closer and they didn't want to get locked in. And the Barrow-Fairbanks plane was waiting for me to climb aboard. I took a quick look at Barrow and then did just that. When we touched down at Fairbanks, Marshal Dorsh chatted with me at the airport until my flight left for Anchorage.

Traveling about 6,500 miles over almost two months to visit 23 towns and villages, I had been told of only five cases with real criminal potential. All involved welfare violations or illegal sexual activities, including one case of statutory rape. ("prosecutor" David Haislip agreed that the cases should be referred to appropriate authorities for further investigation.) The cost to our department was \$324. I was home at last in the late evening of Aug. 27. Home from the final voyage of Alaska's floating court.

There's a song that's sung by those who have sailed the Bering Sea. Writing this, I recall the final stanza:

"So when you boats of fiercest gale,  
That ever ocean you did sail,  
You cannot salty sailor be  
Until you cruise the Bering Sea."

# Exploring the 5 and 5 power when dealing with trusts

By Steven T. O'Hara

Suppose someone creates a trust for you and grants you the power to appoint trust property to yourself. You are the donee of the power. But what would you call that power?

Powers of appointment have many names based on their various characteristics. A common power is known as a "5 and 5" power, which is descriptive of the limit set by the Internal Revenue Code for favorable estate and gift tax treatment; here, the code sets the limit as the greater of \$5,000 or 5% of trust corpus. The limit itself is known as the 5 and 5 exclusion. See IRC Sec. 2041(b)(2) and 2514(e).

Within the family of 5 and 5 powers, there are powers that reference only one 5, such as the \$5,000 power (where the power holder is limited to \$5,000 per year) and the 5% power (where the power holder is limited to 5% of the trust per year). A 5% power is illustrated below.

Suppose a client has decided to grant a 5% power in a trust she is designing to come into existence at her death. When ought the power begin? Immediately at the client's death? Some other date? And when ought the power end?

Many years ago, two law school professors, whose courses I had the privilege of taking, shared estate planning forms with me; one gave me a published form book, the other an assortment of private forms. Based on my studies over the years, including my study of these documents, I would offer the following food for thought: The client might consider beginning the power one year after her death and ending the power one day before the donee's death, illustrated thusly:

*If my brother survives me, then commencing one year after my death, the Trustee shall distribute to my brother as much of the principal of the trust as my brother may from time to time*

*direct in writing, provided that:*

*(a) Trust distributions from the trust pursuant to this right of withdrawal in any calendar year shall not exceed in value five percent (5%) of the aggregate value of the principal of the trust at the end of that year. I refer the reader to IRC Sections 2041(b)(2)(B) and 2514(e)(2) for the tax significance of the words used in this clause (a); and*

*(b) This right of withdrawal shall expire on the day preceding the date of death of my brother.*

Why would the client begin the power one year after her death? Because the client may want a good argument for the trust to be 100% sheltered from federal generation-skipping transfer ("GST") tax through GST exemption as of her death. IRC Sec. 2632(a) and (e) (at death, unused GST exemption is deemed allocated pro rata to direct skips under the GST tax system and then pro rata to trusts; decedent's personal representative may allocate GST exemption differently on a timely filed federal estate tax return).

Note that every dollar in a trust is assigned, for GST tax purposes, to an individual as the transferor of that dollar. See Treas. Reg. Sec. 26.2652-1(a)(1). Beginning when the donee's power comes into existence, the donee may become the transferor of the part of the trust relating to the power. In other words, the donee of the power may become the imputed transferor of property for income tax, gift tax, estate tax, and GST tax purposes. IRC Sec. 678(a)(2), 2511, 2514(b) and (e), 2033, 2041(a)(2) and (b)(2), and 2652(a). And note that state law



**"A 5 and 5 power can keep the actual settlor of a trust the sole transferor of the trust, avoiding imputed transferors under the GST tax system."**

may consider the beneficiary to own the property he can appoint to himself. In Alaska, there is a statute that provides that the trust beneficiary's creditors cannot reach property that the beneficiary can appoint to himself except to the extent that the beneficiary "effectively exercises" the power for the benefit of himself, his estate, or the creditors of either. AS 34.40.115.

In our case, if the 5% power becomes effective at the client's death, the trust might be eligible to be only 95% sheltered from the GST tax. Cf. IRC Sec. 2642(f) (imposing a limita-

tion on authority to allocate GST exemption during the so-called estate tax inclusion period). And the donee of the power might then need to allocate GST exemption to the trust if the goal is to continue to exempt 100% of every part of the trust from the GST tax. See IRC Sec. 2631 and 2642. By contrast, if the 5% power becomes effective after the client's death and is within the 5 and 5 exclusion, the client might remain the transferor of 100% of the trust under the GST tax system. See Treas. Reg. Sec. 26.2652-1(a)(5) (Example 5).

Why end the 5% power before the beneficiary's death? Because if the beneficiary has the power at the time of death, the property subject to the power at that moment is includable in the beneficiary's gross estate for federal estate tax purposes. IRC Sec. 2041(a)(2); 1 Roy M. Adams *et. al.*, *Illinois Estate Planning, Will Drafting and Estate Administration Forms* 137 (Aspen Publishers 1988) (illustration of a Will creating a QTIP Trust wherein the surviving spouse is granted a 5 and 5 power expiring the day before the surviving spouse's death).

Granting a 5 and 5 power may provide tax benefits. Below are examples of possible tax benefits:

A 5 and 5 power can move taxable income to the individual tax return of the power holder, thus minimizing the compressed income tax rates of trusts which reach the top tax bracket very quickly. See IRC Sec. 1(e) and (j)(2)(E) and 678. Note that when a trust has a 5 and 5 power, the trust's federal income tax return can be different each year even where the facts and the law remain the same. This point is discussed in my blog post entitled "Trust Tax Returns Need Extra Attention" at [www.oharatax.lawyer](http://www.oharatax.lawyer).

A 5 and 5 power can qualify gifts through trusts for the gift tax annual exclusion. See IRC Sec. 2503(b) and *Crummey v. C.I.R.*, 397 F. 2d 82 (9<sup>th</sup> Cir. 1968). This point is mentioned in my blog post entitled "GST Tax Issues Appear in Everyday Transactions" at [www.oharatax.lawyer](http://www.oharatax.lawyer).

A 5 and 5 power can provide a way to avoid an imputed transaction under tax law as well as at least two Internal Revenue Service reporting requirements. This point is discussed in my blog post last mentioned.

A 5 and 5 power can keep the ac-

tual settlor of a trust the sole transferor of the trust, avoiding imputed transferors under the GST tax system. Keeping the actual settlor the sole transferor can be important where a trust starts out 100% exempt from GST tax. This point is also discussed in my blog post last mentioned.

A 5 and 5 power can provide the current beneficiary of a QTIP Trust (short for Qualified Terminable Interest Property Trust) flexibility to withdraw property which might then be gifted to descendants or others. Cf. IRC Sec. 2056(b)(7)(B)(ii)(II) (surviving U.S. citizen spouse must be the only current beneficiary of the QTIP Trust during the spouse's lifetime). Regardless of whether a federal estate tax return is required under IRC Sec. 6018 on the death of the first spouse to die, the personal representative of the decedent may decide to make the QTIP election with respect to every QTIPable trust based on: (1) the unlimited marital deduction under IRC Sec. 2056; (2) the portability of unified credit under IRC Sec. 2010(c)(5)(A); and (3) the step up in basis at death currently available under IRC Sec. 1014. Cf. Rev. Proc. 2017-34. Note that it may be advantageous, therefore, to draft the credit-shelter trust to be QTIPable under an A/B or tripartite estate plan in a client's Will or Revocable Living Trust where the client is married to a U.S. citizen. Cf. IRC Sec. 2056(d). With all trusts under a married client's estate plan being QTIPable, a 5 and 5 power can indeed provide flexibility.

A 5 and 5 power can provide the settlor's surviving spouse with a greater interest in trust. The greater the interest given to a surviving spouse, even if the interest is not included in the surviving spouse's gross estate, the better the case with the IRS that a larger PTP credit (short for previously taxed property credit) is available in the surviving spouse's federal estate tax return. See IRC Sec. 2013(e) and Rev. Rul. 79-211, 1979-2 Cum. Bull. 319 (holding a 5 and 5 power qualifies as property for purposes of the PTP credit). Just as electing to pay federal gift tax by planning with certain lifetime gifts can reduce overall federal transfer taxes (due to the tax-exclusive calculation of gift tax under IRC Sec. 2502(c) and 2512, among other factors), so electing to pay federal estate tax on the federal estate tax return of the first spouse to die can reduce overall federal transfer taxes (due to the PTP credit, among other factors). On the other hand, the personal representative of the estate of the first spouse to die may decide to make the QTIP election for every QTIPable trust. See the previous paragraph.

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.

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

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## Law Library News

### Print resources (still!) available

By Susan Falk

In May, the court system was the victim of a serious cyber attack. The breach was discovered early, but the court disconnected all systems from the internet to prevent further damage to the network while servers were rebuilt and restored. As a result, court staff could not access the internet, and the public could not access the court system's website or any of its contents.

As so many of us conduct legal research online these days, this situation posed a bit of a problem — court staff could no longer access computer assisted legal research databases from work. Westlaw, Hein, Basis, the Lexis Digital Library, and all the other electronic resources I tout in this space were unavailable from court computers. Fortunately, the library was able to offer a work-around: books.

A law librarian's least favorite question is, "Isn't it all on the internet?" Well, no. But more importantly for our purposes today, sometimes the internet isn't even on the internet. Should you ever find yourself in this uncomfortable position in the future, remember that the law library still maintains a robust print collection, and these books are available for attorneys to use in the library or check out for use in your office.

The library carries case reporters and digests, statutes, regulations, and court rules. While we no longer maintain current primary law in print for all 50 states, we still have slightly older regional reporters and relatively recent statutes, as well as current statutes for a handful of states including California, Oregon and Washington. We always have the most current laws for Alaska. Our law review collection has shrunk in these digital times, but our treatise collection remains comprehensive. We also have AmJur, ALR, Words and Phrases, dictionaries and encyclopedias, and a complete collection of Alaska legislative history materials (excepting digital-only material).

So should you find yourself — gasp — cut off from electronic resources, remember your friendly neighborhood law library still has books, and we still want to share them with you. Give us a call at (907) 264-0856, or — double gasp — drop by in person and see how we can help.

*Susan Falk is the Alaska law librarian.*

## Lawyer joke ...



How many lawyer jokes are there, anyway? Only three. The rest are true stories.

## Supreme Court suspends Anchorage attorney

On February 26, 2021, the Alaska Supreme Court suspended attorney Gayle Brown for three years and one day, with one year of the suspension stayed, adopting a stipulation between the Alaska Bar Association and Ms. Brown as recommended by the Disciplinary Board. Reinstatement proceedings following a served suspension of two years and one day will be conducted as set out in Alaska Bar Rule 29(c)(1)-(4).

Ms. Brown failed to appeal a dismissal of a client's post-conviction relief action, failed to tell her client that his PCR was dismissed, and failed to tell the client of his right to appeal the dismissal and the timeline for doing so. When representing another client, Ms. Brown also ignored deadlines extended at

her request to file an amended application for post-conviction relief, ignored court inquiries, and ignored her duty to tell her client promptly about the dismissal of his petition and remedies he might pursue. Ms. Brown agreed her conduct violated professional conduct rules governing diligence, communication and expediting litigation.

The court considered several aggravating and mitigating circumstances, including that Ms. Brown had prior disciplinary offenses. Ms. Brown, however, exercised a good faith effort to rectify the consequences of her misconduct by assisting successor counsel.

Prior to participating in a reinstatement hearing, Ms. Brown will

certify that she has earned at least 9 credit hours of CLE in the areas of ethics and law office management. If Ms. Brown is reinstated, she has agreed to be supervised by an attorney for 12 months following her return to the active practice of law. The supervising attorney will report at least monthly to Bar Counsel about Ms. Brown's case management, compliance with court deadlines, and communication with clients. If during the term of supervision, Ms. Brown receives discipline for neglect or failure to communicate, the one year of stayed suspension will be imposed in addition to discipline ordered for the new misconduct.

Ms. Brown's suspension became effective on March 28, 2021.

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# SEC tweaks integration of security-offering provisions

By Julius J. Brecht

Recently, the Securities and Exchange Commission issued a release (Release)<sup>1</sup> announcing adoption of final rules on a different approach to be followed in determining integration of securities offerings under federal law (Changes). With limited exception, the Changes are effective as of March 15, 2021.

The Changes affect a broad range of offerings, both private and public, subject to the federal Securities Act of 1933, as amended (Securities Act). They also pertain to the Securities Exchange Act of 1934 (Exchange Act) and the Investment Company Act of 1940 (ICA).

## What's Integration?—

You say, what's "integration" as used by the SEC? To answer this question, we need to review a few basics of security offerings under federal law.

The Securities Act was enacted primarily to require that investors receive financial and other significant information regarding securities offered for public sale. The Exchange Act was enacted to govern security transactions in the secondary market after issue. The ICA was enacted to establish a stable financial market framework following the market crash in 1929. The Securities Act defines a security by setting forth a long list of items exemplifying the term, including stocks, bonds and numerous other identified instruments and transactions.

The Securities Act requires that an offer and sale of a security must be registered unless an exemption from registration is available. It contains numerous security registration exemptions. The Securities Act also allows the SEC to adopt additional exemptions. The SEC has, from time to time, exercised that authority.

So, the SEC uses the term "integration" in a narrow sense to address and prevent a securities issuer from improperly avoiding registration of an offering. Such avoidance might include an issuer's arbitrarily dividing a single offering into multiple offerings in an attempt to satisfy a security registration exemption based on an investor numerical limitation.

For example, prior to effectiveness of the Changes, the registration exemption under federal Regulation D, Rule 506(b) (a private offering exemption adopted under the

Securities Act) allowed no more than 35 investors. This limitation did not include "accredited investors" as defined in Regulation D, Rule 501 (adopted under the Securities Act).

A careful read of the full Release is needed to get its impact on numerous areas of federal securities law. In addition, the Changes may affect how the State of Alaska administers the Alaska Securities Act pertaining to private and public offerings.<sup>2</sup>

## Changes —

Intended Purposes. The Release states the Changes are meant to facilitate capital formation, as well as to increase investor opportunities. It proposes to attain these goals by expanding access to capital for small and medium-sized businesses and entrepreneurs in the United States.

The Changes generally include the following:

- Modernizing and simplifying integration — For exempt and registered offerings under the Securities Act.
- Establishing rules governing — Offering communications between issuers and investors.
- Increasing, for certain exemptions — Offering and investment limits.
- Harmonizing provisions for other limited matters addressed at different places in the federal rules.

As an example of the above third bullet, the offering dollar limit under federal Regulation D, Rule 504 (adopted under the Securities Act) changes from \$5 million to \$10 million.

A little history. Prior to the Changes, the approach taken by the SEC on the integration concept was that integration of two or more offerings ought to be based on an analysis of specific facts and circumstances of them. This approach had been the basis for determining whether two offerings fell outside safe harbor provisions set forth in federal Regulation D, Rule 502(a) (adopted under the Securities Act) and had to be treated as one offering.<sup>3</sup>

New Rule 152 and Safe Harbors. The Changes establish a new approach to integration through a new Rule 152(a). This rule provides guid-

ance in the form of a general principle of integration (GPI).

The Changes also set forth, in new Rule 152(b), four safe harbors which apply to all security offerings under the Securities Act (Safe Harbors). No integration analysis under Rule 152(a) is required should an offering or offerings satisfy one or more of the Safe Harbors.

New Rule 152(a) provides as follows:

- Should Safe Harbors in Rule 152(b) not apply — Determination of whether two or more offerings are to be treated as one for purposes of registration or qualifying for exemption-- Offers and sales are not integrated if, based on particular facts and

circumstances, the issuer can establish that each offering either complies with registration requirements or that exemption from them is available for the offering.

- Application of GPI-- Where an exempt offering prohibits general solicitation<sup>4</sup>— o Issuer must have reasonable belief, based on facts and circumstances and regarding
- each purchaser in an exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either-- Did not solicit that purchaser through general solicitation, or did establish a substantive relationship with that purchaser prior to commencement of that exempt offering.
- Application of GPI— For concurrent exempt offerings that each allow general solicitation—
- In addition to satisfying particular exemption requirements, general solicitation offering materials for one offering containing material terms of a concurrent offering under another exemption may constitute a security offering, and the offer must comply with all requirements for, and restrictions on, offers under the exemption being relied upon for such other offering (including legend requirements and communication restrictions).

The Safe Harbors are set forth in new Rule 152(b) as follows:

- Safe Harbor 1— Any offering made more than 30 calendar days before commencement of, or 30 calendar days after termination or completion of, any other offering would not be integrated with that offering, with limited further conditions.
- Safe Harbor 2 — Certain offers and sales executed outside the United States (and otherwise satisfying Regulation S (adopted under the Securities Act)).
- Safe Harbor 3 — Certain offers and sales involving "qualified institutional buyers" and "institutional accredited investors."
- Safe Harbor 4 — Offers and sales made in reliance on an exemption for which general

solicitation is permitted are not integrated if made subsequent to any terminated or completed offering.

A lot of information is packed into the previous two Rule 152 bullet outlines. For example, under Safe Harbor 1, the integration avoidance period under Regulation D, Rule 506(b) changes from six months to thirty days.

Nevertheless, under the Changes and as described in the Release, Regulation D, Rule 506(b) is further limited. It provides that, within any 90-calendar day period, the number of purchasers is limited to no more than (or the issuer reasonably believes that there are no more than) 35 sophisticated but non-accredited investors in offerings of the issuer's securities in reliance upon Rule 506(b).

## Summary —

The SEC's effort on the Changes is detailed and broad in scope (the Release is almost 400 pages in length). Integration touches on numerous securities registration exemptions under federal law. With the Changes, integration also enters into the interplay between possible concurrent issuer private and registered securities offerings.

While this article covers some of the Changes in limited fashion, a prudent practitioner, in advising an issuer of, or purchaser in, a security offering under the Securities Act (or in some way subject to the Exchange Act or ICA), ought to become familiar with all of the Changes.

Good luck on your read of the Release.

This article was prepared solely to provide general information about the topic. Its content was not prepared as, and must not be construed as, legal, tax, investment or other advice to anyone. Nothing in this article is intended in any way to form an attorney-client relationship or any contract.

## Footnotes

<sup>1</sup> "Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets," SEC Release Nos. 33-10884, 34-90300, IC-34082; RIN 3235-AM27; November 2, 2020.

<sup>2</sup> The Alaska Securities Act, AS 45.56, replaced the previous state statutory securities law and became effective as of January 1, 2019. As of the date of this article, the state had not adopted new regulations under the Alaska Act.

<sup>3</sup> The approach was based upon application of five factors, i.e., whether the offerings (i) were a part of a single plan of financing, (ii) involved issuance of the same class of security, (iii) were made at or about the same time, (iv) consisted of the same type of consideration, and (v) were made for the same general purpose.

<sup>4</sup> Regulation D, Rule 502(c) (adopted under the Securities Act) defines "general solicitation" or "general advertising" as including but not limited to an advertisement, article, notice or other communication published in a newspaper, magazine or similar media or broadcast over television or radio; and any seminar or meeting whose attendees were invited through such solicitation or general advertising (with limited exception).

*Julius J. Brecht is an attorney in private practice and Of Counsel with the law firm of Bankston Gronning Brecht, P.C. with offices in Anchorage. His concentration of practice is in state and federal securities law and corporate and business law. He may be reached at jbrecht@bgbalas-ka.com.*

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# 38 new Bar members sworn in

The Alaska Court System and the Alaska Bar Association hosted their second virtual swearing-in ceremony for new members of the Alaska Bar Association Thursday, May 20, 2021. Justice Susan Carney presided over the virtual swearing-in of 38 new lawyers. There were 89 participants who logged onto the ceremony through Zoom. Most of the new lawyers can be seen raising their right hands as they take the Oath of Attorney which was administered by Meredith Montgomery, clerk of the Appellate Court.

**NEW MEMBERS:**

Allison Athens	Anderson Grossman	Amanda Palazzolo	Dezira Robb *	Erin Welden
Amber Bennett *	Adam Haynie	Hannah Payne	Spencer Rossini	Jackson Willard
Nicole Burke	Carmen Johnson *	Alex Petkanas *	Victoria Sarant	Daryl Zakov *
Rory Butler	Peter Lovecchio	Ileane Polis	Steven Stewart *	
Katherine Chung	Colleen Maney	Emma Poorman	Amy Taylor	* Denotes United States District Court admission
Kristen Dikeman *	Ashley McBee *	Raymond Powers *	Meredith	
Deni Dzhantaev	Daniel McCarthy III	Benjamin Raker	Thielbahr *	
Paul Ervasti	Nicolas Olano *	Portia Rauer *	Eric Tweed	
Liana Fili	Julie Pack	Zachary Reeder	Coralette Waite	



## A Zoom meditation class in Covid Winter

A poem by Cam Leonard

*I am thinking about  
My plans for the day:  
Important things I need to do  
Of which I have not made a list  
Yet. Stop. Redirect  
To self-compassion —  
That is our theme.  
My eyes are closed, video off,  
But I sneak a peek  
Out of only one eye  
At the screen, our grid  
Of earnest souls, seeking,  
Like myself, the respite  
Of a quiet mind.*

*And I am reassured  
By this primate checkerboard,  
My virtual and silent tribe,  
Some warmth against the snow  
outside.  
I am calmed  
By this company,  
And focus on my breath  
As our leader suggests.  
I am, after all, OK,  
And don't need therapy  
At least not yet. But still...  
I am thinking about things  
I am thinking about  
I am  
Zoom  
Om*

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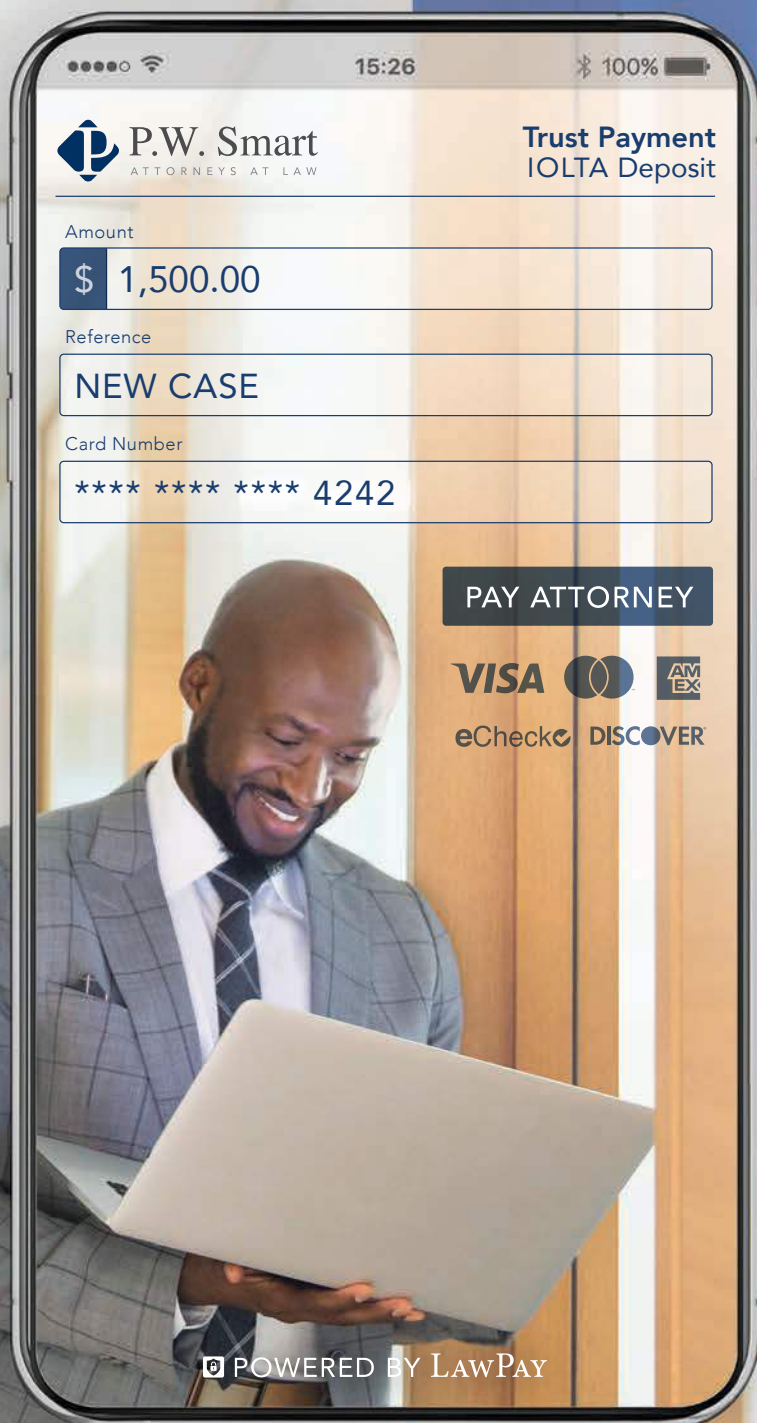
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# 19 law students to receive scholarships

In the 1980s, the Alaska Bar Association offered a scholarship program for Alaskans who were first- and second-year law students and intended to return to Alaska after law school graduation. Alaska has no law schools, so the cost of a legal education for Alaskans is even more expensive because of travel, housing and out-of-state tuition costs. Law students today face a much larger financial burden than most seasoned practitioners did when they were in law school 30 years ago. Unfortunately, the Bar's scholarship program was discontinued long ago. In 2018, however, the Board of Governors voted to implement a new scholarship program.

The scholarship program works as follows: The Bar Association created a special fund managed by the Alaska Bar Foundation, a 501(c)(3) organization. Donations to the fund are therefore tax-deductible. Interested first- and second-year law students are required to submit an application and a one-page essay about why they want to come back to Alaska and practice law here. The Bar's Scholarship Committee may request proof of residency and law school enrollment to verify applicant eligibility requirements.

The Scholarship Committee met April 22 to review applications and announce the scholarship recipients. The Bar received a total of \$6,555 in generous donations. All funds received before April 22 were applied to this year's scholarship program. Nineteen scholarships were awarded in the amount of \$345.

## 2021 Scholarship recipients:



Brianna Bennett



McKinley Brock



Jeremy Conkling



Cynthia Cook



Aaron Druyvestein



Arina Filippenko



Zander Hoke



Caroline Humphreys



Emily Kingsley



Erin LaMere



Bobbie McNeley



Kieran O'Neil



Katherine Pace



Chelsea Phelps



Chanel Simon



Jenna Sutton



Kathe Tallmadge



Emily Walker



Kirsten Williams

## 2021 Scholarship donors:

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- Mckenzie Smith
- Moira Smith
- Stoel Rives LLP
- Robert Stone
- Tom Wagner
- Morgan White

*The Bar would like to thank all of the donors.*

The Bar is now accepting donations for the next round of scholarships. Any contribution will be greatly appreciated, and you or your organization will receive public recognition at the Alaska Bar Convention as well as acknowledgment in the Bar Rag. This is a great opportunity to help struggling Alaska law students make the most of their legal education. These students will return to Alaska to become our next generation of lawyers and judges.

Please send your tax-deductible check, payable to the Alaska Bar Scholarship Fund, to the Bar office, or log on to the Bar's website at [www.alaskabar.org](http://www.alaskabar.org) and pay online. Please contact Bar staff if you have any questions. Thank you for your consideration and support.

ALASKA BAR ASSOCIATION 1996 - 2021

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Mary Anderson



Constance Aschenbrenner



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Nacole Heslep



Mary Holleman



Campbell Jackson



Kevin Jardell



Jill Jensen



Gregory Johnson



Glenda Kerry



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

Fairbanks: Aimee Oravec, [aimee@akwater.com](mailto:aimee@akwater.com)

Mat-Su: Greg Parvin, [gparvin@gparvinlaw.com](mailto:gparvin@gparvinlaw.com)

Anchorage: Stephanie Joannides, [joannidesdisputeresolution@gmail.com](mailto:joannidesdisputeresolution@gmail.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, transportation, medical community contacts and referrals, and other possible solutions through the contacts of the Alaska Bar Association and its membership.



Eric Nixdorf



David Parry



Carolyn Peck



Joseph Pollock



Janis Searles



Jack Smith



Jana Turvey



Kurt Twitty



Raymond Warns



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Joan Wilson



Avraham Zorea

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Wonnell

ALASKA BAR ASSOCIATION 1971 - 2021

# 50 Years of Bar Membership



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Abigail Dunning  
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O. Nelson Parrish



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Peter Smith



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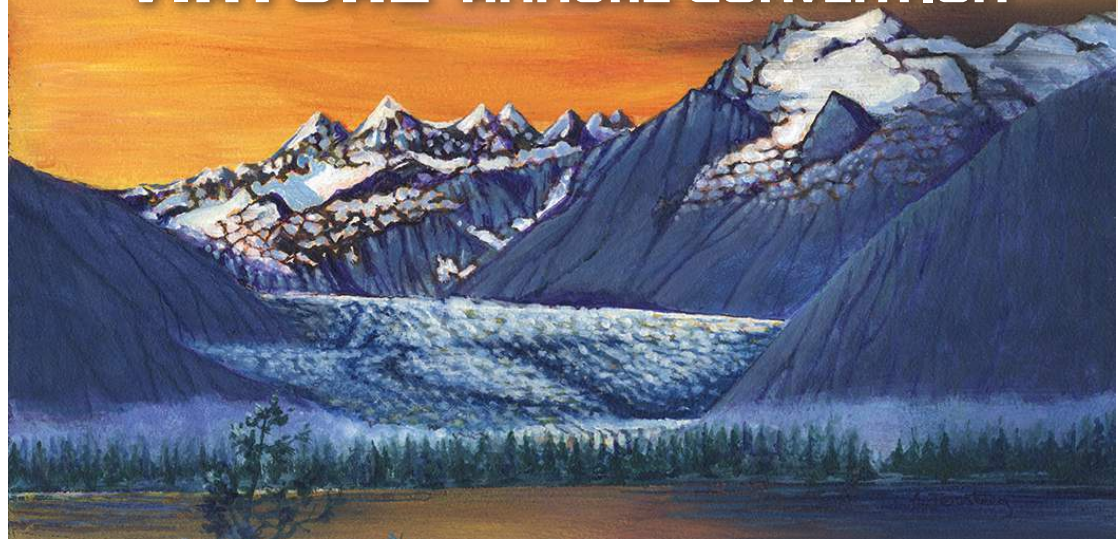
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ALASKA BAR ETHICS  
OPINION 2021-1**Representation of Multiple Clients Charged in Criminal Cases**

**ISSUE:** Under what circumstances, if any, may an attorney ethically represent multiple clients who have been charged with criminal offenses arising out of the same set of facts?<sup>1</sup>

**CONCLUSION:** ARPC 1.7(a) prohibits a lawyer from representing multiple parties when doing so creates a concurrent conflict of interest. Representation of multiple parties in the same criminal matter is a classic example of a concurrent conflict of interest because there is always a significant risk that the representation of one client will be limited by the lawyer's responsibilities to the other client.

However, ARPC 1.7(b) allows in certain, rare situations for concurrent representation when the precise requirements of the rule are met. Specifically, the lawyer must reasonably believe competent and diligent representation can be provided and all the affected clients give informed consent, confirmed in writing.

Because of the significant consequences often attendant to a criminal conviction and a criminal defendant's Constitutional right to effective representation of counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 11 of the Alaska Constitution, the requirements for obtaining informed consent to multiple representation are particularly stringent when multiple clients are charged with crimes arising out of the same set of facts. Accordingly, lawyers should ordinarily avoid concurrent representation of criminal defendants in a case when informed consent of the clients becomes necessary.

The Committee has been presented with two sets of facts relating to the ethical considerations in representing multiple clients who have been charged with criminal offenses arising out of the same set of facts.

1. Defendant A and Defendant B have been charged with theft of the same vehicle, which belongs to Defendant A's employer. Both defendants originally told the police that Defendant A was the only person who drove the vehicle. They now maintain that no crime was committed because, although both of them drove the vehicle, Defendant A had permission to use the vehicle and he gave Defendant B permission to drive the vehicle as well. The Committee concludes that concurrent representation of Defendants A and B is impermissible because a lawyer could not reasonably believe that competent representation could be provided to each client given the multiple ways their interests could diverge.

2. Two commercial fishers were charged with fishing in closed waters and falsely identifying where they caught the fish. Each has a permit for one of the species of fish they caught; one of the defendants is the boat owner and the other is a crewman. Here, the Committee concludes that concurrent representation of the fishers is likely prohibited, again because of the number of ways their interests could diverge; however in a very narrow set of circumstances concurrent representation could be possible with informed written consent of both clients.

**RULES:** ARPC 1.7(a), (b) and (c); 9.1(g) and (c); 1.1; and 3.2

**ANALYSIS:**

ARPC 1.7(a) prohibits a lawyer from representing multiple parties when there is a concurrent conflict of interest among them.<sup>2</sup> In criminal

cases the prohibition against concurrent representation is particularly important: "The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."<sup>3</sup>

Issues that may be unique to concurrent representation in criminal matters, or at least more consequential than in civil matters, might include:

- A. the defendants may be charged with disparate degrees of criminal activity;
- B. one client may be offered a favorable plea agreement that may require testimony against the other;
- C. a defense strategy that favors one client may preclude a theory that is more favorable to the other;
- D. the defendants or their witnesses may testify unfavorably to each other;
- E. counsel's arguments suggesting a minor role for one client may highlight a larger role for the other;
- F. a legal argument for one client may be harmful to the other;
- G. sentencing arguments may emphasize relative culpability to the detriment of one of the clients.

Additionally, questions of timing may play a role: one defendant may wish a speedy trial, while another may find delay better serves his or her interests. The allocation of funds and time between defendants may also create readily apparent conflict issues.

Nevertheless, ARPC 1.7(b) allows for concurrent representations in rare cases when certain requirements are met, including whether the lawyer reasonably believes competent and diligent representation can be provided and the affected clients all give informed consent, confirmed in writing.<sup>4</sup> The terms "informed consent" and "confirmed in writing" are defined in ARPC 9.1(g)<sup>5</sup> and (c).<sup>6</sup>

**When is a concurrent representation conflict not waivable in a criminal matter?**

ARPC 1.7(b) allows a lawyer to represent multiple parties with concurrent conflicts only when "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." The Comment provides guidance on this issue:

The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

The ABA Standards for Criminal Justice (2015) supply additional guidance for assessing conflicts in

criminal matters. Standard 4-1.7(d) states that, except to secure counsel for certain preliminary matters, "defense counsel (or multiple counsel associated in practice) should not undertake to represent more than one client in the same criminal case."

Nonetheless, the Standards allow for concurrent representation in certain very limited circumstances. Standard 4-1.7(d) provides that concurrent representation should be accepted only when it is clear either that no conflict is likely to develop at any stage of the matter or that concurrent representation will be advantageous to each client and foreseeable conflicts will be waived.

Thus, while in the vast majority of cases concurrent representation is impermissible, it is possible for a lawyer to undertake such representation in rare circumstances depending on the balance between the potential advantages and the myriad disadvantages according to the facts presented in a particular case. The advantages of multiple representation may include the financial (shared attorney's fees and other costs) and the strategic ("[a] common defense often gives strength against a common attack"<sup>7</sup>). Nonetheless, ARPC Rule 1.7(a) and its Commentary, and the ABA Standards, make clear that it is only in the truly exceptional case that a lawyer can reasonably conclude that the advantages of multiple representation outweigh the disadvantages to such a degree that a lawyer can provide competent and diligent representation to each client.

In making the decision whether to undertake concurrent representation, the lawyer should also consider whether such an arrangement might evolve into a conflict under ARPC 1.7(a)(2) in which a lawyer's personal interests in collecting fees might conflict with a client's right to separate representation. Specifically, Alaska law requires a lawyer to forego any fees earned after a conflict of interest becomes clear.<sup>8</sup>

In sum, in the vast majority of cases, concurrent representation should be declined.

**What are a lawyer's duties to the client in those cases in which the client wishes to waive the conflict?**

In the rare case in which a lawyer reasonably concludes competent and diligent representation can be provided to multiple clients, ARPC 1.7(b) requires the lawyer to obtain the informed consent in writing of all affected clients.<sup>9</sup> The Comment to ARPC 1.7 requires that the information provided to obtain informed consent for concurrent representation "must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."

Thus, at a minimum, the lawyer must explain that: one joint client cannot be favored over another; relevant information must be shared among all joint clients; and such information, whatever the source, may

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## NEWS FROM THE BAR

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be used by one joint client against the other if adversity develops between them later (in other words, the attorney-client privilege will not protect information shared with the lawyer of a joint client from use by the other joint client at some time in the pending case, or in any other proceeding); a client who has given consent to joint representation may revoke it at any time for any reason; and if the interests of any concurrent client diverges from another concurrent client later, or a concurrent client chooses for any reason to withdraw from the representation, the lawyer (and the lawyer's firm) will have to withdraw from representing all of the clients in the matter and other counsel will have to be obtained.<sup>10</sup>

Further, the lawyer must explain that the lawyer's duty to make reasonable efforts to expedite litigation<sup>11</sup> and to act with reasonable diligence in determining whether a conflict exists<sup>12</sup> requires the lawyer to bring the conflict to the court's attention at the earliest opportunity if the issue has not been raised by the court or opposing counsel. The lawyer must also explain that the court may not accept a waiver and may require separate counsel despite a defendant's wishes.<sup>13</sup>

Turning to the facts referred, in the first scenario - the car theft charges - the Committee concludes that a lawyer could not reasonably believe a concurrent conflict does not exist, nor could the lawyer reasonably conclude the conflict could be waived. The interests of each of the defendants are obviously potentially divergent. The clients have told the police that only one defendant drove the car. That is clearly inculpatory as to one defendant and exculpatory as to the other. If the new defense - permission of the owner, with both defendants having driven the car - falters, the lawyer's ability to shift defenses for the non-driver would be impaired by his duty of loyalty to the alleged driver. That alone should be enough to prevent the lawyer from any reasonable belief in the viability of a concurrent representation. The significant ways in which their interests diverge outweighs any advantage that could be achieved by concurrent representation.

The second scenario - the commercial fishers - supports an analysis similar to the first: that joint representation is prohibited because the differing roles and status of the defendants may well create a situation in which one defendant would seek to minimize that client's ability to control the actions of the vessel, or differing backgrounds could be used by one defendant to emphasize that client's lack of culpable knowledge.

However, it is conceivable that in a very narrow set of circumstances the advantages to each client may outweigh the disadvantages and the lawyer may be able to reasonably conclude both clients will receive competent and diligent representation. Important considerations could include, for instance, whether both clients wish to mount a common defense, whether the costs of separate representation would be beyond the

means of one or both defendants (when court-appointed counsel is not an option), whether the best available defense to the charges is the same for both defendants and whether the relative culpability of the defendants is similar. In this situation, it may be possible for the lawyer to represent both individuals, but only with strict adherence to the informed consent provisions under ARPC 1.7(b).

When the lawyer has concluded that concurrent representation is possible, ARPC 1.7(b) requires the lawyer obtain the informed consent of each client, which requires the lawyer to analyze the available facts and explain risks of concurrent representation and alternative arrangements each client could make for separate representation. In this case the issues that may require specific detailed explanation might include: 1) the defendants' charges could be amended to reflect disparate degrees of criminal activity; 2) one client may be offered a favorable plea agreement that may require testimony against the other; 3) as the facts are revealed in discovery, a defense strategy that favors one client (such as reliance on the Fifth Amendment right not to testify) may preclude a theory that is more favorable to the other (offering the client's testimony on one or more issues); 4) the defendants or their witnesses may testify unfavorably to each other; 5) counsel's arguments suggesting a minor role for one client may highlight a larger role for the other; 6) a legal argument for one client may be harmful to the other; 7) sentencing arguments may emphasize relative culpability to the detriment of one of the clients; 8) the possibility of delay may affect the clients differently; and 9) the lawyer's time expenditures for costs may not be equally allocated between the clients' particular issues, depending on the lawyer's judgment of the importance of the issues.

It should be noted that when a single lawyer (or a law firm) appears in a criminal case on behalf of two or more defendants, the court is obligated to make an independent inquiry to ensure both defendants are prepared to make knowing and intelligent waivers of their Sixth Amendment rights to competent (conflict-free) counsel. In *Moreau v. State*,<sup>14</sup> the Alaska Supreme Court adopted a procedure to ensure that criminal defendants are aware of the pitfalls of joint representation. In *Hutchings v. State*,<sup>15</sup> the Alaska Court of Appeals elaborated on the duties of the trial judge:

The [*Moreau*] court declared that trial judges should "address each defendant personally and forthrightly advise [them] of the potential dangers of [being represented] by counsel with a conflict of interest. [Defendants] must be at liberty to question the court as to the nature and consequences of [their choice of] representation.... [Generally], the court should seek to elicit a narrative response from each defendant that [they have] been advised of [their] right to effective representation, that [they] understand [ ] the details of [their]

attorney's possible conflict of interest and the potential perils of such a conflict, that [they have] discussed the matter with [their] attorney or ... with outside counsel, and that [they] voluntarily waive[] [their right to separate counsel]."<sup>16</sup>

In consulting with and advising clients on the issue of waiver, competent representation under ARPC 1.1<sup>17</sup> would include preparing both clients to respond to the court's inquiries regarding waiver of their Sixth Amendment rights to conflict-free counsel.

Approved by the Alaska Bar Association Ethics Committee on April 1, 2021.

Adopted by the Board of Governors on May 7, 2021.

## Footnotes

<sup>1</sup> This opinion deals only with the situation in which multiple clients have been charged with crimes. It does not deal with matters in the investigative stages of criminal matters in which no charges have yet been filed.

<sup>2</sup> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

<sup>3</sup> Comment to ARPC 1.7.

<sup>4</sup>(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

<sup>5</sup>ARPC 9.1(g) provides: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has adequately explained the material risks of, and the reasonably available alternatives to, the proposed course of conduct.

<sup>6</sup>ARPC 9.1(c) provides: "Confirmed in writing", when used in reference to the informed consent of a person, denotes informed consent that is given in writing by that person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent". If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

<sup>7</sup> *Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978).

<sup>8</sup>See *Jacobus, P.C. v. Kalenka*, 464 P. 3d 1231, 1240 (Alaska 2020) (Lawyer not entitled to any fee, including under a "reasonable value" test, after a conflict of interest becomes clear.)

<sup>9</sup>See notes 4, 5 and 6 *supra*.

<sup>10</sup> It may be possible to deal with this by a prospective waiver, but this requires yet more detailed consultation. See ABA Formal Ethics Op. 05-436 (2005) (stating that a lawyer may obtain advance waiver from client allowing lawyer to represent unidentified future clients with interests potentially adverse to existing client's interests; waiver more apt to be enforceable if client is "experienced user of legal services" or independently represented in connection with the waiver). The Committee takes no position on that issue in this Opinion.

<sup>11</sup> ARPC 3.2 provides: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

<sup>12</sup> ARPC 1.7(c) provides: "A lawyer shall act with reasonable diligence in determining whether a conflict of interest . . . exists."

<sup>13</sup> See *Wheat v. United States*, 486 U.S. 153 (1988) (recognizing the ability of the trial court to refuse a waiver of separate counsel where there was a potential for a conflict); *Daniels v. State*, 17 P.3d 75 (Alaska App. 2001).

<sup>14</sup>588 P.2d 275, 284 (Alaska 1978).

<sup>15</sup> 53 P.3d 1132 (Alaska App. 2002).

<sup>16</sup> *Id.* at 1134-35 (quoting *Moreau*, 588 P.2d at 284 n.27). See also Rule 44(c), Federal Rules of Criminal Procedure.

The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

<sup>17</sup>ARPC 1.1(a) provides: "(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

## Substance Abuse Help

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- Provide advice and support;
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## Anchorage

**Michaela Kelley**  
Canterbury  
276-8185

**Ben Crittenden**  
907-771-9002

**Serena Green**  
777-7258

**Megyn Weigand**  
907-545-4906

**Emma Haddix**  
907-269-5158

**David S. Houston**  
907-278-1015

**Mike Lindeman**  
760-831-8291

**Michael Stephan**  
McLaughlin  
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**R. Collin Middleton**  
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868-8265

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907-279-3581

**John E. Reese**  
345-0625

## Sitka

**Greggory M. Olson**  
907-830-9792

## Fairbanks

**Valerie Therrien**  
907-452-6195

## Juneau

**Yvette Soutiere**  
907-586-4000

**Emily Feenstra**  
907-465-3600

## Arizona

**Jeffrey A. Gould**  
520-808-4435



**Lawyers' Assistance Committee**  
**Alaska Bar Association**

## A call for volunteer attorneys

There is an ongoing need for attorneys to represent Alaskans in adoption matters; minor and adult guardianship cases; estate cases; paternity actions; alcohol commitment proceedings; military service members through the Servicemembers Civil Relief Act; and in post-conviction relief (PCR) cases. The court appoints eligible attorneys under Administrative Rule 12(e) and provides compensation at a rate of \$75.00 per hour.

According to Chief Justice Bolger, the court system is “grateful for the attorneys who volunteer to serve on these cases, which often involve clients who lack the resources to protect very fundamental rights.”

Attorneys interested in accepting appointments under Rule 12(e) should send their contact information (*name, mailing address, phone numbers, e-mail, and fax numbers*) and a copy of their errors and omissions insurance to the appropriate Area Court Administrator (ACA). The ACAs maintain a list of attorneys eligible to receive court appointments in each judicial district.

Below is the contact information for the Area Court Administrators:

### First Judicial District (Southeast Alaska):

James Kwon  
Area Court Administrator  
P.O. Box 114100  
Juneau, AK 99811  
jkwon@akcourts.gov  
907-463-4753;  
FAX 907-463-4720

### Third Judicial District (Southcentral):

Carol McAllen  
Area Court Administrator  
825 West 4th Avenue  
Anchorage, AK 99501  
cmcallen@akcourts.gov  
907-264-0415;  
FAX 907-264-0504

### Second Judicial District (Northern Alaska):

Brodie Kimmel  
Area Court Administrator  
Box 1110  
Nome, AK 99762-1110  
bkimmel@akcourts.gov  
907-443-5216;  
FAX 907-443-2192

### Fourth Judicial District (Interior & Southwest):

Candice Duncan  
Area Court Administrator  
101 Lacey Street  
Fairbanks, AK 99701  
cduncan@akcourts.gov  
907-452-9201;  
FAX 907-452-9206

## Board of Governors Action Items May 6 & 7, 2020

- Approved the results of the February 2021 bar exam.
- Approved 11 reciprocity applicants and 17 UBE score transfer applicants for admission.
- Approved four non-standard testing accommodations for the July 2021 bar exam.
- Appointed a subcommittee to review an applicant for character and fitness issues: Molly Brown, Jed Cox, Hanna Sebold.
- Approved the minutes of the January and February 2021 board meetings.
- Appointed an awards subcommittee: Janell Hafner, Cam Leonard, Rob Stone.
- Appointed keynote speaker committee: Jessica Graham, Zack Manzella, Rick Castillo.
- Voted to publish an amendment to the Bylaws that officers of the Board shall take office on November 1 and shall serve until October 31.
- Voted to make the 2021 Bar Convention a virtual convention.
- Voted to have the Board meeting in Juneau in September.
- Voted to approve Resolution of the Board of Governors on the Alaska Bar Diversity Initiative.
- Appointed an MCLE subcommittee: Molly Brown, Jessica Graham, Mark Regan.
- Voted to reject the Stipulation for Discipline by Consent *In the Disciplinary Matter Involving Vikram Chaobal*, ABA File No. 2017D182, et al.
- Voted to adopt Alaska Bar Ethics Opinion 2021-1 entitled: “Representation of Multiple Clients Charged in Criminal Cases.”
- Appointed a sexual misconduct statement subcommittee: Ben Hofmeister, Hanna Sebold, Diana Wildland.

## Board Proposes Bylaw Amendment to Officer Terms

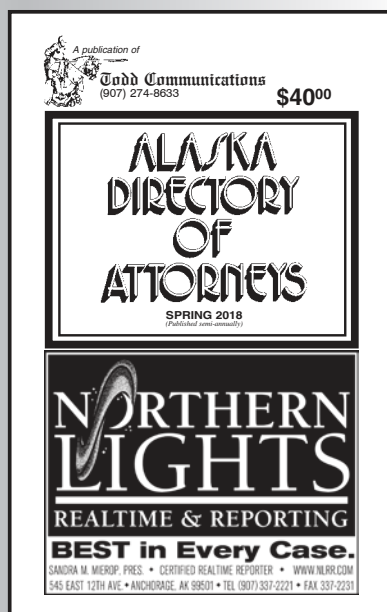
The Board of Governors is proposing an amendment to the Bylaws of the Alaska Bar Association in order to ensure that the elected officers serve one-year terms. The Board previously moved the annual convention from May to the fall in order to coincide with the Judicial Conference. When the convention is held in Juneau and Fairbanks the convention and annual meeting will be held in September. When the convention is held in Anchorage the convention and annual meeting will be held in October. Please send comments to Executive Director Danielle Bailey at [bailey@alaskabar.org](mailto:bailey@alaskabar.org) by July 10, 2021.

### ARTICLE VI

#### Officers; Staff

**Section 1. OFFICERS.** The officers of the Association are a President, President-elect, Vice President, Secretary and Treasurer. The President-Elect, Vice President, Secretary, and Treasurer shall be elected from among the members of the Board by a majority vote of the active members of the Alaska Bar in attendance at the Association’s annual business meeting. Nothing in this Article prohibits an appointed non-attorney governor from being elected an officer of the Association. Newly elected officers of the Association shall take office at the close of the annual business meeting at which they have been elected serve one-year terms, beginning on November 1 and shall serve until the close of the next annual business meeting ending October 31.

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### ALASKA DIRECTORY OF ATTORNEYS

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Fax (907) 929-5550  
[law@todocom.com](mailto:law@todocom.com)

### NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,  
Dated 3/12/2021

**DANIEL J. O'PHELAN**  
Member No. 0006039  
Keaau, Hawaii

is transferred to  
disability inactive status  
effective March 12, 2021.

Published by the Alaska Bar Association,  
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Anchorage, Alaska 99510  
Pursuant to the Alaska Bar Rules