The Alaska
BAR RAG
Dignitas, semper dignitas
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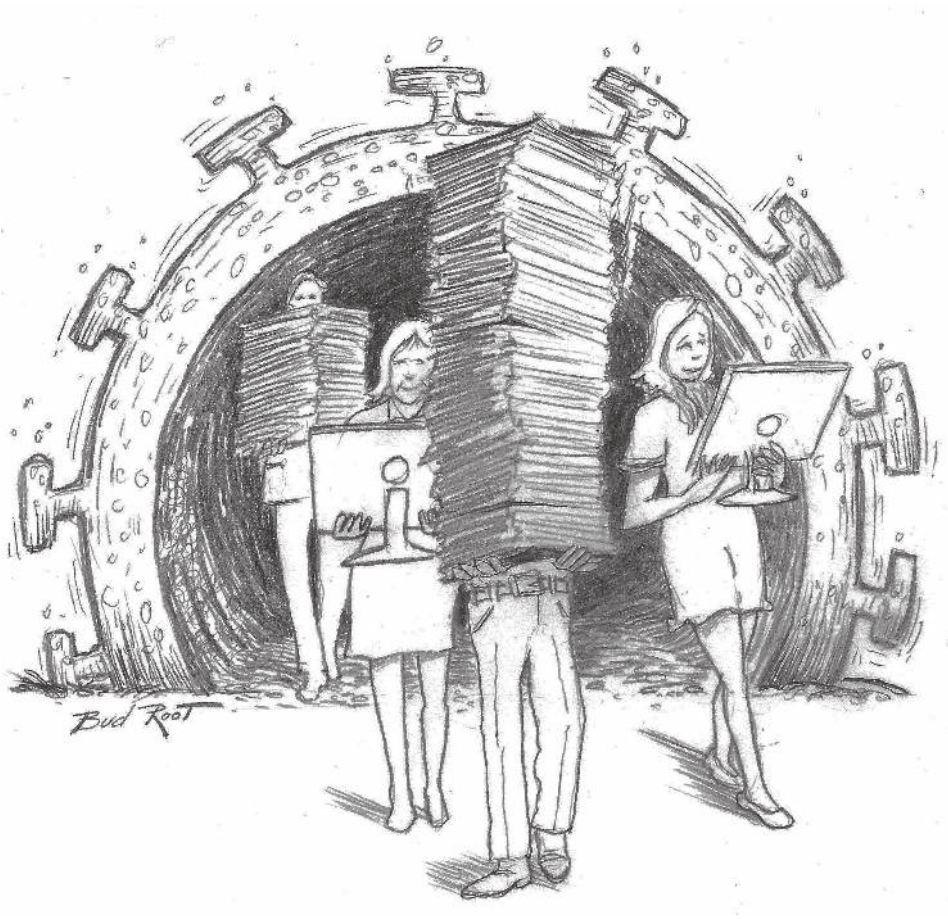

As Covid pandemic wanes, courts unveil new directions

By Abaigeal O'Brien and Jeannie Sato

With the lifting of restrictions issued because of the pandemic, the Alaska Court System is emerging with new services, programs and technologies, some from lessons learned about remote contacts forced by social distancing and other aspects of operations affected by the restrictions. Many of the improvements are aimed at providing citizens better access to the courts.

Since 2020, the Court System's (ACS) self-help services has expanded into the Access to Justice Services Department (A2J Services). This expansion furthers two of ACS's primary goals: (1) increasing access to justice for all Alaskans, and (2) ensuring that every Alaskan who interacts with ACS experiences excellent customer service. We wanted to share some exciting information about our programs, both new programs and those that have been around awhile. All the programs described below are available state-wide.

New Projects & Programs

Eviction Diversion

A2J Services is excited to announce that the National Center for State Courts is awarding ACS an Eviction Diversion Initiative Grant, funded by Wells Fargo. Alaska Legal Services Corporation is a key partner and the project will involve several other community partners from around Alaska. The court will

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Changes for food stamps, Medicaid ahead at end of emergency

By Eva Khadjinova

The approaching summer is bringing changes not only to Alaska landscapes, but also to the public benefits many elderly and disabled Alaskans receive. Some of these changes have already occurred, creating substantial impact on the benefits' recipients. Others will take place with the end of the federally declared public health emergency, currently set for mid-July.

More people eligible for SNAP

Many elderly and disabled people live with their relatives, which, in turn, has a substantial impact on their ability to receive SNAP benefits, more commonly known as food stamps. Generally, if the individuals live together and customarily purchase food and prepare meals together, all of their incomes are considered for SNAP eligibility and amount.[1] If, however, a person is 60 or over and unable to purchase food and prepare meals because of disability, that person should be considered separately in making SNAP eligibility decisions for that person.[2]

For example, if an elderly and disabled person lives with their adult child, only the disabled person's income should be considered for SNAP purposes to determine the disabled person's eligibility. Recently, the Superior Court in Juneau, exercising its appellate jurisdiction over the administrative decision, broadened what "unable to purchase food and prepare meals" means.[3] The court noted that nothing in the law indicates an intent to restrict the benefits to the most severely disabled individuals.[4] The Court concluded that a disabled person who participates in shopping and meal preparation with others' assistance is not necessarily able to do these tasks on their own.[5] To the contrary, many disabled persons may be able to perform some of these tasks with assistance, when they do not have the ability to do the tasks on their own.[6] In such circumstances, the disabled person's income should be counted separately from that of those who live with them.

This decision created a substantial shift in the way the State Division of Public Assistance has historically interpreted the provision regarding ability to purchase and prepare meals. The decision will have a sizable positive impact on the elderly and disabled Alaskans. It means that many more of the vulnerable Alaskans may be entitled to SNAP, even though they are currently not receiving it. It also may mean a substantially higher amount of SNAP to the current recipients.

Medicaid – the end of the public health emergency

The current end-date for federally declared public health emergency (PHE) is set for mid-July. During the PHE, virtually all Medicaid terminations have been suspended. Thus, irrespective of whether a person suddenly started to get more income or received even very sizable resources, they were still receiving Medicaid benefits during the PHE. With the PHE declaration coming to an end, it is anticipated that the agency will start re-determining eligibility for Medicaid, which could result in a significant number of people's benefits being terminated. This, in turn, could have an enormous impact on the most vulnerable.[7]

For example, if a person started to receive pension or survivor benefits for a spouse who passed away during the pandemic, their income may have increased beyond the Medicaid eligibility limits, and their benefits may be terminated following the lift of the PHE. Similarly, if a person suddenly came into an inheritance or to a lawsuit settlement during the pandemic, and their benefits were not affected during pandemic, this may change soon. In many cases, especially when there is a change in income, these terminations can be avoided with various legal instruments, such as trusts. Other actions challenging the termination process may also be available. For example, each Medicaid recipient's eligibility should be redetermined *after* the end of the public health emergency as many may have become ineligible during the emergency, but by the end became eligible again.[8] Given the sheer volume of recipients whose eligibility must be re-determined *after* the end of the public health emergency and the staffing shortages all are experiencing, mistakes are unavoidable.

With the number of the Medicaid recipients surging during the pandemic, it is widely anticipated that there will be an influx of people with Medicaid terminations, and we at ALSC are gearing up for that influx.

New Care Management regulations

Since January 2021, there has been a substantial change in the way the State Division of Heath Care Services (division) assesses Medicaid recipients' use of medical services to restrict their access

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PRESIDENT'S COLUMN

Time to assess the changes brought by Covid

By Jessica Graham

For better or for worse, the changes to daily life required by Covid now seem to be normalized into our day-to-day routines. With cases down, hospitalizations down, vaccines widely available, significant herd immunity thanks to recent contagious variations, and the end of mask mandates (including on airplanes!) we can begin to try to find the silver lining in this very large cloud. Memories can be short, but this experience has made some permanent changes in our professional world. I want to take a little bit of time to celebrate the return of "the old ways" and take a "glass is half full" approach to our evolution in those where Covid has made seemingly permanent change.

Both the federal and state courts have returned to in-person hearings and trials, while retaining the flexibility to allow some hearings to be conducted remotely. Covid seems to have expedited the work on e-filing, an improvement that is long overdue. Just a few weeks ago I was excited to attend (in-person!) the swearing in ceremony for Lane Tucker as the new U.S. Attorney for Alaska. The courtroom was packed with Lane's friends and professional colleagues and it had just a whiff of a school reunion before social media made reunions anticlimactic.

At different times in my legal career I have been an active participant in the Bar Association sections, particularly the corporate counsel section. In the past, we met in the conference room at Stoel Rives with hosted pizza and max seating of about 25 people. Now, during and post-Covid, we have section meetings that include sometimes two or three times that number because bar members can participate from their offices. Similarly, the Bar plans to offer hybrid meetings for committees, saving participants the effort of coming to the Bar office. This flexibility opens up section and committee participation in a meaningful way for bar members outside of Anchorage. It is satisfying and weirdly empowering to make an informed choice about whether you want to participate in person, with all of the benefits and networking that entails, or participate by videoconference, thereby avoiding commuting time, parking woes, and $5/gallon gas. Similarly, more and more CLEs (from all types of providers) are available from your desk. Lawyers outside of our major cities now have a wider range of continuing education available. As a result of Covid, for the first time ever, we have Bar members from outside of Anchorage on the Law Examiners Committee.

"Covid seems to have expedited the work on e-filing, an improvement that is long overdue."

The Bar Association continues to evolve as things have returned to normal. Long-time Fee Arbitration and MCLE Coordinator Ingrid Varenbrink retired after 28 years of service to the Bar. We wish her fair winds and following seas as she heads off to new adventures. Huge congratulations are due to Pro Bono Director Krista Scully who recently began her term as President of the National Association of Pro Bono Professionals. Krista's leadership in this organization reflects the nature of her cutting edge pro bono work in Alaska, as well as her deep commitment to expanding pro bono services across the country. A new bar website should be live later this year, the goal of which is to modernize the look and feel of the site (and the Bar's services) while making the information you care about more easily accessible. Finally, the Bar received a "clean" annual audit from our external auditor, Swalling & Associates, the results of which were reviewed with the Board at the May meeting. Many of us serve on other non-profit boards and we should never underestimate the importance and value of a well-run and financially strong organization.

The Bar office opened to visitors in April, although we held our May Board of Governors meeting in the Court System training room in order to give lots of elbow room to participants and take advantage of available technology for those who could not join in person. Many board members commented that it was nice to have slightly larger space to spread out and still allow for smaller, more informal conversations.

The friendship, camaraderie, learning and networking that are such a core part of the Alaska Bar Association will return with the fall bar convention. It has been really hard losing that sense of community and long-standing relationships. We were extremely disappointed to learn that Judge Ketanji Brown Jackson is not able to join us as our convention keynote speaker in light of her recent confirmation to the U.S. Supreme Court. Fortunately, Judge — soon to be Justice — Jackson has indicated that she will honor her prior commitment to the Bar

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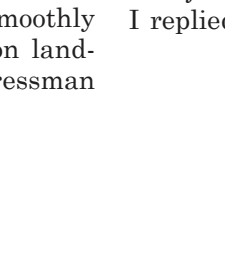
EDITOR'S COLUMN

40 years of airplane meetings with congressman recalled

By Ralph R. Beistline

There has been some discussion of late about naming the Fairbanks International Airport after Congressman Don Young, who, as all know, recently passed away after serving as Alaska's sole congressman for roughly 49 years. The reason this caught my eye is that all but one of my four direct contacts with Congressman Young occurred on airplanes.

The first and most memorable contact occurred about 40 years ago on a late-night flight on Alaska Airlines. I was returning to Fairbanks from Anchorage and was seated near the front of the airplane. The flight was rather empty but, seated toward the middle of the plane was a drunk — loud and obnoxious. It portended to be an uncomfortable flight. Then, just before the front door closed, on walked Congressman Don Young. His large stature filled the doorway and drew the attention of everyone on board, including the drunk, whose yells — in the form of jeers and profanity — immediately turned to the congressman. This naturally upset the flight attendant, who tried to calm the man without success.



"He responded by pumping his right arm in the air and, with a broad smile on his face, shouted "Congressman for all Alaska."

Then Congressman Young came to her aid. He grabbed this unruly passenger by the collar, lifted him from his seat, and, with the cooperation of the flight attendant, escorted the fellow off the plane. It was quite a sight. Moments later, Congressman Young returned to the airplane and was greeted by applause from the rest of the passengers. He responded by pumping his right arm in the air and, with a broad smile on his face, shouted "Congressman for all Alaska." Things went smoothly thereafter and I recall, upon landing in Fairbanks, the congressman greeting his wife, Lulu, with the same broad smile.

Fast forward 15 years, to about 25 years ago. I found myself seated next to the congressman on another flight between Anchorage and Fairbanks. This was the first time we actually met. He was in the window seat, first class, and I was in the aisle seat. I introduced myself, and we spoke generally for a moment until I reminded him of that late-night incident, long before, when he saved the whole plane from a drunk. He came to life! With that broad smile on his face, and a lot of pride, he indicated that, ever since, Alaska Airlines wanted to use him as an Air Marshall. That would have been unique.

Fast forward another five years, 20 years or so ago. I was standing in line behind Congressman Young at the J.C. Penney store in Anchorage, my only direct contact with him that was not on a plane. He was buying a tie of some sort and was speaking that evening at the Alaska Federation of Natives Convention. I, of course, had to introduce myself and noted that I was now a federal judge. "You don't look like a federal judge," he responded, to which I replied, "Well, you don't look like

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Don Young shares smiles with his favorite barber, Kyong Y Chon.

The Alaska BAR RAG

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Board of Governors meeting dates
- August 30 & 31, 2022
- October 24 & 25, 2022

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

Supreme Court justice recalls colleague's old-fashioned values

Editor's note: In our previous issue we published several tributes for Justice Craig Stowers who died in February. What follows here are remarks on his passing delivered by former Chief Justice Joel Bolger at the Alaska Judicial Education Conference April 6, 2022.

By Joel Bolger

Chief Justice Daniel Winfree asked me to say a few words about Senior Justice Craig Stowers who passed away Feb. 10, 2022.

For those who did not know him, Craig came to Alaska in 1977 as a national park ranger. He eventually became the District Ranger at Mount McKinley National Park. Then Craig left Alaska to attend law school at the University of California Davis. As a research assistant, he participated in the revision of the Alaska Corporations Code with Professor Daniel Fessler. After law school, Craig clerked for Ninth Circuit Judge Robert Boochever and Alaska Supreme Court Justice Warren Matthews. Then after several years in practice, Craig founded a litigation firm with Marcus Clapp and Matt Peterson. Craig was an expert in malpractice law and professional defense. He was appointed to the Superior Court in Anchorage in 2004 and the Supreme Court in 2009. Craig served as chief justice from 2015 to 2018.

Bolger

There should be a Robert Service poem for this occasion because Craig was a real Alaska character. He often wore heavy wool clothes, including a tweed vest and a coat, even in the summertime. So, he turned the thermostat down to outdoor conditions for every meeting. He wore a bolo tie even for court and formal occasions. Look at the Supreme Court portrait for 2016, and you can see his bolo with a clasp like a marshal's star worn by Wyatt Earp.

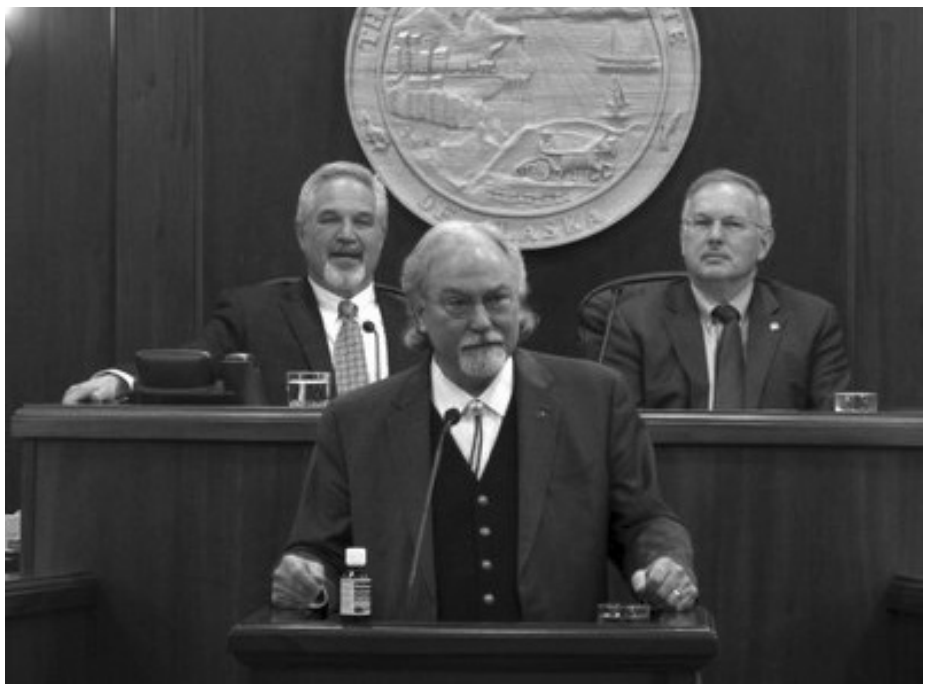
Craig was such a barbecue nut that some people claim he had 11 grills on his back deck. He loved kids and dogs and Star Trek and guns and strong coffee — even the strong dregs at the end of the pot. And many people in the public remember Craig's appearance even if they don't know his name because he grew a ponytail when he joined the Alaska Supreme Court!

Craig had old fashioned values. He got up around four in the morning and routinely reported to work before seven. He started his meetings and his court sessions on time. If an attorney was late, he would threaten to make them do pushups. I heard that one litigator actually dropped to do ten pushups in front of the jury.

Craig wanted to be such a good example that he refused to jaywalk, even when there was no cross-traffic. (This drove me crazy). And he was nearly always polite and personable and pleasant. He was particularly polite and protective to women. As I said, Craig had old fashioned values. He was ultimately a man of strong faith and core beliefs. He often rose to the occasion when there was a crisis, and he could not be budged from his strong convictions.

Craig made lasting contributions to the Alaska Court System. His term as chief justice coincided with three straight years of severe funding cuts. But his administration came up with some very imaginative ideas to keep the justice system intact. Cutting back on the work week and closing the courthouses on Friday afternoons was their response to the most serious cuts. In my opinion though, his major contribution was a new awareness and substantial upgrades in physical security for courthouses across the state.

Craig made a presentation on courthouse security at one of the judicial education conferences in 2008 or 2009. But he didn't stop there. He convinced the Supreme Court to approve an assessment of the physical security at all our larger courthouses statewide. This supported funding increases and security upgrades at nearly every courthouse. Then he organized a statewide security committee (and an Anchorage campus committee) where court system leaders like the presiding judges and area court administrators, court department heads, judicial services officers, and others would meet on a regular basis to review security threats and incidents and discuss policies. Many people remember Craig's caring leadership after the Southcentral earthquake in November 2018. And let me see a show of hands of those who participated in active shooter training at another conference several years ago. Craig's hard work helped keep all of us safer for the past several years and for years to come.



Craig Stowers speaks wearing his signature bolo tie.

But Craig's most memorable contribution was the sense of family he brought to the entire court system. He was unfailingly personable, not only with judges, but also with clerks and in-courts, judicial assistants, and maintenance workers and other staff. He loved to be a mentor to law clerks and newer judges. He knew all the troopers and police officers who worked around the courthouse.

When a court employee became seriously ill, Craig would write a compassionate note and send it around to the entire system. When a court employee, not just a judge, when any court employee passed away, Craig would personally work up a memorial email to allow the entire system to grieve together. He was just a big paternal supportive presence, and he cared about everyone in the entire system.

When Craig retired less than two years ago, he didn't want a big party or any special gifts. He just wanted to kind of ride off into the sunset. That's what he did. And he was able to pass on peacefully at home with his devoted wife Monique.

I don't know quite how to wrap this up. But I told you before about Craig's cowboy habits and the way he rode off like the Lone Ranger. So I guess we should just borrow from another cowboy hero and say, "Happy Trails Craig Stowers. Happy Trails until we meet again!"

Joel Bolger is a senior justice and former Chief Justice on the Alaska Supreme Court.

Judge installed to Superior Court after long delay

After a long postponement due to the Covid pandemic, Adolf Zemon was installed as a Superior Court judge May 22, 2022. Alaska Gov. Mike Dunleavy appointed Zeman to the Anchorage Superior Court April 15, 2020.

Judge Zeman was selected from a group of individuals nominated by the Alaska Judicial Council to fill the seat of retired Judge Michael L. Wolverton.

He has been an Alaska resident for 44 years, and has practiced law for 18½ years. He graduated from Gonzaga University School of Law in 2004. Since his appointment, Judge Zeman has presided over a mixture of civil and criminal cases. He was sworn in by retired Superior Court Judge Stephanie Joannides, for whom he had clerked, before a large group of family, friends and co-workers.

Judge Zeman is sworn in by retired Judge Stephanie Joannides, whom he clerked for after law school.

Zeman family including his wife Brandi and children Claudia and Mateo assist with donning of the robe.

New Alaska attorneys sworn in

The Alaska Court System and the Alaska Bar Association hosted their first in-person swearing-in ceremony since Covid for new members of the Alaska Bar Association Tuesday, May 24, 2022. Justice Dario Borghesan presided over the swearing-in of the 11 new lawyers. Family, friends, and colleagues appeared in person or viewed the live stream of the event through the court system's website. In the picture the new attorneys raise their right hands as they take the Oath of Attorney which was administered by Meredith Montgomery, clerk of the Appellate Court.

As Covid pandemic wanes, courts unveil new directions

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hire a full-time attorney project facilitator to coordinate the program. Central to the program is the opportunity for tenants and landlords to receive free legal advice and mediation prior to starting a court case, ideally before or near the stage when a landlord would serve a *Notice to Quit*. Once a court case is filed, mediation will also be available through a program similar to the court's Early Resolution Program, discussed below. For more information, and contact information for the project facilitator once hired, contact A2J Services Administrative Assistant Charlie Aisenson at (907) 264-0428 or caisenson@akcourts.gov.

In the next year, the court will launch two new tech projects. The first is an online dispute resolution platform, which will be available at no cost to users with small claims, debt collection, eviction (F.E.D.), general civil, and family law issues.

Guardianship Self-Help

As part of a Guardianship Improvement Project grant from the US Department of Health and Human Services Administration for Community Living, A2J Services recently opened an Adult Guardianship Self-Help Phoneline. Similar to the Family Law Self-Help Center Helpline, the Guardianship phone line is staffed by two facilitators who provide direct telephonic assistance to self-represented customers including legal information about adult guardianship forms and procedures. Thursday from 8:00 a.m. to 5:00 p.m. and Friday from 8:00 a.m. to noon. The phone number is (907) 264-0520.

Co-parenting Coaching

A2J Services also has a new co-parenting program designed to teach communication skills to high-conflict parents in custody cases. The program's goal is to reduce the conflict children are exposed to and give parents a method to discuss their parenting plans with each other, rather than repeatedly asking the court to assist. The parents complete Bill Eddy's 6-Unit online course, *Parenting Without Conflict*, at a 50 percent discounted price of $35. Parents also receive three free coaching sessions from our Parenting Plan facilitators to reinforce the online lessons and practice the skills they're learning. The course was designed for high-conflict parents, but the court can refer any interested parents. Attorneys may not participate and no part of the coaching process may be used as evidence in a court case, although a judge may ask parents what they learned. Please contact Abaigeal O'Brien at (907) 264-8236 or aobrien@akcourts.gov for more information.

Online Dispute Resolution

In the next year, the court will launch two new tech projects. The first is an online dispute resolution platform, which will be available at no cost to users with small claims, debt collection, eviction (F.E.D.), general civil, and family law issues. Both represented and self-represented parties can access the platform, with or without an open case, and use the online tools to try to resolve a dispute. Participants can asynchronously negotiate between themselves or request the help of a mediator. This means they do not have to be on the platform at the same time but can communicate back and forth with proposals and responses. If the participants reach an agreement and want a court order, but have no open court case, they can open a case at a reduced fee to have their agreement reviewed and signed by a judge. Parties can also access the platform during an active court case to try to resolve their case before trial. The platform is also being designed for online trials for some case types.

Legal Navigator Portal

The second A2J Services tech project is the Legal Navigator portal project, an internet portal in which users can answer interview questions online, and receive a personalized action plan based on their answers. The action plan will provide information about court procedures, with links to appropriate resources, forms, and content.

Family Law Self-Help Center: Zoom Family Law Education Class

A2J Services includes the Family Law Self-Help Center and Helpline (FLSHC) staffed by four statewide FLSHC facilitators who provide direct telephonic assistance to customers Monday through Thursday from 7:30 a.m. to 5:00 p.m. The facilitators do not give legal advice, but provide information about court procedures and forms. The FLSHC's *Family Law Education Class* has moved from in-person to Zoom Webinar; it is taught every other Wednesday from noon to 1:20 p.m. The class is free, and can be attended by anyone statewide. Facilitators show the *Listen 2 Kids* video at the end, which can fulfill a parent's "Parent Education Requirement." This is the first time a free online option is available to fulfill the requirement. A *Hearing and Trial Preparation* class is taught by Zoom meeting once a month. Check the FLSHC webpage (https://courts.alaska.gov/shc/classes.htm) or call the FLSHC for details on both classes at (907) 264-0851.

Existing Programs

Interpreter Services

An integral part of A2J Services is language access. If a party needs an interpreter because they do not understand or speak English well, or are deaf or hard of hearing, let the court know so that a qualified interpreter can be scheduled for their hearing. You can contact Stefanie Burich at (907) 264-0891 or sburich@akcourts.gov for more information about arranging an interpreter, or use Court form TF-985 *Notice of Need for Interpreter*.

Mediation Programs

A2J services houses a number of dispute resolution programs. There are four court-sponsored mediation programs: Adult Guardianship Mediation, Minor Guardianship Mediation, Child-In-Need-Of-Aid Mediation, and Parenting Plan Dispute Resolution. Contract mediators act as the mediators for all four programs. Additionally, court staff in the Parenting Plan Resolution Office, known as Parenting Plan Facilitators, mediate parenting plan issues. There are no income requirements for any of the mediation programs, although the hours provided are limited. A judge can sign a referral order to any of these programs.

Please contact Abaigeal O'Brien at (907) 264-8236 or aobrien@akcourts.gov for more information about dispute resolution programs.

Early Resolution Program

Dispute resolution includes the court's Early Resolution Program (ERP), which has helped resolve over 2,000 cases in the last 11 years by providing mediators or volunteer attorneys to help self-represented litigants in family law cases. A2J services is immensely grateful to past and present bar members and retired judges who have volunteered to assist in these cases, as well as Alaska Legal Services Corporation for help coordinating volunteer attorneys. ERP is a unique pro bono opportunity for bar members as it offers a very limited commitment, in both time and scope. Most attorneys have found it a very satisfying experience to see a divorce or custody matter resolve in one hearing with all paperwork completed and distributed.

Dispute resolution includes the court's Early Resolution Program (ERP), which has helped resolve over 2,000 cases in the last 11 years by providing mediators or volunteer attorneys to help self-represented litigants in family law cases.

Please contact Loren Hildebrandt at (907) 264-0861 or lhildebrandt@akcourts.gov for more information about volunteering for ERP.

Self-Help Web Content

A2J services also oversees self-help webpages and informational content covering self-representation, domestic violence, finding a lawyer, juvenile delinquency, estates, adult criminal cases, family law, guardianship, language assistance, small claims, appeals, debt collection, filing fees and waivers, housing, name change, and minor offenses including traffic. These pages provide legal information about the different case types, court procedures, and links to relevant forms.

Forms and Jury Office

A2J Services now also houses two longstanding pillars of the court system: Court Forms and the State Jury Office. For more information about forms contact Kathleen Doherty at (907) 264-0572 or kdoherty@akcourts.gov. For more information about the state jury office, contact Stacy Worby at (907) 264-0582 or sworby@akcourts.gov.

For general questions about A2J services, contact Jeannie Sato at (907) 264-0877 or jsato@akcourts.gov.

Abaigeal O'Brien is Dispute Resolution and Special Projects coordinator with the Alaska Court System. Jeannie Sato is director of Access to Justice Services

25 YEARS OF BAR MEMBERSHIP

ALASKA BAR ASSOCIATION 1997 - 2022


Katherine Alteneder


James Aprea


Eric Auten


Harry Bader


Colleen Baxter


David Bedford


Andrew Behrend


Laurel Carter Bennett


Terri Bozkaya


KeriAnn Brady


Valerie Brown


Kevin Burke


Beth Carlson


Juliana Rinehart Cobb


Maribeth Conway


Lisa Crum


Ann Larsen DeArmond


Kevin Feldis


James Fosler


Rachel Gernat


Whitney Gwynne Glover


David Graham


Cheryl Lynn Graves


Marla Greenstein


Gene Gustafson


Helena Hall


James Patrick Hanley


John D Harjehausen


Dianne Hoffman


Jeffrey Jarvi


Rodney Jones

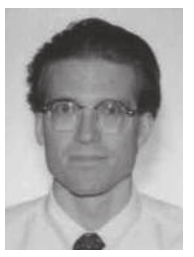

Sarah Josephson


Roman Kalytiak


Marion Kelly


Guy Martin Kerner


Martha King


Nicholas Kittleson


Kari Kristiansen


Jeanne LaVonne


Scot Henry Leaders

Beth Leibowitz

John Leman

Jahna Lindemuth

Daniel Lord

Kenneth Lord

Jane Martinez

Amy Mead

Andrew Mitton

Mark Morones

Judith O'Kelley

Richard Payne

Gwendolyn Payton

Chet Randall

Stefan Saldanha

Evan Schultz

Thea Schwartz

Timothy Seaver

Abigail Sheldon

Rory Stark

Benjamin Summit

Natasha Summit

Celeste Thaine

Jay Trumble

25 YEARS OF BAR MEMBERSHIP

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Jeremy Vermilyea


David Voluck


Amy Walters


Elizabeth White


Marshall White


Taylor Winston

NOT PICTURED

Katherine Hansen
Daniel Schally

50 YEARS OF BAR MEMBERSHIP

ALASKA BAR ASSOCIATION 1972 - 2022


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Peter Aschenbrenner


E. John Athens


Fred Baxter


William Bittner


Harry Branson


Harold Brown


David Bundy


Robert Bundy


Suzanne Cherot


Harry Davis


Robert Dickson


Barry Donnellan

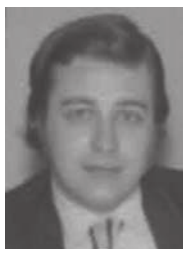

William Donohue


Saul Friedman


Francis Glass


Lee Glass


Peter Hallgren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Joseph Huddleston


Frank Koziol


Gerald Markham


James McCarrey


Peter Michalski


W. Michael Moody


Sigurd Murphy


Peter Partnow


Ray Preston


James Reeves


William Royce


Richard Savell


Sandra Saville


Robert Schlanger


John Sedwick

Douglas Serdahely

Marlin Smith

D. Rebecca Snow

Donald Stemp

Jan Van Dort

Ethan Windahl

60 YEARS OF BAR MEMBERSHIP

Murphy Clark

Michael Holmes

Stanley Howitt

Daniel Moore

Francis Nosek

Alaska Judicial Council recommends retention of all judges

By Susanne DiPietro

Last fall, the Alaska Judicial Council asked for your assistance in its evaluation of judges standing for retention. Thanks to all of you who completed the council's survey last December and completed counsel questionnaires.

On May 12, 2022, the council met to review the results of the attorney survey and other information about the judges' performances. The council determined that all judges under review met or exceeded performance standards, and it unanimously recommended that all judges be retained for another term in office.

In making its recommendations, the council reviewed a wide array of information from a variety of sources. Apart from the attorney surveys, the information included surveys of court employees, peace and probation officers, jurors, and social services professionals. It also included a wide range of non-survey information about each judge: appellate affirmance rates, peremptory challenge and recusal records, compliance with financial disclosure requirements, any public disciplinary proceedings, the judge's contributions to the community and to the administration of justice, and whether the judge's pay was withheld for a decision pending longer than six months. All this information soon will be posted on the council's web site, and a summary of the findings will be printed in the lieutenant governor's official election pamphlet.

Besides providing this information to the public, the council shares the performance evaluation information directly with the judges for their own professional development. This feedback helps each judge understand where they are doing well, and what areas may be in need of improvement.

Every member of the Bar can be proud of Alaska's comprehensive judicial performance evaluation process. But it is equally important that people who are not attorneys understand our system. Voters need objective and fair information about judges' performances. I encourage every member of the Bar to:

- Tell friends, family, neighbors, and acquaintances about Alaska's judicial evaluation process, and direct them to the Judicial Council's web site for more information: www.ajc.state.ak.us.
- Like and follow the Judicial Council on Facebook (Meta). Facebook is an influential platform in Alaska, despite the high levels of misinformation offered there. To maintain the integrity of our retention system and promote true and accurate information, please share the Judicial Council's judicial evaluation information with your social media groups.

Thank you to all who contributed to the council's evaluation process; your feedback on the judges is invaluable. We hope you, your friends, and your family will find the Council's recommendations and accompanying data useful when casting your ballot this November.

Susanne DiPietro is executive director of the Alaska Judicial Council.

Judges Recommended for Retention in November 2022:

Bethany Harbison	Lance Joanis	Martin C. Fallon
Amy Gurton Mead	Kari Kristiansen	Tom V. Jamgochian
Jude Pate	Thomas A. Matthews	David A. Nesbett
Daniel Schally	Andrew Peterson	Shawn Traini
Kirsten Swanson	Peter Ramgren	Brent Bennett
John C. Cagle	Kevin M. Saxby	Terrence Haas
Catherine M. Easter	Kristen C. Stohler	Earl Peterson
Una Sonia Gandbhir	Stephen B. Wallace	Thomas Temple
Josie Garton	Jo-Ann M. Chung	Ben Seekins
Jason Gist	Brian K. Clark	

CLE ALASKA BAR ASSOCIATION

REGISTER AT AlaskaBar.org

"REGISTER AT AlaskaBar.org" and note which CLEs are in person or virtual.

JUNE 2022

June 23: **Neurology for Lawyers**
2.0 General CLE Credits (Webinar)

June 23: **Working with Victims of Mass Violence Incidents (MVI) Prosecutions**
3.0 General CLE Credits (Webinar)

AUGUST 2022

August 10: **Introduction to ALTA/NSPS Land Title Surveys**
1.0 General CLE Credits (Webinar)

August 17: **Client + Social Media = Danger! How to Advise Clients, Manage Judicial Holds, and Discovery with Social Media**
1.5 Ethics Credits (Webinar)

August 23: **Advanced Negotiation Strategies for Lawyers**
2.0 General CLE Credits (Webinar)

August 24: **Hands-on Study of an ALTA/NSPS Survey Review**
1.0 General CLE Credits (Webinar)

SEPTEMBER 2022

September 7: **The Court of Appeals**
2.0 General CLE Credits (In person)

September 8: **Historians' Luncheon — Unconventional Questions: The Hows, Whys, and Why Nots of a Constitutional Convention**
1.0 General CLE Credits (In person)

September 15: **An In-Depth Look at Active Appreciation and Transmutation in Dividing Marital Property upon Divorce**
3.0 General CLE Credits (In person)

OPINION

Rule change would allow attorneys to offer 'human' aid to needy clients

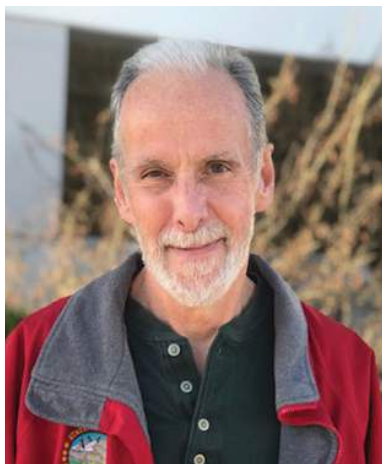
By Dave Jones

One of my favorites, John Prine, sang that "some humans ain't human." I try to be — as I am sure most of us do. And I don't think our rules of professional conduct should create obstacles to that effort. So I recommend that we amend the Alaska Rules of Professional Conduct to remove such an obstacle.

Let's imagine you know a family that is struggling to get by. While talking with them, you learn that they have been unable to buy groceries this week because they ran out of money before they ran out of bills. Would you open your wallet and give what you could? I imagine most of us would; it's the human thing to do.

But now imagine that you know the family only because you represent them pro bono in connection with their asylum applications. Because they are your clients in litigation, by giving them money you might violate Alaska Rule of Professional Conduct 1.8(e). We should change that.

Alaska's Rule 1.8(e) currently prohibits a lawyer from providing "financial assistance to a client in connection with pending or contemplated litigation," subject to two exceptions: (1) advancing court costs and litigation expenses, repayment of which may be contingent on the outcome; and (2) paying an indigent client's court costs and litigation expenses. Alaska's Rule 1.8(e) is identical to Model Rule of Professional Conduct 1.8(e) as it existed before 2020.



Dave Jones

But in 2020 the ABA House of Delegates amended the model rule to include a "humanitarian" exception. That exception allows a lawyer representing an indigent client pro bono to "provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses," subject to certain restrictions. Those restrictions are that the lawyer may not (1) "promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention"; (2) "seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client"; or (3) "publicize or advertise a willingness to provide such gifts to prospective clients." The amendment further states that the lawyer may provide financial assistance under Rule 1.8(e) "even if the representation is eligible for fees under a fee-shifting statute."

You could argue that, in the example I described, the money given to the struggling family isn't really given "in connection with" pending or contemplated litigation. But are you certain everyone would agree? And should we be forced to risk violating the rules of professional conduct when we act on our humanity to help people we've come to know and care about through our pro bono representation of them?

I don't think so. That's why I urge the Alaska Rules of Professional Conduct Committee to recommend adopting the model rules' "humanitarian" amendment.

Anchorage attorney Dave Jones received a Pro Bono award in December 2021 for work in the public sector.

My Five

Back by popular demand: My Five! Your five favorite songs for the various parts of your life. Please enjoy the song selections submitted by our two newest Alaska Supreme Court Justices **Dario Borghesan** and **Jennifer Henderson**.

Top five songs for being a Millennial Dad: Justice Dario Borghesan

1. "The Muse" — The Wood Brothers; The Muse
2. "Rise" — Eddie Vedder ; Into the Wild Soundtrack
3. "Parachute" — Chris Stapleton; Traveller
4. "We Don't Talk About Bruno" — Encanto
5. "Alive" — Pearl Jam; Ten

Top five songs to listen to with your kids (and sing at the top of your lungs): Justice Jennifer Henderson

1. "Just Sing" — Trolls World Tour
2. "Girl on Fire" — Alicia Keys
3. "Could Have Been Me" — the version by Halsey in Song 2
4. "We Don't Talk About Bruno" — Encanto
5. "Can't Stop the Feeling" — Justin Timberlake

ESTATE PLANNING CORNER

Demystifying the Delaware Tax Trap provides useful tool

By Steven T. O'Hara

The Delaware Tax Trap can be transformed into a good thing. Rather than a trap, it can be a positive tool for clients to apply to their facts and circumstances.

In 1988, attorney Jonathan Blattmachr and professor Jeffrey Pennell published the seminal article on the Delaware Tax Trap as an affirmative planning tool. Entitled "Using 'Delaware Tax Trap' to Avoid Generation-Skipping Taxes," the article appeared in the April 1988 issue of the Journal of Taxation.

The Blattmachr/Pennell article continues to inform recommendations about trusts with exposure to the federal generation-skipping transfer ("GST") tax.

And now we appreciate that income tax savings may also be obtained through use of the Delaware Tax Trap. See IRC Sec. 1014(b)(9).

The Delaware Tax Trap is contained in the Internal Revenue Code at Sections 2041(a)(3) and 2514(d). The brainchild of Blattmachr and Pennell is simplicity and flexibility through providing children-beneficiaries of trusts the option to trigger the trap as part of their estate planning in order to reduce tax. With this tool in combination with Alaska law, for example, children-beneficiaries of trusts may reduce tax as applicable as part of their estate planning.

You can understand the Delaware Tax Trap by understanding what it does: It renders property taxable to you as if you were the owner of the property.

You can understand the Delaware Tax Trap by understanding what it does: It renders property taxable to you as if you were the owner of the property. Specifically, under the federal estate tax system, the Internal Revenue Code provides:

The value of [your] gross estate [which may be taxable at your death] shall include the value of all property . . . [t]o the extent of any property with respect to which [you] … by will … exercise … a [special] power of appointment [as illustrated below] … by creating another power of appointment [such as a presently exercisable general power as illustrated below] which under the applicable local law can be validly exercised so as to postpone the vesting of any … interest in such property… for a period ascertainable without regard to the date of the creation of the first power.

IRC Sec. 2041(a)(3) (annotations provided). There is similar language under the federal gift tax system. IRC Sec. 2514(d).

Suppose someone has died, leaving you a trust governed by Alaska law. Suppose the deceased (the donor) has given you (the donee) the power to transfer property out of the trust. Suppose your power is a testamentary power, which is a power you can exercise by Will. And suppose your testamentary power is a special power, meaning a power you may not exercise for the benefit of yourself, your creditors, your estate, or the creditors of your estate. A special power is also known as a limited or nongeneral power.

Under the facts, the property subject to your testamentary special power of appointment is generally not considered owned by you for federal gift or estate tax purposes. However, you will be considered to have owned the property for federal transfer tax purposes if you exercise your power and appoint the property in further trust and give a trust beneficiary a presently exercisable general power of appointment. See IRC Sec. 2041(a)(3), 2514(d), and 2652(a)(1); Blattmachr and Pennell, supra; and see AS 34.27.051(b).

"The thing about formula general powers is that they are unpredictable at best and may be unavoidably flawed."

What does your creating a presently exercisable general power of appointment do? The big-picture answer is it renders the property includable in your gross estate for federal estate tax purposes under the Delaware Tax Trap. The more focused answer is it makes the start date of your special power of appointment—the first power, as referenced in the Internal Revenue Code above—irrelevant. The individual you give the presently exercisable general power can appoint property in further trust and "postpone the vesting . . . for a period ascertainable without regard to the date of the creation of the first power." IRC Sec. 2041(a)(3).

For some quick background, consider the Rule Against Perpetuities. This rule means you can use trusts to postpone the ownership of property and thereby protect the property so it is there when needed. However, the rule limits the duration of trusts. In Alaska, the maximum period is generally one thousand years. AS 34.27.051 et seq. In this area, ownership is known as vesting. When property held in trust indefeasibly vests in you, you now own the property. Then the Rule Against Perpetuities no longer applies. The rule applies, if at all, only when vesting has been postponed. Naturally, to keep track of the maximum period in a particular case, the Rule Against Perpetuities has a start date and an end date. The start date is when the postponement of vesting has begun. The end date is when property has vested.

Consider a client who is preparing her Will. She is an Alaska resident. As of her death, she wants to pass assets to a long-term Alaska trust for her child, also an Alaska resident. The trust will have GST tax exposure.

Instead of giving the child-beneficiary a general testamentary power of appointment over the trust with GST tax exposure, Blattmachr and Pennell have long taught a better alternative is to give the child-beneficiary a special power of appointment.

Indeed, Professor Pennell has called the general-power approach "misguided stupidity." His words are as follows:

I have this fear, maybe it's unfounded, that there are a lot people out there who hear generation skipping. They know only that if the estate tax applies instead, the generation-skipping tax does not and so what they do is, in a trust that's going to last for children for life and then for grandchildren, and so forth, they simply give the children a general power of appointment to intentionally incur the estate tax thereby defeating the generation-skipping tax. And they justify on the grounds that well, after all, the generation-skipping tax is at the highest estate tax bracket, the estate tax will never be greater than that, so why don't we just make life easy for everybody: give the kids a general power and not worry about the generation-skipping tax. My sense is there's a lot of that misguided stupidity out there. And if you're one of those people, wake up. … In a nutshell, all you need to do in your drafting … is give child a non-general power of appointment. You don't need a general power, not a formula general power of any variety. All you need is a non-general power. The Delaware Tax Trap allows child to decide which tax to incur.

Jeffery N. Pennell, "Choosing To Incur GST Tax," 11 Audio Estate Planner (Summer 1994).

The thing about formula general powers is that they are unpredictable at best and may be unavoidably flawed. For example, a formula clause purporting to grant a child-beneficiary of a trust a general power of appointment over that trust only when needed to minimize tax may actually grant the general power at all times. Consider that we can control the amount of our taxable estates through tax deductions available on our federal estate tax returns, such as by deductible bequests to spouses or charities. See IRC Section 2051. A large charitable bequest can result in a zero taxable estate -- and like magic, you undeniably have a general power under typical formula clauses. Thus, if you are granted a possible general power, and you are in control of whether that general power comes into existence, query whether that control means you al-

Continued on page 11

Anchorage Bar donates to Bean's Cafe

The Anchorage Bar Association, has presented a $1,000.00 donation to Bean's Café in memory of the following attorneys who passed away during 2021.

C. Richard Avery
Daniel Beardsley
Richard Block
Christopher Bridger
Jody Brion
Carol Childress
Paul Davis
Theodore Dunn
Deborah Greenberg
Dean Guaneli
John Havelock
David Lawer
Denis Lazarus
Kathryn Lynch
Michael Andrew Martin
Stephen Merrill
David Millen
Robert Noreen
Ronald Offret
Theodore Pease
Barbara Powell
J. Justin Ripley
Patrick Ross
Joel Rothberg
Mitchel Schapira
Brian Shute
James Stanley
John Thorsness
William Timme

At the official donation ceremony are from left: Lisa Sauder, Bean's Café executive director; Cheryl McKay, Anchorage Bar Association president, and Jolene Hotho, Anchorage Bar Association administrative director.

Demystifying the Delaware Tax Trap provides useful tool

Continued from page 10

ways have the general power.

And consider that there are cases where subjecting property to the GST tax system can generate less tax than subjecting the property to the estate tax system. For example, the child-beneficiary of a trust may live in a state with a significant death tax in addition to the federal estate tax. As another example, GST tax generally does not apply where the child-beneficiary has no children. Subjecting property to the estate tax system to avoid the GST tax system in such situations could result in more tax payable and thus a windfall to the taxing authorities.

Continuing our example, suppose that the child-beneficiary of the trust with GST tax exposure is in fact given a special testamentary power of appointment over the trust. With this power, the child-beneficiary may exercise it any number of ways. For example, she may exercise the testamentary power by giving a beneficiary, such as the client's grandchild, a presently exercisable general power of appointment over trust principal, thus intentionally triggering the Delaware Tax Trap. See AS 34.27.051(b). Here, the client's child may elect, in effect, to subject the property to the federal estate tax system at her generational level if she determines such tax would be lower than any otherwise applicable GST tax. See IRC Sec. 2041(a)(3) and Blattmachr and Pennell, supra.

As another example, the child-beneficiary may exercise the testamentary power by giving trust principal to her spouse, a sibling, a sibling's spouse, or a charity. See IRC Sec. 2651 on generation assignment under the GST tax.

And as another example, the child-beneficiary may exercise the testamentary power by giving trust principal to the client's great-grandchildren, thus skipping estate taxation for multiple generations. Cf. IRC Sec. 2653(a) on taxation of multiple skips.

Income tax savings can also occur though use of the Delaware Tax Trap, regardless of whether a trust has GST tax exposure.

Consider the trust in our example above. Suppose the trust has done well. The trust bought publicly-traded stock in a United States corporation for $100,000. Now the stock is worth $500,000. If the trust sells the stock for $500,000, the trust's taxable gain will be $400,000, the consideration received in excess of the trust's tax basis. IRC Sec. 1011. The trust's investment policy is to continue to hold the stock for long-term appreciation.

The child-beneficiary has heard that when an owner of appreciated property dies, under the law in effect in 2022, the person entitled to the property obtains a tax basis in the property that is stepped up to the fair market value of the property. IRC Sec. 1014. The child-beneficiary wonders whether, in the event of her death, there is any way to step up the tax basis in the trust's stock to its fair market value.

One answer in Alaska is yes where, as in our example, the trust includes a provision giving the child-beneficiary a testamentary special power of appointment. With this power, the child-beneficiary may intentionally trigger the Delaware Tax Trap, increasing tax basis as applicable.

Internal Revenue Code Section 1014 is the authority for tax basis adjustment when property is acquired from a decedent. This section includes a provision important for our discussion. It provides generally that if you exercise a power of appointment, and if that exercise renders the subject property includable in your gross estate for federal estate tax purposes, the property (other than annuities or other disqualified property) gets a new tax basis at your death. IRC Sec. 1014(b)(9).

Income tax savings can also occur though use of the Delaware Tax Trap, regardless of whether a trust has GST tax exposure.

In our example, how does the child-beneficiary exercise the testamentary special power of appointment with respect to the trust asset such that the asset could receive a stepped-up tax basis to $500,000? She might consider signing a Will that exercises the testamentary special power by giving a beneficiary, such as her child or other beneficiary, a presently exercisable general power of appointment over the asset. As of the client's death, such exercise would trigger the Delaware Tax Trap. IRC Sec. 2041(a)(3) and AS 34.27.051(b).

Regarding estate planning for a beneficiary with a presently exercisable general power of appointment, Alaska law provides that applicable trust property is subject to the creditors of the general power holder, the donee, only to the extent the power is exercised. AS 34.40.115.

Finally, in our example, the facts are that the property has appreciated in value. If the property in fact has lost value, the person entitled to the property could obtain a tax basis in the property that is stepped down to the fair market value of the property. IRC Sec. 1014(a)(1). So use of the Delaware Tax Trap under such circumstances could increase federal income tax.

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. Nothing in this article is investment advice.

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

Anchorage Bar Association celebrates its 65th anniversary

Members gathered April 21, 2022, at the Broken Blender to celebrate the 65th Anniversary of the Anchorage Bar Association.

President-elect Matt Widmer and President Cheryl McKay stand behind Dena Boughton and Jolene Hotho, administrative director, displaying pictures of the 1949 and 1945 Anchorage Bar Association.

Members of the Anchorage Bar Association in 1945 are from left: Stan McCutcheon; J.L. McCarrey Jr.; Harold Butcher; William W. Renfrew; Dorothy Tyner; Karl Drager; J. Gerald Williams; Edward V. Davis and George Grigsby.

Members of the Anchorage Bar Association in 1949 are: standing left to right: Cecil Rowley, Wendell Kay and Pete Kalamarides; seated in the second row from left to right: Dan Cuddy, Stan McCutcheon, Paul Robison, Harold Stringer, Edward V. Davis and Evander Cile Smith; and seated in first row from left to right: Harold Butcher, John Manders, George Grigsby, Dorothy Tyner, Warren Cuddy and Bill Olsen.

The 65th Anniversary cake

Anchorage Bar Association members gathered at the 65th Anniversary event.

Lori Brownlee, Colleen Knix and George Cruickshank.

Youth Court statewide conference meets in Wasilla

By Krista Maciolek

The United Youth Courts of Alaska (UYCA) held its annual statewide conference primarily at the Best Western Lake Lucille Inn in Wasilla in early April.

The conference brought youth courts together for the first time since 2019. Among other activities, youth court student attorneys heard from a judicial panel consisting of Kari McCrea, Anchorage District Court; Leslie Dickson, Anchorage District Court; Una Gandbhir, Anchorage Superior Court; Shawn Traini, Palmer District Court; and Kristen Stohler, Palmer Superior Court. The panel was hosted by guest speaker, Hasan Davis, a motivational speaker who works with juveniles as well as adults who advocate for them.

The judges shared their personal trajectories into the study of law and onto the judiciary in the State of Alaska. They fielded questions ranging from issues of diversity to costs of education.

Youth Courts are diversionary courts whereby juvenile offenders have their cases resolved in a court of their peers. UYCA strives to educate, empower and engage teenagers to provide public service while holding their peers accountable for low-level criminal offenses. Each year, teenagers

Guest speaker Hasan Davis addresses the conference. (Photo by Madeline Fodor)

contribute thousands of hours of volunteer service to the community, either through youth court-ordered community work service or by the student attorneys themselves.

Geoffrey Bacon

Erin Curran-Tileston

Kevin Gullufsen

Kayla Haeg

Noah Hammett

William Harren

Matison Johnson

Annika Krafcik

Emily Kingsley

Blaine Rizzo

Chanel Simon

Matthew Stone

Jina Yee

Ian Zwink

NOT PICTURED

Garrett Bruner

15 students awarded Bar Association 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 11 to review applications and announce the scholarship recipients. The Bar received a total of $14,000 in generous donations. All funds received before April 11 were applied to this year's scholarship program. After reviewing all applicants' ties to Alaska, their intent to return to Alaska, and their reason for applying for the scholarship, the Scholarship Committee decided to award the following scholarships:

- **$2,500 Scholarship awarded to:**
  - Geoffrey Bacon
  - Chanel Simon
- **$1,500 Scholarship awarded to:**
  - Erin Curran-Tileston
  - Kevin Gullufsen
- **$800 Scholarship awarded to:**
  - Kayla Haeg
  - Noah Hammett
  - Matison Johnson
  - Emily Kingsley
  - Blaine Rizzo
  - Matthew Stone
  - Ian Zwink
- **$100 Scholarship awarded to:**
  - Garrett Bruner
  - William Harren
  - Annika Krafcik
  - Jina Yee

The bar would like to thank all of the 2022 scholarship donors:

- **$1,000 and over**
  - Bering Straits Native Corporation
  - Jermain Dunnagan & Owens, PC
  - Blake Quackenbush
  - Groh Memorial Fund
- **$300-$999**
  - Alaska Association of Criminal Defense Lawyers
  - Dorsey & Whitney, LLP
  - Clifford Groh
  - Kelley Leonard
  - Tetlow Christie LLC
  - Stoel Rives LLP
  - James Torgerson and Morgan Christen
- **$1-$299**
  - Mark Andrews
  - Karen Bendler
  - Bonnie "Betsy" Bull
  - Patrick Callahan
  - Bradly Carlson
  - Matthew Claman
  - Susan Cox
  - Walter Featherly
  - Darrel Gardner
  - Sharon Gleason
  - James Gottstein
  - Peter Massen
  - Paul Morin
  - Deborah O'Regan
  - Melanie Baca Osborne
  - Trina Sears
  - Susan Urig
  - Tom Wagner
  - Morgan White
  - Denise Wike

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 and pay online. Please contact Bar staff if you have any question. Thank you for your consideration and support.

A proposed addition to SEC rules — climate change disclosures

By Julius J. Brecht

The Securities and Exchange Commission recently issued a release that seeks public comment on proposed amendments to its rules to provide certain climate-related information in registration statements and annual reports. The amendments would apply to registrants under the Securities Act of 1933, as amended and Securities Exchange Act of 1934 (collectively, "Federal Acts").

The release

The release is entitled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (found at SEC Release Nos. 33-11042, 34-94478; RIN 3235-AM87; dated March 21, 2022). The comment period on the amendments ended as of May 20, 2022. The amendments (or a variation on them) can become effective thereafter.

On March 15, 2021, the SEC sought public input on climate disclosure. The release states the SEC received approximately 600 unique letters and more than 5,800 form letters in response. The release is almost 500 pages in length (with more than 1,000 footnotes).

The release sets forth amendments requiring a registrant to disclose CRI risks reasonably likely to have a material impact on the registrant's business, results of operation or financial condition. CRI includes disclosure of a registrant's greenhouse gas emissions and CRI financial metrics in the corresponding audited financial statements.

The release posits existing disclosures on CRI risks do not provide adequate investor protection. It further states the amendments are to provide decision-useful information to investors relating to the impact of CRI risks on investments.

The amendments

Overview. The following is a brief outline of some of the amendment features.

Registrants subject to the amendments include a "smaller reporting company," an "accelerated filer," and a "large accelerated filer" as the terms are defined in the SEC rules. See, 17 CFR 229.10(f)(1), 230.405 and 240.12b-2. The amendments treat smaller reporting companies differently from the other two categories of companies. Suffice it to say, they all are companies with larger capitalizations or annual revenues.

CRI changes to financial statement disclosures are to be subject to audit by an independent registered public accounting firm coming within the scope of the registrant's internal control over financial reporting. Also, accelerated filers and large accelerated filers are required to provide attestations as to GHG disclosures.

Basis. The amendments are based, in part, on several national and international climate-related efforts as set forth in the release, one of which is the Greenhouse Gas Protocol. The release states the GHG Protocol has become a leading accounting and reporting standard for GHG.

Under the GHG Protocol, emissions by a company are divided into three types:

- ***Scope 1 --*** Direct GHG occurring from sources owned or controlled by the company.
- ***Scope 2*** —Those emissions primarily resulting from generation of electricity purchased and consumed by the company.
- ***Scope 3*** — All other indirect emissions not accounted for in Scope 2.

Disclosures. The amendments require a registrant to disclose numerous items including:

- Oversight and governance by the registrant's board and management of CRI risks.
- How registrant-identified CRI risks are likely to have material impact on the registrant's business model and outlook.
- Process for identifying, assessing and managing CRI risks and whether the process is integrated in the registrant's overall risk management system.
- Impact of climate-related events and transaction activities on line items of registrant's consolidated financial statements and related expenditures.
- Scope 1 & 2, separately described.
- Scope 3 and intensity (if material) or, if the registrant has set a GHG emissions reduction target, and transition plan, if any.
- Registrant's climate-related target and transition plan, if any.

Possible Risks

Central Focus. The release goes to great lengths in describing CRI risks. At the same time, the release states the central focus of the amendments is identification and disclosure of registrant CRI risks. The release further states CRI risk means actual or potential negative impacts of climate-related conditions and events that affect the registrant's consolidated financial statements, business operation or "value chains," i.e., upstream and downstream activities.

The release defines "upstream" activities as those by one other than the registrant relating to initial stages of production of goods or services of the registrant. The release also defines "downstream" activities as including those by one other than the registrant relating to processing materials into finished products and delivering or providing service to an end user.

Assessing Materiality. The amendments emphasize, when assessing materiality of a CRI risk, the registrant ought to consider its magnitude and probability over short, medium and long terms. The release surmises the magnitude and probability of climate risk can significantly vary over such time periods. It gives as an example, recent wildfires in California and their resulting effect on business access to insurance for such liability.

Opportunities. In providing disclosure relating to governance, strategy and risk management, the amendments allow the registrant to disclose climate-related "opportunities." Such opportunities are described in the release as actual or potential positive impacts on climate-related conditions and events on consolidated financial statements, business operations or chain values.

Possible Physical and Transitional Risks. The release divides climate-related conditions and events presenting risks into "physical risks," i.e., those related to physical impact of climate, and "transitional risks," i.e., those related to climate-related changes in law or policy.

The release further surmises that physical risks might include harm to a registrant's business and assets arising from acute climate disasters, e.g., wildfires, hurricanes, tornadoes, floods and heatwaves. It further surmises that such companies may face chronic risks and more gradual impacts from long-term temperature increase, drought and sea level rise. Finally, it surmises that such physical risks may include potential transition to a less carbon intensive economy, climate-related litigation and changing body of consumers.

Disclosure Phase-In

The amendments allow for phasing in CRI disclosures, depending on the registrant's filer status. For Scope 1 and 2 disclosures, the compliance date for registrants is qualified (should the amendments become effective in December 2022) as fiscal year 2023 for large accelerated filers and fiscal year 2024 for large accelerated filers and non-accelerated filers.

Scope 3 disclosure would be delayed an additional year for these filers. However, smaller reporting companies are given an additional year to report Scope 1 and 2 disclosures and are exempted from mandatory Scope 3 disclosure, all as further defined in the Amendments.

All filers are provided a safe harbor for Scope 3 disclosure. That is, such disclosure would be deemed not to be fraudulent statements unless shown that such statements were made without reasonable basis or made otherwise than in good faith.

Where actual reporting data are not reasonably available, a registrant may use a reasonable estimate of its GHG under limited circumstances as set forth in the Amendments.

Application to Alaska

You say, you only advise small business, not involving registrants. Why should you worry?

While application of the amendments is limited to registrants under the Federal Acts, it does raise the question of possible materiality of CRI risk regarding securities offerings by non-registrants or issuers in private offerings, generally, under those Federal Acts. If CRI risk is material for registrants, does it not follow it may be relevant for non-registrants or smaller offerings, regardless of whether the issuer is a registrant?

An issuer is, under the Federal Acts, required to make full and fair disclosure of all material facts related to its securities offering, regardless of registration under, or exemption from registration under, those acts. For that matter, the disclosure underpinnings of the Alaska Securities Act as to a securities offering in Alaska and under the Alaska Securities Act (AS 45.56) are essentially the same as under the Federal Acts.

For example, a company, because of the nature of its business (and regardless of whether it is a registrant) and contemplating a securities offering in Alaska, may need to address CRI (or some portion of it which may be relevant). That is, separate from the amendments, CRI may be material in an issuer's securities offering and as to proposed or ongoing operations of the issuer's business.

Summary

The SEC's effort on CRI is detailed and broad in scope. It remains to be seen what portion of the amendments is adopted as final SEC rules. It also remains to be seen as to whether the SEC proposes rules in the future which apply some portion of the amendments to companies other than registrants or in the context of private offerings, regardless of whether the issuer is a registrant.

While this article covers some of the amendments in limited fashion, a prudent practitioner, in advising an issuer of, or purchaser in, a security offering under the Federal Acts, ought to become familiar with all of the Amendments.

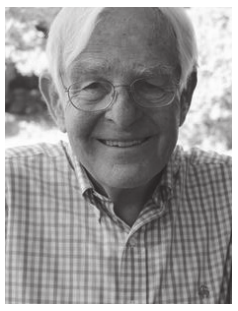
Good luck on your read of the release.

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.

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@bgbalaska.com.

In Memoriam

Former Anchorage lawyer dies in New Hampshire



Robert Ely

Robert "Bob" Ely, 89, died March 3, 2022, at his home in Durham, N.H., surrounded by members of his family.

Ely was born to Robert and Ruth Ely and raised in Connecticut and New York. He attended Yale College, served in the Army and attended Harvard Law School. He moved to Anchorage in 1959, working as a clerk for Judge J. L. McCarrey Jr.

In 1961, Ely joined Gene Guess and Joe Rudd in forming the Ely, Guess and Rudd law firm in Anchorage. Bob was a longtime board member of the Anchorage Museum Association and the Alyeska Ski Club, and enjoyed ski racing with his wife and children.

During his more than 50 years in Alaska, Bob loved hiking with his family and traveling throughout Alaska. In 2013, he moved with his wife to New Hampshire to be closer to their children and grandchildren.

Bob is survived by Heidi, his wife of 55 years; son, Scheffer Ely of Emeryville, Calif.; daughter, Malin Clyde of Durham; son, Winston Ely of Brooklyn, N.Y.; brother, Peter Ely of Elgin, IL.; and four grandchildren, Abby Clyde, Taylor Clyde, Keira Ely and Emory Ely. He was predeceased by his parents; brother, John Prudden Ely of New York City; and a fifth beloved granddaughter, Clara Ely, who died in 2018.

News From The Bar

ALASKA BAR ASSOCIATION
ETHICS OPINION 2022-1

A Lawyer's Duty with Respect to Potentially Impaired Members of the Bar

ISSUE: Lawyer impairments—related to substance abuse, aging, mental health, and otherwise—are not infrequent in Alaska and elsewhere. This Opinion examines what a lawyer must do under the Alaska Rules of Professional Conduct ("ARPC") when they observe that another lawyer might be impaired.

SHORT ANSWER: Having an impairment is not, in and of itself, a violation of the ARPC. However, lawyers with an impairment may fail to satisfy various professional responsibilities under the ethics rules, including competence (ARPC 1.1), diligence (ARPC 1.3), and others. Lawyers who observe such impairments should confer with Bar Counsel about appropriate next steps. Resources like the Alaska Bar Association Lawyers' Assistance Committee are also helpful for obtaining confidential assistance and referrals.[1] Beyond those best practices, under ARPC 8.3 lawyers have an affirmative duty to report a lawyer who has committed a violation of the ARPC that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer, unless the information is protected by a duty of confidentiality under ARPC 8.3(c). ARPC 5.1 provides additional requirements for lawyers in a firm setting, and for other lawyers with managerial or supervisory roles.

Lawyers working with one another—whether under ARPC 5.1, a resource like the Lawyers' Assistance Committee, or otherwise—may help address impairment issues more rapidly and effectively than the ARPC 8.3 disciplinary process. At base, Rules 5.1 and 8.3 are designed to protect the public and the reputation of the legal profession, and should be understood with this purpose in mind.

RULES: 5.1, 8.3.

FACT SCENARIOS

Fact Scenario 1—Aging: Lawyer Adrian, a septuagenarian solo practitioner, has had difficulty with the court's new e-filing requirements, and is also missing various filing deadlines and court hearings. Opposing counsel, Blair, noticed that Adrian appeared to be falling asleep during a hearing at which Adrian did appear—albeit late. And, in the process of settlement negotiations, weeks went by after Blair sent an offer detailed in an encrypted email attachment. Blair emailed Adrian to ask for an update, and Adrian replied that he had not yet consulted his client because he could not open the attachment. Another lawyer, Casey—who has known Adrian for a long time—is concerned because Adrian is taking on frivolous workers compensation and personal injury cases—areas of practice that are unfamiliar to Adrian. When she asks Adrian why, Adrian says he cannot pass up these cases because they will bring in some much-needed income. Adrian says he has no retirement savings and cannot afford not to take a case, even if completely meritless, for a $500 retainer or possible recovery on a contingency fee. What should Blair and Casey do under the ARPCs based on their observations?

Conclusion 1: Under ARPC 8.3(a) (Reporting Professional Misconduct), Blair and Casey are required to report Adrian's behavior to Bar Counsel. Adrian's conduct appears to violate ARPC 1.1 (Competence), ARPC 1.3 (Diligence), and ARPC 1.4 (Communication). ARPC 8.3(a) provides that if the lawyer knows of a violation—either a single violation or, as here, collectively troubling violations—of the ARPCs that raise a substantial question as to the other lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, then they are obligated to make a report to Bar Counsel. Contacting Bar Counsel in this situation does not necessarily mean the reporting lawyer will be the grievant in a discipline case against the other lawyer. A lawyer who is concerned about another lawyer should contact Bar Counsel to find out if what they know rises to the level of imposing a duty to report under ARPC 8.3.

Fact Scenario 2—Substance Abuse: Lawyer Robin receives a call from a client who works with Robin's law partner, Pat, complaining that the client has had a lot of difficulty reaching Pat, and that Pat has recently appeared completely disheveled. The client says that Pat has exhibited erratic behavior over the past few months like pacing around a conference room for an hour when Pat met with the client, not making eye contact, and showing up with a 10 inch high stack of seemingly disorganized papers. Robin knows that Pat was not prepared for recent court proceedings and in general appears to be struggling to keep up with his work. Robin has noticed that Pat has been drinking much more alcohol than he used to at social gatherings, and recently even at the office at his desk during the workday. What should Robin do under the ARPCs based on this information?

Conclusion 2: Robin has obligations under ARPC 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) and ARPC 8.3(a) (Reporting Professional Misconduct) to report Pat's behavior.[2] Pat's behavior appears to violate ARPC 1.1 (Competence), ARPC 1.3 (Diligence), and ARPC 1.4 (Communication); reporting is required under ARPC 8.3(a) because these violations raise a substantial question as to Pat's fitness as a lawyer. As Pat's law partner, Robin also has an obligation under ARPC 5.1 to take reasonable remedial action, if possible, to ensure that any harm to the client is mitigated, and to ensure that systems are in place within Robin and Pat's firm to prevent future harm (see more on the requirements of ARPC 5.1 in Fact Scenario 3).[3]

Fact Scenario 3—Firm Settings: Lawyer Edwin is a named partner with a large book of business at a local firm, and has been prescribed anti-depressants to help him cope with a death in his family. Lawyer Frances is a junior associate at the firm who is working with Edwin on a litigation matter. Frances has observed that Edwin does not seem to retain much detail about the facts of the case, has confused the names of the other parties on occasion, and has missed some minor deadlines. Edwin has insisted that he remain primarily responsible for communicating with the client, which is a long-term client of Edwin's. One week ago Edwin received a copy of a scheduling order and a favorable settlement proposal from the opposing counsel, but he has not forwarded them to the client for review despite two reminders from Frances. When Frances offered to forward the information, Edwin specifically directed her not to do so, but gave no assurance that he would or would have anyone else do so. Now, opposing counsel's requested response date is only two days away. Opposing counsel has made clear that this is the final settlement offer before trial. What should Frances and the firm do?

Conclusion 3: Under ARPC 5.1 the firm must make reasonable efforts to have measures in place that ensure that its lawyers comply with the Rules of Professional Conduct. This can include measures whereby junior lawyers can make confidential reports to a designated partner or special committee. ARPC Rule 1.4 is at issue here since it requires lawyers to keep clients reasonably informed about the status of a matter undertaken on a client's behalf. Frances should utilize any internal reporting systems at the firm, and in turn, the firm must take appropriate remedial action to ensure its lawyers' compliance with the ARPC. Such remedial action could include confronting Edwin about the situation, ensuring that he provides the case update to the client, and implementing internal measures to ensure that Edwin's communications with clients are monitored by others at the firm going forward for a certain period of time.

Note that Edwin's behavior does not yet rise to a level that mandates formal reporting under ARPC 8.3(a). Even though Edwin has missed some minor deadlines and should have been more prompt with client communication, not all violations of the ARPCs require reporting under ARPC 8.3; only violations that raise a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer require reporting.

DISCUSSION

Multiple rules are potentially implicated when a lawyer faces a substance dependency issue or well-being impairment. The Preamble to the ARPC states that "[c]ompliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings." Some or all of these avenues may be required if a lawyer's impairment is affecting their compliance with the ARPCs.

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This Ethics Opinion discusses (I) the ARPCs most likely to be implicated when a lawyer is impaired, (II) who has an obligation to act when they work with an impaired lawyer, and (III) when knowledge of an impairment requires reporting, and to whom. Numerous other jurisdictions have issued opinions on similar topics.[4]

At the outset, we note that an impairment is not, in and of itself, a violation of the Rules of Professional Conduct. Attorneys should not speculate about another's condition, but rather, should focus on objective factors that have caused, or appear reasonably likely to cause, violations of the Rules, and how to proceed from there.

I. ARPCs potentially implicated by lawyer impairment.

The following is a non-exhaustive list of the ARPCs that might be implicated by a lawyer practicing with an impairment.

- **ARPC 1.1: Competence.** Requires "competent representation," including maintaining professional skills by keeping abreast of legal and technology changes.

- **ARPC 1.3: Diligent Representation.** Requires that a lawyer act with reasonable diligence and promptness when representing a client. Impaired lawyers may not be able to provide diligent and prompt representation. The Comments indicate that sole practioners' future inability to assist clients may require that they prepare a plan to address that eventuality.

- **ARPC 1.4: Communications with Clients.** Requires regular and prompt client communication. Under ARPC 5.1, lawyers in a "firm" may be required to communicate with a client about services performed by an impaired lawyer.

- **ARPC 1.6: Duty of Confidentiality.** Prohibits revealing most client confidences and secrets without consent. The rule covers direct statements—which a lawyer might not be aware of if impaired—and the need to safeguard papers and devices with client information, which may not be feasible if facing diminished capacity.

- **ARPC 1.16(a): Declining or Terminating Representation.** Requires a lawyer to forgo or end representation when a "physical or mental condition materially impairs" the representation. The Comments discuss "competent[]" and "prompt[]" representation to completion.

- **ARPC 5.1 and 5.2: Responsibilities of Partners and Subordinate Lawyers.** *See Section II, which addresses who has an obligation to act when they observe an impaired lawyer with whom they have a work relationship.*

- **ARPC 5.3: Responsibilities Regarding Nonlawyers.** Lawyers with direct supervisory authority over nonlawyers are usually responsible for the nonlawyer's conduct. There is a risk of violation if a nonlawyer is impaired, or if an impaired lawyer cannot ensure that nonlawyer's conduct meets the lawyer's professional duties.

- **ARPC 8.3 and 8.4: Misconduct & Reporting.** *See Section III, which goes beyond the requirements of ARPC 5.1 and 5.2 and addresses what lawyers can and should do when they observe another lawyer with an impairment, regardless of firm relationships or supervisory capacity.*

Again, this list is non-exhaustive. A lawyer's ability to comply with other rules—such as ARPC 1.15 (Safekeeping Property), ARPC 3.1 (Meritorious Claims and Contentions), ARPC 3.2 (Expediting Litigation), and ARPC 3.3 (Candor Toward the Tribunal)—might be clouded if facing an impairment.

II. Law firm and supervisory relationships give rise to an obligation to act regarding impaired or potentially impaired lawyers.

ARPC 5.1 and 5.2 govern who has an obligation to act when they work with or observe an impaired lawyer in a firm or supervisory setting. Notably, ARPC 9.1(e) defines "firm" or "law firm" to broadly include any "lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law. It also denotes lawyers employed in a legal services organization or in the legal department of a corporation or other organization." As a result, ARPC 5.1 and 5.2 are not limited to private law firms in a traditional sense.

A. **Lawyers with managerial responsibility within a "firm" have a general obligation to ensure measures are in place to confirm compliance with the Rules.**

ARPC 5.1(a) provides that "[a] partner in a law firm, and a lawyer who individually or together with other lawyers has comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."[5] The measures required depend on the firm's size, structure, and the nature of its practice. The Comments to ARPC 5.1 explain that, "[i]n a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can confidentially refer ethical problems directly to a designated senior partner or special committee." This obligation requires that a firm's systems ensure compliance by *all* lawyers at the firm—including partners and managers—not just subordinate or supervised attorneys. Failure to have such a system in place may subject all partners in a firm to potential discipline. *See* Section II.C, *infra*.

B. **Lawyers with supervisory authority have specific responsibilities with respect to lawyers whom they supervise.**

ARPC 5.1(b) provides that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." A lawyer may be deemed to have supervisory authority over an attorney not within the same "firm," for example, a contract attorney hired by a lawyer to assist with a matter. *See* ABA Formal Ethics Op. 08-451 n.2 (2008) ("A contrary interpretation would lead to the anomalous result that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firm.").

When a supervisor knows a subordinate may be impaired, reasonable measures to ensure compliance with the ethics rules may include confronting the lawyer, forcefully urging the lawyer to seek help, limiting or modifying the lawyer's workload, providing additional project-specific supervision or collaboration with other attorneys within the firm, or preventing the lawyer from rendering legal services to firm clients. ABA Formal Ethics Op. 03-429 (2003). A supervising attorney who is impaired may run afoul of ARPC 5.1(b) if they are unable to make the "reasonable efforts" required by the Rule to ensure compliance by their subordinates.

C. **Lawyers with managerial or supervisory roles may be responsible for the ethical violations of an impaired lawyer.**

Taken together, ARPC 5.1(a)-(c) provide that an observing lawyer is responsible for the ethical violations of an impaired lawyer if the observing lawyer has managerial or supervisory authority over the other lawyer under ARPC 5.1(a) or 5.1(b), *and* "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." ARPC 5.1(c).

D. **Subordinate lawyers have independent—though limited—obligations in the setting of a "firm."**

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Subordinate lawyers are bound by the Rules of Professional Conduct, even when they "act[] at the direction of another person," including a supervising attorney. However, ARPC 5.2(b) provides that a subordinate lawyer does not violate the Rules if the subordinate lawyer "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Thus, a subordinate attorney may be deemed to violate the ARPCs if they undertake a course of action based on the direction of an impaired lawyer if that direction is unreasonable under the Rules.

III. When knowledge of an impairment requires reporting, and to whom.

Lawyers who encounter other lawyers who are potentially impaired may have either an option or obligation to address the issue, depending on circumstance.

If the impairment has not yet led to professional misconduct, the observing lawyer should utilize resources like the Lawyers' Assistance Committee to facilitate potential assistance or referrals to address the impairment. Reports to the Lawyers' Assistance Committee can be made anonymously and the source of the referral will be kept confidential from the potentially impaired lawyer.

If the impairment has led to suspected professional misconduct, then the observing lawyer has an obligation to determine whether the circumstances warrant a report to Bar Counsel under ARPC 8.3 (as outlined below). A referral to the Lawyers' Assistance Committee is also still encouraged.

ARPC 8.3(a) states that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported" by someone else. In many instances, a call to Bar Counsel will suffice as "inform[ing] the appropriate disciplinary authority"; Bar Counsel can advise if it is necessary to file a formal grievance, which would initiate an investigation to determine if disciplinary measures are warranted.[6]

As a corollary to this, ARPC 8.3(c) does not require disclosure of information learned "while participating in an approved lawyers' or judges' assistance program," or information that is otherwise protected by ARPC 1.6 (Confidentiality).[7] The commentary to ARPC 8.3(c) explains that this exception is important to encourage lawyers to seek treatment without hesitation. It also notes that not having this exception—which allows lawyers to seek treatment confidentially and allows other lawyers to facilitate lawyers' or judges' assistance programs—could result in additional harm to the professional careers of lawyers and to the welfare of their clients and the public.

Evidence of impairment may present in many different forms. It may consist of repeated forgetfulness and inattention regarding deadlines, correspondence, or filing requirements, or could, in some severe cases, consist of a single, sufficiently abhorrent act or failing. The Comments to ARPC 8.3 caution that "an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." Oftentimes, based on reports from other lawyers—which can be anonymous—Bar Counsel will reach out to the lawyer in question to see if the situation can be addressed and discussed privately, professionally, and without the need to resort to more formal disciplinary proceedings.

Judgment and discretion are required when applying ARPC 8.3 in these situations, especially given the subjective nature of the word "substantial." The Comments to ARPC 8.3 note that "[t]he term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." This Opinion should not be read to suggest that a lawyer violates ARPC 8.3 if they do not report every violation of the ARPCs related to an impairment about which they "know[]." Rather, a failure to report a "know[n]" violation of an ARPC is itself a violation of Rule 8.3 only when the underlying violation concerns wrongdoing that rises to the level of that which "a self-regulating profession must vigorously endeavor to prevent." ARPC 8.3 Cmt.

"Know[ledge]" of a rule violation is itself a complex issue, since at times it might be unclear whether another lawyer has actually violated a rule. Whenever an attorney is concerned about another lawyer's potential impairment and possible ARPC violations, the concerned attorney should talk to Bar Counsel—even without revealing the name of the attorney causing concern—to discuss at greater length the terms at issue in the ARPCs and their application.

Approved by the Alaska Bar Association Ethics Committee on Feb. 3, 2022.

Adopted by the Board of Governors on May 5, 2022.

Footnotes

[1]See https://alaskabar.org/sections-committees/lawyers-assistance-committee/.

[2]As this scenario demonstrates, obligations under Rules 5.1 and 8.3 are not mutually exclusive.

[3]If Robin was aware of Pat's substance abuse issues earlier—before Pat violated any Rules of Professional Conduct and prejudiced any clients—Robin could have sought assistance from resources like the Lawyers' Assistance Committee or by reaching out to Bar Counsel for advice, in hopes that such resources could work with Pat to address his apparent substance abuse issues.

[4]See, e.g., Va. State Bar Ethics Op. 1887 (2017), available at https://www.vacle.org/ opinions/1887.htm (concerning impairment of lawyer over whom no one has supervisory authority); Va. State Bar Ethics Op. 1886 (2016), available at https://www.vacle.org/opinions/1886.htm (concerning impairment of firm lawyer); N.C. State Bar Ethics Op. 2013-8 (2014), available at https://www.ncbar.gov/for_lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/ (concerning mental impairment of firm lawyer); Ky. Bar Ass'n Ethics Op. KBA E-430 (2010), available at https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2) /kba_e-430.pdf (considering host of questions related to impairment issues); N.Y. Bar Ass'n Ethics Op. 822 (2008), available at https://nysba.org/ethics-opinion-822/ (concerning whether filing a report with a lawyer assistance program satisfies violation reporting requirement); ABA Formal Ethics Op. 03-429 (2003); S.C. Bar Ethics Op. 02-13 (2002), available at https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ ethics-advisory-opinion-02-13/ (concerning medical condition that renders attorney unable to practice with competence); Phila. Bar Ass'n Ethics Op. 2000-12 (2000), available at https://www.philadelphiabar.org/page/ EthicsOpinion2000-12?appNum =1 (concerning aging impairments and dissolving firm); Utah State Bar Ethics Op. 98-12 (1998), available at https://www.utahbar.org/ wp-content/uploads/2017/12/ 1998-12.pdf (concerning use of controlled substances); W.V. State Bar Ethics Op. 92-04 (1992), available at http://www.wvodc.org/pdf/lei/ Chronologic/LEI-92-04.pdf (concerning alcoholism and misappropriation of client funds).

[5]As noted in the Comments, ARPC 5.1(a) applies to "members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law," as well as "lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm."

[6]When in doubt, lawyers should call Bar Counsel for advice on how to proceed. Generally, unless a lawyer specifies that they would like to file a formal grievance, a call to Bar Counsel will not be considered as initiating a grievance under the Alaska Bar Association Rules of Disciplinary Enforcement. A call informing Bar Counsel of an issue—when the caller identifies the lawyer and the issue—may satisfy the obligation under ARPC 8.3 without requiring that the lawyer file a formal grievance. In some circumstances, the Bar may inform the caller that a grievance is necessary, but ARPC 8.3 only requires the lawyer to "inform" the appropriate disciplinary authority.

[7]For example, a lawyer representing another lawyer whose professional conduct is in question is bound by ARPC 1.6 to protect the lawyer-client's confidences and secrets and is neither required nor allowed to make a report under 8.3(a). The Comments to ARPC 8.3 confirm that "[t]he duty to report misconduct is subordinate to the duty of confidentiality set forth in Rule 1.6."

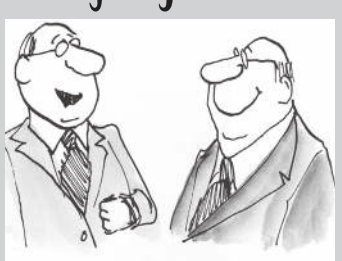
Board of Governors Action Items
April 6, 2022

- Voted to reinstate the Fair and Impartial Courts Committee's 2012 Committee Guidelines and 2014 Resolution.

Board of Governors Action Items
May 5, 2022

- Approved the January and April 2022 minutes.
- Approved 9 reciprocity applicants and 10 UBE score transfer applicants for admission.
- Approved the results of the February 2022 bar exam.
- Voted to approve a Rule 43 (ALSC) waiver for Brooke Sempel.
- Approved five non-standard testing accommodations for the July 2022 bar exam.
- Appointed a subcommittee to review an applicant for character and fitness issues: Rick Castillo, Hanna Sebold, and Diana Wildland.
- Voted to adopt the amendments to Alaska Rules of Professional Conduct 8.4(c) and 9.1 as proposed by the Alaska Rules of Professional Conduct Committee.
- Voted to approve amendments to Article III, Section 3(b) of the Bylaws of the Alaska Bar Association.
- Voted to approve changes to the Standing Policies of the Board of Governors of the Alaska Bar Association as proposed by the Governance Subcommittee.
- Appointed an awards subcommittee: Ben Hofmeister, Rick Castillo, and Jeffrey Robinson.
- Appointed a keynote speaker committee: Diana Wildland, Zack Manzella, and Jed Cox.
- Voted to spend $60,000 from unappropriated capital funds for security improvements to the Bar office.
- Voted to adopt Alaska Bar Ethics Opinion 2022-1 entitled: "A Lawyer's Duty with Respect to Potentially Impaired Members of the Bar."

Lawyer joke …



"You seem to be in some distress," said the kindly judge to the witness. "Is anything the matter?" "Well, your Honor," said the witness, "I swore to tell the truth, the whole truth and nothing but the truth, but every time I try, some lawyer objects."

Attorneys needed to represent Alaskans in certain matters

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 Deputy Director Doug Wooliver, 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):
Emily Wright
Area Court Administrator
P.O. Box 114100
Juneau, AK 99811
ewright@akcourts.gov
907-463-4753; FAX 907-463-4720

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

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

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

Alaska Court System thanks the following individuals who served as Rule 12(e) attorneys from 7/1/16-6/30/21

49TH STATE LAW LLC
ALICIA PORTER
ALLISON GOTTESMAN
AMANDA LYN BIGGS
ANDREW DEAN STEINER
BARLOW ANDERSON LLC
BENJAMIN I WHIPPLE
BONNIE BURGAN-KELLY
BRANDON C MARX
BRENDA MAHLATINI
BRIAN TRIPLETT
BURR PEASE & KURTZ INC
CAP SOLUTIONS LLC
CASHION GILMORE LLC
CATHY A GRISETO
CENTERPOINT MEDIATION & LEGAL SERVICES
CHARLES K VAN KIRK
CHUPKA CURRALL LLC
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Attorney discusses work with Administrative Rule12(e) cases

By Mara Rabinowitz

Administrative Rule 12(e) cases are situations where attorneys are needed 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. In the following interview, Attorney Zach Manzella talks about taking Administrative Rule 12(e) appointments from the Alaska Court System.

MR — What types of Rule 12(e) cases do you take on?

ZM —I limit the universe of cases I will take to things on the civil side, and primarily if it touches conservatorships or guardianships, or somehow a Child in Need of Aid (CINA) case. However, I am open to unique situations. Sometimes I have received calls directly from Judicial chambers to take these cases, and I will listen to see what they have to say, and it has led to some really interesting cases that you could make a movie or a TV mini-series about because they are that fascinating.

MR — How do you receive Administrative Rule 12(e) appointments?

ZM — Many years ago, I signed up on a list with the Area Court Administrator for the Third Judicial District, and I gave them my name and my contact information and I limited what I was interested in. I would say for the most part — about 95% of the time — if I get a call from the court it is for representation in a case in the areas I'm interested in. I would say about half the time I get a call from Judicial chambers and the other half of the time it might come from the Probate Department in the Children's department at the court system, because that is the area I'm more interested in and more experienced at handling.

Zach Manzella

MR — What is your typical Administrative Rule 12(e) client profile?

ZM — It is mostly guardianship and conservatorship cases. Because of some of my work in CINA cases, I have been appointed a few times for psychological parents in CINA cases.

I have represented service members in the Servicemembers Civil Relief Act, and a lot of the other 12(e) cases are cases where people do not have the resources to hire a private attorney. However, there have been cases within the guardianship context where individuals do have the resources to pay for an attorney but there still is an appointment made for one reason or another.

MR — Are Administrative Rule 12(e) appointments a good way for newer attorneys to get experience?

ZM — It is a great way to get experience both with cases and in the courtroom with real clients. I don't think you can overestimate the opportunity if you're willing to put yourself in that position of taking on a 12(e) case early in your career. It might be something that even if you work for a law firm they might be willing to allow you to take a case so you have that ability to be in a courtroom and to work with a client. I would encourage people to look into these cases because there might be some areas that would make a lot of sense for them to make themselves available for because it might tie into the larger areas of practices within their firms.

MR — Why do you take Administrative Rule 123 (e) cases?

ZM — Generally speaking attorneys are in a privileged place in society, and we have a duty to serve the neighbor. I think we have that duty through our profession to provide that service back to our community somehow. For me, I take 12(e) cases that I limit to areas in which I am proficient and perhaps a few unique cases too.

MR — Can Administrative 12(e) cases be good experience for attorneys starting out in private practice?

ZM — If you were going to hang out your own shingle, 12(e) cases would be on my short list of things to think about. If you're just starting out, you can get paid experience in the courtroom and with clients, and you are fulfilling a need. It is a real virtuous circle at the beginning of your career.

Alaska Law Review staff visits Anchorage, Juneau

Alaska Law Review staff

Members of the *Alaska Law Review* staff at Duke Law School visited Anchorage and Juneau in early May. Recent graduates Kate Goldberg, Daisy Gray, Jacob Keohane, Natalie Howard, Matthew Naiman, Mike Keramidas, and Kristen Renberg, and rising fourth year JD/MEM candidate Savannah Artusi, spent the week meeting with judges, state representatives and attorneys about their work in Alaska and what important legal issues they would like addressed in future *ALR* issues.

The *ALR* members collected ideas for future student notes, solicited practitioner articles and received valuable feedback on how to improve *ALR* to better serve the Alaska Bar. They also had some time to explore the state — highlights included a 10-hour Tracy Arm Fjord cruise, a whale watching cruise, and both groups seeing bears in the wild.

The members of *ALR* would like to thank hosts, Joyanne Bloom, Paul Grant, Tracy Dunn, and Susan Orlansky, for opening their homes to us. We would also like to thank Tony Sholty and the rest of the Juneau Bar Association for welcoming us and ending our trip with a special party. Finally, a big thank you to every member of the Alaska Bar who met with us and made these trips so informative and enjoyable. We can't wait to come back to Alaska as soon as possible!

Join the *Alaska Law Review* Oct. 14, for its Alaska and Environmental Law symposium at the University of Alaska Anchorage. If you would like to be involved, either as a speaker or an author, please email the journal at alr@law.duke.edu.

The Alaska Law Review is an academic law journal that examines legal issues affecting the state of Alaska. It is published by students at Duke Law School every June and December. The journal is not published in Alaska, because no law school operates within the state.

Law Review staff visits the Alaska State Capitol. (Law Review photo)

Do you know someone who needs help?

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

Contact 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,
aoravec@doyonutilities.com
Mat-Su: Greg Parvin, gparvin@gparvinlaw.com
Anchorage: Stephanie Joannides,
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.

Changes for food stamps, Medicaid ahead at end of emergency

Continued from page 1

to medical care, called Care Management. Generally, if a person is placed in Care Management, the person can only access a set general provider and pharmacy chosen by the division, which is unlikely to be their current primary provider and pharmacy.

Care Management has always been a rather murky area. Starting January 2021, this became even more obscure. Generally, Medicaid recipients have a free choice of their medical providers and pharmacies. Yet, under certain circumstances, Medicaid allows restriction of that choice — Care Management. Here are some of the examples of what may trigger Care Management: during a period of three consecutive months, receiving prescription drugs from three or more pharmacy locations,[9] or during a period of three consecutive months, using a medical item or service with a frequency that exceeds two standard deviations from average.[10]

Prior to January 2021, in all cases triggering Care Management, the division had to do a clinical review of the recipient's medical history.[11] Only if this review resulted in a determination that the use was not medically necessary could the division place the recipient in Care Management and only up to 12 months.[12]

The new regulations, effective January 2021, have dispensed with the individualized clinical review for individuals falling into certain categories.[13] Moreover, the Care Management restrictions can now go on for up to 36 months.[14] In practical terms, what these changes seem to mean is that under some circumstances Medicaid recipients could face notice of restrictions based simply on a computer-generated algorithm regardless of whether the use in their particular circumstance was medically necessary.

In 2021, many Medicaid recipients started to receive notices that they were being placed in Care Management. One of those notices and placements was challenged at a fair hearing before the Office of Administrative Hearings, which placed its first judicial gloss over the new regulations.[15] First, the OAH opined that the division's notice violated due process as it included mere citations to the regulations that authorized Care Management.[16] The OAH reasoned that such notice did not provide a meaningful opportunity to understand, review, or challenge division's decision, and the notice must be provided *before* restriction is placed.[17]

The OAH next concluded that the new regulations could not be applied retroactively, i.e., to the medical events that took place prior to 2021, even though the division tried, albeit unsuccessfully, to do just that.[18] Following this decision, the division rescinded notices regarding Care Management placement that have gone out to Medicaid recipients up to that point. Now, over a year has passed since the new regulations became effective, allowing division's collection of sufficient statistical data to start re-issuing the notices. Given this, ALCS anticipates that more and more Medicaid recipients will be placed in Care Management in the very near future. Whether such placement can be challenged on the basis of medical necessity remains an unresolved issue under the current version of the regulations.

Eva Khadjinova is senior services attorney with Alaska Legal Services Corporation.

Footnotes

[1]7 C.F.R. § 273.1 (describing the "household" concept).

[2]7 C.F.R. § 273.1 (b)(2).

[3]*Dilts v. State of Alaska, Department of Health and Social Services, Division of Public Assistance*, 1Ju-20-897CI; OAH No. 20-0366-CMB (Dec. 27, 2021).

[4]*Id.* at p. 6.

[5]*Id.*

[6]*Id.*

[7]*See e.g.*, for news articles regarding the potential impact:
https://khn.org/news/article/the-end-of-the-covid-emergency-could-mean-a-huge-loss-of-health-insurance/
https://www.npr.org/2022/04/13/1092655344/who-hhs-covid-public-health-emergency
https://www.npr.org/sections/health-shots/2022/04/04/1089753555/medicaid-labor-crisis
https://www.npr.org/2022/04/06/1088660155/nursing-home-minimum-staffing-labor-shortage-medicare-medicaid-nurses

[8]*See* 42 C.F.R. § 435.916 and CMS (Center for Medicaid and CHIP Services) guidance on unwinding of public health emergency of August 13, 2021 available here: SHO# 21-002: Updated Guidance Related to Planning for the Resumption of Normal CHIP and BHP Operations Upon Conclusion of the COVID-19 PHE (medicaid.gov)

[9]7 AAC 105.600(b)(1)(B).

[10]7 AAC 105.600 (b)(1)(G).

[11]7 AAC 105.600 (Register 193, Regulation in Effect from February 1, 2010 through December 31, 2020); In the matter of DT, OAH No. 21-0106-MDX at p. 4 (May 12, 2021).

[12]*Id.*

[13]7 AAC 105.600; IMO DT, OAH No. 21-0106-MDX at pp. 4-5.

[14]*Id.*

[15]*IMO DT,* OAH No. 21-0106-MDX.

[16]*Id.* at pp. 3-4.

[17]*Id.* (citing *Baker v. State, Dept' of Health and Social Serv.*, 191 P.3d 1005 (Alaska 2008)).

[18]*Id.* at pp. 5-6.

Time to assess the changes

Continued from page 2

and come to Alaska at some point in the future after she has more time on the Court under her belt. We are pivoting to other speaker options, with an inclination toward someone who can speak to many of the key constitutional issues in the headlines right now.

Regardless of pandemics, however, the work of the Bar is a treadmill that never turns off. I want to take some space to recognize and thank those lawyers who have carried the laboring oar for the profession in recent months. Deep gratitude is owed to members of the Alaska Rules of Professional Conduct Committee who have worked carefully and diligently to draft changes to Rule 8.4(c) and its comment, as well as Rule 9.1. These changes reduce the scope of Rule 8.4(c) to more narrowly cover conduct that reflects adversely on the lawyer's fitness to practice law. It also clarifies the scope of a lawyer's responsibilities vis-à-vis lawful covert investigations. These changes have now been forwarded to the Alaska Supreme Court. The Ethics Committee also produced a helpful opinion explaining a lawyer's duty with respect to potentially impaired members of the Bar which was approved by the Board of Governors at the May meeting. The CLE Committee continues to engage with bar members across the spectrum to understand opinions and hurdles to possible changes to mandatory CLE. The Law Examiners Committee graded 43 bar exams during the February bar exam cycle and we were planning to welcome 21 new members at a swearing-in ceremony May 24.

As things return to normal and long (hopefully sunny) days are ahead of us, I made a list of activities to pursue during the summer. Some are touristy, some are exploratory, some are just to get outside. It included things like visiting every craft brewery in Southcentral, taking a dance lesson, riding the Anchorage Trolley, floating the Matanuska, and teaching my daughters how to fish for kings at Ship Creek (because … why not?) On a professional parallel, I encourage everyone to consider something you can do over the next several months to strengthen the profession and engage with colleagues, new and old, in whatever way makes sense for you. Have a great summer.

Jessica Graham is president of the Alaska Bar Association. She has been a member of the board since 2019, and previously served as the Board New Lawyer Liaison from 2000-2002. She graduated from the Duke University School of Law in 1997 and clerked for the Honorable Sidney R. Thomas on the US Court of Appeals for the Ninth Circuit. She worked in private practice for several years before going in-house in 2003. She is the general counsel and chief risk officer for Alaska USA Federal Credit Union.

40 years of airplane meetings with congressman recalled

Continued from page 2

congressman for all Alaska." Then came that smile and off we went. I still don't think he really knew who I was and I didn't have time to mention the drunk.

Forward once more, to roughly 15 years ago. Again, I found myself seated next to the congressman on another Alaska Airlines flight. I think in the same seats and on the same flight we were on decades before. He must have preferred window seats. I still had to introduce myself, but he was subdued now. His wife had recently died, and he openly discussed all this with me, like I was an old friend. He recalled the last time he had seen her as he was off on an excursion to Africa, and how surprised he was at her passing. He even wondered if he would ever date again. I was sympathetic, but eventually reminded him of that event, years past, when he threw the drunk off the plane. The smile came back. It was clear that he was still proud of that.

About eight years later, I read in the paper that Congressman Young had married a Fairbanks lady, Anne Walton, on his 82nd birthday, a marriage that, according to my barber, Kyong Y Chon, was a happy one.

And speaking of my barber, this was my last "contact" with Congressman Young — if sharing the same barber can be considered a "contact." Apparently, every time Don and his wife came to Anchorage they would both see their barber, whom they loved, and who absolutely loved them. Kyong shared the attached picture, which was taken of her and the congressman on one of his last visits to Anchorage.

Now I know that even if I ever did run into the congressman in the barber shop, I would have had to introduce myself again. After all, I haven't been involved in politics for more than 30 years. But I also would have known how to make the congressman smile — just a simple reminder of that late-night flight, roughly 40 years past, when he saved the whole plane from a drunk!

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

Offhanded advice inadvisable; attorney has only 2 choices

By Mark Bassingthwaighte

I love a good a story, particularly when a valuable lesson can be learned from its telling. Here are two memorable ones.

A long-term client reached out to his attorney with a quick question about an airplane he owned. The plane had been under renovation, which included a substantial upgrade, for some time. Due to time delays and cost overruns, a significant fee dispute had come into play. Figuring that possession of the plane would strengthen his position in the fee dispute, the client reached out to his attorney to ask if he could remove his property from the repair facility. For reasons unknown, the attorney failed to take any time to discuss the situation in depth. Instead, he made the decision to quickly share a technically correct answer. His reply was along the lines of "yes, recovery of property you already own is not illegal. You have a right to its possession" and he left it at that. The client shortly thereafter successfully recovered the property and was subsequently arrested due to the manner in which the recovery was done. Eventually the client incurred a substantial loss as a result of a civil suit brought by the repair facility. Of course, this client then sought recovery from the attorney alleging negligent advice. The attorney tried to defend his actions by essentially saying "Not only did I never tell him to go and take possession of the plane, I had no idea he would try something like that! This one's not on me." That defense didn't fly. Pun intended.

My next story involves an attorney who was representing the executor of an estate. This attorney would later describe the situation as his having little involvement because the client was really running the show. Apparently, all the client wanted was a little advice and direction from time to time. At one point, this client reached out to share that she disagreed with a conclusion the commissioner of accounts had reached regarding the calculation as to how certain funds should be distributed. The attorney casually shared that he too disagreed with the commissioner's conclusion and also let the client know that if an issue were to ever arise, he would speak with the commissioner in order to clear up the confusion. Unfortunately, this client took that response as an implicit okay to go ahead and she disbursed the funds in accordance with her interpretation of the will. The commissioner did not approve the accounting and now there was a problem.

Here are the takeaways.

I get that at times it can be tempting to take the easy way out when a client asks a question. If nothing else, quickly spouting off some generic or technically correct advice or sharing an off-the-cuff comment can certainly save some time. Regardless of your reasoning, a decision to take the easy way out is never a good idea. That's a takeaway.

It also matters not if the reason you decide to take an easy way out is because you truly believe you don't have the time, view the question as unimportant, are talking with a non-client, are talking in a casual setting, or are just saying what you think your client wants to hear so you can move on. These are all rationalizations; and when rationalizations are used to justify a decision to take an easy way out, trouble may be just around the corner. Such advice, which really is the equivalent of giving advice in a vacuum, is problematic because you are failing to consider how the person you are speaking with might rely upon or act on the advice. This too is a takeaway.

Giving advice in a vacuum is rarely appropriate, particularly in the absence of adequate and documented disclaimers. Even if technically allowable under some defined set of circumstances, doing so fails to take into account the realities of the attorney-client relationship. Clients do expect their attorneys to stand by all advice given and the client will consider an attorney's attempt to claim an intentional limited knowledge of the circumstances as irrelevant. The client will still seek to hold their attorney accountable for any unanticipated fallout that occurs once the client acts on the advice received. Again, a takeaway.

But wait, there's more.

There is also an ethical component to this. Consider ABA Model Rule 1.4 Communication, which states in section (b), *"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*" This makes it quite clear. At a minimum, the attorneys in the two stories above should have taken the conversations further by inquiring about their client's proposed course of action. By not doing so, these two attorneys allowed their clients to act without the benefit of legal advice given with full awareness of the entire situation. Had these two attorneys made an effort to take into account what their clients were thinking, the advice would have been, out of necessity, quite different.

In the end, a defense along the lines of "I had no idea my client was going to do that" is no defense at all, even with perceived short unimportant calls where one is tempted to not take the time to ask the right questions. When situations like the above arise, there is no middle ground. There really are just two options. One is to decline to provide any advice and the other is to take the time to give a competent, thorough, and reasoned response based upon full awareness of the client's situation. Come at it from a different perspective by trying to put yourself in your client's shoes. Would you expect anything less when asking your attorney a question? Call me a skeptic if you must; but I seriously doubt it.

Since 1998, Mark Bassingthwaighte. has been a risk manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Bassingthwaighte has conducted more than 1,200 law firm risk management assessment visits, presented more than 400 continuing legal education seminars throughout the United States, and 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. He can be reached at mbass@alpsnet.com

Bar People

Landye Bennett Blumstein names associate, partner

Richard A. Camilleri

Richard A. Camilleri has joined **Landye Bennett Blumstein** as an associate attorney. He was raised in Utqiaġvik and graduated from Temple University Beasley School of Law. After graduation he practiced in New York as a litigator and supervising attorney for the city's Administration for Children, at the trial and appellate levels. Camilleri's diverse policy experience includes working in 2016 for the Obama Administration's White House Council for Environmental Quality for the National Environmental Policy Act Oversight.

Camilleri focuses his practice on local government (municipal and tribal), Alaska Native, corporate, administrative, environmental, natural resource, and real estate law.

Karl Kaufman has become a partner in the firm. He focuses his practice on federal and state taxation, estate planning and administration, tax-exempt organizations, and Alaska Native law. Kaufman obtained his LL.M. in Taxation from New York University School of Law in 2010, and his Juris Doctor from the University of Oregon School of Law (Order of the Coif) in 2007. At NYU, he was a Wilf Tax Scholar and a Graduate Editor on the Tax Law Review. Kaufman is a member of the Alaska Bar Association, the Oregon Bar Association, and a past president of the Anchorage Estate Planning Council.

James S. Nolan now a partner at Richmond & Quinn

Richmond & Quinn, a civil defense firm based in Anchorage, has announced that **James S. Nolan** has become a partner with the firm. Nolan's practice focuses on personal injury, product liability and employment litigation defense. He has been in private practice in Alaska for six years, advising clients on matters arising in the tourism, transportation, energy and hospitality industries. With the addition of Nolan as a partner, Richmond & Quinn looks forward to continuing to serve both our clients and all communities of Alaska.

New U.S. attorney leaves Stoel Rives

Lane Tucker

Former Stoel Rives' partner S. Lane Tucker has been appointed by the U.S. District Court of Alaska as United States Attorney for the District of Alaska. She brings to her new role more than 30 years of experience in federal government contracting, health care fraud disputes, bid protests, construction, and injunctive litigation. Before entering private practice in 2010, Tucker was an assistant U.S. attorney, serving as the civil chief for the U.S. Attorney's Office in Anchorage; a trial attorney with the U.S. Department of Justice in Washington, D.C.; and an assistant general counsel with the U.S. General Services Administration. She is a past president of the Alaska Chapter of the Federal Bar Association and was section chair for Alaska for the Public Contracts Section of the American Bar Association. Tucker received her law degree from the University of Utah and undergraduate degrees from Mary Baldwin College and Oxford University.

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