

Meet Phil Shanahan – the new Bar Counsel

By Clinton M. Campion

Phil Shanahan took over as Bar Counsel for the Alaska Bar Association in December 2019. I met with Phil Feb. 7, 2020, to discuss his life, his legal career and his initial im-



Phil Shanahan

pressions of his role as Bar Counsel. Phil and I have known each other since I began prosecuting cases for the State of Alaska in 2008 and he was a criminal defense lawyer.

Phil was born and raised in an Irish Catholic family just outside of Boston. His parents grew up in the projects in South Boston. His father went to school with James “Whitey” Bulger, the infamous leader of the “Winter Hill Gang” in Somerville, MA. Phil’s father knew at a young age that Whitey would turn out to be bad.

Phil is the youngest of six children. He is the only one of his siblings to graduate from college, but all of his siblings have had successful careers in Massachusetts. All of his siblings still live in Massachusetts.

Phil grew up playing sports and rooting for New England’s teams. His family has had season tickets

Continued on page 9



The Bar Rag Editor recalls a special visitor and a question for the ages. For details see the Editor’s Column on Page 2

Look for changes coming in the federal criminal justice system

By Darrel J. Gardner

It is with true sadness that I report that this will be my last regular column. I have been writing the “Federal Bar Update” for many years now, and I hope that I have provided our legal community with

interesting news and information about our federal courts and practice here in Alaska. However, it’s time for a big change; I have accepted a position to become the first Criminal Justice Act Supervising Attorney for the Eastern District of Washington, and my wife and I will be moving to Spokane at the end of March. We have very mixed emotions but are looking forward to our new adventure. I was born and raised in Alaska, and other than time away for college, law school, and a short stint in California in the late 1980s, I have lived and worked here my entire life. I have so many friends and memories from this beautiful place. I have been greatly honored to be a part of the Alaska legal profession for more than 36 years. I have traveled all over the country as part of my volunteer bar activities, and I have met literally hundreds of other lawyers; I can honestly say that the quality of practice and the level of professionalism in Alaska is second to none. If you ever find yourself in Spokane, please feel free to give me a call at the federal courthouse — I would love to have a cup of coffee with a fellow Alaskan!

New president takes over

The Alaska Chapter of the Federal Bar Association has been moving forward under the leadership of Kevin Feldis (Perkins Coie), who assumed his role as president on Oct. 1, 2019, replacing out-going



Jamie McGrady takes the oath as Alaska’s Federal Public Defender. She assumed the post Jan. 1. Photo by Judge Leslie Dickson

president Mary Pinkel. The first gathering of the year took place on Feb. 13, 2020, at our usual meeting spot, the Executive Dining Room at the Fitzgerald Federal Building and Courthouse.

Featured speakers at the lunchtime event included Chief Judge Timothy Burgess, U.S. Attorney Bryan Schroder, and Federal Public Defender Jamie McGrady, who reported on current happenings and anticipated future developments concerning the court and the federal criminal justice system in Alaska. Judge Burgess announced that not only is Alaska still on track to have a new federal courthouse, but there has also been talk of establishing a

federal detention center in Anchorage. Currently, there is no federal detention facility in Alaska, so all federal prisoners are housed under contract with the Alaska Department of Corrections. This situation adds additional costs and complications in that the state jails in Anchorage, Fairbanks and Juneau often have conflicting rules and procedures compared to the requirements of the U.S. Marshals, who are charged with overseeing the detention of federal inmates.

Bryan described a “full steam ahead” status at the U.S. Attorney’s office due to recent federal funding

Continued on page 11

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Decision means Bar must adhere to core functions

By Rob Stone

Since my last president's column, I traveled to Juneau and Austin, TX, representing the Bar. While in Juneau, I had the pleasure of attending a luncheon with the Juneau Bar Association. It was a packed room, likely due to the attendance of our federal bench; Chief Judge Timothy Burgess and Judge Sharon Gleason. It was a friendly atmosphere, with the federal judges fielding a number of questions. As members of the Alaska Bar, we are fortunate to have opportunities to break bread with the judiciary outside of the formal courtroom setting. We should strive to continue this practice.

On the topic of mingling with the bench, mark Oct. 28 on your calendars. Beginning this year, the Alaska Bar and the judiciary are overlapping one day of the Bar Convention. We will meet in Anchorage Oct. 28, with both the state and federal judges addressing the Bar. It will be a great day of presentations, including U.S. Supreme Court summaries and Alaska Supreme Court summaries by Professors Chemersinsky and Levenson. There will be a social event in the evening. Don't miss this opportunity to socialize with your colleagues; both lawyers and judges.

As stated above, I also traveled to Austin for the Mid-Year meeting of the National Conference of Bar Presidents. Of the many issues discussed, two were of particular interest to me. The first involved a 2018 U.S. Supreme Court decision, *Janus v. AFSCME*. In *Janus*, the court struck a blow to compulsory

union membership. Shortly thereafter, the Court granted *certiorari* on a case titled *Fleck v. Wetch* (challenging compulsory membership by the North Dakota Bar Association). The Court created a tremendous amount of anxiety with bar associations nationwide when it granted *certiorari* and then remanded the case "for further consideration in light of *Janus*." Legal scholars feared that this could be the end of mandatory bar associations. Bar leaders contemplated and planned for this contingency.

In Austin, and over the past year post *Janus* and while *Fleck* has been litigated on remand, your Board of Governors, and in particular your Bar president, president-elect, Deborah O'Regan, and bar counsel, have studied the practices of other mandatory bar associations. We have compared these practices to the practices of the Alaska Bar Association. I am pleased to report that the Alaska Bar Association, in my opinion, is the most conservative among the mandatory bars with respect to its functions. The Alaska Bar Association, through its Board of Governors, works diligently to administer the core administrative functions of the Bar (*i.e.*, discipline, admission, the administration of justice), without straying outside of these functions like many other mandatory bars. It may surprise you that some mandatory bars lobby for and against controversial legislation. We have not,



"On the topic of mingling with the bench, mark Oct. 28 on your calendars. Beginning this year, the Alaska Bar and the judiciary are overlapping one day of the Bar Convention."

do not, and will not. We leave that to voluntary bar associations and other organizations.

Back to *Fleck*. In August, the 8th Circuit reviewed its earlier decision in light of *Janus* and affirmed. The case was fast tracked to the U.S. Supreme Court. Many scholars speculated as to what the Court would do, and how the mandatory bars would change if the decision were favorable to Mr. Fleck. I am pleased to report that the Court, on March 9, 2020, denied *certiorari*. Thus, it appears for now that the sky is no longer falling. But *Fleck*

shall serve as a reminder that the Alaska Bar Association is a mandatory bar association and thus we must limit our activities accordingly. Our membership is diverse in all respects, and we should not involve ourselves in politics, regardless of how worthy the issue may seem. We shall leave this work to lobbying organizations, the Legislature, and the courts. The second issue of particular interest in Austin was a discussion regarding access to justice. This is an issue nationwide. In Alaska, approximately 70 percent of domestic relations cases involve unrepresented people. Access to the system is cost-prohibitive for most. And this doesn't just affect the poor; it affects the middle class as well. Not many people have \$5,000, \$10,000, \$15,000 to shell out for representation; especially during a time where one set of household

expenses is becoming two. Washington State, and others, have started limited license programs. These programs are new, and many questions exist. Alaska is watching Washington, and other states, as these programs work through their infancy. More to come, I am sure.

Krista Scully at the Bar has additional trips for me to take in 2020, including trips to Bethel, Kodiak and Dillingham. It is my goal to reach out to as many members as possible, in order to assist the Bar in doing its best for its members. The Bar Association is located in Anchorage, but we represent all lawyers across the state. As always, if you have any comments or concerns you would like addressed by the Board of Governors, please do not hesitate to reach out to me.

Rob Stone is president of the Alaska Bar Association.

The Alaska BAR RAG

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Contributing Cartoonist:

Bud Root

Design & Production:

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Advertising Agent:

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EDITOR'S COLUMN

Surprise visitor raises question for the ages

By Ralph R. Beistline

I attended a funeral in Anchorage some time ago and ran into Bill Pearson, an attorney practicing in Anchorage, who reminded me of a story I told at a Bar Convention years ago. It was a story that I had long-since forgotten but that, upon reflection, deserves repeating, for it raises a question about the judiciary that many have asked over the years. So, here we go.

My first legal job after law school was as a law clerk for the three Superior Court judges in Fairbanks — Judges Blair, Van Hoomissen and Taylor. This was in the former state courthouse at 805 Barnette. My office, the first real office I ever had, was located across the hall from the three judges' chambers and just outside the courtrooms. The office itself was small and was dominated by a large elk head (not a moose head), owned by Mert Forbis, the area court administrator. The elk head hung on the wall directly across from the doorway to my office. It was on the common wall that I shared with the courtroom, so the elk head hung just on the other side of the wall from the judges' bench.

My desk stood under the elk head.

Anyway, it was the spring or summer of 1975 — noon hour — and I was dutifully working at my desk when I heard footsteps enter the common area adjacent to the judges' chambers. This was before security was in place and people could simply come and go as they pleased. I could hear the footsteps moving from one chamber to the next, apparently in search of a judge; from Judge Blair's chambers, to Judge Van Hoomissen's, to Judge Taylor's, but without success. Then, just as I was about to see who it was, the visitor appeared at my doorway. And what a visitor.

It was Jay Hammond, the governor of the State of Alaska. I had never met a governor before and certainly never had one in my office. But his attention was not on me. His eyes were focused on that elk head. He then strode across the office directly to the elk, paused for a moment, and patted it on its neck. Then, with a twinkle in his eye, he looked directly



"I had never met a governor before and certainly never had one in my office. But his attention was not on me. His eyes were focused on that elk head."

at me and he spoke (the governor, not the elk).

"Is the ass in the courtroom?" he asked.

Immediately I was faced with a quandary and was not sure of his meaning. But he was the governor and I had to be honest.

"Yes," I answered, "he just went in."

To which the Governor responded, "Well tell him I stopped by to say hi."

As quickly as he arrived, the governor was gone and my first and only visit with Gov. Hammond

was over. But I was left with another quandary, which one of the three judges was he referring to, and to whom I should deliver the message?

I don't recall now how I resolved this delicate issue, but I understand that the governor's question remains one for the ages, one that is often debated, frequently repeated, and commonly asked, "Is the ass in the courtroom?"

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

Do citizens have a constitutional right to police protection?

Editor's note: Former Alaska Supreme Court Justice Robert Erwin who died last month was a consistent contributor to the Alaska Bar Rag. He recently submitted two articles that we had yet to publish. This is the first of those, used by permission from his family.

By Robert C. Erwin

Recently, after a visit to Alaska by the attorney general of the United States, Alaska Native leaders, the Anchorage Daily News, and several Alaska television stations, raised questions about the lack of law enforcement in rural areas and Native groups requested the federal government provide aid to local village governments in policing certain crimes in the bush.

There are legal questions of both federal power and state power under such requests. This article is to examine if there is a state constitutional right to police protection under Alaska's Constitution.

There are no federal police powers set forth in the United States Constitution. But Article I, Section 8 and the Tenth Amendment provide that powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the states or to the people.

Each state thus has the power delegated to it in its own constitution. There are a few state opinions which hold there is no right to police protection by its citizens. See *Warren v. District of Columbia*, 444 A.2d 1 (Dist. Col. 1981); *Massengill v. Yuma County*, 456 P.2 376 (Arizona 1969).

However, no state has the constitutional provisions in their Bills of Rights similar to those adopted in Article I of the Alaska Constitution which provides as follows:

1. Inherent Rights. This Constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities and protection under the law; and that all persons have corresponding obligations to the people and to the State. (*Emphasis added*).

2. Source of Government. All political power is inherent in the people. All government originates with the people, is founded upon their will only and is instituted solely for the good of the people as a whole. (*Emphasis added*)

These general statements as to the rights of all Alaska citizens are followed in Article I by specific statements with regard to criminal administration in Section 12 and the Rights of Crime Victims in Section 24 as follows:

Section 12: Criminal Administration: "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: *The need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender and the principle of reformation.*" (*Emphasis added*).

The interpretation of Alaska's constitutional provisions has been discussed in several early Alaska Supreme Court opinions. The conclusion of those opinions was that the rights expressed under the Bill of Rights expressed in the Alaska Constitution were not limited by similar provisions in the US Constitution.

In an early opinion of the Alaska Supreme Court in *Roberts v. State*, 428 P.2d 340, 342 (Alaska 1969), Justice Boney stated the Declaration of Rights found in the Alaska Constitution was broader than the similar provisions in the U.S. Constitution:

"...We are not bound in expounding the Alaska Constitution Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution..."

In *Baker v. The City of Fairbanks*, 471 P.2d 401, 402 (Alaska 1970) the Alaska Supreme Court in an opinion by Justice Conner, again, stated that the Alaska Bill of Rights was to be given an interpretation that was necessary for the kind of civilized and ordered liberty which is at the core of our constitutional heritage:

"...In deciding Appellate has a constitutional right to a jury trial, we have decided to extend this protection. In doing so, we recognize that this result has not been reached in certain other jurisdictions or by the United States Supreme Court. The mere fact, however, that the United States Supreme Court has not extended the right to jury trial to all types of offences does not preclude us from acting in this field. While we must enforce the minimum constitutional standards imposed on us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for the constitutional direction from the highest court in the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

Subsequently, in the case of *McGinnis v. Stevens*, 570 p. 2d 735,737 (Alaska 1977), Justice Rabinowitz noted that due process rights under the Alaska Constitution were more extensive than those delineated under the US Constitution. See also *State v. Browder* 486 P.2d 925, 936-937 (Alaska 1971) for discussion of *Baker v. City of Fairbanks*, supra.

An extensive review of the Alaska Constitutional framework and the expansive reading thereof, is set forth in the Article "Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework", authored by Susan Orlansky and Jeffrey Feldman and is found in the Duke University Alaska Law

Review, Volume XV Page 1 (June 1998). This review followed an early article on the same subject by Nelson, "Welcome to the 'Last Frontier' Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation", Volume XII Duke University Alaska Law Review, Page 1 (June 1995).

There are no cases which interpret the words "protection of the public" apart from those cases which discuss victims of crime. The focus of these cases is clearly after an injury which is vitally important in and of itself. But it would seem to flow that avoiding victimization is important as well.

As a matter of logic, it appears that protection from crime is at least as important to a potential victim as ones rights after victimization. Certainly, the lack of a police response impacts each Alaska citizen: this entitlement cannot arguably be fulfilled by simply giving the Indian community the right to enforce such rights without the means of doing so.

The constitutional right would have to be enforced by the state or under the authority of the state. It would be clearly under the observation by Justice Rabinowitz in his dissent in *Hootch v. Alaska State Operated School District*, 536 P.2d 793, 809, 814 (Alaska 1975) that a constitutional right cannot be limited or abridged to balance the budget.

The cost of police protection for villages (of more than 200 persons) would be enormous. There is little or no ability for small villages to provide tax revenue to support the cost.

See page 12 for obituary.

However, the problem of lack of police protection gets to be a bigger and bigger political issue. This is due to the rate of domestic violence, child physical and sexual abuse coupled with drug and addiction problems. This causes alarming conditions. The "elephant" in the room may become a herd of "elephants." The veto by the governor of funds for village police will intensify scrutiny on the lack of policing in rural areas and may force solutions to the problems.

Robert C. Erwin was admitted in Washington in 1960 and Alaska in 1961. He served as DA at Nome, Fairbanks and Anchorage. He was a member of the Alaska Supreme Court from 1970 - 1977. He presented more than 220 appeals to the Alaska Appellate Courts. He died Jan. 24, 2020.

Footnotes

The jurisdiction of Indian Courts is based on the concept of "Indian Country" created by Indian Treaties and Indian areas which were created by the Federal Government. The Federal Government has recognized more than 200 Native Villages in Alaska as Indian areas; but the United States Supreme Court has ruled there is no tribal sovereignty in Alaska except for Annette Island Reservation in Southeastern Alaska. *Metlakatla Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961); reversed in part 369 US 45 (1962). See also, *Alaska v. Venetie Tribal Government*, 522 US 520 (1998), for a history of Tribal Sovereignty in Alaska. See *Atkinson v. Haldane*, 569 P.2d 151, 152-154 (Alaska 1977).

It is difficult to determine how the Federal Government could authorize a Native Court in Alaska Native Villages when such villages are subject to the police and taxing powers of the State Native Village of Stevens, 757 P.2d 32, 40-41 (Alaska 1988).

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TVBA celebrates the Fourth of July

What do cocktail recipes, RBG bobbleheads, drill bits, chocolates, knives, and a potato have in common? Some of these items could have been yours if you had attended the TVBA Fourth of July party held Feb. 21, 2020. Nonetheless, your “polite company” combat skills would have been tested during this white elephant exchange. On that day, a variety of distinguished, well dressed, and/or learned Fairbanks legal community members and their guests ventured into the cold, dark night for the warmth of conversation with friends new and old at the Binkley Room at Pike’s Lodge. (One TVBA idiosyncrasy is that the TVBA’s picnic and games in July are traditionally referred to as the TVBA Christmas Party, while the annual dinner changing leadership, aka Fourth of July Party, is held in the winter.)

After a satisfying buffet dinner complete with seconds and a separate plate for salad, we reflected on the TVBA’s busy 2019: our Fourth of July Party in January, hosting the Law Day ‘chase the ambulance’ Race Judicata, providing 2019 Alaska Bar Convention attendees a popular hospitality suite, entertaining a slate of 9th Circuit Court judges, the Christmas Party in July at Pioneer Park for friends and families, contributing to the ‘We the People’ competition, and substantive discussion on controversial state and local bar issues. There was sporadic reporting during the Ken’s Korner section of our weekly meeting. Sometimes Ken’s Korner was presented by a series of not-Kens. We recognized all the members and officers who supported 2019’s activities with their time, energy, dues, and/or criticisms. They made these events possible.

We turned the reins over to the new 2020 slate of officers: Kirk Schwalm, president; Rachael Delehanty, vice president/treasurer; and Mike Kenna, secretary, all of whom enthusiastically assumed their duties sans oaths for 2020. The evening continued with door prizes and a participatory gift exchange, complete with authorized grand and petty theft. Some stayed at Pikes,

some took home leftovers, but everyone wore smiles by the end of the evening.

So how do you become a part of these activities and camaraderie? Please join us at the weekly meeting of the TVBA. This Fairbanks legal tradition began much earlier than 1945, but we cannot vouch for the

location or the language back then. The meeting is in Fairbanks, Fridays at noon, on the second floor of Salty’s on Second, and you can find members breaking bread, heckling

during entertaining minutes, hearing court updates, learning the latest developments affecting our practice, and often engaging in substantive/procedural legal discussions. First timers are always welcomed, as are attorneys new and old, judges, paralegals, those working in the legal field, those interested in the law, and curious onlookers from far and near. By attending you will help sustain this meeting of colleagues

We recognized all the members and officers who supported 2019’s activities with their time, energy, dues, and/or criticisms. They made these events possible.



Bob Groseclose made quite a haul of door prizes and Chinese auction items.

much more friendly than the gentleman who suggested that E.T. Barrette vacate the *Lavelle Young*.

If you are not ready for a committed relationship, consider attending the Christmas Party in July. The TVBA provides grilled items and beverages, members and guests the sides, and Judge Beistline the good ole time family games (egg toss, sack races, tug of war, etc). This is Fairbanks summertime magic, and as my father-in-law says, “Fairbanks in the summer is just like Los Angeles ... in the 1950s.” Please join us.

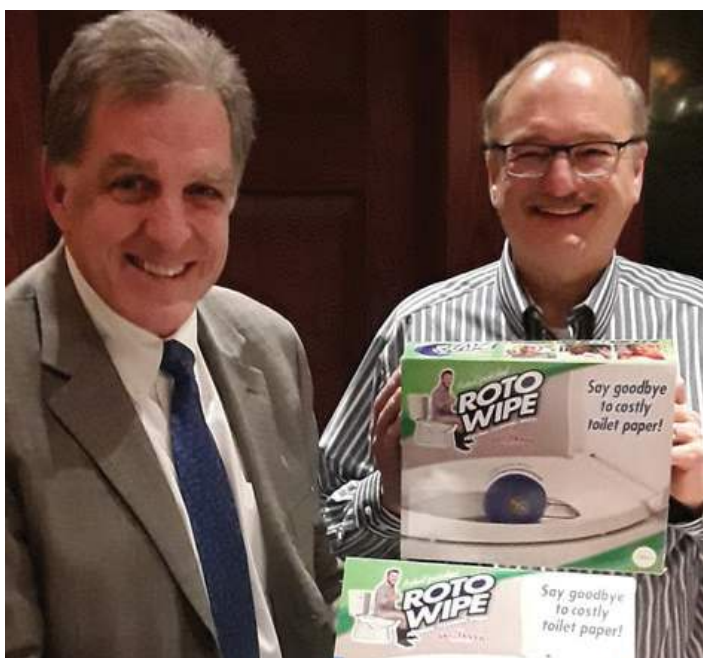
Photos by Gail Ballou



Superior Court Judge Tom Temple engaged in lawful theft at Chinese auction to procure this family-friendly item.



Outgoing president Scott Oravec passes the scepter and TVBA robe to incoming president Kirk Schwalm.



Superior Court Judge Mike MacDonald and District Court Judge Ralph Beistline display their matching Rotowipes from the Chinese auction



Rita Allee and Terri Coleman examine a Chinese auction item -- what might this be? Oooh, a Ruth Bader Ginsburg action figure!



Alicemary (Aly) Rasley guards a knife set selected at the Chinese auction (but lost it on the next round)



Samantha Slanders

Advice from the Heart

Dear Samantha,

To serve my country as a coast guardsman, I moved to Kodiak from Shaker Heights, Ohio. It's been tough getting used to this wet and weird place. Women wear rubber boots to bars. Every guy has a beard. It makes an American lonely for home. When I feel that way, I drive over to the Taco Bell for two double cheesy gordita crunches and a Baja blast. That is comfort food in Ohio if you don't live in Cleveland. Now the 'Bell is pulling out of Kodiak. I'll have to fly to Anchorage for a decent taco. What Should I Do?

**Sincerely,
Crunchless in Kodiak**

Dear Crunchy,

When I was your age, mac and cheese was my comfort food. Not the kind that came out of a blue box manufactured by an international food cartel, but ambrosia straight from grandma's oven. Any dish accompanied by mashed potatoes and gravy came in close second. But it had to be made with love, not for a minimum wage salary. Forget fast food. Find a nice partner who can cook even while wearing XtraTuff boots on the first date. That's a chic-sexy look in an Alaskan fishing town.

**Sincerely,
Samantha Slanders**

Dear Samantha,

Alaska is too boring. National and international news sites are full of weird and strange news that takes place elsewhere. They never report anything happening here. Lots of odd stuff happens in Florida. Just last month, when the temperature dropped to near freezing, the weather service issued a warning for falling iguanas. Have you ever even seen a lizard in Alaska? A golden retriever made the news in England for holding five tennis balls in his mouth at one time. All Alaska has is the boring Iditarod. In Italy threats were made against a woman who substituted brown gravy for marinara sauce on her pasta. I bet half the cooks in Anchorage are

rushing to duplicate this tasty dish. What is wrong with Alaskans?

**Sincerely,
Disgusted in Douglas**

Dear DD,

You think frozen iguanas falling out of trees is special? What about the bull moose whose antlers became tangled up in outdoor Christmas lights? How about Stubbs the cat, the one-time Talkeetna mayor? A Juneau black bear fell through a sky light and smashed a child's birthday cake. You don't read about iguanas crashing kid's birthday parties in Florida. All Alaskans should embrace rather than ignore the weirdness like you do. It helps to get through the long winters.

**Sincerely,
Samantha Slanders**

Dear Samantha Slanders,

Last summer I bought a roundtrip ticket from the Alaska Marine Highway to ride a ferry from Bellingham, Washington, to Tenakee Hot Springs and back. I was prepared for the Tenakee experience, even brought several towels for drying off after dips in the communal bath. Life here was so pleasant that I kept delaying my departure. Then one day I learned that there would be no more ferry service until next summer, if at all. I spent all my money at the Tenakee store. Now I'm getting by as an unpaid house sitter while living on frozen chum salmon and cheap packages of ramen abandoned by a group of kayakers after they paddled here from Hoonah last September. Could you advertise my plight, maybe set up a go-fund account? Call it, "Out of Luck, Out of Service in Tenakee."

**Sincerely,
Stuck and Shriveled**

Dear Shriveled,

The lawyers for this newspaper won't let me set up go-fund accounts for even the most worthy of people. But I will print your letter. You are only one of many left on the beach this winter by the blue canoes.

**Sincerely,
Samantha Slanders**

Name that lawyer



Alaska Law Librarian Susan Falk and the library staff have come across a number of photographs with no identification. The Bar Rag plans to run one or two of them as a regular feature in future issues, in the process asking if anyone can identify the people in the pictures.

The note accompanying this photograph says: "Photograph of a group of Anchorage attorneys taken at the Lido Gardens at Fourth Avenue and B Street sometime after the end of World War II." Pictured are Edward L. Arnell, Harold J. Butcher, Warren O. Cuddy, Edward V. Davis, Anthony J. Dimond, George B. Grigsby, Simon Hellenthal, John E. Manders, J.L. McCarrey Jr., Stanley McCutcheon, Raymond Plummer, Gerald Williams, and two unidentified men. We would love to know which name belongs to which face as well as the names of the two unidentified men.

If you can identify the two unidentified people in the photograph and/or put the correct names with the everyone (or even one or two) at the table, please send the information to managing editor Tim Jones at jonesatim@gmail.com. There's an extra special prize for anyone who can name the waitress.

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 in 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, aimee@akwater.com

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

Anchorage: open (seeking volunteer)

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.

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ALASKA BAR ETHICS
OPINION 2020-01**Representing a Non-Party
Witness at a Deposition in a
Matter Where the Lawyer Also
Represents a Named Party**

FACTS: A lawyer is representing a client at the deposition of a third-party witness. During a break in the deposition, the lawyer and witness confer. When the deposition resumes the lawyer announces that the lawyer is now representing the witness. As the deposition proceeds, the lawyer instructs the witness not to answer certain questions and at different points recesses the deposition to consult with the witness.

The Committee is told that this scenario is not infrequent in litigation, and has been asked whether it is permissible under the Rules of Professional Conduct.

RULES: ARPC 1.2, 1.5, 1.6, 1.7, 1.8(f), 1.9, 1.10, 1.11, 1.13, 4.3, 7.3

SUMMARY: Agreeing to represent a witness mid-deposition when representing one of the parties to the matter raises serious ethical issues. Before undertaking such a representation, a lawyer must carefully consider the issues, disclose potential conflicts, and obtain informed consent from both the prospective client and from the lawyer's existing client. Caution and prudence are in order, as many ethical issues are implicated in this situation.¹

OPINION: The factors that apply to any representation of multiple clients in the same matter apply to this situation. These considerations may not be ignored simply because of time pressures in the deposition setting. We review the applicable ARPCs below.

ARPC 1.2 – Scope of Representation. The first issue is scope

of representation. The lawyer and the client must agree on “the objectives of representation” and “the means by which they are to be pursued.” ARPC 1.2(a). If limited, the scope must be reasonable under the circumstances and the client must give informed consent (“consent after consultation”). ARPC 1.2(c).

Questions to consider include whether the representation is limited to representing the witness during the deposition, or is it concerning any issue that may arise relating to the matter, or perhaps even a broader scope? Does the witness understand what the limitations are and how they affect the witness's interest? In this circumstance, given the on-the-fly creation of an attorney-client relationship, clarity and understanding on the scope of representation are critical.

Ethics opinions from other jurisdictions express skepticism that a person can be adequately represented at a deposition on a “limited representation” basis.²

ARPC 1.5 – Fees. The lawyer and client must agree on fees. ARPC 1.5. If fees are expected to exceed \$1,000, a written fee agreement must be entered “before or within a reasonable time after commencing the representation.” ARPC 1.5(b). The rules require disclosure of any potential assessment of an adverse party's “costs, fees, or expenses if the client is not the prevailing party.” ARPC 1.5(b).

Additionally, if the representation is limited under ARPC 1.2 and a written agreement is required under ARPC 1.5, “the agreement shall describe the limitation on the representation.” ARPC 1.2(c)(2).

The questions to consider in this situation include whether fees will be charged for the representation, who is paying those fees and, if the

lawyer's existing client is paying for the lawyer's services, whether both clients agreed to the arrangement.³ The question of potential liabilities must also be considered and disclosed. While seemingly remote in this situation, an adverse fee award is within the realm of possibility: for example, if the lawyer instructs the witness not to answer a question and an order to compel and award fees is entered by the court.

ARPC 1.6 and 1.8 – Confidentiality of Information. In the usual representation, a lawyer “shall not reveal a client's confidence or secret unless the client gives informed consent,” except for disclosures that (1) are impliedly authorized in order to carry out the representation, ARPC 1.6(a), and (2) are permitted in certain very limited circumstances. ARPC 1.6 (b). “Use of confidences and secrets to the disadvantage of the client violates the lawyer's duty of loyalty.” ARPC 1.8(b) Cmt.

When there is joint representation of two or more clients, “impliedly authorized” disclosures encompass confidential information material to the joint representation. The prospective jointly represented clients need to be informed and consent to the exchange of otherwise confidential information with each other and the concomitant waiver of confidentiality between them. “With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.” ARPC 1.7, Cmts.

In the situation presented, the lawyer must analyze whether representation of the witness is a separate representation or a joint representation with the lawyer's other client and seek consent accordingly. For example, if the lawyer is representing a corporation and one of its employees is the witness, will the lawyer's representation of the witness be a stand-alone representation or is it part of a joint represen-

tation with the corporation? If joint, and the witness confides something to the lawyer that could jeopardize the witness's employment, but which is also material and helpful to the corporation's defense, the lawyer may be obligated to disclose that information to the corporation—and vice versa. The lawyer must carefully explain these issues and obtain informed consent from both the witness and the existing client before agreeing to represent the witness.

ARPC 1.7, 1.8, 1.9, 1.10, 1.11 – Conflict of Interest. The general rule on conflict is that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” ARPC 1.7(a). “Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client, or a third person or from the lawyer's own interests.” ARPC 1.7 Cmt. Specific conflict rules apply in certain circumstances.⁴

In the situation described, the obvious initial inquiry is whether there is a conflict of interest between the lawyer's existing client and the witness. There may be no conflict; there may be a waivable conflict; or there may be an unwaivable conflict. See, ARPC 1.7(a) and (b). Other conflicts, with other clients or the lawyer's own interests, may also exist. In the situation presented, regardless of the time pressures inherent in an ongoing deposition, the lawyer is required to assure that there are no conflicts that would prevent the representation. The lawyer must:

- 1) clearly identify the client or clients;
- 2) determine whether a conflict of interest exists;
- 3) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is waivable; and
- 4) if so, consult with the clients affected ... and obtain their informed consent, confirmed in writing.

Continued on page 7

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Emma Haddix
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David S. Houston
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Mike Lindeman
760-831-8291

Michael Stephan
McLaughlin
793-2200

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222-0506

Nicholas Ostrovsky
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Greggory M. Olson
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Valerie Therrien
388-0272

Juneau

Yvette Soutiere
465-8237

Kenai

Liz Leduc
283-3129

Arizona

Jeffrey A. Gould
520-808-4435



Lawyers' Assistance Committee
Alaska Bar Association

Board of Governors Action Items January 30, 2020

- Voted to recommend approval of 13 reciprocity applicants and 17 UBE score transfer applicants.
- Voted to approve the stipulation for a private reprimand in a discipline matter.
- President appointed a subcommittee to review three applicants for character and fitness issues: Hofmeister, Sebold and Leonard.
- Voted to adopt the ethics opinion entitled: “Representing a Non-Party Witness at a Deposition in a Matter Where the Lawyer Also Represents a Named Party.”
- Voted to approve three requests for non-standard testing accommodations for the February bar exam.
- Voted to transfer \$100,000 to the Long Term Capital Reserve account.
- Voted to approve two Rule 43 (ALSC) waivers for Peter Travers and James Rynard.
- Voted to authorize the building subcommittee to proceed, subject to approval by the Board.
- Voted to appoint Jon Katcher to the Alaska Judicial Council.
- Voted to decline to provide Bar member emails to ALPS; voted to allow a link on the Bar homepage which would take a member to a Bar page with information about ALPS with a link to their site; that this page would be available to other malpractice insurance providers on request.
- Voted to send to the governor the following nominations to the Alaska Commission on Judicial Conduct: 1st Judicial District: Jane Mores and Mark Choate; 2nd & 4th Judicial District: Michael Hostina, Thomas Jamgochian and Karla Taylor-Welch.
- Approved the October board meeting minutes.

NEWS FROM THE BAR

Continued from page 6

ARPC 1.7 Cmt.

It is also important to recognize and disclose that “[o]rdinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.” ARPC 1.7 Cmt. Representation of the witness may be tactically advantageous at the moment, but if conflicts emerge after the deposition, the lawyer may be disqualified from representing either party as the matter proceeds. And, as the Alaska Supreme Court has noted, “It is well established that an attorney, disqualified on conflict-of-interest grounds, generally is barred as a matter of public policy from receiving any fee from either of the opposed interests.”⁵

Conflict of interest is a significant issue in this scenario. Great caution is in order. Disclosure to, and informed consent by, both clients is critical. Moreover, even if a conflict is not apparent at the outset of the representation, a conflict can arise later. The lawyer must be aware, attentive and responsive to developing conflicts.

ARPC 4.3 and 1.13 – Dealing with Unrepresented Persons and Organization as a Client. While perhaps not the classic situation, in the scenario presented the witness is an “unrepresented person.” Whether the lawyer is proposing representation or is responding to the witness’s request for representation mid-deposition, the “lawyer shall not state or imply that the lawyer is disinterested.” ARPC 4.3.

In particular, and related to the conflict issues discussed above, when dealing with an organization’s employee or other “constituent,” a lawyer is obligated to “explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” ARPC 1.13(f).

ARPC 7.3 – Solicitation of Clients. This rule may not be a major issue in the situation presented. Nonetheless, it is worth keeping in mind that a lawyer “shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain...” ARPC 7.3(a).

The concern is that the prospective client “may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.” ARPC 7.3 Cmt. That concern could easily be an issue during a heated deposition, where the witness is the subject of aggressive or hostile questioning by the opposing party’s lawyer.

Conclusion. As the above list indicates, agreeing to represent a witness mid-deposition when representing one of the parties to the matter raises any number of serious ethical issues. The Committee counsels prudence and deliberation

before a lawyer agrees to undertake representation in the situation presented.

Approved by the Alaska Bar Association Ethics Committee on January 2, 2020.

Adopted by the Board of Governors on January 30, 2020.

Footnotes

¹ These ethical concerns are present in many situations involving actual or potential multiple representation. For example, a lawyer representing a corporation may be asked to attend a deposition of a company employee. The employee may see the lawyer as “their” lawyer and rely upon the lawyer for advice and guidance before and during the deposition. A lawyer facing this or another multiple representation situation should consider the ethical issues identified in this opinion and address those issues, in advance, with all concerned.

² The New York City Bar Association, for example, concluded that it is doubtful that a lawyer could ever adequately represent a deposition witness on a “limited” basis:

Although there is no such thing as a “one-size-fits-all” representation, representing a non-party witness for the purposes of a deposition may involve the following activities:

- Reviewing relevant documents, testimony and other materials in order to understand the issues in the case and the potential relevance of the witness’s testimony;
- If the witness is also subpoenaed to produce documents, assisting the witness in identifying, collecting, reviewing and producing documents in response to the subpoena;
- Meeting with the witness in advance of the deposition to prepare for the testimony;
- Evaluating whether the potential testimony may expose the witness to criminal or civil liability, and providing advice on how to minimize such liability (or, if the potential liability implicates an area of practice that is outside the attorney’s expertise, advising her to retain competent counsel);
- Evaluating what impact the witness’s potential testimony may have on the case generally;
- Attending the deposition and interposing appropriate objections and offering appropriate guidance to the witness concerning the testimony;
- Ensuring that the deposition transcript is transmitted to the witness, assisting as needed with filling out an errata sheet, securing the witness’s signature on the transcript, and delivering the signed transcript to opposing counsel;
- Following up, as needed, with additional requests for information or documents from the witness; [and]
- Answering any questions the witness has concerning the testimony and its implications for the witness or for the case generally.

NYC Bar Ethics Committee Formal Opinion 2016-2: “Representing a Non-Party Witness at a Deposition in a Proceeding Where the Attorney Also Represents a Named Party.” <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2016-2-representing-a-non-party-witness-at-a-deposition-in-a-proceeding-where-the-attorney-also-represents-a-named-party>

³ See ARPC 1.7 Cmt (“Interest of Person Paying for a Lawyer’s Services”) (“A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client.”) and see ARPC 1.8(f) (“A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the lawyer-client relationship; and (3) information relating to a client’s confidences or secrets are protected as required by Rule 1.6.”).

⁴ See ARPC 1.8 (Conflict of Interest: Current Specific Rules); ARPC 1.9 (Duties to Former Clients); ARPC 1.10 (Imputation of Conflicts of Interest: General Rule); and ARPC 1.11 (Special Conflicts of Interests for Former and Current Government Officers and Employees).

⁵ *Moses v. McGarvey*, 614 P.2d 1363, 1372 (Alaska 1980).



Alaska Supreme Court meets in Ketchikan (1970)

The Alaska Supreme Court opened a two-day session in Ketchikan Jan. 16, 1970. The justices were greeted when court opened that morning by members of the Ketchikan Bar Association. KBA President A.H. Ziegler and Vice President W.C. Stump welcomed the court and introduced KBA members. Justices seated on the bench from left are: Roger G. Connor, Jay A. Rabinowitz, acting Chief Justice John Diamond, George Boney and James M. Fitzgerald. Fitzgerald was a Superior Court judge in the Third District sitting in for Chief Justice Buell A. Nesbitt who had been hospitalized. Members of the Ketchikan Bar Association are from left; Clark Stump, Robin Taylor, Richard Whitaker, Pete Ellis, A.H. Ziegler, District Court Judge Henry C. Keene Jr., W. C. Stump, George Gucker, Ed Stahia, Cliff Smith, Charles Cloudy, and Fred Miller. Eleven other members were absent. Clerk of the Supreme Court was Josephine McPhetres, foreground.



First Alaska Superior Court judges sworn in (1959)

The first Alaska Superior Court judges named after statehood were sworn in at a ceremony Nov. 28, 1959, in Juneau. From left with their assigned cities are: Harry O. Arend, Fairbanks; Hubert A. Gilbert, Nome; James A. von der Heydt, Juneau; James M. Fitzgerald, Anchorage; J. Earl Cooper, Anchorage; Everett W. Hepp, Fairbanks; Edward V. Davis, Anchorage; and Walter E. Walsh, Ketchikan. The eight judges took their oaths of office for the \$19,000 posts at ceremonies in the federal courtroom. The eight left a week later for a five-day training-by-observation program in the courts of New Jersey and Brooklyn. They were to begin hearing cases when the Alaska Court System moved into operation the following January. Photo by Joe Alexander.

SEC proposes changes to investment adviser rules

By Julius J. Brecht

The Securities and Exchange Commission has proposed in a release (release)¹ revising (Changes) certain rules pertaining to investment advisers (current rules and advisers, respectively). Current rules were, and changes are to be, adopted by the SEC pursuant to the Investment Advisers Act of 1940 (Act).

Scope of Changes—

Itemization. Changes pertain to four areas (applying to Rules 204 and 206 under the Act):

- *Advertising (advertisements).*
- *Forms of, and compensation for, solicitations (solicitations).*
- *SEC Form ADV (Form ADV).*
- *Required books and records (recordkeeping).*

Public comment period; release size. The release sought public comment on changes through Feb. 10, 2020. The SEC may proceed to final rule adoption after that date.

The release is over 500 pages long and contains over 1,200 questions seeking comments on specific changes.

Focus of release. The release focuses on reforms relating to advertisements by, and use of solicitations by or for, advisers in seeking or maintaining clients and investors (collectively, clients). Form ADV and recordkeeping complement the other changes.

Advertisements replace broadly drawn current rule-limitations,

first adopted in 1961, with a more principles-based approach (PBA) to regulation. Solicitations use PBA in addressing changes in regulatory and industry practices occurring since adoption of relevant current rules in 1979. Changes include disclosing all compensation forms for, and expanding the disciplinary-events list which can be the basis for disqualifying a person from acting as a solicitor for an adviser in, solicitations (solicitor).

While current rules require recordkeeping for advertisements sent to 10 or more persons, Advertisements require it for such activity to *one or more* persons. This change subjects individual, personalized services to advertisements and recordkeeping.

What's an Adviser or Solicitor? Under the Act, an Adviser is a person who, for compensation, engages in the business of providing advice to others or issuing reports or analyses regarding securities. Under Current Rules, a Solicitor is a person who, directly or indirectly, solicits a client for, or refers the client to, an Adviser, i.e., the subject of Solicitations.

Bi-level securities regulation—

Federal and state levels. Adviser regulation in the United States is not only at the federal level. Un-

der the act, regulation of an adviser with less than \$25 million of assets under management (small adviser) is deferred to state regulation, with limited exception. That exception applies where the state, in which a small adviser has a principal office and place of business, has no laws regulating small advisers.

Alaska does regulate small advisers and solicitor-type activity. It is accomplished under the Alaska Securities Act (AS 45.56, effective Jan. 1, 2019, Alaska Act).

Several persons are excluded from the Adviser definition under both the Act and the Alaska Act. They include lawyers, accountants, engineers and teachers, whose performance of that service is incidental to the respective practice or profession.

Effect on small advisers. States are not required to follow change-related provisions in regulating small advisers. However, changes which end-up as final SEC rules might be of interest to states in interpreting their respective small-adviser laws.

Some change-related ideas may influence future Alaska Act regulations. If made a part of those regulations, they could prove useful to Alaska in administering, and to those persons seeking to function as small advisers or solicitors under, the Alaska Act.

Some further changes through advertisements —

Overview. The following is given as descriptive of some further provisions of advertisements.

The release notes advertisements are useful for advisers. They are disseminated as to adviser services to inform, persuade and provide information to clients. However, it also notes advertisements can present risk of misleading clients.

The release states, aside from an interest in attracting or retaining clients, an adviser has a duty not to mislead them. That duty may conflict with adviser-personal-interest. Balance between adviser and client interests is further challenged by the manner in which a client receives information from the adviser.

Current rule approach. To address these advertising-related issues, Current Rules impose *four prohibitions of actions* thought by the SEC to be *per se misleading* (Current Prohibitions):

- **Testimonials, endorsements and third-party ratings (testimonials)** — As to adviser and adviser services.
- **References to specific profitable recommendations** — Previously made by adviser.
- **Representations as to graphs or other devices** — That they can independently be used to determine which securities are to be bought or sold.
- **Statements as to free services** — Cannot be made, unless the services are actually so provided, without condition or obligation.

Current rules also prohibit advertisements containing any untrue statement of a material fact or which

are otherwise false or misleading. This caveat was adopted to address advertisements which, although not containing violations of current prohibitions, could nevertheless be fraudulent and misleading.

Changes in marketplace. The release notes changes have occurred since current rule adoption, including:

- **New and expanded uses of communications technology** — Advent of internet, mobile applications and social media.
- **Expectations of investors shopping for advisory services** — Greater reliance upon internet.
- **Changes in nature of investment advisory industry** — Moving away from newsletters to personalized services.

It outlines a new approach through advertisements.

Change approach through advertisements. To remedy these perceived current-rule shortcomings, the SEC sets forth and describes need for significant revisions as contained in advertisements, including the following:

- **Modifying definition of "advertisement" (modifications).**
- **Replacing current prohibitions.**
- **Allowing limited testimonials.**
- **Including tailored requirements for presentation of performance results (tailored requirements).**

The release states modifications are needed to address ever-changing technology. Modifications' redefinition includes any communication, disseminated by any means by, or on behalf of, an adviser. They further include an effort seeking to retain a client in a pooled investment vehicle advised by the adviser.

Modifications set forth specific exclusions from the definition as follows:

- **Certain communications** — Live, oral communications, not broadcasted on radio, television, internet or similar medium.
- **Certain responses** — To unsolicited requests for specific information.
- **Other limited exclusions.**

Advertisements contain a list of prohibited practices, e.g., including making a material claim without substantiation. They also use PBA to replace current prohibitions. For example, advertisements exclude advertising containing an untrue statement of material fact or omission of material fact "necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading."

The release proffers testimonials can be useful and important for investors when evaluating advisers. Tailored requirements provide necessary disclosures and other safeguards to avoid investor deception through testimonials.

The release states advertising adviser-performance results can be useful for investors when presented in a manner neither false nor misleading, i.e., in accordance with tailored requirements. In that con-

Continued on page 9

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Meet the new Bar Counsel – Phil Shanahan

Continued from page 1

for the New England Patriots since Phil was a child. Phil has been to four Super Bowls to see the Patriots. His favorite sports memory is attending Super Bowl 51 with his son in Houston, TX, in 2017.

He was an average student until the ninth grade when his basketball coach convinced him that academics

were going to be more important to his future than basketball. Phil attended Rockland High School and Stonehill College in Easton, Massachusetts. While in college, he was inspired to attend law school by a college professor who had been a practicing lawyer.

Phil attended Northeastern Law School with his future wife, current Superior Court Judge Una Gandb-

hir. While in law school, Phil worked in Hawaii and Alaska as part of Northeastern's cooperative legal education program. For his Alaska co-op, he worked for current Superior Court Judge William Morse at the International Brotherhood of Electrical Workers. During this experience, Phil fell in love with Alaska and he developed a lifelong relationship with Judge Morse.

Phil graduated from law school in 1993 and took the Alaska bar exam in 1994. He then worked as a contract attorney for four years, taking on primarily criminal defense and some family law work. Based on those experiences, Phil decided he wanted to be a criminal defense attorney.

In 1998, he accepted a position as a criminal defense counsel with the Office of Public Advocacy in Anchorage. Phil showed an aptitude for accurately evaluating criminal cases. As a result, Phil spent most of his time in an intake position with OPA.

In 2007, Phil returned to private practice and in 2010, he opened his own firm. His private practice was almost entirely criminal defense, mostly in state court. Phil has primarily practiced in the Third Judicial District, but he has practiced in

rural Alaska as well. Throughout his career, he relied on bar counsel to help him navigate thorny issues.

After more than a decade in private practice, he decided that he wanted to give back to the Alaska Bar by serving as bar counsel. In this role, he wants to help attorneys avoid issues by providing informal ethical advice counsel early on. Phil's decades of experience in representing clients provide him with a wide perspective on the issues that clients can cause for attorneys. He also wants to assist lawyers with transition plans to protect clients' interests and the reputation of our profession.

When attorneys call him for advice, Phil advises them to have their rule book handy. Attorneys should be aware that all of the Ethics Opinions of the Alaska Bar Association are available at <https://bit.ly/3aqiNNA>. Though thrilled to serve as Bar Counsel, he still dreams of coaching basketball (he coached his son's teams for many years).

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Clint Campion is a member of Sedor, Wendlandt, Evans & Filippi, LLC. He is also a member of the Alaska Bar Association's Ethics Committee.

After more than a decade in private practice, he decided that he wanted to give back to the Alaska Bar by serving as bar counsel. In this role, he wants to help attorneys avoid issues by providing informal ethical advice counsel early on.

SEC proposes changes

Continued from page 8

text, they also require attention to the intended audience, e.g., level of sophistication in, and access to analytical information on, proposed investments.

Some further changes through solicitations—

Overview. The following is given as descriptive of some further provisions of solicitations.

Use of solicitors. The release notes advisers sometimes retain and use solicitors to attract clients. It states, without appropriate solicitor disclosure to clients, compensation under that retention creates risk that clients might mistakenly view solicitor recommendations as being unbiased opinion.

Current rule Approach. Current rules make a cash-fee paid to a solicitor for referrals to the adviser unlawful, with limited exception. The exception requires the adviser and solicitor to have entered into a written agreement stating the terms of their relationship (agreement). The agreement must require the solicitor to provide a client with a current copy of the adviser's Form ADV brochure (generally descriptive of Adviser and Adviser services, Brochure) and other specified disclosures.

Moving to PBA. While continuing the current rule-agreement requirement, solicitations expand it to include specificity of solicitation activity and terms of all compensation forms. Solicitations make several other changes, moving away from prescriptive-based requirements. For example, they eliminate the express solicitor requirement to provide a client with a copy of the brochure.

Solicitations use PBA, e.g., requiring disclosure to investors as to

the effect of compensation on solicitor incentive in making an adviser referral.

Expansion of disqualifications. Current rules set forth restrictions on who may function as a solicitor, e.g., the restriction imposed when the person is barred or suspended by the SEC from association with an adviser. Changes expand those restrictions to include other events, e.g., disciplinary actions by other regulators and self-regulatory organizations.

Summary —

Efforts by the SEC on changes are comprehensive. While this article covers some changes, prudent practitioners, in advising advisers, solicitors or their clients, ought to be aware of all changes and what eventually may become SEC rules.

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 other 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, Alaska. His concentration of practice is in state and federal securities law and corporate and business law. He may be reached at jbrecht@bgbalaska.com-client relationship or any other contract. The author may be reached at jbrecht@bgolaw.pro.


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Footnote

¹ "Investment Adviser Advertisements; Compensation for Solicitations," SEC Release Nos. IA-5407; File No. S7-21-19, RIN: 3235-AM08; November 4, 2019.

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FEDERAL BAR ASSOCIATION UPDATE

Look for changes coming in the federal criminal justice system

Continued from page 1

that has expanded the resources available for prosecutions, particularly with respect to crime in rural Alaska. Several new prosecutors have already been added, and several more positions are being created. Jamie responded that, despite the increasing number of criminal cases being filed by prosecutors, the number of federal defenders has remained constant. Jamie is hoping to obtain funding for at least one new assistant federal defender. Jamie took over as Alaska's Federal Public Defender Jan. 1, 2020. She has been extremely busy learning all of the administrative functions of that office, in addition to handling her regular criminal case load. The next FBA-Alaska meeting will take

er litigant with discovery-related issues only. For more information, please contact the court's *pro se* staff attorney, Natalie Wicklund (natlie_wicklund@akd.uscourts.gov).

Lawyer representatives

Lawyer representatives play an important role in the administration of justice in the Ninth Circuit; they work to foster open communication between judges and attorneys, and provide support and advice in the functioning of the courts by serving as liaisons between the federal bench and practicing bar. Lawyer Representatives are chosen to serve three-year terms, representing attorneys practicing



mittee (LRCC) is composed of a senior delegate elected by Lawyer Representatives from each of the 15 respective Ninth Circuit districts. The LRCC acts as a liaison for the Lawyer Representatives to the Ninth Circuit Judicial Council's Conference Executive Committee. As its name implies, the LRCC also coordinates the activities of the Lawyer Representatives across the circuit. The LRCC presents educational programs, including the Conference of Chief District Judges and the Ninth Circuit Judicial Conference. The next Ninth Circuit Judicial Conference will be held in Portland July 27-30, 2020.

The number of Lawyer Representatives in a given district is based on the number of District Judges in each district. In the District of Alaska, there are four Lawyer Representatives. The terms are staggered, with two lawyers being selected as co-representatives every third year. Alaska's delegate to the LRCC is the senior-most Lawyer Representative; this year's LRCC delegate is Jamie McGrady. The LRCC district delegate is responsible for planning the Alaska District dinner meeting, which takes place at the Ninth Circuit Conference. The delegate also writes the annual District Report for the District of Alaska, which is published on the Ninth Circuit's website (www.ce9.uscourts.gov).

The current Alaska Lawyer Representatives are:

Kendri Cesar
Email: kendri@sonosky.net
Phone: (907) 586-5880
Term expires: September 30, 2022

Kevin Feldis
Email: kfeldis@perkinscoie.com
Phone: (907) 263-6955
Term Expires: September 30, 2021

Jamie L. McGrady
Email: jamie_mcgrady@fd.org
Phone: (907) 646-3405
Term expires: September 30, 2020

Danee Pontious
Email: dlp@pontiouslaw.com
Phone: (907) 677-9900
Term Expires: September 30, 2021

For more information on becoming a Lawyer Representative, or if you have any questions, comments, or concerns regarding federal courts or federal practice, please contact any of the Alaska Lawyer Representatives listed above. Information is also available on the Ninth Circuit website at www.ce9.uscourts.gov/lawyer_reps.

Darrel Gardner is a past president of the FBA Alaska Chapter, current Ninth Circuit Vice President for the Federal Bar Association, and past president of the Alaska Bar Association.



Chief Judge Timothy Burgess, U.S. Attorney Bryan Schroder, and Federal Public Defender Jamie McGrady speak to the Federal Bar Association.

place March 19, 2020, at noon: "An insider's View of Aviation in Alaska with the FAA and NTSB." Also, be sure to mark your calendar for the Annual Alaska Federal Bar Conference, which will be held on Aug. 11, 2020. As usual, the conference will coincide with the annual fall visit by a panel of the Ninth Circuit Court of Appeals.

For more information, or to join the Federal Bar Association, please contact Kevin Feldis (kfeldis@perkinscoie.com), or visit the Alaska Chapter website at www.fedbar.org; like us on Facebook at "Federal Bar Association - Alaska Chapter;" and follow "Fed Bar Alaska" on Twitter "@bar_fed."

Pro bono project

The District of Alaska continues to seek attorneys to participate in the Pro Bono Prisoner Project, in which local lawyers volunteer to assist *pro se* prisoners with federal Section 1983 cases. The court allows limited appointments in these cases. For example, an initial appointment might consist of assisting a prison-

er in each of the Ninth Circuit's 15 districts in nine western states and two Pacific Island jurisdictions. Currently, there are 168 Lawyer Representatives. Through the years, attorney support and contributions to the administration of justice in the Ninth Circuit have been invaluable and have resulted in positive changes that have improved the functioning of the courts.

On a local level, many Lawyer Representatives work closely with the District, Bankruptcy, and Magistrate Judges in their home districts. Lawyer Representatives sit on various court committees; help plan and present the local District Conference in association with the Federal Bar Association; meet quarterly with District and Circuit Judges, the Federal Public Defender, the U.S. Attorney, and the Chief U.S. Probation Officer; and attend the Ninth Circuit Judicial Conference, held annually at various locations throughout the Circuit.

On a national level, the Lawyer Representatives Coordinating Com-

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In Memoriam

Bob Erwin, former Supreme Court justice, dies at 85

Former Alaska Supreme Court Justice Robert C. Erwin died Jan. 24, 2020, of complications from congestive heart failure. He was 85.

Bob Erwin was born in Seward in 1935. An original Seahawk, he graduated from Seward High School in 1952. He attended the University of Colorado and received a BS in Business Administration in 1956. He attended law school at the University of Washington and earned an LLB in 1960. He was admitted to practice law in Washington in 1960 and in Alaska in 1961.

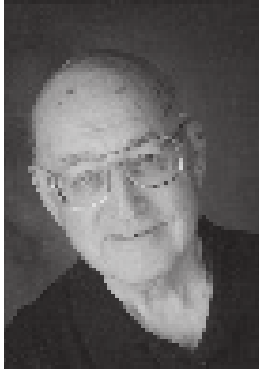
Erwin's legal career in Alaska began before statehood. In 1959 he went to work as a law clerk for the (new) State of Alaska's Department of Law in Juneau and became an assistant attorney general. He moved north when he was appointed district attorney in Nome. In 1960, he met Monica Boucher in Nome. They were married in Nome in October 1962 and had seven children: Robert, William, Janet, Andrew, Kristina, Roberta and Michel.

He was appointed district attorney in Fairbanks in January 1962. He served in Fairbanks until March 1963, when he was appointed district attorney for Anchorage. Bob centered his legal career for the next 57 years in Anchorage.

In April 1964, he entered private practice with the law firm of Hughes, Thorsness & Lowe. He remained there as a partner until his appointment to the Alaska Supreme Court, at age 35, by Gov. Keith Miller in August 1970.

After his retirement from the Supreme Court, Erwin returned to private practice, where he handled a wide variety of cases and developed a successful appellate practice. As close as he could figure, he was the only attorney who had argued a case before every sitting Alaska Supreme Court Justice since statehood. He had his last Supreme Court oral argument on March 22, 2018 at the age of 83. He continued writing on legal issues right up to the end: these included many articles he wrote for the Alaska Bar Rag.

A man of both principle and compassion, Bob believed that 30 percent of your law practice should be devoted to litigants who would not otherwise have access to justice, and his practice reflected this belief. Bob served as a board member on numerous non-profit organizations, including: Beans



Robert C. Erwin

Café, Sudden Infant Death Syndrome Group, Programs for Infants and Children, and as chairman of the Anchorage Mayor's Committee on Alcoholic Homeless, to name only a few.

Bob's passion for the legal profession is reflected in three of his children who also developed careers in the legal field: his son Andrew who is a state circuit court judge in Oregon, his daughter Tina who is a paralegal in Oregon, and his daughter Bobbi; with whom he shared an office for many years. Bob was energized by the special bond he had with his grandchildren: Samantha (now in law school), Robert, and Alexandra Erwin; Mackenzie, Will, and Chance Sahr; and Benjamin, Daniel and Michael Birky.

Even after leaving the bench, Bob continued to regularly "hold court," often with his attorney brother Bill Erwin and other long-time lawyers at Jackie's Place restaurant that allowed them to sit and discuss (and occasionally resolve) various legal issues and the political and societal woes of the day.

Bob is survived by his brother, William M. Erwin (Sheila); his sister, Jo Ann Kraly; his children: Janet (Dave) Birky, Andrew (Karen) Erwin, Kristina (Pat) Eaton, Roberta Erwin, and Michel (Christine) Erwin; his grandchildren; and many nieces and nephews. He was preceded in death by his father and mother, William C. and Hazel Lucile Erwin; his brother Jack A. Erwin; and sons Robert and William.

Condolences may be sent to Roberta Erwin, 429 L Street, Anchorage, Alaska 99501 or rcerwin.palmiererwin@alaska.net. Services for Bob were to be held 4 p. m. Feb. 21, 2020 at St. Patrick's Church in Anchorage.

Arrangements were made with Janssen's Evergreen Memorial Chapel.

Attorney recalls a remarkable associate

By Nelson Page, retired Alaska Bar Association counsel

Wilma French passed died April 25, 2019. I had met her on my first day on the job at Burr, Pease and Kurtz in September 1979, when I reported aboard the law firm as a very young and very green new associate. She was Don Burr's secretary at the time, and she was given the additional assignment of being my legal assistant, overall mentor and quality control supervisor. It was a position she held for almost 38 years. I always assumed that the powers in charge of administering the law firm wanted to give me the best possible guidance as I figured out how to be a lawyer. Either that, or they wanted to minimize the potential damage from turning me loose on an unsuspecting professional community. Possibly it was both of these. In any event for me it was a seriously fortunate decision.



Wilma French

From the beginning Wilma took on the difficult task of trying to make me look better than I was. When I first started working for her I had no experience typing or dictating my own pleadings and correspondence. She suffered through turning my (illegible) handwritten drafts into polished and professional documents. She kept track of my docket and reminded me when things were due. I was very bad at deadlines and she accepted, with little more than a raised eyebrow, my handwritten corrections, which often made their way to her at the last minute — or perhaps after the last minute — and made sure that filings happened on time. She also made carefully diplomatic suggestions about things I might have forgotten, such as the draft order to accompany a motion, or the party that needed to be served with copies. As my career wore on, her corrections and suggestions were for things that were a little less basic, but were just as important to ensuring the quality of my work.

While she was keeping me out of trouble she was also central to the smooth functioning of the entire law firm. She handled the docket for, at one time, more than 20 lawyers, carefully and accurately noting every deadline. She also handled the workload of our senior and very busy partner, Don Burr. When we started switching to new technology she was the person who tested the programs and the machines and made recommendations about what to use. She was a trusted and reliable go-between when management

Continued on page 13

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In Memoriam

Shannon D. Hanley

Shannon D. Hanley, 68, a retired prosecutor for the State of Alaska, and former Kenai Magistrate for the Alaska Court System, died Feb. 8, 2020, at her home in Ocala, FL.

Born in Amarillo, Texas, to William and Mary Jeanne McKinney, she graduated from Texas A&M University magna cum laude, with a B.A. in history, then obtained her Juris Doctor degree from the Mississippi School of Law. In 1978 she moved to Alaska, where she was admitted to the Alaska Bar and began working as court attorney and acting magistrate for the Kenai Superior Court judge.

In 1980 she joined the State of Alaska's Department of Law as a prosecutor in the Kenai District Attorney's Office. Shannon worked as a prosecutor for the state until her retirement in 2001, with the exception of 18 months serving as magistrate for the District Court in Kenai.

She was predeceased by her mother and father. She is survived by her husband James; sister, Traci Alley; a nephew; and twin nieces; several cousins; five step-children, five grandchildren and two great-grandchildren.

Anyone wishing to send a memorial, her two favorite recipients were the Christmas Child Shoebox Ministry at CTKAC and Alaska Christian College, an accredited college in Soldotna.



Shannon Hanley

Deidre Susan Ganopole

Deidre Susan Ganopole, 69, died in Anchorage Oct. 8, 2019, after a battle with Crohn's disease. Deidre was born Aug. 9, 1950, in Bakersfield, CA. In November 1959 the family moved to Anchorage. Deidre graduated from West Anchorage High School, then went to Western Washington State College in Bellingham for several years.

Deidre went to work for the state Legislature in Juneau. After Juneau, she worked briefly for the Alaska Federation of Natives in Anchorage, but she wanted more. Deidre went back to school, graduating from the University of Idaho, Moscow, with a BA in Political Science in 1977, and then from Lewis and Clark Law School, Portland, OR, in 1980 with a Juris Doctor. She had been a family law attorney in Anchorage for almost 39 years.

Deidre was also preceded in death by her husband John; her parents, Gerald and Margaret Ganopole and two brothers, Mark and Lyle. She is survived by her sisters, Denise Ganopole and Lissa Budrow; two nieces and a nephew; and her stepmother.



Deidre Susan Ganopole

Scott A. Schillinger

Former Anchorage attorney Scott A. Schillinger, 54, died Feb. 2, 2020 in Post Falls, ID. He attended the University of Washington where he received both his Bachelors and Masters of Law degrees. He also graduated from Gonzaga Law School. He became a trusted advisor to many both professionally and personally. He was an avid outdoorsman and hunter.

He leaves his wife Penny; son Wyatt; stepson Kyle; stepdaughters Amber and Brandy; father Fred; mother Marlene; and brothers Mark and Ric; brothers and sisters-in-law Alva, Joel, Rusty, Karen and Ellie; and nine grandchildren.

His funeral was to be held Feb. 29 at English Funeral Chapels & Crematory, Coeur d'Alene, ID.



Scott A. Schillinger

Wilma French

Continued from page 12

and the administrative staff had issues that needed to be resolved. At the age of 90, when she retired to live with family in Washington, she was still important to the smooth operation of almost every aspect of our law firm. She was also active in the legal community, serving for years in the Alaska Legal Secretary's Association

Of course there is so much more to Wilma's story than the 47 years she spent at Burr, Pease and Kurtz. When she died she left a universe of family, friends and colleagues who were the beneficiaries of her quiet but always thoughtful and helpful approach to the life. For me, it is hard to think about my career without contemplating Wilma's place in helping it happen.

At every turn there is always the potential to meet someone who will change your life. Completely professional and always competent, always available and endlessly patient. I was fortunate to know her and so lucky to have her in my corner. I learned by her example about the benefits and satisfactions of doing a job well, and without a lot of fuss. Thank you, Wilma, for so very much.

Bruce Eric Gagnon

Bruce Eric Gagnon, 78, an Alaska attorney died Jan. 12, 2020, at his home in Anchorage. Bruce was born Jan. 2, 1942, in St. Cloud MN. He attended Maple Lake High School and graduated from Harvard College with a B.A. in English in 1964 and then from Harvard Law School in 1967. He then served as assistant professor of Law at Vanderbilt Law School where he was selected Professor of the Year.

In 1970, he and his wife moved to Anchorage, where he joined Atkinson, Conway and Young, which eventually became Atkinson, Conway and Gagnon. In Anchorage he found himself immediately immersed in the legal issues of the pipeline years. In 1993, Bruce was elected to the American Law Institute, and was included in "The Best Lawyers in America," in the areas of business litigation, corporate law (mergers and acquisitions), professional litigation and real estate law.

Bruce is survived by his wife Sharon; a son Elliott Gagnon; a daughter Anne Millington; and four grandchildren.



Bruce Gagnon

Donald A. Burr

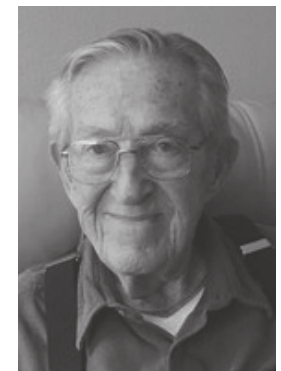
Donald A. Burr, 94, died Feb. 4, 2020, in Anchorage. He was born in 1925 in Gurley, NE. He graduated early from high school in Sidney, and later from the University of Nebraska, Lincoln.

He served in the U.S. Army Air Corps, 1943-46, where he trained to fly the P-51 Mustang. Later, he graduated from Creighton University School of Law. He was recalled to active duty with the U.S. Air Force in 1951.

He moved in 1953 to Alaska to practice law. During 1955 Don served as an assistant U.S. attorney for Alaska. He was a founding member of the law firm Burr, Pease, and Kurtz where he worked for more than 30 years. He served as Alaska attorney general during 1966-67.

Don was preceded in death by his wife of more than 60 years, Joy. He leaves four children: Linda Collins, Utah; Susie Williams, Alaska; Ron, Alaska; and Liz Hixon, Washington; and 12 grandchildren. Don also is survived by siblings Dr. Bill Burr, California; Richard, Nebraska; Joan Hobson, Colorado; and Joyce Lyon, Alabama.

Funeral Mass was held at St. Patrick's Parish Feb. 10.



Don Burr

David Eugene George

Anchorage attorney David Eugene George died Nov. 20, 2019. He was born at Fort Ord, CA, Aug. 9, 1952, and eventually landed in Ft. Greely, Alaska, in 1958. He graduated from the University of Colorado, Boulder, and attended law school at Gonzaga University before returning to Alaska in 1979.

When he first passed the bar, David set up his law practice in a study room at the local law library; proudly displaying his sticky-note shingle on the door which read "David E. George, Esq., Murderer's Best Friend."

He helped raise his step-daughter Megan Gonzales.

Toward the end of his life, David taught English as a second language at a local church.

A celebration of life was Jan. 4 at Writer's Block in Anchorage.



David E. George



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Does a consumer-based national law firm model work in Alaska?

By Clint Campion

One of the practice of law's ongoing challenges in Alaska and around the country is finding ways to increase affordable access to legal services while still ensuring that those services are provided competently. Some entities aim to combine technological advancements with local expertise (or at least local presence) to drive down the costs of services. For example, entities may use centralized or online data-collection and form preparation before local lawyers assist with local aspects of the work. Local practitioners must take care to ensure that the services they provide satisfy all ethical requirements, including the duty of diligence, when Outside lawyers play a significant role in the work-product that is being delivered locally. Re-

cent developments highlight the ethical risks for lawyers in these multi-jurisdictional practices.

Overview of multi-jurisdictional law firm model

A number of multi-jurisdictional law firms that handle a high volume of cases or matters claim to provide greater access to justice for thousands of Americans. Access is enhanced through the affordable use of technology. Legal services are provided by hundreds of experienced local "partners" across the country who engage in a streamlined, efficient practice. These partners generally have their own practices and receive compensation through referrals from the website.

For example, one multi-jurisdictional law firm encourages consum-

ers facing bankruptcy to "get access to justice" by connecting with a senior client consultant. Consumers can connect with a senior client consultant through a website or a toll-free telephone line during extended "office hours." This convenience allows consumers to avoid having to travel to an attorney's office during regular business hours.

The client provides basic information to the senior client consultant and pays a fee. The senior client consultant generates basic filings for review by the local partner who reviews the filings and meets with the client prior to filing.

Potential ethical concerns

This law firm model may provide greater access to legal services, but it also raises potential ethical concerns. A "partner" is a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law. See *Alaska R. Prof. Conduct* ("RPC")

9.1(j). Partners are imputed to have managerial authority in their law firms and are required to make reasonable efforts to ensure that all attorneys in the firm conform to the Rules of Professional Conduct. See RPC 5.1. An attorney who joins a national law firm should be cautious in allowing the firm to promote the attorney as a "partner" if the attorney is not truly a partner, i.e., not entitled to any managerial authority in the firm.

Attorneys are obligated to supervise nonlawyers, such as the "senior client consultants" described above, who are employed or retained in a national law firm model. See RPC 5.3. "Partners" are required to provide appropriate instruction and supervision to nonlawyers on their ethical obligations, and the partners are responsible for the nonlawyers' work product. See RPC 5.3 commentary.

An attorney associated with a multi-jurisdictional law firm is obligated to take reasonable steps to ensure that the nonlawyers in a consolidated call center follow the rules of professional conduct. The attorney should be aware of the policies and procedures at the call center and should ensure that those nonlawyers have appropriate supervision.

For example, the attorney should take reasonable steps to ensure that the client consultants do not engage in high-pressure sales techniques which would violate the attorney's obligations under RPC 7.3. The attorney should understand the compensation model for the client consultants. If the client consultants' compensation is based on signing up clients, without adequate oversight, the attorney may be permitting a potential for abuse of clients. See RPC 7.3 commentary.

The upfront collection of fees by the client consultant creates another potential ethical landmine. Attorneys have a fiduciary responsibility to manage client funds, which includes maintaining a complete set of records of client funds for five years. See RPC 1.15(a). In a multi-jurisdictional law firm model, an attorney would remain responsible for managing an Alaska client's funds, even if the funds are collected by a client consultant outside of Alaska.

Summary

A multi-jurisdictional law firm model offers the potential for more reasonably priced legal services. But it also offers the potential to harm clients if there is a lack of oversight and accountability. As U.S. Bankruptcy Judge Paul Black noted in 2018, "[a]n attorney cannot claim to be a partner in the firm and file cases with the Court as lead counsel, but yet claim no responsibility for what happens in the main office on the files the attorney decides to take. Attorneys considering joining firms with this business model should understand that, in this Court, while an injury might be initiated elsewhere — there is a real possibility the pain is going to be felt at home."

Clint Campion is a member of Sedor, Wendlandt, Evans & Filippi, LLC. He is also a member of the Alaska Bar Association's Ethics Committee. The views expressed in this article are solely those of the author.

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Gifts get complicated if Tom Brady plays till he's 62

By Steven T. O'Hara

Born in 1977, Tom Brady is old enough to be the father of many of the other players in the National Football League. The longer Brady plays, the more his career can be used as a case study in various fields, including income tax, gift tax, estate tax and generation-skipping tax.

Suppose the year is 2040. Brady is 62 years of age and is still playing. In 2040 he is awarded, in his capacity as an NFL quarterback, an automobile with a value of \$215,000. Impulsively, out of gratitude mixed with generosity, Brady immediately turns around and transfers the car without consideration to his center lineman, Karl Center, who was born in 2015. Brady makes no other transfers to Center in 2040. Tax law in 2040 is the same as it is in 2020. Brady and Center are both married filing joint returns and are in the top federal income tax bracket. In previous years Brady has gifted millions of dollars such that he has used all his unified credit against gift tax under IRC Sec. 2505. Also, in previous years he has allocated all his GST exemption under IRC Sec. 2631.

Income Tax.

Brady is liable for federal income tax in 2040 on the value of the automobile. IRC Sec. 61. He would not get a deduction on his federal income tax return for transferring the car to Center. Brady is an employee of a team and as such his expenses are not deductible as a trade or business. IRC Sec. 62(a)(1). And expenses for the production of income under IRC Sec. 212 are generally non-deductible. IRC Sec. 67(g).

Brady is in the 37% federal income tax bracket. IRC Sec. 1(j)(2)(A). So, an estimate of what Brady owes in federal income tax would be \$79,550, being 37% times \$215,000.

Gift Tax.

Congress created the federal gift tax system as a backstop to the federal estate tax system. The gift tax was perceived necessary because otherwise there would be a giant loophole from estate tax. To avoid estate tax, individuals could give away property before death. This loophole exists but has been limited, in general, to the gift tax annual exclusion of \$15,000 per donee per year plus certain gifts for tuition or medical care. IRC Sec. 2503(b) and (e).

In the case at hand, Brady is liable for federal gift tax in 2040 on the value of the automobile, minus \$15,000 for the gift tax annual exclusion, plus the amount of federal generation-skipping transfer tax paid with respect to the gift of the automobile. IRC Sec. 2502(c), 2503(b), and 2515. The generation-skipping tax is discussed below, but it bears repeating that under the federal gift tax system, Brady's payment of federal generation-skipping transfer tax is considered an additional gift to Center. IRC Sec. 2515.

Under the facts Brady is in the 40% federal gift tax bracket. See IRC

Sec. 2502(a) and 2001(c). An estimate of what Brady owes in federal gift tax would be \$112,000, calculated as follows: \$215,000 minus \$15,000 equals \$200,000. \$200,000 times 40% equals \$80,000. And Brady owes \$80,000 in federal generation-skipping transfer tax as discussed below; \$80,000 times 40% equals \$32,000. So, \$80,000 of gift tax plus another \$32,000 of additional gift tax by reason of IRC Sec. 2515 equals \$112,000.

Generation-Skipping Tax.

Congress created the generation-skipping transfer tax because it would like an estate tax paid at each generation, subject to credits and exemptions that generally apply to all taxpayers. The basic concept of the generation-skipping tax system is that whenever a gift, bequest, devise, inheritance, or a change of a trust beneficiary occurs and a generation is skipped, a flat 40% generation-skipping tax could be owed in addition to any gift or estate tax paid when the property was initially transferred. IRC Sec. 2601 and 2611.

Here Brady is liable for generation-skipping tax in 2040 on the value of the automobile minus \$15,000 as the nontaxable portion of the transfer. IRC Sec. 2603(a)(3), 2624, and 2642(c)(1). Just as the federal gift tax system applies to gratuitous transfers from one to another, regardless of any family relation, so the federal generation-skipping transfer tax system applies as well.

Where the parties are not related by blood, adoption or marriage, they are assigned to a generation on the basis of their relative age. IRC Sec. 2651(d). An individual born within 12.5 years after the transferor's birth is considered a member of the transferor's generation. IRC Sec. 2651(d)(1). An individual born more than 12.5 years but not more than 37.5 year after the transferor's birth is considered a generation younger than the transferor. IRC Sec. 2651(d)(2). An individual born more than 37.5 years after the transferor's birth is considered two or more generations younger than the transferor. IRC Sec. 2651(d)(2) and (3).

Under the facts the year is 2040. Brady was born in 1977 and Karl Center in 2015. Their difference in age is 38 years. So, under the federal generation-transfer tax system, Brady's transfer skipped a generation.

The federal generation-skipping transfer tax is 40%. IRC Sec. 2001(c) and 2641(a)(1). So, an estimate of what Brady owes in federal generation-skipping transfer tax would be \$80,000, calculated as follows: \$215,000 minus \$15,000 equals \$200,000. \$200,000 times 40% equals \$80,000.

More Income Tax.

Karl Center has exposure to federal income tax in 2040 on the value of the automobile because the transfer was made in a business context



"The meaning of a gift for gift tax purposes is different from, and quite opposite, the meaning of a gift for income tax purposes."

— i.e., between a professional quarterback and his center lineman. Tax law allows a whipsawing where a transfer can be a gift for gift tax purposes, resulting in a gift tax liability, but not a gift for income tax purposes, resulting in an income tax liability.

The meaning of a gift for gift tax purposes is different from, and quite opposite, the meaning of a gift for income tax purposes. In both instances, the meaning that has been adopted is in favor of the United States Treasury.

For gift tax purposes, a gift is a voluntary transfer of property by one to another without consideration. IRC Sec. 2501(a)(1) and 2512(b). The transferor's motivation is irrelevant. Treas. Reg. Sec. 25.2511-1(g)(1). The analysis of whether a gift has been made is based strictly on the objective facts of whether a transfer has occurred for less than full and adequate consideration. *Id.*

By contrast, a gift for income tax purposes is dependent on the subjective intention of the transferor. *Commissioner v. Duberstein*, 363 U.S. 278, 285-286 (1960). A gift must be defined for income tax purposes because the Internal Revenue Code specifically excludes gifts from gross income, along with bequests, devises, and inheritances. IRC Sec. 102(a); *cf.* IRC Sec. 691.

For income tax purposes, a transfer without consideration is not necessarily a gift. *Duberstein*, *supra*, at 285-286. The transferor's dominate reason that explains the transfer must be "detached and disinterested generosity" for a transfer to be a gift for income tax purposes. *Id.* Examples are transfers that arise primarily "out of affection, respect, admiration, charity or like impulses." *Id.*

A transfer is not a gift for income tax purposes, the Supreme Court has explained, where the transferor's dominate reason for the trans-

fer is a moral or legal duty, including gratitude for services rendered, or an anticipated economic benefit. *Id.*

In this case, Brady and Center depend on each other in order to play a game for pay. Just as their relationship is transactional, so there was a transactional quality to the transfer of the car from Brady to Center. There was a level of generosity but it arguably was neither detached nor disinterested.

Center is in the 37% federal income tax bracket. IRC Sec. 1(j)(2)(A). So, an estimate of what Center owes in federal income tax would be \$79,550, being 37% times \$215,000.

Summary & More Taxes.

The foregoing illustrates federal taxes of \$351,100 on receipt and transfer of a \$215,000 automobile. Dare we add state and local taxes?

To complete this case study, and further illustrate tax on tax, suppose as part of his estate plan Brady elects to name Center as the beneficiary of a traditional Individual Retirement Account with, say, a balance of \$100,000. Here Brady can project that Center will net \$36,000 after federal taxes. The calculation of those taxes would be as follows: \$100,000 minus \$40,000 (per the 40% estate tax) equals \$60,000. IRC Sec. 2001. \$60,000 minus \$24,000 (per the 40% generation-skipping tax) equals \$36,000. IRC Sec. 2001(c), 2603(b), 2623, and 2641(a)(1). Income tax on the net amount of \$36,000 is estimated at zero based on the availability of an offsetting deduction for the estate tax paid on a traditional IRA. IRC Sec. 691(c); *cf.* IRC Sec. 275.

Nothing in this article is legal or tax advice. Non-lawyers must seek the counsel of a licensed attorney in all legal matters, including tax matters. Lawyers must research the law touched upon in this article.

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

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Association of Legal Administrators Alaska Chapter Salary Survey

Survey Cost

Members who participated in the survey: \$100
Non-members who participated in the survey: \$150
Non-participants (members and non-members): \$275

For more information contact Jodi Walton at
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On finding a good meal in questionable places

By William R. Satterberg Jr.

I knew when I became a lawyer that I would enter into the arena of conflicting opinions and lawyer jokes. Contrary to dentists, doctors, engineers, and many other professionals, all of whom usually enjoy a good reputation and respect among the community because they provide a service which most people need and willingly accept, lawyers often find themselves being the brunt of criticism, ridicule and disdain. After all, we have created our own market. I learned this early on in law school when my property law professor, Sam Fetters, told our freshman class that we had to keep in mind that, for every person who wanted us to win a case, there was one who wanted us to lose. On the other hand, almost everyone wanted doctors to succeed and for the patient to recover. He asked us, why didn't we go to medical school instead?

There is a joke which maintains that, when a prospective juror was going through jury selection, he was asked what he thought about lawyers. His response was "There are good lawyers and there are bad lawyers. My ex-wife had a good lawyer. I had a bad lawyer."

So, when I entered law, I realized that I would be stepping into a quagmire. But, I was up to the task. Fortunately, I've always viewed the practice of law with humor. One time when I was telling lawyer jokes, another Fairbanks lawyer, destined to become an attorney general for the State of Alaska, took offense at my joking criticism of lawyers. I was confused by the attorney's opprobrium. Aren't lawyer jokes funny? Then again, another lawyer, Jim Dewitt, had even more lawyer jokes than myself. Jim kept them on his computer and was never afraid to use them. It is all relative.

When I opened up my own shop in the early eighties, I sought office space. Many attorneys had fancy, oak-decorated offices on upper floors of stately office buildings. I was not so inclined, however. Nor could I afford such lavish surroundings. Instead, I took my hard-earned pennies and bought a single-story house in Fairbanks. It was on the old "Row" of Fourth Avenue. The "Row" was where the local houses of ill repute had set up a thriving flesh trade which lasted for years. Coincidentally, my office and my adjoining annex appear to have been devoted to the lucrative profession. In fact, my next-door annex office has a number of "cribs" in the basement where it is reputed that significant money was made, and many successful old-time Fairbanks marriages started out.

Soon, I became quite at home

with my new surroundings. I even considered at one point decorating the offices with red and black velvet wall coverings so my clients would feel even more at home. In fact, I am probably one of the only living lawyers who runs his shop out of converted whorehouses. But that is not where it stops. For some reason, I often gravitate to one of the oldest professions in the world. It is a professional courtesy thing.

Several years after I began private practice, I was in California on a family vacation. My wife, Brenda, and our two young daughters, Marianne, and Kathryn, had traveled to San Diego to enjoy the zoo, SeaWorld, and tap dance on plastic traps at LEGOLAND. One night, my wife asked for her favorite meal of prime rib. I looked for a good place to take the family. I remembered that someone once told me that, should I ever go to San Diego, I had to visit a place near the Miramar Air Station. It was known as "The Butcher Shoppe." It featured meat. Reputedly, the restaurant had prime rib and was historical. What I wasn't told at the time was that the restaurant was famous for virtually "everything" being on the menu, including the stunning waitresses.

Not wanting to disappoint Brenda, following a hard day at the zoo, I took the girls to The Butcher Shoppe for dinner. As promised, it was truly a historical location. It had hundreds of pictures of long dead mobsters and politicians on the walls. The walls were decorated with red and black velvet wallpaper which reminded me of my own interior decorating plans for my office. We were politely seated by an attractive lady. She was wearing a white toga reminiscent of the toga party in "Animal House." She did an excellent job serving us and, like the others, was quite attractive. I noticed that we were probably the only family in the restaurant, but that did not bother me. I also enjoyed looking at the pictures. Even Frank Sinatra was there and someone who, in retrospect, looked a lot like a young Harvey Weinstein without the walker. At the end of dinner, we thanked our waitress for her service, paid our bill, left a generous ten percent tip, and left. It wasn't until almost a year later when I was recommending The Butcher Shoppe in San Diego to a person that I was told that it was one of the oldest and most famous whorehouses in southern California. When I said that I had taken my family there



"I've always viewed the practice of law with humor."

for dinner, the incredulous response was "You took your family to a whorehouse?" Apparently, I had done something wrong. No filter. I decided that I needed to do more research in the future.

Years later, I began taking shooting classes in Nevada at Front Sight. Tom Temple, who is a true marksman, suggested that

I attend Front Sight after having once watched me unsuccessfully try to blast a beer bottle at four feet. Given Tom's encouragement, I attended the classes where I purportedly became a better shot. I actually enjoyed my training and no beer bottle within three feet is safe anymore. Front Sight is a one-hour drive outside of Las Vegas and is a 15-minute drive from Pahrump, a retirement community. Pahrump is noted for its golf courses. It is noted for its Alaskans. And it is noted for its many whorehouses, of which the community is quite proud.

One of our good friends was a principal at a local Fairbanks high school. Her name is Shari. Shari was retiring and a party was scheduled to celebrate her tenure. As a retirement gift for Shari, I decided it would be nice to give her a t-shirt at her party from a thriving business in Pahrump, known as Shari's Brothel. I was attending a shooting class at the time. My wife, Brenda, had traveled with me to Las Vegas to take her slot machine courses. I casually remarked to Brenda that I was going to go to a whorehouse to get a t-shirt for Shari and Shari's upcoming retirement party. To my surprise, Brenda did not object to my plan. Equally to my surprise, however, Brenda insisted that she would come along. It was non-negotiable. Not that Brenda thought I would succumb to temptation, but why risk it? Either that, or she was simply curious.

When we arrived at Shari's Brothel after following several billboards directing us to the location, I explained that I would only be a minute. I would just dash into the gift shop that I expected would exist while Brenda waited patiently for me in the car. After all, I was concerned that the staff might take offense at my "bringing coal to Newcastle." This plan also was clearly unacceptable. Once again, discussion ensued. Either we were both going to go into the brothel or no one at all. Remembering that Brenda had already had experience with a brothel in San Diego, I decided that — no harm, no foul.

We both entered the premises. As I expected there was a gift shop which sold t-shirts, coffee cups and company condoms. Brenda was impressed with the quality of the facility. It was actually quite professional in more ways than one. And, once again, I strangely felt at home. After selecting two t-shirts and a coffee cup, we drank a Diet Coke and left. Brenda boasted later how she had now been taken to two famous brothels by her husband, one in San Diego and one in Nevada. If anybody was red-faced about the situation, it was me. But there was

more to come.

In February of 2020, we traveled to Costa Rica. Brenda and I had originally planned to visit Saipan and China, but plans changed. The coronavirus had struck China and was expected to spread. We wisely decided that it would be best to wait before traveling into the Far East. Still, we wanted to have some sun. More than one person at the Fairbanks District Attorney's had suggested that we go to Costa Rica. Zip lines, white water rafting, beaches and lots of monkeys. I found it interesting that the local assistant district attorneys knew so much about the place. Was I surreptitiously being set up to disappear in the rainforest or to be attacked by a coronavirus infected pirate? Regardless I decided that I would accept their advice. As such, during the first of February, Brenda and I traveled to Costa Rica. Our point of entry was San Jose, Costa Rica's largest metropolis. We selected a hotel in the center of the city so that we could see the sights without having to waste time or to depend on taxis and Ubers.

The second night after we arrived, Brenda announced she was hungry. She wanted a steak and wanted local beef. Not just the ubiquitous black beans and rice known as casado that we were later fed on virtually every tour we took. We had walked a fair amount around the core of the city, shunning McDonald's and KFC, when I saw a nice-looking venue known as the Restaurant Del Mar, which was part of the Hotel Del Rey.

We entered the restaurant and studied the menu. Of interest was that the fancy restaurant was open 24 hours a day. It served breakfast anytime, as well as steaks. We both sat down and had an excellent dinner. Once again, little did I know that I had taken Brenda to yet another whorehouse. I found this out the next day when I recommended the place to our tour driver, who gave me a shocked look. When I confirmed his question, "Did you really take your wife to the Del Mar Restaurant?" the driver's eyes rolled. I explained that we had a delightful meal. When the moment presented itself, the driver pulled me aside and quietly told me that I probably would not want to take my wife to that location again whispering, "It's a whorehouse!"

The next day was Super Bowl Sunday. By the time the Super Bowl was over, most restaurants in San Jose were closed, except for the many McDonald's and KFC's. Fortunately, I knew one restaurant which was open 24 hours a day, served breakfast all day long and had good steaks. It was our only option. So I suggested to Brenda that we visit our old standby for dinner, neglecting to mention the reputation of the place. Once again, dinner was excellent. In fact, I even intend to provide a report on Trip Advisor one of these days, and to pursue a claim for referral fees from these three establishments.

Admitted to the Alaska Bar in 1976, William R. Satterberg Jr. has a private, mixed civil/criminal litigation practice in Fairbanks. He has been contributing to the Bar Rag for so long he can't remember.

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ECLECTIC BLUES

A rustic weekend leads to something of an existential crisis

By Dan Branch

On the Saturday morning of last month's Martin Luther King weekend, I was in Talkeetna, wearing every bit of clothing I had brought with me from Juneau. It was 14 below. The previous night I had slept upstairs in the Talkeetna Roadhouse. Waking before breakfast but after the cook made coffee for earlier risers, I minced my way the 15 feet from my room to the communal toilet, wincing for sleepers in the other upstairs rooms when each foot fall made one of the hand-milled floorboards creak.

Personal business done, I creaked downstairs, filled a to-go cup with coffee, and headed out to the confluence of the Chulitna, Susitna, and Talkeetna rivers. We rarely see stars in the Juneau sky so I was hoping to spot Orion or one of his constellation buddies floating over Denali. I needed both of my mitten-covered hands to bring the to-go cup to my lips. It was a black

the river. Slipping down a snow machine trail I reached the river, passing a hand painted sign warning about dangerous ice. The sign gave me pause. So did the sound of current coming from under the ice.

I walked twenty feet away from the shore, stopped, warmed my face with a mitten-less right hand, and experienced an existential crisis. My proximity to open water should have worried me. So should have the frost-bite-like stiffening of my face. I should have been frustrated by the predawn twilight — too dark to make out Denali, too light for star gazing. Yet, I felt happy. Is this because it's been more than 30 years since I last stood on a frozen river when it was below zero or was I suffering an early onset of hypothermia?



"I walked twenty feet away from the shore, stopped, warmed my face with a mitten-less right hand, and experienced an existential crisis."

hour. Most writers never will. Why, then, was I'm using my government pension to attend a writer's workshop in the frigid Susitna Valley?

Back inside the roadhouse, I ordered a sourdough pancake with blueberries and refilled my to-go cup with coffee. The dining area filled up as I waited for breakfast. Leaving my 30-year-old beaver hat to mark my place at a long communal table, I checked out the bunk room where I was to move that night.

The bunks looked as confining as those on a World War Two submarine. Even though I had brought earplugs, there would be no sleeping for me if the other bunks fill up with snorers. "Not a big deal Dan," I told myself, "You get to move back to an upstairs room tomorrow night when you can catch up on your sleep."

On the way back to my beaver hat I checked with the desk clerk, who assured me that I would have the bunk room to myself. Relieved and now hungry, I reached my spot at the table just as my pancake arrived. It was a crepe-thin disk that drooped two inches over the plate edge. While folding the dangling portion back onto the plate, I wondered if the cook overpoured the batter or was just honoring a roadhouse tradition. Then the waiter plopped down an equally expansive pancake in front of another customer. It must be a Talkeetna thing, like Irish Coffee in San Francisco and moose-turd earrings in the Denali Princess Hotel.

As the temperature rose with the sun outside the roadhouse, I enjoyed the workshops and the company of the other writers, all of whom were current or former participants in the UAA MFA program. There was no time to ponder why I felt such joy doing a slow freeze on unstable river ice that morning.

After lunch I noticed that large backpacks lay on all but one of the bunks in the bunkroom. My rollie bag squatted on the other one. The backpacks belonged to college co-eds on break from their German university. I worried that the coming night would be like the long, dark hours I spent on a train crossing Germany in my 19th summer, except that I would be the old guy sleep-speaking in his native tongue while the college kids debated American politics and drank cheap wine. I was set to be the saddest character in an existential novel, marooned on a metaphorical beach with Camus' stranger.

When the vision cleared, I thought of the comfortable-looking couch in the workshop room — a possible life raft for saving me from drowning in embarrassment. Thanks to the kindness of the other work shoppers and the roadhouse management,

I was allowed to move my rollie bag from the bunk room and spend the night on the couch.

The next morning, I waited for sunrise before walking down to the river. The sky was blue. Denali looked like a

20,000-foot-high molar on the opposite side of the river. Somebody back in the roadhouse could probably tell me how many people struggled to its summit and how many died trying. Why did they spent so much and risked so much to make the climb? Maybe they were trying to climb out of their own existential crisis.

I used a snowmachine trail to move further out onto the river. To my left a sundog circled its sun. Ahead shadows deepened on Denali. Behind, empty ice stretched between me and town. I wondered why the Germans students weren't on the ice, freezing for the beauty. Maybe they are too young for an existential crisis.

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



The Alaska Range massif rises above the upper Susitna Valley. The higher mountains from the left are Mount Foraker, Mount Hunter and Denali.



The rainbow arch of growing sundogs is visible to the left of the sun.


and bitter brew. A few sips were enough to stave off my need for caffeine. I spilled the rest on the street and watched a large and irregular brown stain freeze onto the ice. It will mark the street until spring or the next heavy snowfall. I felt as guilty as a litterer each time I passed it.

The previously frostbitten parts of my face stiffened as I neared

In case it was hypothermia, I retreated from the river ice and returned to the roadhouse, passing a sign that promised to pay census workers \$28 an hour. That's the respectable sum that the government will pay locals to pry into people's lives. A Talkeetna census worker could earn enough for a new 70 horse outboard or a snowmachine. A TSA worker earns little more per

As the temperature rose with the sun outside the roadhouse, I enjoyed the workshops and the company of the other writers, all of whom were current or former participants in the UAA MFA program.

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Hiring contract attorneys shouldn't be all about the money

By Mark Bassingthwaight

Firms hire contract attorneys for a variety of reasons, not the least of which is an attempt to control expenses. While reducing expenses is a good thing, the financial savings shouldn't be the only issue in play as unintended consequences could follow if no thought is ever given to a few other concerns. The issues that come to mind most readily for me are conflicts of interest, accountability for work product, disclosure, and insurance coverage were an allegation of negligence ever to arise.

Addressing these issues is problematic however, because the term "contract attorney" means different things to different people. IRS definitions and regulations aside, contract attorneys can run the gamut from fulltime "employees" who are held out as members or associates

of a firm to temporary part-time attorneys who never step foot within the walls of the firm. For the purposes of this article, I am going to focus on contract attorneys who will never be held out publicly as being associated with the firm at which they are working.

Let's look at the insurance coverage concern first. Don't assume that coverage for contract attorneys under your existing policy is a given. While some insurance companies make no distinction between "contract attorneys" and "employed" attorneys, others do. This means that some insurance carriers will automatically add contract attorneys to your policy, once notice has been given and the appropriate amount of premium paid, and others will not. Why won't they? One reason is that contract attorneys are often temporary and/or part-time and some firms hire quite a few. Do these part-timers have their own clients, to include other firms that they work for under contract? Is there frequent turnover of contract attorneys at the firm? In short, contract attorneys represent an unknown risk to a malpractice insurance carrier.

If your insurance carrier will not

extend coverage under your existing policy, the contract attorney may need to purchase his or her own coverage if they feel coverage is necessary. I would suggest that coverage should be mandatory if the contract attorney will be doing things like appearing in court or taking depositions. It may not be necessary if there will never be any client contact and the hiring firm will be reviewing and accepting accountability for the contract attorney's entire work product. Regardless, always confer with your insurance carrier when thinking about hiring a contract attorney (or attorneys) so that the situation can be fully understood, documented, and appropriately underwritten by the carrier if they are willing.

The decision as to whether to use contract attorneys is not something that should lie

The accountability piece is an interesting issue. Under agency principles, the firm is going to be liable for what the contract attorneys do within the scope of their employment. Sometimes firms will try to do an end run around this concern and treat the contract attorneys as independent contractors.

exclusively with the firm. Clients may or may not be comfortable with contract attorneys and thus clients should be included in the decision-making process. Certainly our ethical rules require disclosure; but ethical rules aside, whose matter is it? It's the client's. I would argue

that clients fundamentally deserve to know who will be working on their matters due to confidentiality, competency, and financial concerns at a minimum. Explain to your clients why the use of contract attorneys is necessary. Let them know who they are and what skill set they bring to the table. Then detail what the savings will be and share the steps that will be taken to ensure that confidences will be maintained. In the end, it's all about respecting the attorney/client relationship.

The accountability piece is an interesting issue. Under agency principles, the firm is going to be liable for what the contract attorneys do within the scope of their employment. Sometimes firms will try to do an end run around this concern and treat the contract attorneys as independent contractors. This may be partially effective if the contract attorneys are fully independent (think in accordance with the IRS definition) and the client has not only been made aware of the situation but consented to it in writing. I say partially effective because there will always be the possibility of a negligent hire claim should any of the independent contract attorneys commit malpractice. Given this, appropriate risk management practices are called for whenever utilizing the services of contract attorneys. Adequate supervision and work product review are a given. Have the contract attorneys sign a confidentiality agreement and instruct staff to never discuss unrelated firm matters in front of them. You would also be well advised to inquire into the background, education, and experience of every potential contract attorney hire as well as ask about past claims or disciplinary matters prior to making any hiring decision.

Perhaps the most significant issue with contract attorneys is the imputed conflict problem. Here the

specifics of the working relationship will matter. There is going to be a real difference in how the conflict problem plays between contract attorneys who will never step foot inside your firm's physical space, have no access to firm files, and will only work on one project for your firm versus contract attorneys who will work internally, will be employed there for an extended period of time, will be working on multiple projects, and have access to the firm's client files. The issue can be further compounded if any of the contract attorneys will also be working at one or two other firms at the same time. To minimize the risk of unintended conflict problems arising, limit the contract attorneys' access to client files to the greatest degree possible. An isolated or off-site work space coupled with no access to the firm's computer network or the area where client files are maintained can be an effective way to manage the problem. In contrast, the greater the degree to which any contract attorney becomes integrated within a firm the greater the likelihood that all the conflicts this attorney carries will be imputed to the firm. Understand that this isn't about how contract attorneys are paid. It's about length of time in your employ, scope of the relationship with the firm, de-

gree of client contact, access to client files, the clients' understanding of the relationship, and the list goes on.

The decision to use contract attorneys can be an appropriate decision that brings real value to your firm and the clients you serve. Just don't rush into this for the expense savings alone because there can be unintended consequences that in the end could prove more costly than if you had never hired the contract attorneys in the first place.

Since 1998, Mark Bassingthwaight has been a risk manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Bassingthwaight 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

ATTORNEY DISCIPLINE

Disciplinary Board reprimands attorney

At its recent meeting, the Disciplinary Board privately reprimanded Attorney X for disobeying a discovery order issued in a civil court case. Attorney X and an associate entered a facility to which they had been denied physical access for inspection. Attorney X agreed that he violated the court order not to enter and inspect which had been issued several months earlier. By ignoring the court order, he violated Alaska Rule of Professional Conduct 3.4(c).

Attorney X also agreed that he violated Alaska Rule of Professional Conduct 5.1(a) and (c) because he had direct supervisory authority over his companion and did not ensure that the other lawyer conformed to the rules of professional conduct. Although Attorney X did not engage in substantive communication with a represented party, he allowed unsupervised communication to occur between his companion and a facility director.

The court prohibited the use of any evidence that may have been obtained during the unauthorized inspection of the facility and ordered Attorney X to reimburse for costs and fees incurred as a result of a show cause hearing. The court declined to disqualify Attorney X from continuing to represent his client and deferred the matter to the Alaska Bar for appropriate punitive actions regarding the violation of the order.

Attorney X did not inspect the facility beyond the reception area and he was there only briefly. Although the court found that Attorney X was in premises where he should not have been, the parties agree that it was an isolated incident and unlikely to be repeated.

Pursuant to Alaska Bar Rule 16(c)(3), Attorney X has paid \$1,000 in costs and attorney fees to the Alaska Bar Association.

Alaska Supreme Court suspends Anchorage attorney

The Alaska Supreme Court suspended Anchorage attorney Paul D. Stockler from the practice of law for 18 months with six months of the suspension stayed. Stockler violated Alaska Rule of Professional Conduct 8.4(b) when he willfully failed to file his individual income tax returns for tax years 2006, 2008, and 2009 in violation of Title 26, United States Code Section 7203. Under Rule 8.4(b) it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Stockler had earlier signed a plea agreement admitting to three misdemeanor counts of willful failure to file his tax returns and timely self-reported through counsel to Alaska Bar Counsel. The United States District Court sentenced Stockler to 14 months of imprisonment, a \$10,000 fine and \$886,058 in restitution to the IRS. Stockler agreed that the fact of his imprisonment would not serve to mitigate the sanction for his ethical violation.

After Stockler serves the one-year of suspension which began on Feb. 7, 2020, he will serve a two-year probationary period under a lawyer monitor who will confirm that Stockler is complying with the rules of professional conduct, particularly those related to law office management.



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Dated 1/21/2020**

KENNETH P. JACOBUS
Member No. 6911036
Anchorage, AK

**is transferred to
disability inactive status
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NOTICE TO THE PUBLIC

**By order of the Alaska Supreme Court,
Dated 1/23/2020**

COREY G. STEWART
Member No. 1202003
Homer, AK

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Bar marks members' passing with donation to Bean's Cafe

Anchorage Bar President H. Ryan Fortson, along with Anchorage Bar Administrative Director, Jolene Hotho, presents a \$1,000 check to Bean's Cafe Executive Director Lisa Sauder. The \$1,000 check is a donation to Bean's Cafe in memory of those attorneys who died in 2019: Allan Beiswenger, Deidre Ganopole, David George, Allan Gifford, Mary Greene, Frederick Hahn, Karl Heimbuch, Elizabeth Hickerson, Christopher Keyes, David Loutrel, Tim MacMillan, Scott Marchand, Robert Mason, Thomas Melaney, C.J. Occhipinti, Glen Price, Jan Rutherfordale, and Brenda Sheehan.

Bar People

Anchorage attorney elected into partnership

Anchorage-based Jon Katchen was among 15 Holland & Hart LLP attorneys elected into the firm's partnership recently. Katchen focuses on natural resources project development, defense of governmental and citizen enforcement actions, and complex commercial litigation. He also counsels investors and resource development companies regarding economic development opportunities in Alaska.



Jon Katchen

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