The Alaska
BAR RAG
Dignitas, semper dignitas
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Three Ketchikan judges plan to retire this year

By Heidi Ekstrand

Ketchikan Daily News
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Before this year is out, Ketchikan is expected to lose three local judges to retirement, including two life-long local residents, with a combined total of about 60 years of service on the bench among them.

Superior Court Judge William Carey, who just turned 68 and has served since 2008, will retire Feb. 28.

Superior Court Judge Trevor Stephens, 62, on the bench since 2000, will retire May 31.

District Court Judge Kevin Miller, 59, appointed in 1999, hasn't set a firm retirement date, but says it's likely to be "September… 30-ish."

All three plan to remain in Ketchikan.

Susanne DiPietro, executive director of the Alaska Judicial Council, said it's not unheard of for multiple judicial vacancies to open up in Alaska communities within a short period of time. But she noted the longevity of Ketchikan's three retiring judges and agreed, "it's been a long time since there's been an opening in Ketchikan!"

A public hearing by the Judicial Council to receive comments on the applicants for Carey's position was scheduled Jan. 31.

A separate public hearing for Stephens is set for May.

The council is tasked with screen-

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Former Chief Justice Craig Stowers dies at age 67

Bar Rag staff

Former Alaska Chief Justice Craig Stowers died Feb. 10 at the age of 67. He had served on the Alaska Supreme Court from 2009 when he was appointed until 2020 when he retired as Chief Justice.

He was born June 11, 1954, in Daytona Beach, FL, and raised in Yorktown, VA. After earning a degree in biology at Blackburn College, he went to work for the National Park Service. He was a park ranger at Colonial National Historical Park and transferred to Mount McKinley National Park (as Denali National Park was called at the time) in 1977, where he worked first as the East District Naturalist and then as the West District Ranger.

For more about Justice Stowers turn to page 3

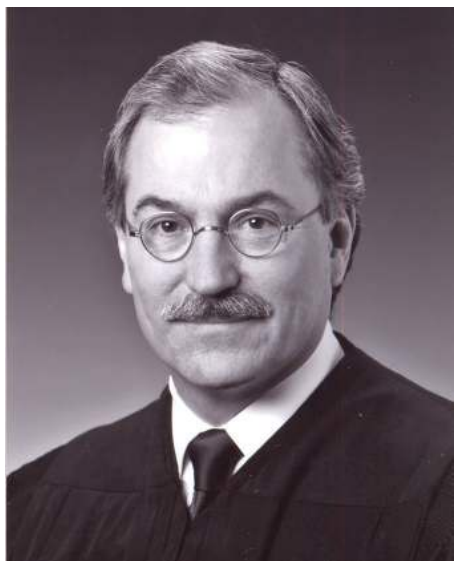
After leaving the Park Service he earned his law degree at the University of California, Davis, School of Law graduating in 1985.

At the time of his death current Chief Justice Daniel Winfree sent the following email to Court employees: "Those of you who worked for the court system during our friend and colleague Craig Stowers' term as Chief Justice will recall that he never failed to send out an email when someone connected to the court system was seriously ill or had passed away. This was a touching way to remind people about court history and the court family. Now, I regret having to inform you all that Craig Stowers died — peacefully — last evening. I don't know that Craig ever really got over leaving his job as a park ranger in Denali National Park, but I know he loved his work as a law clerk, judge, justice and chief justice. Craig clerked for Justice Warren Matthews, as well as Ninth Circuit Judge (and former Alaska Supreme Court Justice) Robert Boochever. After a long career in private practice, he was named a Superior Court judge in Anchorage from 2004 until 2009, when he joined the Supreme Court. He served as Chief Justice from 2015-2018. He retired in June 2020. I served with him for about a decade on the Supreme Court and can attest to his hard work, his dedication to justice in Alaska, his love of the Alaska Court System, and his great sense of humor."

Earlier in his career Chief Justice Craig Stowers was a Superior Court judge in Anchorage from 2004 until his appointment to the Supreme Court in 2009 and was elected by his colleagues on the court to serve as Chief Justice beginning in July 2015 through June 2018.

While in law school, he was employed for two years by Professor Daniel Fessler and the Alaska Code Revision Commission to research and draft what became the Alaska Corporations Code, the Alaska Nonprofit Corporation Act, and the official commentary to those acts. He was a partner with Atkinson, Conway & Gagnon and subsequently co-founded the Anchorage-Fairbanks law firm, Clapp, Peterson & Stowers.

During his legal and judicial career, he served on various Alaska Bar Association committees, including the Law Examiners Committee, and various Alaska Supreme Court committees, including chairing the Child In Need of Aid Rules Committee and the Alaska Court System Statewide Security Committee; he was also a member of the CINA Court Improvement Project Committee.



Former Chief Justice Craig Stowers

He previously served on the Appellate Rules and the Continuing Judicial Education Committees. During his three-years as Chief Justice, Justice Stowers served as chair of the Alaska Judicial Council and a member of the Conference of Chief Justices. He was a commissioner on the National Conference of Commissioners on Uniform State Laws and a Fellow of the American Bar Foundation. He also served on several nonprofit corporation boards, including terms as board president of the Alaska National History Association (now known as Alaska Geographic) and board president of Christian Health Associates.

He is survived by his wife Monique Stowers.

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PRESIDENT'S COLUMN

Board faces issue of increasing CLE effort

By Jessica Graham

The Alaska Bar Association must be re-authorized periodically by the Alaska Legislature in a process often referred to as "sunset." Sunset represents the period of time during which the Bar is either reauthorized to continue operating for a set period of time (most recently eight years) or, if not reauthorized, required to undergo a year-long wind up period to stop operating.

Fortunately, the Bar was reauthorized in the spring of 2021 for another eight-year period, but not without significant discussion about our modest continuing education requirements and whether reauthorization should be tied to an increase in mandatory CLE. It is hard to overstate how strongly legislators conveyed this message to the bar leadership. Most states have significantly more CLE requirements than Alaska, and the Bar's inaction on more stringent mandatory CLE despite several past legislative directives casts a shadow over our ability to continue to operate.

Bar members discuss the issue on Pages 12-14

This is a topic worth robust discussion. In this issue, we have several members of the Bar who are offering a range of opinions on the topic. Stephanie Harrod, an active member of the Bar who serves on the Discipline, Fee Arbitration and CLE Committees, makes the case for increasing our overall CLE requirements. Mark Regan, chair of the Bar's CLE Subcommittee, takes the opposite position. In an important parallel discussion, Judge Pamela Washington advocates for making continuing education on diversity and unconscious bias part of our annual mandatory requirements while John Haley argues against this topic.

"The Board and the Bar staff are committed to facilitating a discussion on these ideas and we ask you to be engaged and active ..."

These are not issues that are going away. It is time for the Bar to engage in a robust discussion on these topics and come to some conclusions, one way or the other, for the foreseeable future. The Board of Governors agreed to this initiative in its September 2021 meeting and work is getting underway. Our goal is a robust debate among friends, colleagues, sections, committees, opposing counsel and everyone in between on two key questions: (1) Should the number of mandatory CLE hours be increased; and (2) Should one or more of the mandatory ethics CLE hours be dedicated to the specific topic of reducing unconscious bias in the legal profession. The Board and the Bar staff are committed to facilitating a discussion on these ideas and we ask you to be engaged and active, particularly if you have strong feelings. As part of this conversation I encourage you to reach out to your representatives on the Board of Governors to share your opinions and shape the Board's decision-making.

I am not Switzerland in this debate. From where I sit, as a Bar leader and as the General Counsel of a large Alaska-based institution, an increase in mandatory CLE for all active members of the Bar is the right thing to do. It is a change that would be consistent with our professional obligations, benefit the Bar as a whole, and demonstrate to all of our non-lawyer stakeholders that we are collectively committed to a continuous drive for knowledge and improvement in the practice of law. We are a profession that is rooted in a fundamental barrier to entry via an extensive (and expensive) educational requirement. It feels intellectually inconsistent to endorse — or even continue to benefit from — this type of minimum standard to practice law, but then discard ongoing education responsibilities after being sworn in.

At this stage in our collective professional lives, the barriers to CLE are minimal. It is not a cost issue. There are free CLE opportunities in the state every year, offered by the Alaska Bar, various regional bar associations, section meetings, symposiums, and firms. In fact, the Alaska Bar is one of the only bar associations that is required by rule to provide free CLEs to its members. While only being required to provide three free hours of CLE to members, the Alaska Bar hosted eight free hours last year. And you don't need a scheduling miracle to attend these free events. There are currently 13 and a half hours of free CLE available in the Alaska Bar's video on demand library which is available to all members.

Some point to recent law review literature suggesting there is not a correlation between increased CLE and fewer discipline cases.

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EDITOR'S COLUMN

Want to join the Bar? Have an obit ready

By Ralph R. Beistline

When I first served as editor of the *Bar Rag*, back in the 80s, we seldom included obituaries in the paper because we seldom had lawyers die. It wasn't because we were healthier then (we weren't), but because we were younger then (we were), and we were younger then, in part, because the State of Alaska was younger too; it was less than 30 years old.

It is different now. The State of Alaska is more than twice as old. Although the Bar Association is growing, there seems to be a lot of us who, as Robert Service might say, are "passing over the great divide," or who are rapidly approaching it. In this edition of the paper alone, we see the loss of a considerable number of the great ones.

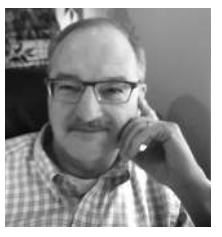
Dan liked to write about anything, and we liked to read what he had to say.

Anyway, this increasing mortality rate creates a growing challenge for the *Bar Rag*, as we try to find and publish appropriate obituaries. We don't have an obituary columnist, and so we use what we can find. We do our best with what we have. But, on the lighter side, we recently received some advice concerning this matter from *Samantha Slanders*, the paper's long-time advice columnist, who suggested a permanent solution, something that the Board of Governors may consider.

According to Samantha, all that needs to be done to solve the obituary problem is to require that every new member of the Alaska Bar Association submit their obituary to the Bar Association along with their first dues payment. In order to maintain Bar membership, the obituary would have to be updated every 10 years, for the next three decades, every five years thereafter, for the next two decades, and every year thereafter, forever. This would, once and for all, solve the matter for the paper. When ultimately needed, the obituary would only be a key stroke away. This also would insure a more personal obituary while providing members a focal point against which to measure their progress in life.

And, as Samantha notes, the compulsory nature or the "Obituary Rule" soon would be accepted by the membership, much as the Bar has accepted mandatory CLE and other mandates.

But, speaking of obituaries and *Samantha Slanders*, we cannot forget a close associate of hers, kind of an alter-ego, who she relied upon heavily in recent years for advice, a man whose obituary appears in today's paper, and who for decades was an integral member of the *Bar Rag* family, and that is Dan Branch.



" Branch kept writing right up to the end so, in a way, Dan followed the "Obituary Rule" long before it was instituted."

Dan liked to write about anything, and we liked to read what he had to say. He kept writing right up to the end so, in a way, Dan followed the "Obituary Rule" long before it was instituted. Just get some old copies of the *Bar Rag*, or maybe even his recent book, *Someday I'll Miss This Place Too*, and you'll know what Dan has been doing, where he has been, and what was on his mind. It is a great legacy.

So, it is only fitting that this Editor's Column be dedicated to one of our own, Dan Branch, who must have a lot of new material to write about now. And, maybe, as Dan might say, Someday He'll Miss This Place, Too.

For more about Dan Branch please turn to Pages 4-5

Dan, may you rest in peace.

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

The Alaska BAR RAG

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March	Feb. 10
June	May 10
September	Aug. 10
December	Nov. 10

Former clerk recalls working with 'The Judge'

By Jessica M. Brown

"One man cannot summon the future. But one man can change the present." — Capt. James T. Kirk and Lt. Cmdr. Spock, "Star Trek"

Alaska lost a great man Feb. 10. It is challenging to put to words the impact former Alaska Supreme Court Justice Craig Stowers, who was simply "Judge" to those of us who knew and loved him, had on the young legal minds he tutored, the Alaska Court System he shepherded, and the everyday Alaskans he served.

He was conscious of the power he wielded and the responsibility of humble service that accompanied that power. He never lost sight of the impact the justice system had on ordinary Alaskans, especially the youngest ones. He had a special place in his heart for juvenile dependency, or Child in Need of Aid — "CINA" — cases. He once told me that if he could not be a father, the least he could do was give all his time and energy to discerning difficult CINA cases for the benefit of the kiddos who came before the court.

An intensely private man, he was known to many for his seriousness and occasional dry sense of humor. But in chambers, outside the public eye, his playful sarcasm shined through. He enjoyed learning about odd pop culture references and needling his clerks with a straight face that usually ended in a mischievous grin. He was proudly old-school — he never met a book he didn't love — and he relished making hand-written edits in red ink, which only his beloved and long-suffering judicial assistant could read. He cherished his relationships with his fellow judges, his clerks and the court staff.

Next to his wife, who he openly adored, and his many cats and dogs, we — his clerks, staff and judicial colleagues — were his family. He pushed us all to be our best at all times: to approach cases and each other with intellectual rigor, respect for the rule of law, and commitment to the Alaskans we were privileged to serve. He always sought collegiality, compromise and consensus with his colleagues.

In an era of extreme partisanship and division, Stowers possessed a mind capable of persuasion. If the law called for an outcome, he was always and unequivocally brave enough to "write it as he saw it." He trusted his clerks to ferret out the truth, but he pushed us to defend every premise upon which we rested our conclusions.

I will never forget the hours we spent going back and forth on cases, usually over weekends — the Judge was notorious for burning the midnight oil and expected the same from his team — wrestling with the law and the facts until logic compelled a single outcome. It was in these exchanges that I learned to deeply listen to "the rub"— the thing that really bothered the person posing the question.

Justice Craig Stowers

Years later, I was fortunate enough to argue a case before the Alaska Supreme Court, with the Judge — Justice Stowers — sitting center stage. In his questions, and those of other members of the Court, I could hear "the rub" — and I couldn't help but smile as I took a deep breath, and answered like I was back in chambers with him. It was an honor to appear before him. He taught me to be honest with the law and, by extension, he showed me, in his own quiet way, the honorable nature of the legal profession.

While every lawyer experiences burnout at times in his or her career, remembering the Judge's pure love of the law continues to inspire me to find the joy that exists doing justice, however imperfect it can be at times. The Judge took a chance on me and many other clerks he took under his wing. Several of us appeared ill-suited on paper for a prestigious clerkship with Alaska's highest court. But he believed in us because he saw in his clerks the values he espoused in his life: grit, hard work, and above all, intellectual curiosity.

I would be remiss if I didn't also mention his intense love of barbecue and mastering every style of barbecue sauce, much to his clerks' delight. You were one of a kind, Judge, and we will all miss you. Thank you for choosing us. We were privileged to serve with you.

Jessica M. Brown is an associate with the law firm Holland & Knight in Alameda, CA. She served Justice Stowers as a judicial clerk from 2013-2014.

Board faces the issue of increasing CLE effort

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This might be more influential if the only point of CLE was to reduce discipline but that's a faulty argument. We should not engage in CLE merely so that we do not end up on the wrong end of a discipline complaint. We should engage in CLE in order to improve the profession as a whole, obtain better outcomes for our clients, keep our intellectual engagement high, and meet our ongoing responsibility to stay abreast of changes in the law.

Finally, at the end of the day, the optics matter. A refusal to commit to ongoing continuing education sends the wrong message to our clients, our oversight bodies, and the public as a whole. In an era of extraordinary access to information and technological change, our community cannot afford to thumb our nose to education. It is, after all, what allowed us to enter the profession in the first place.

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

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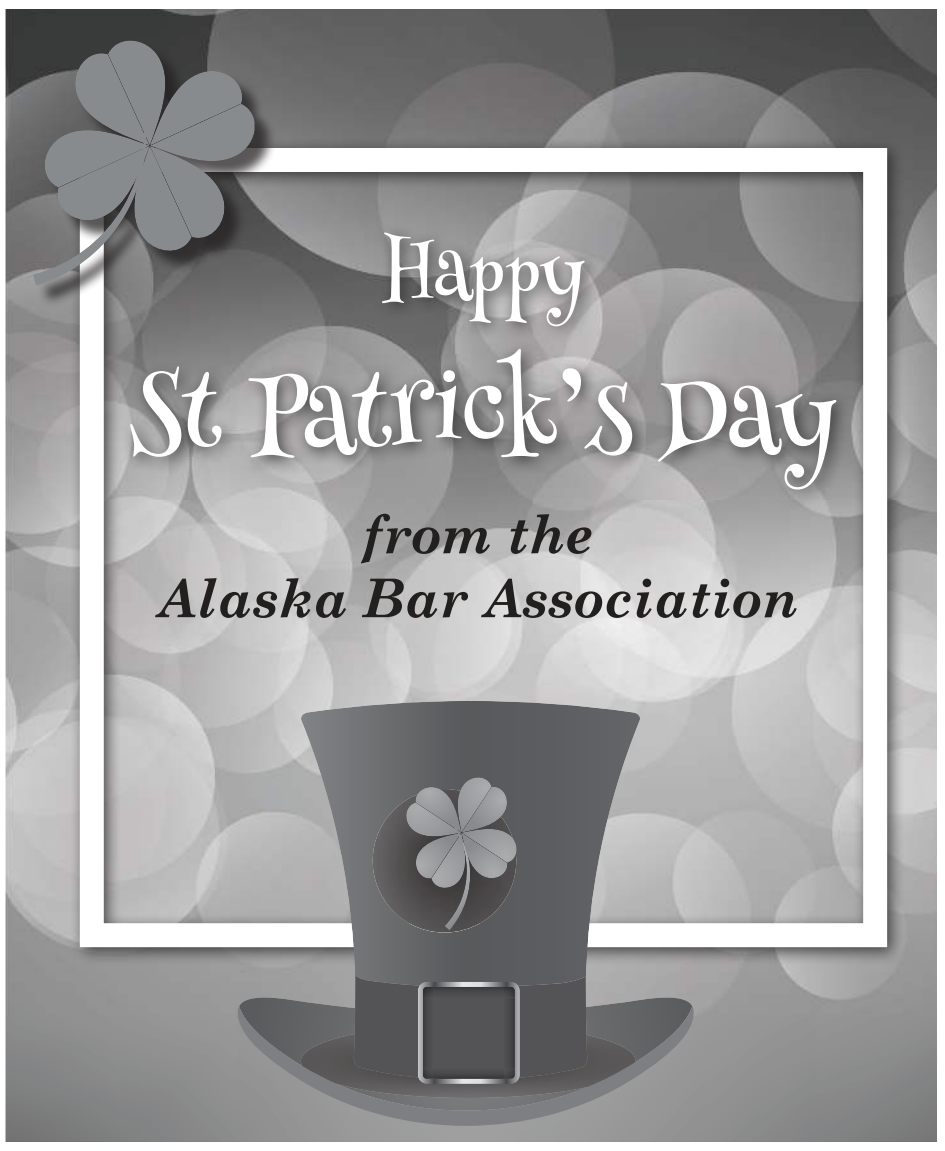


In Memoriam

A friend recalls the essence of a lawyer-writer

By Doug Pope

Dan Branch and I shared a circumstance. We were lawyers who during long careers decided to also join a tribe of Alaska writers. Many lawyers are good writers, but legal writing, where the writer is editing in her mind with every word put to the page, is a different universe from creative writing, where that kind of constant editing is a disability rather than an asset. It gets in the way of letting words flow. And from letting words flow comes art. Or, so the thinking goes. So, the most important step in the journey from legal writing to creative writing is to overcome that disability. Dan and I met at the UAA program for MFA students in creative writing. We talked about our shared circumstance and our own efforts to break away. Thus began a long dialogue over the years about craft and stories we were trying to tell. We became friends who read each other's work, listened to each other read aloud to audiences, and gave each other honest feedback.

The cover of Dan's book *Someday I'll Miss This Place Too.*

Dan was well known in the tribe of Alaska writers. He had a stoic wit that sometimes made you laugh out loud, and a dogged determination to get his words and sentences right. Dan received his MFA in creative non-fiction, and while students stood cheering, Dan held above his head the plaque for the annual award for "literary excellence." Most people would have called it a day right there. Dan went back for another year to study poetry, because it's more than just fun, writing poetry improves a writer's prose. Such was his commitment to getting it right.

Dan was well known in the tribe of Alaska writers. He had a stoic wit that sometimes made you laugh out loud, and a dogged determination to get his words and sentences right.

In the spirit of Dan's essays, I feel compelled to recall two lawyer stories I think say a lot about Dan and his time. Those with 30- or 40-year pins and experience in the bush might appreciate them. They ended up in Dan's recent book *Someday I'll Miss This Place Too*, a book of nonfiction essays and poetry that covers Dan's time in Alaska.

One of the first things Dan learns is that cultural norms in the Yukon-Kuskokwim Delta mean he must wait as a sign of respect, wait for someone to speak first, so he gets in the habit of silently setting out cups of tea while waiting for the client to ask for help.

The background many of you know is that beginning in the 1970s Dan worked as a lawyer in Bethel, and then later as a magistrate in Aniak. One of the first things Dan learns is that cultural norms in the Yukon-Kuskokwim Delta mean he must wait as a sign of respect, wait for someone to speak first, so he gets in the habit of silently setting out cups of tea while waiting for the client to ask for help. On a Friday afternoon a Yup'ik woman with purple bruises on her face and one eye closed comes into his office, and Dan waits and serves tea. She starts speaking in Yup'ik. Dan's secretary is Yup'ik too, and she translates. Even without hearing the translation Dan knows this woman needs a restraining order against a drunken husband rampaging with his fists. In those earlier times you had to file for a divorce decree and move for a restraining order in order to get such relief, and Dan and his secretary try not to fidget as the clock ticks. Dan files the complaint and motion at 4:30 p.m.. At a quarter to five the judge issues the restraining order, and the client spends the weekend in a hotel room in Bethel looking into a mirror while studying her damaged face. On Monday morning the husband shows up in Dan's office, and Dan invites him in for tea. He's filling a kettle when the husband starts shouting: "GIVE HER BACK . . . GIVE HER BACK." He tears up the restraining order in front of Dan, while whispering now, "give her back . . . give her back." He then turns on his heels and heads for the office door. Dan's reaction is to feel guilty for causing such grief.

Many years later, Dan and his wife Susan are standing at the Aniak airport, leaving for the last time. Dan has been magistrate for the Kuskokwim River above Bethel, issuing orders and marrying couples and going with the local Trooper to recover drowned bodies, but now they're moving to Ketchikan. The weather is below minimums, and for a few hours a small group of passengers waits inside the terminal, drinking coffee and getting anxious about meeting a connecting flight in Bethel. Finally, a twin-engine Piper Navaho makes it in when there is only a mile of visibility, and the pilot goes inside the terminal. He sees Dan and Susan's names on the manifest and tells them to climb aboard. Other passengers rush out and start pleading with the pilot. It goes so far as one woman pounding on the passenger door and screaming "take us with you, you can't leave without us," but the pilot is resolute and says another plane is coming in time to make the last flight out of Bethel. They take off, Dan and Susan in a plane big enough to take nine passengers, and Dan doesn't understand why. Until the pilot pulls out a stack of court documents and asks Dan how divorce court works.

Branch word cloud: Dan displays the word cloud developed from his master's thesis which eventually led to his book.

Such was a lawyer's life in the bush. The book ends up in Juneau, which is where Dan lived when he died. Three times I read versions of the manuscript that became *Someday I'll Miss This Place Too*, and talked about them with Dan. During those times Dan and I had our own conversations about death. He didn't know how much time he had, and he wanted to finish his book. I didn't want him to compromise his standards because he was afraid he wouldn't live long enough. When for the third time I said another revision would make it better, I didn't hear from him for a week. Then he wrote to say he'd had to go through the stages of denial and anger and depression before he could get back to work. And then he did. And now I say rest in peace Dan, you finished a beautiful book.

Dan's wife Susan meets him at the Juneau dock when he returned from the North Words Writing Symposium in 2016.

Doug Pope has been licensed to practice law in Alaska since 1973, although my last case was decided in the United States Supreme Court in March of 2019. I'm also the author of The Way to Gaamaak Cove, published by Cirque Press in 2020, a non-fiction book of essays set mostly in the Alaska wilderness.

In Memoriam

VISTA volunteer, attorney, writer Dan Branch dies

Daniel Nelson Branch, 70, died Jan. 5, 2022, at his home in Juneau. It can be a cliche to say a man lived a full life, but Dan did that and more. He left an indelible mark on people across Alaska with his work as a state attorney, his passion as an artist and writer, and the quiet strength and listening ear he provided to many a friend and colleague.

Dan was born April 20, 1951, in Burbank, CA, the son of Graydon Branch and Bernice (Whalen) Branch. He was an alumnus of Verdugo Hills High School, the University of California, Berkeley, and the University of San Francisco Law School. He moved to Alaska in 1976 to serve as a VISTA volunteer in Bethel, providing free legal services to locals. What he expected to be an interesting year's experience became a lifelong love of the 49th State and the people who call it home. Dan met his wife, Susan Oshida, in Bethel; they were together for 44 years.

Dan spent 13 years total on the Kuskokwim River (10 in Bethel and 3 in Aniak), before relocating to Southeast Alaska in 1989. He worked for the Attorney General's Office in Ketchikan and then Juneau, retiring as a senior assistant attorney general in 2013. His career highlights include many arguments before the Alaska Supreme Court, mentoring fellow attorneys, and (a begrudging highlight according to him) authoring an infamous legal opinion that declared it illegal for Alaska charities to raise money by soliciting bets on rat races.

After retirement, Dan earned an MFA in creative non-fiction from the University of Alaska Anchorage. His essays, stories, and poetry, which often explored how Alaska's harsh and beautiful environment shapes the lives lived within it, were published in well over a dozen publications across the world. Dan also served on the board of directors of 49 Writers and authored a long-running column in the Alaska Bar Association's Bar Rag.

Dan was diagnosed with glioblastoma in September 2020. It drove him to publish a collection of his works, which resulted in the book, Someday I'll Miss This Place Too, published last year by Cirque Press. Dan completed it while undergoing cancer treatments, a testament to his passion and determination. Dan's service to the Juneau community included work as a volunteer chaplain at Bartlett Regional Hospital, a difficult calling for which he was exceptionally gifted. He was also an active member of his local parish and volunteered many hours at the Cathedral of the Nativity of the Blessed Virgin Mary.

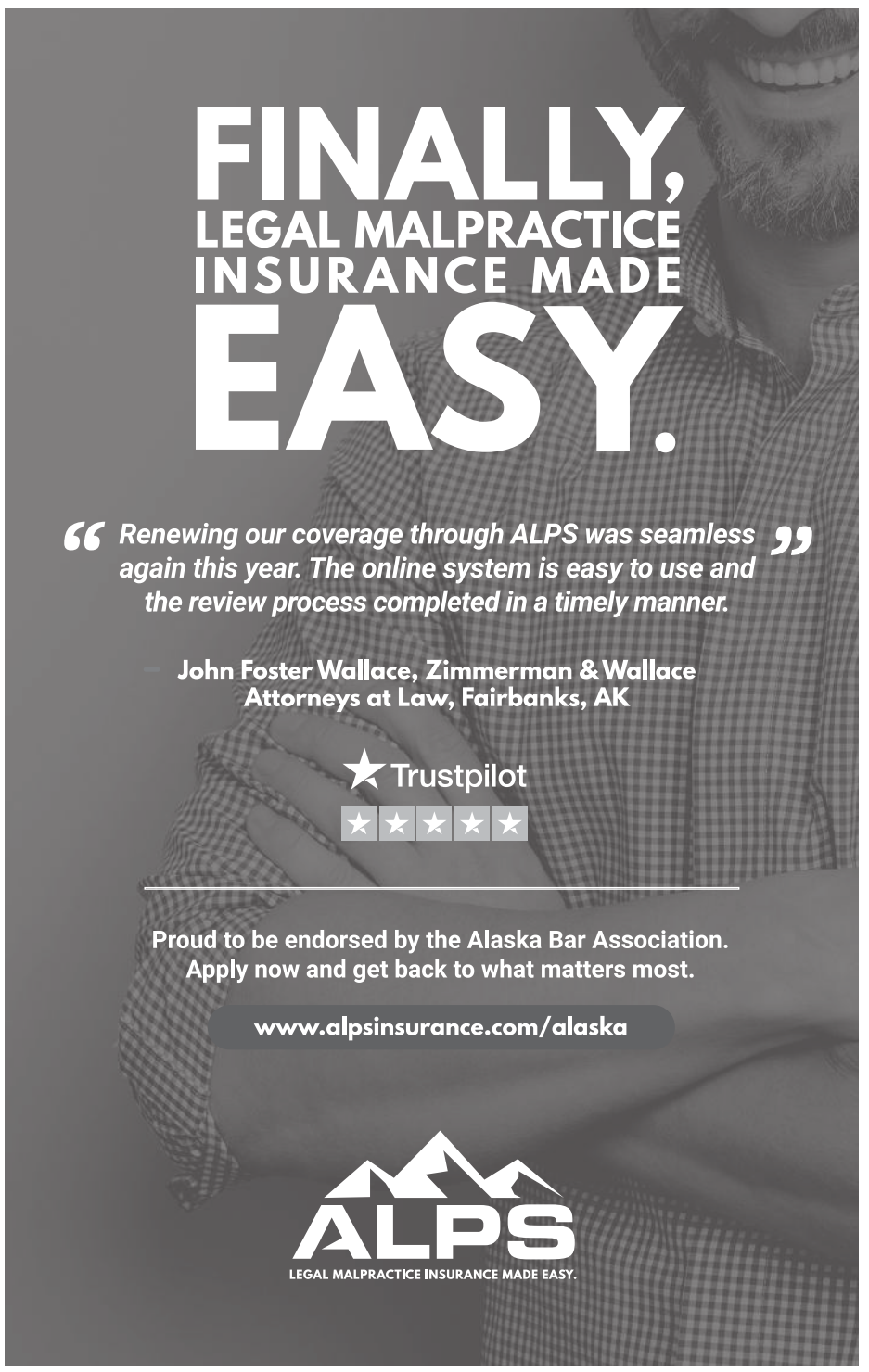
As an artist, Dan developed his own unique style of wood carving and had pieces featured in art shows and exhibitions across Alaska. He was also humbled and honored to have been taught by Tlingit and Haida master carvers while living in Ketchikan and Juneau.

Finally, as a lover of photography and Southeast Alaska's unmatched beauty, his observations and musings live on in more than 2,400 posts on the Walking with Aki blog (https://kwethluk.net/).

Dan is survived by his wife, Susan; his daughter, Anna Branch, and her husband, Robert Montenegro; his sister, Mary Musgrove, and her husband Jack; many nieces, nephews, and cousins stretched across the country; and his loyal canine hiking companion, Aki.

Dan's family would like to recognize and thank his many friends in the Juneau community who have been so warm and generous during the previous months. It is the perfect reflection of a life lived well that so many people came together to share in his love. Dan will be interred at the Shrine of St. Therese. Per his wishes, there will not be a public funeral.

Celebrants of Dan's extraordinary life are encouraged to make a donation to Juneau's emergency shelter and soup kitchen, The Glory Hall, located at 8715 Teal St. and www.feedjuneau.org. His family encourages anyone who feels called to share memories of Dan to send these to jnubranch@gmail.com.



In Memoriam

Longtime Anchorage attorney Ted Pease Jr. dies at 91

Theodore Mitchell (Ted) Pease Jr., age 91, died Nov. 15, 2021, in his Rabbit Creek home of more than 60 years. In his final weeks, he was surrounded by the love of family and friends.

Ted was born June 19, 1930, in Springfield, MA to Theodore M. Pease Sr. and Ruth Bache-Wiig Pease.

He graduated from Yale University in 1951, where he rowed on varsity crew. He graduated from Harvard Law School in 1957. In between, he volunteered for the U.S. Army infantry during the Korean War, then enrolled in officer training school. While on a three-day military pass, he met his future wife, Claire Vogelsong, through a mutual friend at a Philadelphia Philharmonic performance. He married Claire July 13, 1957.

They spent their early years together in Cambridge, MA, where Ted worked as a lawyer for Foley, Hoag and Elliott. While living in Cambridge, Ted mowed the lawn and shoveled snow for his neighbor, poet Robert Frost.

His first fling with Alaska was in 1950, when he drove the Alaska Highway to work on a gold dredge near Fairbanks. He described stacking mastodon tusks near the mine's entrance, where an archeologist from the University of Alaska would pick them up.

During two summers between military service and law school, Ted again traveled to Alaska for adventure and work, including a voyage on a power scow from Seattle up the Inside Passage. He worked as a choker-setter in a logging camp near Ketchikan. The next summer, he sought work in the fishing industry. he turned down a job offer from a creek robber and instead crewed on a salmon trap tender when fish traps were still legal.

Ted and Claire arrived in Anchorage mid-winter, 1960 when Ted accepted a job as district attorney. They lived in the L Street Apartments, now the Inlet Towers. Within the year, they purchased a log house off Rabbit Creek Road. Around this time, Ted helped found Alaska Legal Services. He next joined the Anchorage law firm of Burr and Boney, later Burr, Boney and Pease, and finally Burr, Pease and Kurtz. The law firm lost an office building downtown in the '64 earthquake but suffered no injuries. Ted was on his way home in his pickup when the quake hit, and he walked the final mile up Rabbit Creek Road after the bridge across Rabbit Creek collapsed.

Theodore Mitchell (Ted) Pease

Ted practiced law in Anchorage for nearly 45 years, a highlight of which included arguing a case before the U.S. Supreme Court. His clients included friends and neighbors as well as corporations such as Maytag, Kawasaki, Bell Helicopter and Savage Arms. He spoke admiringly of the pioneer lawyers who served as his mentors, and the younger lawyers whom he mentored later in his career. He attended his official retirement party in 1996, but continued to practice law for another seven years.

He served on the Anchorage Symphony and the Alaska Kidney Foundation boards, among others. He freely volunteered his time to his children's activities and helped cut some of the early Kincaid ski trails.

Fitness was a passion. For years, Ted competed in Nordic ski races, making a smooth transition from wood skis, pine tar, and wool knickers to fiberglass skis, glide wax and Lycra. On his lunch hour, he ran laps in the old City Gym, and later along Chester Creek bike path. Ted was one of Anchorage's first bike commuters, pedaling his Schwinn Continental from Rabbit Creek to his downtown office when the Seward Highway was two lanes. From their 50s onward, Ted and Claire explored the world on bicycles, pedaling through parts of Russia, Scandinavia, Eastern Europe, Inner Mongolia, Vietnam, Nova Scotia and Ireland.

He held the town and people of Seldovia in his heart, maintaining a cabin there and valued the many friends and memories he made in Seldovia over 50 years.

Ted is survived by his wife of 64 years, Claire V. Pease; three children, David (Mary Ann), Nancy (Dan Hull), and Thomas (Susanne DiPietro); four grandsons, Teddy, Arthur, Andrew and Thomas; and nephews and niece, Paul, Arthur, and Margaret Egolf of Delaware and their families. Ted's sister, Sally Egolf, preceded him in death.

A celebration of his life will be hosted by his family when warm weather returns in May or June 2022.

Former public defender Joel Rothberg dies

Joel A. Rothberg, 70, died unexpectedly Nov. 15, 2021, in Vancouver, WA.

Growing up in suburban Washington, D.C. in the 1960s, Joel Rothberg believed in President Kennedy's call to: "ask what you can do for your country." So after law school he volunteered for the "domestic peace corps" or VISTA, Volunteers in Service to America, which sent him to Alaska. For his entire professional life Joel was committed to public service as both an Alaska Legal Services attorney and as an assistant public defender in Kotzebue, Kenai, Juneau and Anchorage.

Joel's natural humility hid a determined intellect. He often accepted the difficult cases no one else wanted. He accepted the underdog role with grace. His working premise was that justice is never easily attained, and the hardest cases require the hardest working lawyers. Despite three decades of litigation, those who worked with Joel never heard him complain of a client or disparage another lawyer.

Preferring a solitary life to having a roommate, Joel always kept a dog, and developed close relationships with them. He invariably adopted a mystery breed from the pound that no one else wanted. Lavished with attention, his dogs were strangers to discipline. Each walk on a leash became a tug-of-war, each trip to the vet a contest of wills. Joel's last canine roommate predeceased him by one week.

He was an active devotee of Tai Chi, and thought to be in good health. His twin brother, Maury Rothberg, a Library of Congress historian, predeceased him. He is survived by his sister Belle.

Alaska banker-attorney dies at 54

Michael A, Martin

Michael A. Martin, banker, family man and all-around good guy, died of a heart attack in his home Nov. 11, 2021. He was 54.

He was born Dec. 22, 1966, in Latrobe, Pa., to Irene and D.T. Martin. He studied political science and art at Juniata College and graduated from Ohio Northern University School of Law.

He excelled at football in high school and college, where he was named to the All-Middle Atlantic Conference first team. A lifelong Steelers fan, Michael could rhapsodize about the latest game or ancient Steelers history. He also loved rugby, which he played in college, law school and in the men's league in Anchorage.

He and his wife, Nancy, were college sweethearts. Nancy came to Alaska first, and Michael joined her on his spring break from law school in 1992. They fell in love with the state as they explored the snowy roads from Hatcher Pass to Homer in a tiny rental car.

Mike had broad shoulders — literally, as an ex-football player, and figuratively, as a rock-solid pillar of the community. He was chief operating officer and general counsel at Northrim Bank. He also served as president of the Alaska Bankers Association and Alaska Public Media, and as a ski coach for Junior Nordic. With Nancy, he led the Cross Country Ski Team Booster Club at West High.

A law firm job lured them back to their college town of Huntington, Pa., but their appetite for adventure was rekindled when a friend called, raving about Alaska's summer beauty. Michael's enthusiasm was all it took to convince them to sell their belongings and head north.

Banking, not law, turned out to be Michael's true career passion. With his legal knowledge and gregarious personality, he had an uncanny ability to solve complex problems while putting people at ease. He felt fortunate to work with talented mentors at First National Bank Alaska and then as part of the Northrim Bank family. Michael was also an eager mentor and loved teaching at the Pacific Coast Banking School.

Michael leaves his wife Nancy; sons Jackson, Finlay and Kelly; mother Irene; half-sisters Eileen Martin, Vicki Furmanek and Kelly Deegan. He was preceded in death by his father; and half-sister Catherine Martin.

A celebration of life is planned for 1-4 p.m. June 18 at the Dena'ina Center.

Memorial donations in Michael's name may be made to Alaska Public Media or Nordic Ski Association of Anchorage.

The family invites you to share memories at michaelamartin.org

Courts launch e-course related to Indian Child Welfare Act

From Alaska Court System

The Court Improvement Program (CIP) launched its Indian Child Welfare Act (ICWA) e-Learning course in December. The CIP monitors and improves the way the court system handles child in need of aid (CINA) cases and enhances coordination between the court system and other agencies and tribes involved in CINA cases. Members of the CIP Committee include judges, tribal representatives, and state agency representatives involved in child welfare from around the state. The curriculum subcommittee of CIP developed the e-Learning court.

Alaska is serving as a model for other states and profiled the course at a national call with the Federal Children's Bureau and CIP representatives from all 50 states last December.

The goal of the course is to provide an understanding of the historical context of ICWA, the substantive provisions of ICWA, and strategies for ensuring compliance with the letter and spirit of ICWA. The historical section of the course includes a series of video vignettes of Alaska Native people from different regions of the state talking about the continued impact on Native communities of historic trauma experienced over the last two centuries.

The curriculum was developed by an interdisciplinary team representing each discipline involved in ICWA cases. Although the course is designed for judges, tribal representatives, attorneys, child protection workers, and child advocates, it is available to anyone who wants to learn more about ICWA. The course is divided into ten sessions, beginning with a historical context session, which sets the stage for discussing the passage of ICWA, and moving through the legal elements of ICWA cases.

The e-Learning course will increase access to course materials. In-person and Zoom ICWA trainings are regularly provided to judges, attorneys, ICWA workers, tribal partners, OCS staff, and child advocates. The eLearning course will enable anyone to access the training resources at their own pace and in whatever way is most helpful to them, through reading materials, listening to a podcast style narration, or watching videos of Alaska judges and practitioners presenting the materials. Learners can then test and apply their knowledge in a series of learning interactions following a case study at the end of each subject matter session.

The course is available here: Indian Child Welfare Act: History, Law and Practice. https://bit.ly/3gQrGFk

Mayor establishes domestic-violence prosecution unit

From City of Anchorage

In December Anchorage Mayor Dave Bronson announced the creation of a specialized Domestic Violence Unit of the Municipal Prosecutor's Office, specifically targeting domestic violence in Anchorage. He named experienced prosecutor Monica Elkinton as deputy municipal prosecutor in charge of the elite unit, which includes five longtime prosecutors, four administrative support staff, and two Anchorage Police Department officers.

Monica Elkinton

The Municipal Prosecutor's Office handles almost all the misdemeanor criminal charges in the boundaries of the Municipality of Anchorage, more than 10,000 cases per year. Domestic violence cases (such as assault, criminal mischief/destruction of property, and other crimes) consist of roughly half of the crimes prosecuted by the municipality. The Domestic Violence Unit specifically focuses on crimes involving intimate partner violence, child abuse and neglect, as well as animal abuse and neglect cases which can be a precursor to domestic violence against partners or household members.

The municipality also prosecutes a unique crime called "family violence" which consists of committing a domestic violence assault in the presence of a child, an act which has been shown to have long-term trauma consequences on children's brain development. Each of the specially trained prosecutors handle caseloads of 300-500 cases at once. The police officers stationed in the Domestic Violence unit are charged with enforcing bail and sentence conditions, which prohibit abusers from contacting their victims after arrest. In addition to Elkinton, Bronson appointed Travers Gee, another deputy municipal prosecutor in charge of general trial cases at the Prosecutor's Office. Both will serve under Municipal Prosecutor Sarah Stanley.

"We know we need to protect our families and this is one step I can take toward that goal," Elkinton said. "We can all work together to stop violence in our city, and create safe homes. No one deserves violence in their home or relationship."

Elkinton, Gee and Stanley are all long-term employees of the municipality and have served under several mayoral administrations.

Follow the link to hear Deputy Municipal Prosecutor Monica Elkinton discuss the new unit: https://youtu.be/mJqYPd2xuSQ.

Alaska Supreme Court suspends Anchorage attorney Chaobal

The Alaska Supreme Court adopted the Board of Governors' recommendation to suspend Anchorage attorney Vikram Chaobal from the practice of law for 30 months, with two years and a day to be served and the remainder of the 30-month suspension stayed.

Bar counsel investigated 11 grievances against Mr. Chaobal based on complaints filed by clients and referrals from the courts and fee arbitration panels. Several clients alleged that Mr. Chaobal accepted fees without a written fee agreement and then failed to complete the promised work.

Mr. Chaobal disagreed with some of Bar Counsel's findings which he could have contested at a disciplinary hearing before a three-person hearing committee. After negotiations, the parties stipulated that Mr. Chaobal breached duties he owed to his clients by failing to act diligently, failing to meet deadlines, failing to keep his clients informed, failing to prepare written fee agreements, failing to disclose the lack of malpractice insurance, failing to account for client funds, and failing to deliver funds to clients promptly.

Mr. Chaobal breached professional duties when he failed to properly withdraw from client representation, failed to turn over files promptly, failed to pay fee arbitration awards promptly, and failed to provide mandatory responses to Bar grievances. He violated duties to the legal system when he failed to follow fee arbitration rules and procedures and submitted an affidavit to the court containing an inaccurate recounting of events.

Clients experienced stress and anxiety by their inability to speak with Mr. Chaobal, particularly when they saw little progress being made on their cases. Clients were frustrated by their inability to calculate what was owed in fees or why more was owed when a "flat fee" had been charged. Clients often had to pursue fee arbitration in order to get funds returned.

Mr. Chaobal acknowledged that he failed to address some personal issues in a healthy way and that he was remorseful that events in his personal life and his response to certain challenges led to compounding problems with his law office management and resulting harm to his clients.

The court imposed conditions for Mr. Chaobal to meet prior to his seeking reinstatement to the practice of law and participating in a reinstatement hearing as set out in Alaska Bar Rule 29(c)(1)-(4). If reinstated, Mr. Chaobal shall perform legal work during the stayed portion of the 30- month suspension only under the supervision of an attorney mutually acceptable to Bar Counsel and Mr. Chaobal. The supervising attorney will report monthly to Bar Counsel.

State of the Judiciary

Chief Justice Daniel E. Winfree delivers his annual state of the judiciary report to the Alaska Legislature Feb. 9. Links to the video and transcript are available at: https://courts.alaska.gov/soj/index.htm.

Bar People

Parker joins Lane Powell Labor, Employment, Benefits Team

Douglas S. Parker

Lane Powell has welcomed its newest Shareholder and Labor and Employment Attorney, **Douglas S. Parker**. With a labor and employment practice spanning over 35 years, Parker has earned the reputation as a trusted advisor and renowned litigator across the Pacific Northwest and Alaska. He is a management-side lawyer who practices traditional labor law and represents employers in litigation involving a broad array of employment claims, including wrongful discharge, wage and hour, discrimination, retaliation, non-compete, and ERISA matters. He also handles union issues for employers, including representation and unfair labor practice proceedings before the National Labor Relations Board, grievance and interest arbitrations, union election changes, and collective bargaining. Parker has represented employers across a variety of industries, including marine and air transportation, national restaurant and retail chains, leading Northwest-based scientific research and technology organizations, a large Alaska telecommunications provider, Alaska Native Corporations, and companies in the mining, oil, and gas industries.

Perkins Coie promotes Anchorage attorney to partner class

Michael O'Brien

International law firm **Perkins Coie** recently announced its 2022 partner class promotions, which included Anchorage partner **Michael O'Brien**, who is a member of the Labor & Employment practice. He counsels business and institutional clients as they navigate labor and employment law issues, and they often turn to him for representation in litigation, arbitrations and negotiations. He frequently advises organization leaders on traditional labor, discrimination, investigations, and human resources operations.

Organizations hire new executive director

Justice Not Politics Alaska and **JNPA Civics Education Fund** have hired **Charles Ward** to serve as their new executive director. Ward brings a wealth of experience to JNPA and JNPA-CEF. He is a licensed attorney and has worked in both private practice and for a non-profit law firm. Prior to his professional roles as a lawyer, Ward worked for the State of Alaska as operations manager for the Division of Corporations, Business and Professional Licensing and as the Marine Pilot Coordinator. In the latter position, he served as executive administrator, investigator and licensing examiner for the Alaska Board of Marine Pilots. Ward moved to Alaska in 2010 to work as an editor for the *Juneau Empire* after working as a journalist for several other publications and news sites. He earned journalism and law degrees from the University of Oklahoma.

Three Ketchikan judges plan to retire this year

Cotinued from page 1

ing, conducting public hearings and interviewing applicants for vacant judicial positions, after which it will nominate at least two of the most qualified applicants. Those names will then be forwarded to the governor for appointment to the position.

Three candidates have applied for Carey's position: Daniel Doty, an assistant U.S. attorney in Fairbanks; Kristian B. Pickrell, an assistant district attorney in Ketchikan; and Amanda M. Schulz, magistrate judge in Ketchikan.

In the years since they first started, they've all seen some dramatic changes in the court system procedures and technology.

Doty, Pickrell and Schulz have also applied for Stephens' position, in addition to Katherine Lybrand, an assistant attorney general in Juneau, and John Whitesides, a staff attorney at Alaska Legal Services in Kenai.

Stephens was born and raised in Ketchikan. In addition to working in private practice he served as district attorney in Ketchikan from 1993 to 1999 before being appointed as Superior Court Judge. During his time on the bench, he was also the presiding judge for District One from 2011 to 2020.

Miller moved to Ketchikan when he was 4 years old when his father moved to town to do legal work for the pulp mill, and he's lived here ever since.

Carey grew up outside of Boston, MA. He went to Anchorage in 1980 for an internship position "expecting to stay the summer," but remained in Alaska, instead. He worked in private practice for many years, including Petersburg and traveled throughout Southeast, before being appointed to the bench in Ketchikan.

Looking back on their careers, all three men praised the efforts of the staff they work with.

"I think the main highlight was working with the staff here, and all the attorneys who come through Ketchikan," Miller said.

"Without the staff we have right now, we wouldn't be able to do what we do. We spend more time with them than with our family, so they become part of the family," he said.

In the years since they first started, they've all seen some dramatic changes in the court system procedures and technology.

"I think when I started they were still hand-writing log notes and we were recording on cassette tapes!" Miller said.

"We did our weekend arraignments up at the jail, in the side cell, with a little cassette recorder, and they'd bring in one defendant at a time. And now that's all done over the telephone."

And the COVID-19 pandemic has, of course, dramatically changed the way things are handled in the courtroom, with everyone adapting to working in a remote court environment and proceedings over Zoom.

Stephens said jury trials were suspended in 2020 at the start of the pandemic, although other court work continued telephonically. Then a see-saw of jury trial windows opened and closed depending upon the impacts of the Delta and Omicron virus variants. But he said as of Jan. 10 of this year "we're back in the trial business."

Carey said he just finished a two-week jury trial for the first time in two years. "And it was, I just have to say, it was really invigorating to actually have people in the courtroom."

But things are opening back up slowly.

"It will be a slow start," said Miller. "We'll be doing one trial at a time and see how it goes."

Being a presiding judge in a small community brings with it some unique personal challenges.

Carey said a judge's position is "insular and isolated."

"You have to be conscious of your appearance in public," Carey said. "There's a responsibility to present a good face with the court system, and to the community. You're also limited in the types of contacts. Our natural constituency among our friends would be people in our profession. But you really can't do that, because those might be the ones practicing in front of you, and you just have to keep your distance."

Stephens said he felt a "self-imposed pressure" coming into his position after growing up in his hometown. With a sense of responsibility to his teachers, neighbors, friends, family — "I wanted to do a good job for my community," he said.

From left, Ketchikan Superior Court Judge William Carey and Ketchikan Superior Court Judge Trevor Stephens stand with District Court Judge Kevin Miller at the Ketchikan courthouse Jan. 21. *(Ketchikan Daily News photo by Dustin Safranek)*

Miller said, "You certainly know a lot of people who are either showing up for jury service, or showing up in front of you for civil cases, or criminal cases. And that makes it uncomfortable, but you have a job to do. And if you really can't be fair, you get yourself out of the case. Otherwise, you set aside what you know, decide the case on its facts."

"I think we all got into this because we wanted to move on from our previous careers in private practice and be able to help other people and help the community," Miller said.

But looking back over their years on the bench, the three all agreed on a central theme that Miller expressed.

"I think we all got into this because we wanted to move on from our previous careers in private practice and be able to help other people and help the community," Miller said. "And it's been a very rewarding career, and I'm sure we're all very grateful to have been appointed to this position."

Once the weight of their judicial positions is behind them, all three will have more time to spend at home.

Miller and Carey are self-described "dahlia-queens" and plan to spend time in their gardens. Miller and his wife recently bought a 60-foot boat and plan to do some cruising in Southeast. Stephens is still formulating plans, but figures he'd like to do some traveling. Carey mentioned fishing, more time in Mexico, and he clearly treasures time with his grandchildren, who live in Petersburg.

ESTATE PLANNING CORNER

Easy access to cash from life insurance may hold tax traps

By Steven T. O'Hara

A dividend-paying whole life insurance policy issued by an excellent company may develop a cash surrender value and offer easy access to cash through loans as well as through one or more surrenders. Easy access to cash is a valuable lifetime benefit, but this benefit can lead to tax on the lapse of the insurance during the insured's lifetime.

In addition to providing easy access to cash, dividend-paying whole life insurance might provide a level of asset protection during life and at death. Consider Alaska's $500,000 rule: If unmatured life insurance and annuity "contracts have accrued dividends and loan values available to the individual aggregating more than $500,000, a creditor may obtain a court order requiring the individual debtor to pay the creditor … the amount of the accrued dividends and loan values in excess of $500,000 or the amount of the creditor's claim, whichever is less." AS 09.38.025(a)(emphasis added). Consider Alaska's larger rule for death benefit. AS 13.33.101(d) and (e).

Asset protection planning, as authorized by law, is maximized through asset ownership planning.

Tax planning is maximized when a life insurance policy is not classified as a MEC, which stands for Modified Endowment Contract. See IRC Sec. 61(a)(3) and (9) and 72(e)(10). A MEC is life insurance. See IRC Sec. 7702A(a). However, a MEC is considered a policy so heavily funded, a contract that accumulates cash so quickly, that Congress has defined it for purposes of imposing less favorable tax treatment. For example, a loan taken by the owner from a MEC will be taxable to the extent the loan exceeds tax basis. See IRC Sec. 72(e)(4)(A) and (10)(A) and 1001. A 10% penalty tax may also apply. IRC Sec. 72(v).

The first Alaska statute referenced above uses the term "accrued dividends." Dividends in the context of life insurance are refunds, also known as return of premium. See IRC Sec. 72(e)(6) and Treas. Reg. Sec. 1.72-6(a)1(i) and (3)(Example 3); cf. IRC Sec. 72(e)(5)(E).

Premium paid for life insurance generally equals tax basis. IRC Sec. 72(e)(1)(A), (5)(A) and (C), and (6); see Atwood v. Commissioner, 77 T.C.M. 1476 (T.C. 1999); see also Rev. Rul. 2020-5, 2020-9 IRB 454 (applying IRC Sec. 1016(a)(1)(B)).

Logically, therefore, refunds reduce tax basis and are income to the extent they exceed tax basis. See IRC Sec. 61(a)(3) and (9) and 72(e)(5)(A) and (C) and (6). But is tax basis unaffected to the extent refunds are used to buy paid-up additional insurance? Do refunds then become premium which would add to tax basis, offsetting what would otherwise be a reduction to tax basis? This position makes sense as a matter of economic substance. See IRC Sec. 72(e)(6), Treas. Reg. Sec. 1.72-6(a), and Tax Facts 1 on Life Insurance at 117 (Q130)(National Underwriter 1996 Edition). Cf. Brown v. Commissioner, 693 F.3d 765 (7th Cir. 2012), aff'g. T.C. Memo. 2011-83 (holding IRC Sec. "72(e)(4)(B) … is inapplicable to payments under life insurance policies"). In Brown, the starting point of tax basis (i.e., gross premium) was not reduced until paid-up insurance (purchased by dividends) was surrendered.

"Asset protection planning, as authorized by law, is maximized through asset ownership planning."

With life insurance, tax basis is also known as "investment in the contract" where a policy is not sold by the owner after the policy is issued. See IRC Sec. 72(e)(6) and Atwood, supra; cf. IRC Sec. 1011 and 1016(a)(1)(B). However, not all payments add to tax basis. Payments that do not add to tax basis include premium on riders and interest payments on policy debt. See Rev. Rul. 2020-5, supra; Rev. Rul. 55-349, 1955-1 CB 232 (holding premium on disability income benefit is not included as part of total premium paid for an endowment contract); and IRC Sec. 72(e)(6).

Cash distributed or deemed distributed from a mutual life insurance company to the owner with respect to a non-MEC whole life policy includes: cash that is tax free, such as dividends that reduce tax basis, cash surrenders that reduce tax basis, and generally proceeds of loans; and cash that is taxable, such as dividends in excess of tax basis, surrenders in excess of tax basis, and policy debt paid out of cash value on the lapse of the policy during the lifetime of the insured. IRC Sec. 61(a)(3) and (9) and 72(e)(5)(A) and (C); see Commissioner v. Tufts, 461 U.S. 300, 307(1983) and Atwood, supra; cf. IRC Sec. 7702(g).

The owner's tax basis in a non-MEC whole life insurance policy can be academic to some extent where the policy, once issued, is never sold or deemed sold by the owner and if the insured dies with the policy in force. Cf. IRC Sec. 101(a)(2). Upon the insured's death, the death benefit can be tax free under the federal income tax system. IRC Sec. 101(a)(1). From the death benefit, any balance owed the insurance company is applied by the company to pay off the debt. The insurance company then pays any remaining balance of the death benefit as directed by the owner's beneficiary designation form on file with the insurance company.

As mentioned, a lifetime benefit under a non-MEC whole life insurance policy is the owner's tax-free access to cash through policy loans. For example, suppose Jane Client operates a business through a limited liability company, which is a "tax nothing" because she is the sole owner of the LLC. Treas. Reg. Sec. 301.7701-2(a) and 301.7701-3(b)(1)(ii). Suppose she owns a non-MEC whole life insurance policy issued by a mutual life insurance company on her life. Suppose the cash value in the policy is $100,000, which is more than her tax basis. Client uses the dividend-paying whole life insurance policy exclusively as a business line of credit, paying the insurance company five percent on policy loans. These interest payments do not add to Client's tax basis in the policy. See IRC Sec. 72(e)(6). She does, however, deduct the interest payments as a business expense. IRC Sec. 162.

Under the policy, or under one or more other policies, Client has the right to pay additional premium for more dividend-paying whole life insurance. She figures that if she obtained a line of credit from a bank, she would pay more interest and fees. Client has calculated this additional cost of a line of credit with a bank to be approximately $2,000 per year. Client is intentional in paying this $2,000 to one or more life insurance companies each year in the form of additional premium on dividend-paying whole life insurance, thus increasing cash value.

Through policy loans from well-designed non-MEC whole life insurance policies, owners finance large purchases, including expenditures relating to health, education, and support. See Tufts, supra, at 307. Policies can grow tax free. See IRC Sec. 7702(g) and Nesbitt v. Commissioner, 43 T.C. 629 (1965).

Ultimately, the death benefit in dividend-paying whole life policies may become a way to do more than eliminate policy debt on a tax free basis. See IRC Sec. 101(a)(1). However, life insurance can be subject to income tax, gift tax, estate tax, and generation-skipping tax. See IRC Sec. 101(a)(2), 2501, 2042, and 2601.

When there is policy debt on a life insurance policy, there is no question that the debt will be paid — plus interest. The policy dictates the maximum policy debt and serves as collateral for the debt. The only question is: Will the repayment be a taxable event?

Suppose Jane Client calls Hypothetical Mutual Insurance Company and borrows $100,000 for personal use. Cf. IRC Sec. 163(h). The loan is available through another non-MEC whole life policy that Client owns on her life. Client's tax basis in the policy is less than the policy's cash surrender value. In the event of Client's death, the policy debt will be paid (if not before) out of the death benefit. If the policy debt ever exceeds a certain limit, the debt will be paid automatically out of cash value and the policy will lapse. One way or another, policy debt will be paid.

Suppose Client never makes a payment on the $100,000 loan. There is negative amortization; unpaid interest is added to the principal balance of the loan each year. Eventually, the policy lapses during Client's lifetime because the policy debt exceeds the applicable limit. Policy debt is paid automatically out of cash value, and there is no cash surrender value remaining.

By reason of the lapse of the policy, tax law imputes a transaction upon Jane Client and the insurance company. For her part, Client is deemed to have received a cash sum equal to policy debt, which is $100,000 plus accrued and unpaid interest. For its part, the insurance company is deemed to have paid to itself for the account of Client the same amount, $100,000 plus interest, in satisfaction of policy debt. Consequently, policy debt is paid in full, and Client has imputed income to the extent that tax basis is less than the cash she is deemed to have received. IRC Sec. 61(a)(3) and (9) and 72(e)(5)(A) and (C). The Tax Court has dealt with such cases and has concluded: "This satisfaction of the loans had the effect of a pro tanto payment of the policy proceeds to [taxpayers] and constituted income to them at that time. *** A contrary result would permit policy proceeds, including previously untaxed investment returns, to escape tax altogether and finds no basis in law." Atwood, supra, at 1478.

The lapse of the policy is the economic equivalent of a cash surrender of the policy. See id. The insurance company books Client's imputed income as a "distribution" on IRS form 1099-R and sends the 1099 to the Internal Revenue Service and Client. See id. at 1477. The imputed income is taxable as ordinary income. Brown, supra. The $100,000 that Client actually received may be nowhere liquid, requiring her to come up with cash from other sources to pay the tax on the imputed income.

The importance of disciplined policy debt amortization is perhaps at its highest level when Jane Client is relying on one or more non-MEC whole life insurance policies to supplement cash flow during her retirement years. Would a 30-year amortization be reasonable under the circumstances? Each policy is unique.

Policy owners may say: "I'm not going to pay interest to the insurance company. The cash value is my money!"

On the other hand, consider whether a policy owner would rather pay interest to the insurance company than take into in-

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Some considerations when firm, attorney part company

By Mark Bassingthwaighte

A number of books have been written on the topic of attorney departure, many of which provide a plethora of valuable information on everything from partnership law and the fiduciary duty of loyalty to whether or not a firm's client list is a trade secret. While good stuff, I suspect many attorney departures occur without anyone ever taking the time to pick up one of these books, if for no other reason than the lack of time. Given my suspicion, I offer the following in an attempt to succinctly cover the basics.

What's the most important thing everyone needs to know?

At all times, keep the interests of all impacted clients first and foremost in mind when making any departure related decisions. A failure to do so is just asking for trouble.

Can a firm prevent an attorney from leaving?

The short answer is nope. Clients are not property and efforts to try to restrict a departing attorney's right to practice are often found to be unethical and/or unenforceable agreements. Clients get to decide who they want to work with, period.

Who should be notified and when?

Here, timing is everything. The firm should be notified as soon as possible after a decision to leave has been made and before any clients have been notified. While there are no bright lines, there is a difference between thinking about leaving a firm and committing to actually leaving. Note, however, that committing to actually leaving does not mean waiting until after an agreement spelling out the terms of a lateral move has been formalized. It means when the departing attorney has made the mental decision to begin investigating options. The reason is one should not allow a firm to make an untimely and potentially poor business decision unaware of an upcoming departure. Of course, if a partnership agreement exists and the document spells out the notice requirements for an attorney departure, abide by the terms of that agreement.

Clients for whom the departing attorney is primarily responsible are to be promptly notified once a decision to depart has been made. The reason is you want to allow time for all impacted clients to be notified and to give these clients sufficient time with which to decide who they want to represent them post departure.

If a court or tribunal is involved, timely notice of necessary attorney withdrawals must be given for any attorney of record who will no longer be involved. Motions to withdraw should be filed and be certain to follow-up by verifying that a Substitution of Counsel has been filed.

From whom should the client notice come?

In a perfect world a joint letter from the firm and the departing attorney would be sent to all impacted clients. This letter should inform these clients of the upcoming change as well as set forth the options they will have to choose from. If the departing attorney will remain in practice, the options would normally be the matter/s stay with the firm, go with the departing attorney, or the client may select to have their matter/s transferred to a different firm. Keep in mind that there is no rule prohibiting differing default options should any particular client not respond to the notification letter.

If a joint letter isn't possible, don't try to grab as many clients as possible and never disparage the departing attorney or the firm one is departing from in the separate notices that will be sent to all impacted clients. Publicly airing your dirty laundry risks alienating clients, damaging relationships, and damaging your reputation. Remember, everyone at your firm is in the employ of your clients. You work for them and are to always put their interests first. This means the decision as to who gets the file post departure will always remain solely with the client.

What about client files?

When a client file leaves with the departing attorney or is going to go to a different firm keep the following in mind. First, the file must be delivered in a reasonable time and in a useful format. Unless you can do so without causing harm to the client, you cannot hold a client file until the firm is paid its share or the account is brought current.

Next comes the decision regarding what must be turned over, which can be a difficult one. A practical guideline is this. Beyond the obvious, such as client originals, if you billed for producing a document, it belongs to the client. Include it in the file.

Clients for whom the departing attorney is primarily responsible are to be promptly notified once a decision to depart has been made.

Last, but certainly not least, if you have any concerns about potential liability on any given file, make a copy of the file at your expense. Always do this before the file physically leaves the premises because trying to obtain a copy later on is going to be problematic. Of course, keep a record of what files went where, when they left, and document with all departing clients that the firm's responsibility for these files has come to an end.

Finally, are there any cautions to be aware of?

Yes, there are. Addressing the firm first, lockout tactics directed at the departing attorney are never going to pass ethical muster, so don't go there. For example, don't try to prevent the departing attorney from continuing to work on client files that he has primary responsibility for or refuse to provide the new contact information to clients.

That said, a departing attorney can't ignore her fiduciary duties to the firm. While she may make necessary logistical arrangements prior to departure such as renting office space, opening bank accounts, or purchasing office equipment, she cannot engage in secret discussions to lure away staff, other firm attorneys, and or firm clients. She also can't unilaterally decide to move client monies to a new trust account or take firm forms. Most importantly, she should never try to remove client files, computer equipment, and the like off site in the middle of the night. In other words, no clandestine self-help. Unfortunately, this advice does need to be shared.

Since 1998, Mark Bassingthwaighte has been a risk manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Bassingthwaighte has conducted more than 1,200 law firm risk management assessment visits, presented more than 400 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics and technology. He is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School. He can be reached at mbass@alpsnet.com

Easy access to cash from life insurance may hold tax traps

Continued from page 10

come in one year the total sum of all outstanding policy loans plus all outstanding premium loans (if the owner stopped paying premium) plus all accrued but unpaid interest, to the extent that total sum exceeds tax basis.

Below are some cases where tax was payable on the lapse of life insurance during the lifetime of the insured.

In Atwood, supra, a 1999 case, two polices are discussed. Under the first policy, tax basis is $25,000, policy debt paid out of cash value is $39,403.63, and the remaining cash surrender value is $439.48. The taxpayer has imputed income of $14,403.63 plus $439.48 of additional income. With respect to the second policy, an endowment policy, tax basis is $50,000, policy debt paid out of cash value is $73,274.49, and the remaining cash surrender value is zero. The taxpayer has imputed income of $23,274.49.

In McGowen v. Commissioner, 438 Fed. Appx. 686 (10th Cir. 2011), aff'g. T.C. Memo 2009-285, tax basis in the policy is $500,000, policy debt paid out of cash value is $1,065,224.11, and the remaining cash surrender value is zero. The taxpayer has imputed income of $565,224.11.

In Sanders v. Commissioner, U.S. Tax Court (Dec. 20, 2010), tax basis in the policy is $10,117, policy debt paid out of cash value is $17,292, and the remaining cash surrender value is zero. The taxpayer has imputed income of $7,175.

In Feder v. Commissioner, T.C. Memo. 2012-10 (January 10, 2012), tax basis in the policy is $7,029, policy debt paid out of cash value is $12,654, and the remaining cash surrender value is zero. The taxpayer has imputed income of $5,625.

In Brown, supra, tax basis in the policy is $8,271.76, policy debt paid out of cash value is $37,365.06, and the remaining cash surrender value is zero. The taxpayer has imputed income of $29,093.30.

In Mallory v. Commissioner, T.C. Memo. 2016-110 (June 6, 2016), tax basis in the policy is $87,500, policy debt paid out of cash value is $237,897.25, and the remaining cash surrender value is zero. The taxpayer has imputed income of $150,397.25.

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

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

Bar studies potential changes to mandatory CLE

By Rob Stone


Rob Stone

The state Legislature, through its legislative audit committee, recommends that the Bar create mandatory CLE. The Bar is examining the pros and cons associated with mandatory CLE. This edition of the Bar Rag contains articles advocating for mandatory CLE, and against mandatory CLE. It also includes articles discussing whether the Bar should require diversity and implicit bias CLE. Below is a summary of how we got to this point.

Pursuant to Title 44, Chapter 66, the state Legislature audits the activities of the Alaska Bar every few years and determines whether to extend the Bar's "sunset" date. During this sunset process, the Legislative Budget and Audit Committee performs a comprehensive audit. The auditors analyze every aspect of the Bar, keeping in mind the Bar's two core functions: admission and discipline. The auditors then make recommendations to the legislature. The last audits occurred in 2006, 2008, 2012, and 2020. These four audits all contained a mandatory CLE recommendation. The next audit is set for 2028.

By way of history, the Alaska Supreme Court amended Bar Rule 65 in 1999 to create a voluntary CLE rule ("VCLE"). Under this rule, attorneys were encouraged to complete 12 hours of CLE, one or more as ethics.

During the 2006 legislative audit, it was recommended that the Bar adopt a mandatory minimum CLE requirement. In 2007, the Alaska Supreme Court amended Bar Rule 65 to require 3 hours of ethics CLE ("MECLE"). Bar Rule 65(a). The rule also "encourage[s] all members to engage in Voluntary Continuing Legal Education ("VCLE")." Bar Rule 65(b). "Every active member of the Alaska Bar Association should complete at least nine credit hours per year of approved VCLE." *Id.* The amended rule has been in effect since January 1, 2008.

During the past 14 years, the Bar has examined the issue of mandatory CLE. A subcommittee was created. It concluded that there was no correlation between mandatory CLE and lawyer discipline. A Bar poll was conducted. The membership overwhelmingly opposed mandatory CLE. Thus, the Bar has not previously recommended mandatory CLE to the Alaska Supreme Court (besides MECLE).

The Bar went through the audit and sunset process in 2020-2021. During that process, the auditors again recommended mandatory CLE. The Board discussed the auditor's recommendation. This discussion led to a more specific discussion of whether the Bar should mandate diversity and implicit bias CLE for members of the Bar. The Board is now examining the pros and cons associated with mandatory CLE generally, and, separately, whether to mandate diversity and implicit bias CLE.

As stated above, this edition of the Bar Rag includes articles advocating for mandatory CLE, and against mandatory CLE. There also exist articles advocating for mandatory diversity and implicit bias CLE, and against mandatory diversity and implicit bias CLE. The Board encourages all members to reach out to the executive director of the Bar with comments regarding these important issues.

Rob Stone is a former president of the Alaska Bar Association and is the current chair of the MCLE Subcommittee.

Editor's note: The views expressed in these opinion pieces are the writers' and are not necessarily endorsed by the Alaska Bar Association or the Bar Rag, which welcomes a broad range of viewpoints. To submit an opinion piece or other article for consideration, email info@alaskabar.org

Why I support increasing required CLE credits

By Stephanie Harrod


Stephanie Harrod

Full disclosure, I may have an unpopular opinion by supporting an increase in the number of general mandatory Continuing Legal Education (CLE) credits required by the Bar, but who doesn't love playing Devil's Advocate? Regardless, this time around I find that I am not just playing Devil's Advocate for the sake of arguing, I really do believe that we can all benefit from staying updated on the latest legal developments and improving our skills in specific practice areas, not to mention one of the biggest challenges — improving civility among the bar membership (fingers crossed).

I recognize that it might seem like the Bar is implying that we are incompetent and uncivil and that we can only be improved by requiring us to do more work, and I also understand the inclination to oppose such a proposal. Are a few extra hours every year really going to make the difference between being competent or not? A few extra hours won't change my attitude either, if I don't want to change myself. Besides, don't we all have enough to do already? Shouldn't we have left 'school' behind after we graduated? What proof is there that increasing MCLE actually benefits anyone?

Well … I know that I don't have those answers, but let's talk about it.

Recently I worked for an organization on their insurance coverage and risk management processes. What I really learned was that if the organization increased its risk management processes, then there would be a decrease in potential insurance liability claims. Seems logical, right?

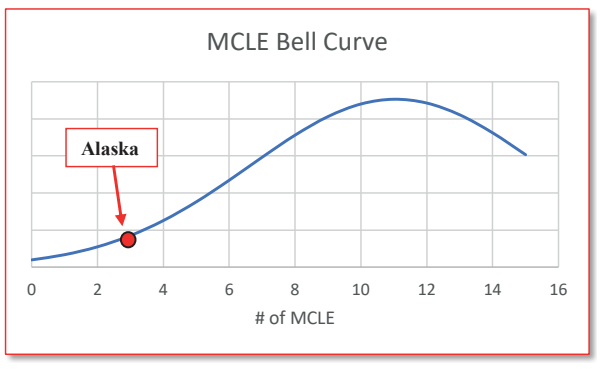
I believe that it might help to view an increase in CLE the same way. In a way — if we increase our annual training, then we decrease the risks to our professional careers. The purpose of mandatory ethics is to promote competence and professionalism in Bar members.[1] If the Bar Association increases the number of CLE credits required, then we should similarly see a decrease in potential negative effects (e.g. misconduct claims by clients or colleagues, fee disputes, disciplinary proceedings, etc.) or at least have defenses against any claims that might be made.

So, what do competence and professionalism mean? "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation".[2]

In contrast, there is no specific definition for professionalism, but we have an entire set of rules intended to govern our professional behavior. The Preamble states that "a lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service." [3]

I believe that we can achieve the highest level of our professional skills and improve the legal profession by taking training courses on various topics that are of interest to ourselves. But we have so many reasons for not wanting to take classes — time, cost, relevancy, etc. I know I've definitely used those excuses for not wanting to take CLE. But you should know that the Bar will consider a wide-variety of topics to qualify for CLE credit, including professional responsibility, workplace ethics, law office management, attention to cases and clients, time management, malpractice prevention, collegiality, general attorney wellness, professionalism, and even more.[4]

You can choose to take credits through those offered by the Bar, or you can choose to sign up for your own training courses that are the most relevant to you and then request for the bar to accept it for credit. The Bar offers free courses throughout the year as well as various discounts. I've even volunteered for Bar events and received a certificate to take a free course. Once these excuses get out of the way, what else is stopping you from wanting to take continuing legal education courses? I know that I certainly didn't graduate from law school knowing everything that I needed to know, and sometimes I need to be motivated to do something that I don't want to do. The Bar increasing CLE requirements is the motivation that I would need.



I like facts and data, and sometimes I can be a visual learner. When I need to see something from a different perspective, I like to take that data, analyze statistics, and create charts (and to answer your unasked question, yes, I worked in finance and accounting before practicing law). The Practicing Law Institute website reviews and summarizes each states' CLE requirements.[5]

Based on that data, the average number of general CLE required by State Bar Associations is 11.06 credits.[6]

Currently, there are only five states (MD, MA, MI, SD, & D.C.) that have no MCLE requirements. Alaska is then tied with Hawaii for the fewest number of general MCLE required with only 3 MCLE credits. Overall, there are only 13 states (AK, CA, D.C., FL, HI, ID, IL, MD, MA, MI, NE, RI, SD) that require fewer than the average number of general MCLE otherwise required nationwide. Why do most all other states require more CLE than Alaska does? I wouldn't say that they are more competent or professional than Alaska attorneys, but I haven't practiced outside Alaska. I worry that over time, they may just start to be.

Stephanie Harrod is an attorney for Josephson Law Offices in Anchorage and a member of the CLE committee and MCLE Subcommittee of the Bar.

Footnotes

[1]*Alaska Bar Rule 65. Available at: https://alaskabar.org/wp-content/uploads/Rule-65.pdf*

[2]*Alaska Rules of Prof'l Conduct, Rule 1.1. Available at: https://public.courts.alaska.gov/web/rules/docs/prof.pdf*

[3]*Id., at Preamble.*

[4]*Alaska Bar Rule 65. Available at: https://alaskabar.org/wp-content/uploads/Rule-65.pdf*

[5]*Available at: https://www.pli.edu/credit/CLE*

[6]*General MCLE includes the total number of required MCLE credits, which includes any specific topic (e.g. ethics, professional responsibility, anti-discrimination and implicit bias, etc. in that total number.*

Understanding implicit bias is a matter for mandatory CLE

By Pamela Washington

I recently co-chaired the National Association of Women Judges' committee on Racial Disparities in the Courts and had a chance to interview the Honorable Judge Bernice Donald on the Sixth Circuit United States Court of Appeals who was invited to speak. I met Judge Donald more than 12 years ago when she was presenting a breakout session on implicit bias at a joint Alaska Bar/Judicial Conference at the Dena'ina Center. Hundreds of lawyers and judges attended the conference but fewer than a dozen people attended Judge Donald's breakout session on this important and emerging topic. I thought then as I do now, "*how do you get lawyers and judges to realize the impact of implicit bias in the legal profession*?"

I am an advocate for implicit bias education and a proponent of mandatory continuing legal education on implicit bias. In my 25-plus years as a member of Alaska's legal community, I have personally experienced how implicit biases can narrow a person's vision and influence their behaviors. I also became keenly aware of my own biases and remain vigilant and intentional to eliminate them from my judicial discretion and decisions. As co-chair of the Alaska Supreme Court's Fairness, Diversity, and Equality Commission and member of the Cultural Competency subcommittee, I am involved with a team of judicial officers working to ensure ongoing implicit bias education and training is provided to all Alaska judges. It is not just the judiciary, but the integrity of every part of our system of justice is under scrutiny. As members of the legal profession, this should concern us.

Pamela Washington

I believe there are two main barriers to making mandatory CLE credits for cultural competency, diversity, inclusion, and implicit bias education. One barrier is "race." The other barrier is "mandatory."

The issue of race has always been difficult to talk about, especially for those who are members of the predominant group. The predominant group that makes up 93.4% of the Alaska Bar membership may be adversely triggered by words like *race*, *critical race theory*, *white privilege* and *racial injustice*, and may think of implicit bias in the same way. Implicit bias is not an accusation of racism. In fact, implicit bias is not about racism, or sexism, or ageism, or any other "isms." It is about your subconscious brain and mental associations. Judge Donald explained that implicit bias is the process by which the brain uses well-established mental associations to operate without our awareness, without intention, or control. "*It is that human computer program that is working in the background that is influencing our actions and our thoughts even when we are not aware of it and it is contrary to our announced and deeply held values.*" These associations are a product of our backgrounds, lived experiences, our in groups, and our out groups. As members of the Bar, even when we believe we are fundamentally fair at our core, we cannot disregard the fact that bias is baked in. Unbeknownst to us, our brains are sorting information and making conclusions that compromise the good judgment of fundamentally fair, well intentioned people. Consider that an adverse reaction to training on implicit bias may well be an indication of implicit bias at work in us.

In the introductory statement of the Alaska Rules of Professional conduct, we are reminded that lawyers should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. If we know the influence of implicit bias creates deficiencies in the administration of justice, then we should act to minimize these deficiencies in the interests of living up to the ideals of equal justice for all. We are all vulnerable and when we know we have a blind spot that can be obstructing our view, we must be intentional about removing the obstruction so we can see clearly.

The other barrier to overcome in support of imposing a mandatory CLE on implicit bias is "mandatory." Members of the Bar would probably not oppose voluntary CLEs addressing such topics, but prefer to retain the right to choose. However, this is more than a matter of personal choice. It is a matter of professional competency.

Mandatory requirements reflect what we value as members of the legal community. We value education and professional competency. It is the reason why it is mandatory that lawyers graduate from an accredited law school, pass a Bar Exam, and engage in mandatory continuing legal education. Rule 1.1 of the Alaska Rules of Professional Conduct articulates this value—a lawyer shall provide competent representation to a client. Competent representation requires effective communication with a very diverse population. Effective communication requires a level of cultural competency and a sensitivity to that human computer program working in the background unconsciously influencing our actions and thoughts.

We already recognize the importance of removing bias from the law. When a judge knows they have a personal bias or prejudice concerning a party or a party's lawyer, Cannon 3E(1)(a) of the Code of Judicial Conduct, states the judge shall disqualify himself or herself when a judge's impartiality might be reasonably questioned. Unconscious biases are more important because they may have an impact on impartiality yet never be recognized in lawyering or judicial decision-making. We value professional competency and we make what we value "mandatory." Unconscious bias is an ethical issue and should be a mandatory part of continuing legal education.

Other professions are recognizing the need for mandatory implicit bias and cultural competency education and training. Professional organizations such as Joint Commission and Liaison Committee on Medical Education require training in implicit bias for accreditation. Implicit bias training is mandatory for all nurses in California and Michigan. Mental and behavior health clinicians are required to complete mandatory education and training hours on cultural competency for licensure. As of Nov. 15, 2019, Missouri requires attorneys to complete three Ethics credits every year, one of which must cover topics addressing Cultural Competency, Diversity, Inclusion, or Implicit Bias. These organizations found value in having their members recognize and address their implicit biases, build cultural competency, and appreciate the importance of diversity and inclusion, so they made training mandatory.

Our failure as a profession to acknowledge our own deficits has had its share of unfortunate consequences. In 1978, the Indian Child Welfare Act was enacted to correct the most longstanding and egregious removal practices specifically targeting Native children. It was not just social workers and case workers, but also judges, lawyers and guardians-ad- litem were preferring non-Native placements for Native children. Presumably these were all good hardworking professionals. Could that human computer working in the background lead a person to conclude that only a non-Native placement was in the best interests of a Native child? It is clear unconscious biases played a role in system abuses directed at Native children. Mandatory continuing legal education on cultural competency, diversity, inclusion and implicit bias will give the legal profession an opportunity to regain some of the ground the legal profession has lost through the years to unconscious biases and move toward regaining and building the public trust in the justice system.

Judge Pamela Washington is a District Court Judge in Anchorage.

Leave CLE requirement where it stands currently

By Mark Regan

One question the most recent legislative audit has raised is why Alaska has only three required hours per year of Continuing Legal Education, with all three required hours devoted to ethics. Maybe it's time to revisit the compromise the Supreme Court worked out many years ago. On the other hand, if the Bar is to require lawyers formally to devote more time each year to doing CLE, that would probably lead to more onerous recordkeeping requirements, for individual practitioners and for the Bar, and to an end to the honor system through which we now report on the CLE we have done without having to specify what it was.

Mark Regan

This might be necessary if we thought that more mandatory hours of CLE led to our doing better jobs as lawyers, but the one recent study on this subject suggests that it doesn't. David Schein's confrontationally titled article, "Mandatory Continuing Legal Education: Productive or Just PR?," 33 Georgetown Journal of Legal Ethics 301 (2020), argues that mandatory CLE does not reduce lawyer discipline, does not reduce lawyer malpractice suits, and does not improve public perception of the legal profession.

It is certainly possible to think of different ways of organizing our profession in which more hours of mandatory CLE would make more sense. For example, if we all became certified specialists in something, and part of the continuing certification requirements was taking mandatory CLE in the areas of our specialties, this mandatory CLE might be more relevant to our competence in those areas. Or, if each of us had to take yearly courses in law office management, maybe we would do better jobs of managing our practices. But the present system is one where we lawyers can choose to do just about anything in the way of CLE, and there is no necessary connection between what we take and our competence as practitioners.

Why have three mandatory hours of ethics, then? Leaving aside the "PR" value of having the ethics requirement, I'd suggest that it is worthwhile for each of us to have the opportunity and responsibility, at least once a year, to think through together with colleagues some of the ethical questions that come up in all of our practices. Also, three hours, half a workday, is the right amount of time to gather and confer, and the Bar has made it clear that it will put on at least one free ethics program each year.

Has Alaska's decision to have limited numbers of mandatory CLE hours contributed to public distrust of the legal profession? Maybe, although I'd think that it's minor as compared to the other reasons why many people mistrust lawyers. We are typically in the bad news business, and we often direct our clients not to do things they would like to do and act in ways that non-lawyers perceive as officious. The perception that we are not competent because we do not do enough continuing legal education is, however, a relatively rare one, and it doesn't appear to be justified. With respect to numbers of mandatory CLE hours, we should leave things as they are.

Mark Regan, legal director at the Disability Law Center, chaired a Bar Association subcommittee on mandatory continuing legal education this past year.

See more CLE on page 14

Diversity, bias CLE unlikely to increase diversity, reduce bias

By John Haley

The Alaska Bar Association is less diverse than the community it represents. This lack of diversity is compounded by the fact that many of us live in a bubble — the majority of our closest friends and family share similar racial, ethnic, religious, political, educational and economic backgrounds. And while I would like to think that our profession engages in less overt discrimination than the population as a whole, we have all read news stories or seen first-hand evidence proving that overt discrimination has not been eliminated from our ranks.

In addition to problems with diversity and overt prejudice, there is a body of research showing that implicit bias — discriminatory biases based on implicit attitudes or implicit stereotypes — is widespread. There is an ongoing academic debate regarding whether implicit bias can be adequately measured and whether it has any actual effect on behavior. Nevertheless, it seems intuitive to me that we have all developed implicit or unconscious associations with the characteristics that functionally divide society, and that those unconscious associations have some effect on our behavior.

If you agree that these are serious problems, then you might think the proposal for a new rule requiring annual diversity and implicit bias Continuing Legal Education is the solution. But unfortunately, the prevailing view of academics researchers is that these types of mandatory trainings do not lead to increased diversity or a decrease in biased behavior.

The bar association already provides a free, three-hour ethics CLE every year. It is the best attended CLE in the state.

Why not? First, many of these trainings are bad. They are led by entrepreneurs without deep knowledge in the subject. They often teach strategies with no empirical basis like telling people to "think slow" before making decisions. Other trainings focus on making people aware that implicit biases are normal — which can have the perverse effect of making people less likely to feel the need to correct their biases.

The second problem is that people (especially lawyers) often react negatively when they feel coerced. This is why mandatory trainings tend to create a backlash effect, sometimes leading organizations to become even less diverse than they were before the implementation of mandatory diversity training.

The bar association's current rules — which allow credit for any CLE approved by another state — combined with a new requirement to take annual diversity or implicit bias CLE may lead attorneys to take a CLE course that is bad at best, and counter-productive at worst.

Voluntary trainings — when done well — have shown more promise. Of course, the problem with voluntary trainings is that many people do not take them. But the bar association could adopt a policy that will nudge a substantial portion of attorneys toward diversity and bias CLEs.

The bar association already provides a free, three-hour ethics CLE every year. It is the best attended CLE in the state. The bar could implement a policy of offering that free CLE on the subject of diversity, inclusion, or bias. That way the CLE will be well attended, and the bar association will be capable of ensuring that the CLE is taught by someone with real expertise in this arena.

If we tactfully nudge our membership toward good diversity and bias CLE's, then I think we can expect more of our members to adopt the types of structural changes that they have the power to implement individually. As one example, judges could be convinced to use discretion elimination tactics in evaluating briefs and motions — such as by asking an assistant to remove information that might identify the name, age, race or gender of a party or attorney before reading a motion or brief. Any attorney evaluating a group of job applicants could use similar tactics.

If we tactfully nudge our membership toward good diversity and bias CLE's, then I think we can expect more of our members to adopt the types of structural changes that they have the power to implement individually.

As a closing thought, I should point out that a new rule requiring every attorney to take annual diversity or bias training would serve as a strong statement of the bar association's values. No speech, mission statement, or policy announcement will have the same symbolic power. Neither will low-profile policy changes intended to nudge attorneys toward diversity and bias CLE. I suspect that some of our members will say that the symbolism of mandatory diversity and bias training is enough on its own, even if such a mandate is unlikely to increase diversity or reduce biased behavior. At this point, I am skeptical of that view, but I am interested in hearing from others as the debate over the proposed rule continues. I hope that our members will share their ideas and perspectives.

John Haley is an attorney in Anchorage and a member of the CLE committee

Lawyer joke …

A lawyer is appearing in Court and in the distance the sound of a siren is heard. The judge remarks, "Mr Smith shouldn't you be out chasing that ambulance." The lawyer says, "Oh come on Your Honour, you know very well that's a fire engine not an ambulance."

OPINION

Group advocates for sanctity of judicial retention elections

By Donna Goldsmith

EDITOR'S NOTE: "The views expressed in this opinion piece are the writer's and are not necessarily endorsed by the Alaska Bar Association or the Bar Rag, which welcomes a broad range of viewpoints. To submit an opinion piece or other article for consideration, email info@alaskabar.org."

For the first time in the history of our state, Alaska's judiciary is sitting on the edge of a precipice, under assaults levied by the governor, the Legislature and special interest groups and individuals. Make no mistake about it — an attack on even one judge is an attack on our entire judiciary.

Alaska's judges are increasingly the targets of well-resourced and rigorous political campaigns aimed at removing any judge who is either perceived as "unfriendly" to a particular political or ideological perspective or one who made a legally correct but unpopular decision.

This November, 32 judges are eligible to stand for retention. While Alaskans have voted to retain all but six judges who have stood for retention since statehood, the judicial retention landscape has changed dramatically in the last few years. Alaska's judges are increasingly the targets of well-resourced and rigorous political campaigns aimed at removing any judge who is either perceived as "unfriendly" to a particular political or ideological perspective or one who made a legally correct but unpopular decision.

Alaska's experience in recent retention elections is in keeping with national trends. The latest report from the Brennan Center for Justice concludes that 2019-2020 state supreme court elections "*attracted more money* – including *more spending by special interests – than any judicial election cycle in history*…[N]o other cycle comes close to the nearly $100 million that big donors and interest groups spent to influence the composition of state supreme courts…." The report concludes that this past cycle "was less an aberration than an escalation… with state courts and state constitutions as the next focal point for protecting rights and resolving high-stakes disputes." While the report focuses primarily on supreme court elections — both contested and retention — the broader assault on state judiciaries encompasses efforts we have seen in Alaska to urge non-retention of justices and judges who have been found worthy of retention by the Alaska Judicial Council. With each new election cycle in Alaska, the scale and sophistication of the attacks has increased.

Unfortunately, since statehood *individual state judges facing anti-retention campaigns have had to stand alone to defend themselves*. Institutions that support the judiciary and advocate for judicial independence, such as the Alaska Court System and the Alaska Judicial Council, cannot come to the aid of a judge under attack because retention elections are inherently political and taking sides in a political process would jeopardize the neutrality of these important institutions. Similarly, the Alaska Bar Association and Justice Not Politics Alaska do not defend individual judges under attack.

Each of these institutions and organizations serves vital functions in Alaska's system of justice, and each honors the appropriate limits on their respective roles. But without an entity that can speak up for individual judges and garner resources to defend them, Alaskans stand to lose highly qualified public servants to turbulent political tides.

Alaskans for Fair Courts is the only entity in Alaska whose mission includes standing for judges against unwarranted attacks during retention. We are a nonpartisan, volunteer group of Alaskans from across the political and ideological spectrum who will respond to the escalating, last-minute attacks against high-quality judges standing for retention who have passed the Alaska Judicial Council's exhaustive performance evaluations yet become targets of politically and ideologically motivated attacks.

Historically, the legal community has rallied at the 11th hour during retention elections to support judges who are under attack. But we have rallied under the assumption that we can continue to rely on a few volunteers to pull a rabbit out of their hats under enormous election pressures — election cycle after election cycle. This last-minute approach is no longer a viable mechanism for shoring up our courts — our judges deserve more from us and, more importantly, Alaskans deserve more. With the increasing influx of dark money from Outside, last minute campaigns with frantic volunteers will no longer stem the special-interests tide.

Alaskans want — and deserve — high quality judges who will adhere to the rule of law despite any pressure to do otherwise.

The framers of our Constitution made clear that retention elections are a means of balancing the tension between two worthy ideals: judicial excellence and judicial accountability. Retention offers Alaskans the chance to vote on whether judges are performing their duties professionallay and with integrity — nothing more — nothing less.

We believe that all of us have a responsibility to defend judges who have the integrity to follow the rule of law despite pressures outside of the courtroom to do otherwise. We cannot stand by and allow political winds to remove honest, high-quality judges based on perceptions of a judge's political *bona fides*. Most important, we cannot allow politics and special interests to interfere with the delivery of justice throughout Alaska. We need all of you to join us and stand up to the bullying tactics being used to remove our judges without legitimate cause. If we fail, we stand to lose valued members of an institution that we count on every day throughout our state to deliver justice fairly, equitably and with integrity.

Alaskans for Fair Courts cannot successfully accomplish these shared goals without you. For all of us who place a high value on retaining high quality judges who serve our communities with integrity, this year marks the beginning of a new political landscape. The confluence of the constitutional convention question on the ballot, coupled with the trends that we are seeing in which judges are coming under attack for no legitimate reason other than their perceived political ideologies, does not bode well for Alaskans.

We implore you to join us and stand up to these intimidation efforts. We urge you to help us garner all of the resources that you can collectively bring to bear — through discussions with friends or clients, writing letters to the public to correct misinformation about our judiciary, direct support, and/or joining in other forms of community outreach.

For all of us who place a high value on retaining high quality judges who serve our communities with integrity, this year marks the beginning of a new political landscape.

Alaskans want — and deserve — high quality judges who will adhere to the rule of law despite any pressure to do otherwise.

Support our efforts and help us make sure that justice is not for sale in Alaska.

Submitted by Donna Goldsmith, Elaine Andrews, Niesje J. Steinkruger, Debra O'Gara, Bruce Botelho, Chuck Kopp, Barbara Hood, Tom Amodio, Erin Jackson-Hill and Bud Carpeneti.

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Anchorage lawyer nominated to be U.S. Attorney for Alaska

President Biden has nominated S. Lane Tucker to be U.S. Attorney for the District of Alaska, the official who will be responsible for upholding the rule of law as the top federal law enforcement official for Alaska.

Tucker has been a partner in the Anchorage office of Stoel Rives LLP since 2010. From 2008 to 2009, she was Of Counsel at Perkins Coie LLP, and from 2006 to 2008, she was a sole practitioner. Tucker previously served in the United States Attorney's Office for the District of Alaska from 2002 to 2006, first as an assistant U.S. attorney from 2002 to 2003 and then as the Civil Chief from 2003 to 2006. From 1991 to 2002, she served as a trial attorney in the Civil Division of the United States Department of Justice. From 1987 to 1991, Tucker served as an assistant general counsel for the General Services Administration. Tucker received her J.D. from the University of Utah S.J. Quinney College of Law in 1987 and her B.A. from Mary Baldwin College in 1983.

S. Lane Tucker

State Law Department lauds outgoing head of Civil Division

By Aaron Sadler

For someone who tends to shun the spotlight, Joanne Grace cast quite the shadow at the Alaska Department of Law.

Grace was an unassuming but impactful leader during her 30 years with the attorney general's office. She retired in December as director of the Department of Law's Civil Division following a career of steady, quiet public service. Just before her retirement, she earned recognition from the National Association of Attorneys General for her work. She was presented with that group's Meritorious Service Award for her time at the department.

Grace never wanted to be the center of attention during her years of dedicated service to the state, said former Attorney General Charlie Cole, who hired her as an assistant attorney general in 1991. When she was hired, Cole dispatched Grace to the Department of Natural Resources for about six months, where she worked behind the scenes to build resources-focused statehood defense cases. DNR employees took to calling her the "stealth assistant attorney general," she said. To hear her colleagues describe her, the nickname is appropriate.

"She just works very carefully, quietly and studiously," Cole said.

After her time located at DNR, Grace moved to the Department of Law's offices at the Brady Building in Anchorage, where she filed several successful lawsuits to uphold Alaska's sovereignty. She went on to lead the Department of Law's Natural Resources Section for more than 15 years. Later, she oversaw the office's Opinions, Appeals and Ethics Section, where she served as the chief appellate lawyer for

Joanne Grace

Alaska. In that role, she was named Alaska's first solicitor general.

One of her former employees is current Alaska Supreme Court Justice Dario Borghesan, who spent 10 years working with Grace. He described her as an unselfish boss whose behind-the-scenes efforts helped advance the careers of her employees.

"Joanne is singularly effective at bringing out the best in the people working for her," Justice Borghesan said. " … Joanne spent a lot of extra time thinking about how to be a supportive leader and how to encourage the professional development of those working for her. She understood that being a good leader requires focusing not only on getting the work done, but on developing others' ability to get the work done. She was always thinking about how to invest in her people."

That employee-first focus was essential during Grace's time as director of the Civil Division. She oversaw more than 280 attorneys and support staff across six offices in Alaska as she helped manage the state's largest law firm. She did so through the first two years of a health pandemic, while at the same time serving under three different attorneys general within a three-year period.

As expected, Grace gave the credit to others for her success at the department.

"There are so many really good people in the Department of Law, great people and great attorneys," Grace said. "The camaraderie and collaboration have made this an outstanding place to work. What makes this place special is the people, and I just hope everyone remembers and cherishes that."

Attorney General Treg Taylor said Grace was the epitome of what a public servant should be, and that she was one of the most admired and respected attorneys in his office.

"Joanne is the rarest of things, both an extraordinarily talented attorney and a superb manager and mentor of attorneys," Taylor said. "She is a master of concise, precise and readable prose, crafting lucid and persuasive briefs. She is also a superlative editor, able to improve even the most talented writer's work." Cole noted that Grace has never needed an editor herself.

"One would never have to edit her work product," Cole said. "She was one upon whom we could rely to write fine appellate briefs on behalf of the state."

For her part, Grace said she decided to go to law school mainly because she "loved school" and three more years of it seemed exciting to her. She was a law clerk for Alaska Supreme Court Justice Jay Rabinowitz then worked for the Perkins Coie law firm both before and after earning her master's degree in tax law.

She preferred public service over the private sector because of the ability to collaborate with other attorneys for the greater good, she said.

"In private practice, people are territorial about the work, and here, if someone has an interesting case, I always felt like it was 'our' case," Grace said, again deflecting the spotlight.

Borghesan said Grace's ability to channel her talents into supporting others defines her as a person and as a professional.

Borghesan said Grace's ability to channel her talents into supporting others defines her as a person and as a professional.

"In most state attorney general offices and private law offices, the solicitor general or partner will place their name atop the brief and present oral argument in the most important cases. Joanne rarely did that," he said. "Instead, she entrusted crucial cases to the people working for her, giving us the opportunity to rise to the occasion and learn from the experience. Her approach to leadership reflects a focus on the long term and on the health of the institution. Although she no doubt would have done a better job than any of us, she understood that by giving us these prime opportunities to learn and grow, our team would be stronger in the end, and our success more enduring."

Aaron Sadler is the communications director for the Alaska Department of Law.

Do you know someone who needs help?

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

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

Fairbanks: Aimee Oravec,
aoravec@doyonutilities.com
Mat-Su: Greg Parvin, gparvin@gparvinlaw.com
Anchorage: Stephanie Joannides,
joannidesdisputeresolution@gmail.com

Through working with you and close friends of the family, the coordinator will help determine what would be the most appropriate expression of support. We do not solicit cash, but can assist with contributions of clothing, transportation, medical community contacts and referrals, and other possible solutions through the contacts of the Alaska Bar Association and its membership.

TALES FROM THE INTERIOR

Over time experience teaches attorney legal areas he should avoid

By William R. Satterberg, Jr.

In the early 1980's when I was intending to open up my own private practice, having left the prestigious Alaska law firm of Birch, Horton, Bittner, Monroe, Pestinger, (and a whole bunch of other names), I sought counsel of established private attorneys. At the time, Dick Savell, later to become a judge (and even later yet to grow a pony-tail and move to Eugene, OR) graciously met with me. Dick asked what specialty I intended to practice. I replied that I planned to try everything on for size. Dicks' response was, "Well, then maybe you will make it."

As Clint Eastwood once remarked in one of the *Dirty Harry* movies, "A man has got to know his limitations." In time, I began to realize my strong points as a practitioner. And the areas to eschew. For example, I recognized that transactional work, trust and estates, and desk-jockeying were areas to be avoided by me. Boring.

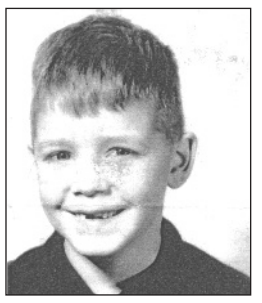
Although I do take on long-haul civil cases, I am more drawn to the area of criminal defense. Criminal defense work is exciting, fast paced, and has much more at stake.

On the other hand, I enjoyed trials. When I initially began practicing law, I worked for the State of Alaska Attorney General's Office for several years in construction and eminent domain litigation. Boring. To draw an analogy, construction and eminent domain litigation would be tantamount to flying a cargo freighter. Criminal litigation would be equivalent to being a fighter pilot. So, before long, I found myself wanting to be the fighter pilot. Although I do take on long-haul civil cases, I am more drawn to the area of criminal defense. Criminal defense work is exciting, fast paced, and has much more at stake.

As I entered litigation, notwithstanding Dick's admonition, I eventually learned by experience that there were three areas for me to steer clear of. Those areas were divorce, worker's compensation, and bankruptcy.

I am now in my 46th year of trial practice. Yet, I have only done three divorce cases. I remember the first two. For traumatic reasons, however, the last one draws a blank. None of the cases involved child custody disputes, just property division.

My first divorce case was when I was still employed in Fairbanks by the law firm of Birch, Horton, (and a whole bunch of other names). Because Birch/Horton had the Teamster's contract, the firm accepted virtually any legal action from a member teamster. Either that, or lose the contract. The member had made an appointment to meet with a plan attorney to file a divorce. Although I knew nothing about divorce, having only recently been married, I still met with the client as ordered. I confidently explained that I should be able to handle his case. He then asked how many divorces I had done. I honestly told him that this was my first case, but I could probably figure it out. After all, the Code of Ethics allows an attorney to take on a new matter as long as they enlist help from other, more knowledgeable attorneys, doesn't it? That is why we call it a practice of law.



"As Clint Eastwood once remarked in one of the Dirty Harry movies, "A man has got to know his limitations."

Soon after my client had left the office, I received a phone call from Hal Horton, the proverbial "enforcer" of the Birch/Horton hockey team. Hal told me in no uncertain terms that I had made a grave professional error in confessing that I did not know what I was doing. Instead, I should have assured the client that I was quite capable of handling the matter and that Birch/Horton had other qualified personnel, as well, as resources. Apparently, my new client had complained to his business agent that he had been given a rookie attorney. My candor of being willing to learn was not a consideration. The Teamster's contract, on the other hand was important. Fortunately, the divorce case was successful. At least, that was how I viewed it. In the end, the client and his wife must have both received the same type of counsel from questionably competent rookie attorneys. They chose to reconcile. The marriage continued.

My second divorce case was a dispute between newlyweds. I resisted taking on the case, but the wife's father was well-respected in Fairbanks and insistent that I accept the matter if I wanted any more business from him. Most importantly, he had lots of money and guaranteed that he would pay his daughter's bill.

At stake was property division. My client was not pregnant. Nor did she have any intention of becoming so. Another local attorney, who also did not do divorce work, Ted Hoppner, represented the husband. It was going to be a battle royal. Both Ted and I are purportedly a bit pig-headed. Judge Hodges was the judge. To my knowledge, no attorney had ever accused Judge Hodges of obstinacy, at least to his face while in court. In time, my client became frustrated with the process. Unbeknownst to me, she unilaterally decided to take one of the two main assets, the family pickup truck, and drive to Seattle. In fact, I did not learn about her going walkabout until I was summoned to Judge Hodges' courtroom on short notice. Ted's client wanted the pickup truck returned to Alaska. Unfortunately, by then, my client had arrived in Washington. Despite my entreaties for mercy for my absent client, Judge Hodges was adamant that the truck was to return to Alaska without delay. If not, there would be serious sanctions.

As ordered, my client raced back to Alaska. Sadly, she was not mechanically inclined and failed to realize that motor vehicles, in addition to requiring gasoline, also require lubricants. Sufficient motor oil was not an option. It was a necessity. Admittedly to her credit, she did make it back to Alaska as ordered. Just not to Fairbanks. Instead, halfway between North Pole and Fairbanks, the pickup decided that it no longer wanted to belong to the family and died on the spot. Without an engine, the truck had negligible value.

That left only one further asset for distribution which was the eight-piece Sterling silver table setting the couple had received at their wedding. Following additional protracted negotiations, a "Solomon" resolution was struck, effectively splitting the baby and ending the case. Each party received a 4-place table setting. In the end, my clients' father held true to his promise and paid me. Ted, however, told me later that he had not fared quite so well in his foray into the field of divorce litigation, apparently not having been paid anywhere nearly in full.

Worker's compensation is another area which I painfully learned to avoid. To date, I have only done one worker's compensation case. The matter involved a Fairbanks police officer who became upset at his supervisor. To calm down, he went into the department's gym and broke his hand on a punching bag. Better than a suspect's jaw, at least. He next filed a disputed worker's compensation claim. Ann Brown, formerly an insurance defense attorney in Fairbanks, but now active in the Alaska Republican party, represented the employer. Because the matter was contested, we had a hearing before the Worker's Compensation Board. Ultimately, my client was awarded his medical bills and back pay. But it was when it became time to address attorney's fees that I realized why I did not want to practice worker's compensation law. I received less than three hundred dollars for a case which lasted several months. In its decision, the worker's compensation board made it implicitly clear to me that workers compensation was a chancy area.

Worker's compensation is another area which I painfully learned to avoid. To date, I have only done one worker's compensation case.

The final area not for me is bankruptcy law. Although, in some respects, bankruptcy practice is interesting because the court tends to be less pretentious, it became my considered opinion that bankruptcy law, similar to a memorable scene in Butch Cassidy and the Sundance Kid, has very little in the way of formal rules. Remember the scene? "Rules? What rules? This is a knife fight. Knife fights don't have any rules!" was the statement made by the angry cowboy planning to kill a mouthy Butch Cassidy. Upon learning that there were no rules in the knife fight, Butch Cassidy delivered a swift kick to his opponent's groin, followed by a solid punch to the jaw, thus winning the battle.

But I did do one rather successful bankruptcy case many years ago. I represented the now deceased owner of the local topless/bottomless bar, Bryan. When I first met Bryan, it was via a panicked phone call. Bryan's regular attorney was out of town. A local process server, David Chausse, had raided Bryan's bar and was actively emptying the till.

Still, even after the dismissal, I spent a considerable amount of time visiting Bryan's establishment to ensure that it was continuing to be a responsible and respectable business.

Ultimately, not knowing what to do, I decided to push the bankruptcy button. This was at a time when counsel were not obligated by law to advise their clients on whether or not bankruptcy was or was not a viable option. Not that it mattered. At the time, it seemed to be the only realistic approach in Bryan's case. Like a "fire on my position" order in battle, the filing of the bankruptcy certainly stopped the attack. Eventually, Bryan actually began to enjoy bankruptcy. Bankruptcy was a safe haven. To his credit, Bryan began to run an accountable business and found that he had significant protection from creditors who might seek to collect on outstanding bills. In fact, Bryan's bankruptcy continued for several years until I eventually received a polite call from the court indicating that Bryan had been in bankruptcy far too long. He needed to convert his case, propose a plan, or dismiss it. Given the choices, the dismissal button was pushed. Still, even after the dismissal, I spent a considerable amount of time visiting Bryan's establishment to ensure that it was continuing to be a responsible and respectable business.

The one thing I did learn from the above-experiences was that divorce, worker's compensation, and bankruptcy were not to be my areas of practice. So don't even ask, unless your name is Bill or Melinda Gates . . . or you own a topless dance bar.

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

Utqiagvik Superior Court judge combines passions for law, community

By Alena Naiden

The Arctic Sounder
Used by permission

For David Roghair, his passion for law goes hand in hand with his passion for the Utqiagvik community that raised him.

Roghair was appointed as an Utqiagvik Superior Court judge right before Christmas and took the oath Dec. 29. The spot opened up after Judge Nelson Traverso retired, and Gov. Mike Dunleavy selected Roghair who has been a magistrate judge in the city since 2015.

"I had this job in mind when I went to law school almost 20 years ago," said Roghair, who grew up in Utqiagvik since he was 11. "I really love this community. They've been really, really good to me over the years."

"When I travel, plans may change at the last minute," he said. "When I travel or when I learn a foreign language, I find that there's always more to learn. When I studied law, I found there's always more to learn."

Roghair grew up in a family of ministers and spent his childhood in Cincinnati, Ohio. He and his parents also lived in Orange, New Jersey, for a few years before moving to Utqiagvik.

"Growing up, I was very interested in the idea of justice and in rules and systems," he said, "the rules that we people need to follow whenever we live together in groups."

The inspiration for a career in law also came to Roghair from a living example: a former judge of many years, Michael Jeffery."

"I learned a lot from him about making the court system accessible," Roghair said, "about making sure the proceedings are understandable to the people. He always did a very good job of teaching folks about the law, about the legal system, what we were, and what we were doing in court on any given day."

Roghair went to graduate from Stanford University and Lewis & Clark Law School and in the course of his studies spent a semester studying abroad in Siberia learning, among other things, "how to deal with the unexpected."

"When I travel, plans may change at the last minute," he said. "When I travel or when I learn a foreign language, I find that there's always more to learn. When I studied law, I found there's always more to learn."

Even while Roghair was exploring different places of the country and the world, he said he had a feeling that he would go back to Alaska after law school.

"I felt like there were a lot of people cheering for me when I graduated from school at Stanford," he said. "I definitely had a real calling to serve a community that took care of me growing up."

Roghair started practicing law in Bethel — "a place that has some similarities to the place where (he) was raised," he said. He also worked in private practice in places like Kotzebue and Palmer.

"Working in rural Alaska, you learn how to get things done and how to improvise if things aren't working," Roghair said. "When the internet or the phone is down or weather delays happen, you have to deal with it now to be self-sufficient and adjust things on the fly as necessary."

Another five years of his career Roghair spent working as magistrate judge and standing master in a small courthouse in Tok, where he had just one coworker, a court clerk. Inevitably, one of the two court employees would have to take a day off or take a vacation, Roghair said, so they had to know how "to be a backup for basically all the functions of a courthouse."

In 2015, he finally returned to Utqiagvik. By now, his parents have retired and now live in Santa Fe, but Roghair lives with his wife and has a brother in town, as well as "other people who are not officially family but very, very close friends."

Until his recent appointment, Roghair has served as a magistrate judge, getting "to do a little bit of everything that the court does," he said.

"It prepared me for all kinds of situations," he said about the magistrate judge role. "It's a job that lets you interact with the public a lot — the public that I serve. So it's been a very good experience."

The role also allowed Roghair to work closely with the issues relevant to the community.

"We have a lot of the same issues as other communities in terms of social problems, whether that's alcohol or drug-related or issues with crime," he said. "I want to do my part to improve people's lives."

Roghair has started handling the hearings as the Superior Court judge though he is still handling a portion of his previous caseload as well.

Roghair said if young people are considering a career in law, the most important way to prepare for it is to learn how to write well. He said that academic or even creative writing skills will help with legal writing: What matters is a good, clear and straightforward style

"It's a bit of a transition," he said. "I am trying to approach it with some humility and understanding that I've worked in a courthouse for 12 years now, but I still have more to learn. "Nobody knows everything on day one."

One of the objectives all judges have is to stay impartial. In a small community like Utqiagvik, Roghair sometimes encounters a case involving someone he is close to. When that happens, he said he acknowledges his relation to the person and invites people to bring up their concerns or decides to recuse himself from handling the case.

Besides being a judge, Roghair is also a part of a close-knit community where he serves as one of the church leaders, volunteers at the library, and "interacts with people in a less formal setting than a courtroom. Roghair's inspiration and friend Jeffery showed him "a way that a judge can be part of a community and engage with the community," he said. Now he hopes to show that to the next generation as well.

Retired Superior Court Judge Michael Jeffrey swears in the new Superior Court Judge David Roghair *(Photo provided by Mary Lum Patkotak.)*

Roghair said if young people are considering a career in law, the most important way to prepare for it is to learn how to write well. He said that academic or even creative writing skills will help with legal writing: What matters is a good, clear and straightforward style.

Roghair also recommended to make sure "you have a heart for the work, whatever type of law you want to practice," before applying to law school.

"You don't have to have it always figured out but make sure you really want to do this work," he said. "It can be challenging, but it can also be very rewarding."

To help students from the North Slope, Roghair's wife, Adrienne Roghair, hopes to start a scholarship fund in the name of his late mother, Willa Roghair. While David Roghair can't participate in the endeavor directly, he supports the idea.

"I would love to see another kid from the North Slope replace me as a Superior Court judge someday," he said.

NEWS FROM THE BAR

Board proposes amendments to update bylaws regarding nonpayment of Bar dues

At its meeting Jan. 27, 2022, the Board of Governors voted to invite member comments to the proposed amendment to the Bylaws of the Alaska Bar Association regarding suspension for nonpayment of Bar dues. When the Bar submits suspension petitions to the Supreme Court, the suspension orders are typically granted the same day the petitions are filed. In order to provide clarification of this process to membership, the Board wants to amend the Bylaws to clarify that these petitions request immediate suspension. The Board also seeks to update the Bylaws to reflect current suspension practices. Currently, the Court sends out an email notifying the court clerks immediately after the suspension order is entered. As a result, the Court no longer relies on the Executive Director to separately notify clerks of court. (Insertions underlined, deletions ~~struck through~~)

Please send comments to Executive Director Danielle Bailey at bailey@alaskabar.org by April 15, 2022.

Article III, Section 3(b) Suspension for Nonpayment. Thirty days after the due date of the membership fees, the delinquent member shall be notified in writing, by certified or registered mail, that the Executive Director will, in 30 additional days, petition the Alaska Supreme Court for an order immediately suspending the delinquent member from membership in the Alaska Bar for nonpayment of the appropriate membership fees and any late payment penalties due and owing. The notice is sufficient if mailed to the address last furnished to the Association by the delinquent member. Following suspension of the delinquent member, the Alaska Bar shall provide notice of the suspension to the member by certified mail. ~~Following notice by the Bar to the delinquent member of his or her suspension by the Supreme Court, the Executive Director shall immediately notify the clerks of court of the member's name and the date of his or her suspension for nonpayment of the appropriate membership fees and penalties.~~ Members suspended for nonpayment may not engage in the practice of law while suspended, nor are they entitled to any of the privileges and benefits otherwise accorded to active or inactive members of the Alaska Bar in good standing. Suspended members who engage in the practice of law are subject to appropriate discipline under Part II of the Bar Rules.

Board of Governors Invites Comments on Proposed Amendment to ARPC 8.4(c)

At its meeting on January 27, 2022, the Board of Governors voted to invite member comments regarding the following proposed Rule of Professional Conduct amendment. The Alaska Rules of Professional Conduct Committee has unanimously proposed an amendment to clarify that ARPC 8.4(c) is intended to punish dishonesty, fraud, deceit or misrepresentation that reflects adversely on a lawyer's fitness to practice law. In doing so, the Committee further suggested amendments to ARPC 9.1, amending the definition of "fraud" and adding a new definitional term – "lawful covert investigation" – and an amendment to the Comment to ARPC 8.4, clarifying that deception used during a "lawful covert investigation" (as defined) would not run afoul of ARPC 8.4(c). While supervision of lawful covert activity is discussed in the existing Comment to ARPC 8.4, there are restrictions on the types of matters in which covert activity could ethically be utilized. These amendments would broaden the ability of lawyers to supervise lawful covert investigations in matters beyond those listed in the current Comment, but still prohibit lawyers from directly participating. (Insertions underlined, deletions ~~struck through~~).

Please send any comments to Bar Counsel Phil Shanahan, shanahan@alaskabar.org, by April 15, 2022.

RULE 8.4. Misconduct.

It is professional misconduct for a lawyer to:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

COMMENT

. ..

[4] ~~This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer's conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. "Covert activity," as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.~~ This rule prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law. This rule does not, for example, prohibit a lawyer from advising and supervising a lawful covert investigation into matters involving criminal law, civil law, or constitutional rights, though the lawyer may not participate directly in the covert investigation. See Rule 9.1 for the definition of "lawful covert investigation." This rule additionally does not prohibit a lawyer from engaging in lawful forms of deception if the conduct is among their duties of employment as a non-lawyer by a government agency, a law firm, or other entity.

RULE 9.1. Definitions.

(f) "Fraud" or "fraudulent" denotes conduct (including acts of omission) performed with a purpose to deceive. It does not include negligent misrepresentation or negligent failure to apprise another of relevant information~~.~~, or advising or supervising persons who are using deception in a lawful covert investigation.

…

(i) "Lawful covert investigation" means an investigation in which the participants misrepresent or do not disclose their true identity or motivation, but which otherwise conforms to all relevant law, including the Rules of Professional Conduct and all pertinent statutes, constitutional provisions, and decisional law. For purposes of Rule 8.4(c), a lawyer may advise and supervise the people engaged in a lawful covert investigation, but the lawyer must not participate personally.

Board of Governors Action Items December 7, 2021

- Approved two reciprocity applicants for admission.
- Approved ALSC waiver for Ann Kustoff.
- Approved the amended 2022 budget in accordance with the salary adjustments.

Board of Governors Action Items January 27, 2022

- Approved the September, October, and December 2021 Minutes.
- Voted to appoint Patricia "Tricia" Collins to the Alaska Judicial Council.
- Voted to appoint George R. Lyle as the Alaska Bar Association liaison to the Rocky Mountain Mineral Law Foundation for a one-year term.
- Voted to recommend approval of 4 reciprocity applicants and 13 UBE score transfer applicants.
- Voted to approve two requests for non-standard testing accommodations for the February bar exam.
- Voted to approve three Rule 43 (ALSC) waivers for Olivia Knestrict, Michael Korniczky, and Darren Mayberry.
- Voted to submit proposed amendments to Bar Rule 2 to the Supreme Court.
- Voted to temporarily suspend the Fair and Impartial Courts Committee's 2012 Committee Guidelines and 2014 Resolution.
- Voted to publish amendments to Alaska Rule of Professional Conduct 8.4 in the *Bar Rag* for comment.
- Voted to publish amendments to Article III, Section 3(b) of the Bylaws of the Alaska Bar Association in the *Bar Rag* for comment.

Alaska Bar Association's Board of Governors statement on alleged member misconduct and disciplinary process

The Alaska Bar Association strives to ensure that lawyers in Alaska conduct their legal practices with the highest ethical standards established by the Rules of Professional Conduct and Ethics Opinions adopted by the Board of Governors of the Alaska Bar. As part of that effort, the Bar is tasked with independently reviewing, investigating, and prosecuting allegations of lawyer misconduct.

While the Alaska Bar Association's review and investigation of a complaint is confidential, we are often asked about whether or why the Bar is, or is not, being more vocal or taking quicker action.

Sometimes, the Bar Association is asked to comment on the alleged misdeeds of its members. Those requests may become even more pronounced when there are public reports involving allegations of sexual misconduct or impropriety. While the Alaska Bar Association's review and investigation of a complaint is confidential, we are often asked about whether or why the Bar is, or is not, being more vocal or taking quicker action. To help address these concerns, we believe it's important to provide an explanation of our disciplinary process.

The Alaska Bar Association in no way tolerates illegal or unethical conduct by its members. Indeed, the Bar has a robust system for investigating and responding to reported instances of such conduct. The Board of Governors serves as the Disciplinary Board for the Alaska Bar Association and oversees disciplinary matters for the Alaska Supreme Court, which has the ultimate authority over lawyer discipline. In doing so, the Bar Association follows the procedures and timelines established by the Alaska Supreme Court in the Alaska Bar Rules.

Disciplinary matters are ordinarily triggered by the filing of a grievance, or complaint, against a member of the Bar by other bar members, clients or members of the public. Except in very rare circumstances, the Bar does not initiate its own investigation of a lawyer's conduct. When a grievance is filed with the Bar, the complaint is promptly reviewed by Bar's discipline staff. Under Alaska Bar Rule 22, if Bar Counsel determines that the allegations contained in the grievance do not warrant an investigation, Bar Counsel will notify the complainant and respondent (the lawyer who is the subject of the grievance) in writing. The complainant may then file a request for review of the determination within 30 days of the date of Bar Counsel's written notification. A complainant may ask that the decision be reviewed or appealed to the Board Discipline Liaison — a member of the Board of Governors — to review the complaint. If they concur with the decision of Bar Counsel, the matter is closed.

However, if Bar Counsel or the Discipline Liaison, upon review, determines that the matter should be accepted, a case will be opened for a formal investigation into one or more of the allegations.[1] Bar staff contacts the Respondent, and if they are represented, their counsel. Staff will serve a copy of the grievance upon the Respondent and invite the Respondent to submit a response in writing of all facts and circumstances pertaining to the alleged misconduct.[2]

The Bar's lengthy disciplinary process may be understandably frustrating to people who view the Bar's lack of commentary or action as being out of touch or dismissive of member wrongdoing, particularly when allegations of sexual misconduct or impropriety may be at issue.

Bar counsel and the Respondent may then discuss a potential agreement on discipline. Parties can agree to one of a variety of sanctions: censure, private reprimand, public reprimand by the Board of Governors or by the Supreme Court, probation, suspension, or disbarment. If the Respondent and Bar staff agree to a specific sanction or sanctions, the agreement is presented to the Board for approval. After conducting a hearing to review the proposed agreement, the Board can accept or reject the stipulation. If the stipulation calls for a serious sanction, the Board forwards the recommended sanction to the Alaska Supreme Court for final determination.

If the lawyer contests the allegations, they are entitled to a hearing before an Area Hearing Committee, which consists of two local lawyers and a public member. The Committee conducts what is essentially a trial, hearing evidence and making a determination about culpability. They also make a recommendation to the Board of Governors, acting as the Bar's Disciplinary Board, as to the appropriate level of sanction. At this point the Respondent can agree to the committee's recommended sanction, or contest it. If it is contested, evidence is presented to the Board of Governors and the sitting members make a determination of culpability and the appropriate sanctions. After reviewing the Hearing Committee's report and record, the Board enters an appropriate recommendation or order, which it sends to the Supreme Court for a final disciplinary determination. Throughout this process, there are repeated opportunities for both the complainant and the respondent to appeal various decisions, and corresponding timelines for each step in this comprehensive process.

Because of the Bar's role in the disciplinary proceedings, and because all who come before the Board are entitled to due process, it is critical that the Board not speak to matters that may one day come before it, or predetermine the culpability of any one member by weighing in on media or other public reports of alleged wrongdoing or misconduct. The Bar's lengthy disciplinary process may be understandably frustrating to people who view the Bar's lack of commentary or action as being out of touch or dismissive of member wrongdoing, particularly when allegations of sexual misconduct or impropriety may be at issue. But it would be irresponsible and unethical for the Bar — or its members — to disclose confidential information or prejudge a matter without first allowing the process to fully transpire. And disciplinary matters are lengthy in nature, as they are designed to assure a meaningful opportunity to be heard and to protect everyone's rights throughout the process.

The Alaska Bar Association, as an agent of the Alaska Supreme Court, takes its role in administering the ethical requirements that govern its members' conduct seriously. It expects the highest standards from its members and holds those who breach it accountable. This includes violations related to sexual misconduct. To that end, the Bar Association has also taken up recent measures to specifically address sexual misconduct in the practice of law. This led to the Supreme Court adopting Alaska Rules of Professional Conduct 8.4(f) — an ethical rule whose genesis stems from complaints of sexual harassment committed by members against other members engaged in the practice of law. The Bar Association is always interested in and appreciative of feedback from its members. We will continually strive to listen to both our members and the public as we carry out our mission on behalf of Alaskans.

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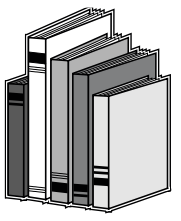
Footnotes

[1] If a lawyer actually faces criminal charges for their conduct, the Bar Association disciplinary matters would ordinarily be stayed pending the outcome of those proceedings. In some circumstances, however, the Alaska Supreme Court has the authority to order the interim suspension of the lawyer pending the outcome of the criminal case.

[2] Under Bar Rule 22(b), complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline proceedings prior to the initiation of any formal proceedings, and it is regarded as contempt of court to breach this confidentiality in any way. After the filing of a petition for formal hearing, hearings held before either a Hearing Committee or the Board will be open to the public, though their deliberations remain confidential under Rule 21(a).

Law Library

A new face joins the Juneau Law Library



By Susan Falk

If you visited the Juneau Law Library this fall, you may have glimpsed the wonderful Marinke Van Gelder, who graciously shrugged off retirement for a few months to help cover the library while our staff position was vacant. While we are overflowing with gratitude to Marinke for stepping in, we are also overflowing with excitement about the newest member of the library staff, Kathryn Portelli, who started working in the Juneau branch in January.

Kathryn hails from Michigan, where she attended Michigan State University, did a year with AmeriCorps, and most recently worked in the fundraising office for MSU's library system. When her fiancé, Cody, accepted a job with NOAA Fisheries in 2020, the two packed up their life and moved to Alaska, sight unseen, arriving in Juneau seven months into the pandemic. She spent her first year here working at the University of Alaska Southeast and exploring her new home.

Kathryn reports that after nearly a year and a half in the state, she and Cody are loving Alaska. "Seeing whales in the wild is a dream come true, and I get a huge kick out of the endless mountains, trails, and beaches here. From the library, I can watch the weather on the peaks of Douglas Island, where I hope to learn to ski before this winter is over."

Kathryn is especially happy to be back in a library, a workplace she has been drawn to since her days as a public library page. "Every day brings something new to learn, and it's a joy to help people find the information they need." Want to help Kathryn acclimate to her new role? Go visit her at the Juneau Law Library, and let her flex her information muscles by helping you find what you need. The law libraries in Juneau, Anchorage and Fairbanks are open to the public Monday through Thursday, noon to 4 p.m. We are available via phone and email Monday through Thursday, 8 a.m. to 6 p.m.; 8 a.m. to noon Fridays, and noon to 5 p.m. Sundays.

Susan Falk is the Alaska law librarian.