

Ptarmigan, raven square off in legislative smackdown

By Dan Branch

Last week a raven and a ptarmigan flew into a Juneau bar. The ptarmigan ordered a bowl of willow catkins. The raven said that he'd make do with what he could find in the trashcan. "Look," the bartender said, "this ain't a vegan joint, and we don't serve carrion. Either order a drink or get out." A lobbyist slipped the barkeep a twenty and guided the ptarmigan to a dark corner of the bar. After checking to make sure no one could overhear him, the lobbyist whispered, "I represent some people who would like the raven named the state bird. What would it take for you to support that?" It's sausage-making time again in Juneau.

The Senate has already held committee meetings on governor bills designed to gut public education, the Alaska Marine Highway, and the rural criminal justice system. Other bills, like SB 28 — an act to make the raven our state bird — have yet to get a hearing. By the deadline for this column, the House had finally chosen someone to lead them.

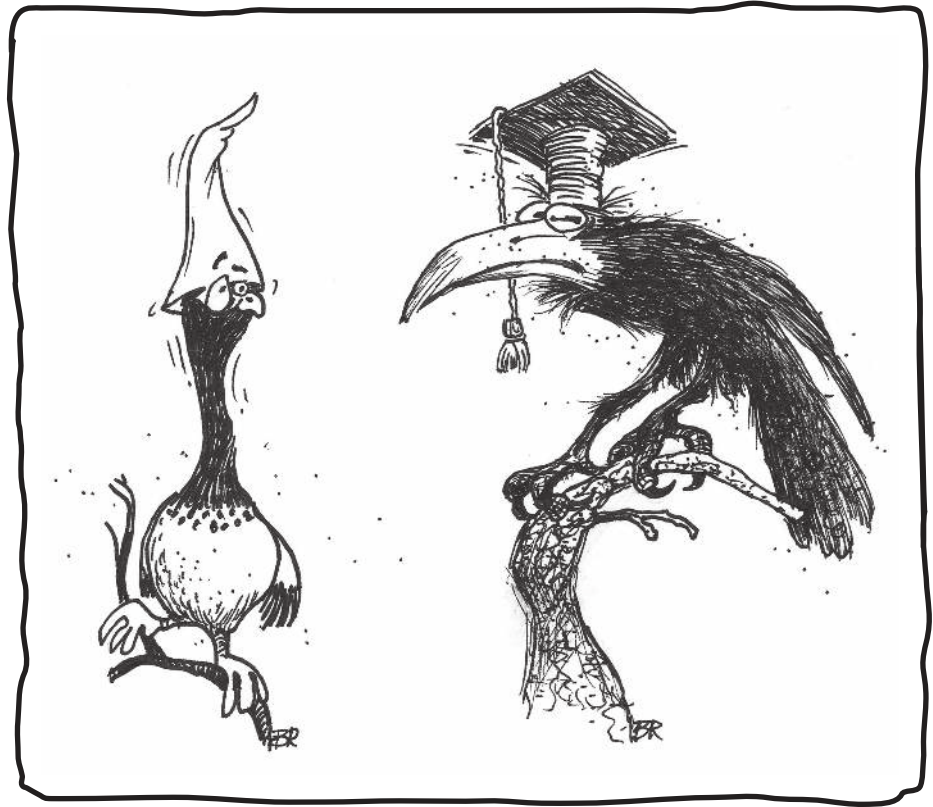
Given the governor's commitment to cut his way to prosperity, I expect him to submit a proposed budget that would force schools to replace computers with slates and chalk, expensive textbooks with McGuffey Readers. After masticating a while on such heavy fare, our legislators might feel relief when they take up S.B. 28 (The Raven Bill). But like the periodic effort to legislate away daylight savings time,

SB 28 could drag them into a troll-filled swamp.

By naming raven the state bird, the Legislature would be dethroning the willow ptarmigan, a plump and tasty relative of the pheasant that has served as Alaska's official bird for 64 years. In 1955, when every American liked Ike and Alaska was the country's largest territory, the Alaska Legislature designated the willow ptarmigan the territory's official bird. H.B. 2, the ptarmigan bill, flew through the legislative process. The House passed it unanimously on the third day of the session. Two days later, the Senate approved it and sent it back for House concurrence. The ptarmigan was crowned territorial bird on Day Five.

Little of the legislative history of H.B. 2 exists today. But thanks to the bill's preamble, we know that it ratified the results of a student poll conducted by the Territorial Department of Education and the Education Section of the Alaska Native Service. Approving S.B. 28 would overturn that election and substitute the preference of our current legislators for pre-statehood pioneers.

Anchorage Daily News supports S.B. 28. In a Jan. 9 Op Ed piece, they argued that the raven is smart and the ptarmigan is dumb. No one can contest a raven's intelligence. But that intelligence is often used for bad rather than good. More than once I've had to rescue a neighbor's package from ravens. After our postman leaves a box on someone's doorstep, one or two ravens will strut



over and start ripping it open with their powerful beaks. One box, delivered just before Christmas, was reduced to See's Candy wrappers and torn cardboard before I could intervene.

As for those folks who call ptarmigan stupid, may I point out that Chicken Ridge in Juneau and the Alaska town of Chicken, both once popular places for hunting ptarmigan, were so named because the local humans couldn't spell "ptarmigan."

The ptarmigan's tendency to

hold their ground as people shoot at them is often seen as proof that they are stupid. I ask folks who believe this to consider the tendency from a survival-of-the-species point of view. During the spring mating season, ptarmigan gather in large flocks. If a hunter approaches, most of the birds fly to safety before the first shot. A small number hunker down, hoping that their white bodies will make them hard to spot against a snowy

Continued on page 11

'Till death do us part, not to exceed maybe a year or two

By Mark Andrews

It was an Alaskan legislative oddity.

In 1980, Alaska State Rep. Michael Beirne introduced a bill "authorizing marriages of limited duration." As its title indicates, the bill provided for marriages that would end neither upon death or divorce, but rather on a fixed date that bride and groom agreed upon.

The proposal had good intentions. It was aimed at the problem that "the traditional marriage of unlimited duration has not met the needs or aspirations of many Alaskans and as a consequence many couples in the state are living together out of wedlock." Also, many couples who would divorce could not do so for a variety of reasons (including "inertia"). And the bill sought to minimize the "ugly consequences"

which can accompany a divorce.

As radical as this notion was, its purpose was to support a traditional view of marriage. According to the legislative findings, "marriage imbues a man-woman relationship with a special significance in the minds and hearts of most Alaskans," and "many of the joys and satisfactions of life arise out of caring and trusting relationships between members of the opposite sex."

To solemnize their time-limited marriage, the semi-happy couple would file an agreement with the registrar of vital statistics, stating when the marriage would expire and describing the future division of property if the marriage were not renewed.

As time passed, the now happy, if somewhat cautious, couple could renew their marriage for another limited time before it expired. This re-

newal required only a notice, filed again with the registrar.

Finally, the bill provided that He and She, of limited duration, could throw their discretion to the four winds and remove the time limit entirely. The notice to the registrar would rescind the original agreement.

Of course, kids happen. Child custody disputes over the issue of a time-limited marriage would be decided under the same statute governing all such disputes.

The bill specified no minimum time for a marriage. A series of marriages, each one month long, was



Mark Andrews

Continued on page 11

Non-Profit Organization
 U.S. Postage Paid
 Permit No. 401
 Anchorage, Alaska

Alaska Bar Association
 P.O. Box 100279
 Anchorage, Alaska 99510

Plan proposed to bring more judges to Bar convention

By Brent Bennett

"We are lawyers first," as one particular judge put it to me when expressing a desire for judges to attend the Annual Bar Convention. Since 2017, the Bar has noticed a substantial decline in the number of judges making it to the convention. Historically, the judges attended both their conference in October and the convention in May. As we have all collectively dealt with difficult budgeting decisions, the judiciary has also had to make some tough choices — one of them being to forego funding judicial attendance at the Bar Convention.

The Annual Bar Convention is designed as a time for lawyers across our vast state to come together at one central location. The convention is a time for learning, but also for connection — both making new and celebrating the old. The judges are quite simply missed. They are, after all, lawyers too. They were our friends and colleagues long before taking the bench, and it's just good to catch up. For some young lawyers, interacting with

a judge at the bar convention may be their first opportunity ever to talk with a judge off the bench. That experience could provide a very useful lesson about how we are all just lawyers.

Determined to come up with a solution, in October, bar president-elect, Rob Stone, Susan Cox, Deborah O'Regan and I met with Chief Justice Bolger and court staff. Out of that meeting was born an idea to move the bar convention to align with the judges' conference. But there are some logistical questions to iron out.

The judges meet, typically in Girdwood, in the off season — usually some time in October. The Bar Convention meets on a yearly location rotation — Fairbanks, Anchorage, Juneau, Anchorage, Fairbanks, etc. So we come close to each other on our Anchorage years. We have proposed meeting



So while you ponder the future, make sure you are booked to join us in the Golden Heart City May 8-10. See you in Fairbanks.

each other halfway. The idea is that on the years when the Bar Convention is held in Anchorage the judges' conference and the convention would overlap by a day — perhaps on the first day of the convention when perennial convention favorites Erwin Chemerinsky and Laurie Levenson speak. Maybe the judges could meet in Girdwood on Monday and Tuesday, join the Bar in Anchorage on Wednesday, and then choose to remain for Thursday and Friday at the convention, or not? Aligning in this way could help members attend the

convention more easily too. If the judges aren't on the bench, the court schedules will permit lawyer travel.

So if the Bar were to meet every other year in October, in Anchorage, should it still meet in Fairbanks and Juneau in May? Or switch Fairbanks and Juneau to October too? Or hold our Anchorage conventions in October to correspond with the judges, but move Fairbanks and Juneau to September (hoping a few weeks earlier would be just a bit more temperate)?

What is your opinion? Would it be easier for you to travel in October

anyway? Couldn't bear to not go to Juneau during May? Love the idea of coordinating with the judges? Or continue with May conventions and judges who are interested can come if they want? Please email any comments or suggestions to Deborah O'Regan at oregan@alaskabar.org by May 3 so the board can discuss at our next meeting.

Of course none of this changes anything for this May. So while you ponder the future, make sure you are booked to join us in the Golden Heart City May 8-10. See you in Fairbanks.

Brent Bennett is president of the Alaska Bar Association. He lives in Fairbanks where he works for the Office of Public Advocacy.

The Annual Bar Convention is designed as a time for lawyers across our vast state to come together at one central location. The convention is a time for learning, but also for connection — both making new and celebrating the old.

EDITOR'S COLUMN

Getting in tune with the Bar Rag's 'My Five'

By Ralph R. Beistline

Somewhere in the past, for some reason, we started publishing a small column entitled "My Five," in which certain selected members of the Bar set forth their favorite five songs, present or past. It wasn't

my idea and I don't know the legislative history. I frankly didn't think anyone would care or take note. Bury it in the back I thought. Keep Samantha company. Then I was called upon to take part in this adventure, along with some of the other federal judges, and I quickly learned that this was no easy task. It actually proved to be time-consuming and thought-provoking, but enjoyable. And my colleagues, though complain-

ing about the five song limit, have been humming down the halls ever since. But for me it was a particular challenge since neither Anchorage or Fairbanks really have any Goldie-Oldie radio stations anymore. FM 102.1 has "classics from the 80s and more," but that's long after most of the good stuff came out.

Anyway, for the last week or so I have been Googling lyrics from days long passed, as well as an occasional new song, and trying to find the five. That's when it hit me — I

do have some special songs that supersede *My Five*. I have a daughter who can sing the *Alaska Flag Song* a cappella better than I have heard it before. She sang it at my retirement din-



Anyway, for the last week or so I have been Googling lyrics from days long passed, as well as an occasional new song, and trying to find the five.

And then there are the Sweet ADELINES who sing *This is My Country* at our Naturalization ceremonies at a time, and in fashion, that brings tears to the whole audience. And I guess the last one would have to be *Moon River* by Andy Williams. My wife says that it is her favorite song because we danced to it on the River Boat DISCOVERY on our first date in Fairbanks more than 50 years ago.

So with these exceptions I will leave my *Special Five* and proceed with some of my colleagues to set forth *My Five*. It is actually an interesting experience. Be thinking about it for yourself. You could be next. Just look for a call from the Bar's Krista Scully. She does the picking. And you can sing along.

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

See "My Fives" from the Federal Bench. Page 3

I was called upon to take part in this adventure, along with some of the other federal judges, and I quickly learned that this was no easy task. It actually proved to be time-consuming and thought-provoking, but enjoyable.

lyke Emery
@its_Emery

Follow

"@HumOrousLAWYER: Imagine the appeals, dissents and remandments, if lawyers had written 'The Ten Commandments'."

The Alaska BAR RAG

The Alaska Bar Rag is published quarterly by the Alaska Bar Association, 840 K St., Suite 100, Anchorage, Alaska 99501 (272-7469).

President: Brent Bennett
President-Elect: Rob Stone
Vice President: Molly Brown
Treasurer: Bill Granger
Secretary: Cam Leonard
Members:

Sharon Barr
Susan Cox
Darrel Gardner
Bill Gordon
Ben Hofmeister
Hanna Sebold
Adam Trombley

New Lawyer Liaison:
Diana Wildland

Executive Director: Deborah O'Regan
Editor in Chief: Ralph R. Beistline

Managing Editor: Tim Jones
Editor Emeritus: Harry Branson
Contributing Writers:

Peter Aschenbrenner
Dan Branch
Jason Brandeis
Darrel Gardner
Cliff Groh
Susan Falk
Steven T. O'Hara
William Satterberg

Contributing Photographer:
Mara Rabinowitz
Lynn Coffee

Contributing Cartoonist:
Bud Root

Design & Production:
Sue Bybee

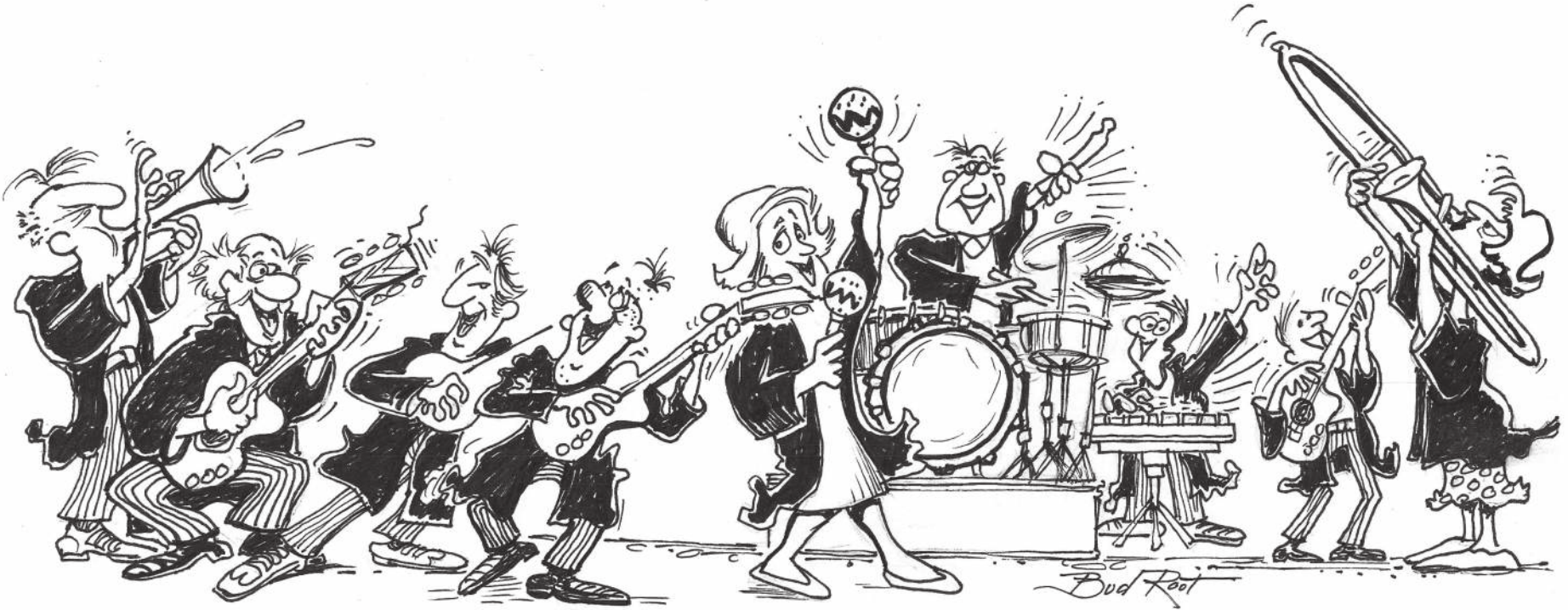
Advertising Agent:
Alaska Bar Association
840 K St., Suite 100,
Anchorage, Alaska 99501
(272-7469)

Board of Governors meeting date:
May 6 & 7, 2019

Annual Convention in Fairbanks
May 8 - 10, 2019

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

[Editor's Disclaimer: As with all *Bar Rag* articles, advertisements and letters, we do not vouch for, stand by, or support most of what we publish. Nor have we cleared any of this with either the FDA or the Department of Homeland Security (aka Interior Ministry). We sure as hell won't be responsible for your hurt feelings or misguided reliance on anything we publish or not]. TVF 2000



My Five

We've done something a little different with the "My Five" music feature this issue. Instead of finding three people to contribute we went to the Federal Court Bench and solicited several more lists.

Andrew Kleinfeld

- "Va Pensiero" — Giuseppe Verdi
- "Penny Lane" — The Beatles
- "Sinnerman" — Nina Simone
- "Folsom Prison Blues" — Johnny Cash
- "Bridge Over Troubled Waters" — Simon and Garfunkel

Morgan Christen

- "Let It Be" — The Beatles
- "Defying Gravity" — Performed by Kristen Chenoweth
- "Bridge Over Troubled Waters" — Simon and Garfunkel
- "Stand by Me" — Ben E. King
- "I Dreamed a Dream" — Performed by Susan Boyle

Timothy M. Burgess

- "Love and Happiness" — Al Green
- "All Along the Watchtower" — Jimi Hendrix
- "Sympathy for the Devil" — Rolling Stones
- "Wish You Were Here" — Pink Floyd
- "I Walk the Line" — Johnny Cash

Sharon L. Gleason

- "Appalachian Spring" — Aaron Copeland
- "Symphony No. 8" — Antonin Dvořák
- "Under Pressure" — Queen
- "Loves Me Like a Rock" — Paul Simon
- "634-5789" — Tina Turner with Robert Cray 1988 Live Version

Ralph R. Beistline

- "Over the Rainbow" — Israel "Iz" Kamakawiwo'ole
- "Dream a Little Dream" — Cass Elliot
- "Elusive Butterfly" — Bob Lind
- "Deep Purple" — Nino Tempo and April Stevens
- "Ferry Cross the Mersey" — Gerry and the Pacemakers

H. Russel Holland

Once I got started, I couldn't do five ~ so you're getting ten.

- "Tocatta and Fugue in F Minor, BWV 534" — J.S. Bach
- "The Entertainer" — Scott Joplin
- "Goodbye Yellow Brick Road" — Elton John
- "A Taste of Honey" — Herb Alpert, The Tijuana Brass
- "Waterloo" — Abba
- "California Dreamin'" — The Mommas and Poppas
- "Puff the Magic Dragon" — Peter, Paul and Mary
- "Kodachrome" — Simon and Garfunkel
- "Roller Derby Queen" — Jim Croce
- "Hotel California" — The Eagles

Deborah M. Smith

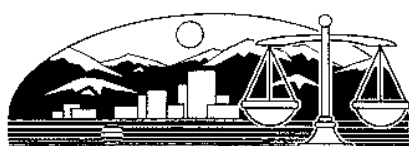
- "Sittin' on the Dock of the Bay" — Otis Redding
- "Here Comes the Sun" — Richie Havens
- "Help Me" — Joni Mitchell
- "Autumn Leaves" — Errol Garner, Jazz Pianist
- "A Love So Beautiful" — Roy Orbison

Matthew McCrary Scoble

- "Tangled Up in Blue" — Bob Dylan
- "Prepárame la cena" — Calle 13
- "Ode to Joy" — Beethoven
- "The Weight" — The Band
- "Fear Not of Man" — Mos Def

Scott A. Oravec

- "Sweet Caroline" — Neil Diamond (best performed in the middle of the 8th inning at a packed Fenway Park on a warm summer night)
- "Fast Car" — Tracy Chapman
- "Stars and Stripes Forever" — John Phillip Sousa (best arranged for and performed by a *marching band*)
- "Hold on I'm Comin'" — Sam and Dave
- "Lawyers, Guns, and Money" — Warren Zevon



Anchorage
Bar Association, Inc.

ANNUAL

St. Patrick's
Day
CELEBRATION

Friday, March 15, 2019

5:00 - 8:00 p.m (or until the keg is dry!)
PERFORMING ARTS CENTER
(North Entrance - across from Egan Center)
DOOR PRIZES!!

Free for Anchorage Bar members and a guest
\$25/person for extra guests
Hardy "Irish" appetizers, Beer, Wine, Irish music
*Come one and all and enjoy a "wee bit"
of Irish merrymaking!*

Membership sign-ups taken
at the door



Up to the minutes (or notes) with the Juneau Bar Association

Juneau Bar Association meeting Feb. 22, 2019

The Juneau Bar Association met, again, on Friday Feb. 22, 2019, at the Baranof Hotel, the landlord of Juneau's newest laundromat and exercise room. Our guests were (besides those past presidents who finally showed up as noted below) Anchorage Superior Court Judge Gregory Miller, the Alaska Court System's General Counsel Nancy Meade (more on that below), and Nicolas DeHart.

Here is this week's question posed in honor of our past presidents (the quiz this week has a presidential theme): "Name the people who visited Juneau while they were any one of the following: president, first lady, former president, former first lady, candidate for president, candidate for first lady, past presidential candidate, and person who later became president." The Answers are below. Way below.

But first, an announcement: "I am a 1L student at Seattle University School of Law and will be a legal intern this summer in downtown Juneau. I am looking for

any extra room/studio/unit that someone may be able to rent out over the summer from late May until mid-August. I am very clean, respectful, and responsible. My number is (206) 715-4414. My email address is natalieellencrane@gmail.com and Thank you!"

Yet another announcement: Duke Law Students are coming to Juneau on March 8 at 1:30 and we need to do something! Any ideas? Let's talk. Unfortunately, they will not be able to come to the JBA lunch so they will miss out on a discussion of suggested topics for the Notes and Comment section of the Alaska Law Review.

How about a follow up to this scholarly law review article: James L. Huffman, *Chicken Law in an Eggshell: Part III: A Dissenting Note, 16 Environmental Law 761 (1986)*? Alternatively, undertake a long overdue look back at this time-



ly quote from Dick the Butcher by the noted author of *Henry VI*: "The first thing we do, let's kill all the lawyers." Or, how about a Casenote on this not-cited-

enough case: "No principle of significance is involved, and it is inconceivable that a substantial sum of money could be awarded. This is of the genre of cases that Dickens must have had in mind when he had Mr. Bumble state, 'the law is an ass-an idiot.'" (Citation provided upon request, and this little passage was written by one of JBA's past presidents. You might get a free lunch if you come to the next JBA meeting and let us know who.)

Before we stopped yelling about whose sandwich was whose, and whether someone was a past president and should have their meal paid for (see below), we were lucky enough to hear from Ms. Meade. She allowed that like most of

state government officials involved with policy, all commissioners, the attorney general, their families and staff, she lives in Juneau during session. (We wonder if Nancy isn't even more present in Juneau than our AG and commissioners.)

We warmly welcomed Nancy and her spouse Judge Gregory. Nancy described the governor's bills that affect the judicial branch, mostly they repeal the Godless (if it is Godless) SB 91 (Duke Law, what do you think)? Ben Brown noted that the author of SB 91 controls Senate Rules committee now, so we will see where all this passion for red meat ends up. Another piece of legislation that Nancy mentioned was SJR (pronounced "SJR") 3, which would amend the constitution to require legislative confirmation of three attorney members appointed for six-year terms by the Alaska Bar Association. We hope to hear a debate on this matter at a future JBA meeting. Duke Law could write about that?

There will be a silent auction in April to support the Glory Hall, fka Glory Hole. This was an announcement from Tom Wagner and we will keep you updated on this later.

Next, Bruce made the following motion and Susan Cox seconded to pay for president (and co-president) Tony Sholty, Co-President and Vice President Debby Holbrook, and Treasurer Andrew Pappone to attend the Alaska Bar Convention in May 2019 in Fairbanks. Mary Alice McKeen moved to table that motion until next week's meeting and that was fine with everyone if we could find part of a table that wasn't a big mess. I now understand why Juneau restaurants are hesitant to allow the JBA to meet at their establishments. Bruce will follow up with Duke Law, Brent Bennett and the Tanana Bar on what there is to do in that region of the state in May (besides looking for the state's commissioners and AG, maybe)?

A proclamation by JBA President (or is it co-president) Tony Sholty: Hear Ye! The JBA will have a special President's Day bar lunch today. All past presidents who attend will receive a free lunch. We thank you for your service! This proclamation and your past position will not get you early boarding on Alaska Airlines. Some of those who accepted this honor of a roughly, \$12 lunch for attending are included in the following roster of JBA Presidents (please help fill in the blanks or correct the following list. Gordon Evans was out of state or else we would have filled in the blanks from 1901-65):

- 1901-1965:
- 1966 (the first year of its incorporation): Alan Engstrom
- 1967: Bob Boochever
- 1968-82:
- 1982: Monte Brice
- 1983: John Clough
- 1985: Tom Wagner
- 1988-87:
- 1988: Eric Kueffner
- 1990: Susan D. Cox
- 1991-93:
- 1994: Bruce Weyhrauch
- 1995: Bruce Weyhrauch
- 1996: Ann Gifford
- 1997: Sherri Hazeltine
- 1998: Lach Zemp

Register Now

Alaska Bar Association

ANNUAL CONVENTION

May 8-10, 2019

Westmark Fairbanks Hotel

Continued on page 5

Rising attorney fees look toward uncertain future

By Robert C. Erwin

Recently, I was given a copy of the Anchorage Bar Association minimum bar fee schedule from 1966. That fee schedule contained the fee that each lawyer had to charge for the service provided and excess fees were a breach of the canons of Professional Ethics. Subsequently, such schedules were held to be unconstitutional, but they existed on a national level until that time. They existed in Alaska from the establishment of the territory in 1912 until after Alaska became a state in 1959.

Fee Schedule

1966	2019
Hourly Rate \$80.00	Hourly Rate \$300.00 - \$500.00
Contingent Fee 33 1/3%	Contingent Fee 25% - 45%
Appeal \$3,400.00	Appeal (up to) \$50,000.00
Divorce \$650.00 – default \$800.00 – custody/ property \$1,150.00 – Contested	Divorce – Default, custody / property or contested – No limit
Probate \$575.00 plus percentage of estate value (1% - 6%)	Probate – as awarded by the court

These fees must be contrasted with the present Alaska Bar Rule 35 which only requires the fee agreement be in writing and be “reasonable” if the amount involved is more than \$1,000.00.

There are a number of cases decided under Civil Rule 82(b)(2)&(3) which discuss the factors courts can consider in awarding the prevailing party attorney’s fees in a case. The cases clearly require proof in the record to support such award. *Haskins v. Shelden*, 558 P2 487, 495-495 (Alaska 1976).

This can only be contrasted with the funding of the fee arbitration panel who found a \$75,000.00 fee “reasonable” without any time records to support it. *Maclpine v. Priddle*, 321 P.3d 345 (Alaska 2014).

There is no definitive definition of what a reasonable hourly attorney rate is or what a reasonable fee is. These decisions are apparently left to the trial judge (*Cooper v. Thompson*, 353 P.3d 782, 798-799 (Alaska 2015)) or the fee arbitration panel (*Maclpine v. Priddle*, 321 P.3d 345, 351 (Alaska 2014)). Clearly, no member of the general public could understand what is “reasonable” without substantial help from someone with a legal background.

Up to the minutes (or notes)

Continued from page 4

- 2000: Dawn Collingsworth
- 2001: Julie Willoughby
- 2002: Stacie Kraly
- 2003: Jim Sheehan
- 2004: Marie Marx
- 2005: Ben Brown
- 2006: Zach Falcon
- 2007: Hanna Sebold
- 2008: Ethan Falatko
- 2009: Jessica Srader Leeah
- 2010: Karen Godkin
- 2011: Eric Vang
- 2012: Alex Hildebrand
- 2013: Renee Wardlaw
- 2014: Mary Gramling
- 2015: Blake Rider
- 2016: Mari Carpeneti
- 2017: Lael Harrison

- 2018: Trini Contreras
- 2019: Debby Holbrook
- Answers: The names of the following people who visited Juneau while they were any one of the following:
President of the United States: Warren Harding
First Lady: Florence Harding.
Former US presidents: G. Ford, Reagan
Former First Ladies: Nancy Reagan
US Presidential Candidates: Ralph Nader, Dennis Kucinich, Mike Gravel, JFK, Nixon
Candidates for First Lady: Kitty Dukakis
Persons who later became US presidents: JFK, Nixon

Solo Practitioners

and Small Firms

Did you know you can create a

Professional Corporation Trust

to hold your practice, assuring smooth transfer on death or disability?

Contact **Kenneth Kirk**, 279-1659 to find out how!

What will the future hold as to attorney’s fees? Who can pay unlimited fees? Will ordinary people be able to afford legal services if the cost and attorney’s fees continues to rise?

There are as many rumors as there are lawyers about the six-figures fee charged for a basic case.

There has been a legislative effort in several states to require the posting of medical costs so that a patient is aware of the potential costs before he undergoes treatment. Is this the future for legal costs? Clearly the present disclosure of legal costs is as opaque as those of medical costs. Does the legal profession owe more transparency to the public? Should there be a cap on fees or at least a requirement that the fee agreement should be further reviewed shortly after the litigation commenced?

I have attached one page of the 1966 schedule as an exhibit and will mail a copy of the entire document to anyone who simply contacts my office.

Robert C. Erwin was admitted in Washington in 1960 and Alaska in 1961. He has served as DA at Nome, Fairbanks and Anchorage. He was a member of the Alaska Supreme Court from 1970-1977. He has presented more than 220 appeals to the Alaska Appellate Courts and still practices law in Alaska to this day.

Superior Court-Domestic Relations

1. Plaintiff's or Defendant's Attorney

a. Divorce--annulment--legal separation

- (1) Not involving custody or property, uncontested- ~~\$250.00~~ 500.00
- contested--- 500.00 1,150.00
- After first day of trial, per diem ----- 400.00 900.00
- (2) Involving custody or property or both*

- uncontested- 350.00 800.00
- contested --- 500.00 1,150.00
- After first day of trial, per diem ----- 200.00 450.00

b. Each motion for temporary relief, or modification, or contempt, or custody, minimum --- 100.00 225.00

c. Collection of support or alimony arrears (see regular collection fee schedule)

d. Separation agreement involving custody but no court action, hourly rate; minimum ----- 250.00 575.00

Note: Where custody and property both enter into the agreement, time involved as well as the value of the property obtained should be determining factors in arriving at the fee.

All other services should be based on the minimum hourly rate and consideration of the value of the matter involved as well as the points set forth at the beginning of the fee schedule.

B. Probate Court

1. Ordinary legal services rendered the personal representative of a decedent's estate, including formal proceedings in the Probate Court and the preparation and filing of Federal and state inheritance tax returns:

- Minimum ----- 250.00 575.00

Plus each step listed below up to the gross value of the estate:

- Second Step ----- \$ 2,500 to \$ 10,000---- 6%
- Third Step ----- 10,000 to 100,000---- 5%
- Fourth Step ----- 100,000 to 500,000---- 4%
- Fifth Step ----- 500,000 to 1,000,000---- 2%
- Sixth Step ----- 1,000,000 up ----- 1%

MAGISTRATE COURTS

A. Magistrate Court-Civil

- 1. Complaint ----- 150.00 350.00
- 2. Aid of execution or execution on wages, where no contingency ----- 20.00 70.00
- 3. Answer ----- 100.00 225.00
- 4. Attachment--affidavit and bond (in addition to -----



Association of Legal Administrators Alaska Chapter Salary Survey

Survey Cost

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

For more information contact Jodi Walton at
(907) 334-5608 or Jodi@mb-lawyers.com

Alaska ALA
P.O. Box 100031
Anchorage, AK 99510-2396
www.alaskaala.org

Slow, steady strangulation: Life for Bahá'ís in Iran

By Daniel B. Lord

Third in a series

In previous parts of the series, I discussed the legal situation of the Bahá'ís in Iran, first focusing on that country's penal code, and then taking a closer look at the Constitution of the Islamic Republic of Iran to show how the unjust treatment and persecution of the Bahá'ís can be traced to its provisions.

Specifically, while the Iranian Constitution protects certain recognized religions, namely, Islam, Christianity, Judaism and Zoroastrianism, these religions have, by law, an unequal status. This recognition, nevertheless, does provide certain rights and protections. In sharp contrast, no rights or protections are formally afforded under the Constitution or by law to adherents of those religions not recognized under the Constitution — the Bahá'ís being the largest non-Muslim group falling into this category.

Of course, being a non-recognized religion does not necessarily result in there being intentional state involvement in its discrimination. But in the case of the Bahá'ís in Iran there are official documents evidencing that the destruction of the Bahá'í community as a participant in Iranian society is a matter of government policy. See Bahá'í International Community, *The Bahá'í Question Revisited: Persecution and Resilience in Iran* 1, 3 (2016) (policy “emanates from the highest levels of government”); Siyamak Zabihi-Moghaddam, *State-Sponsored Persecution of the Bahá'ís in the Islamic Republic of Iran*, 3 *Contemp. Rev. Middle East* 124, 146 (2016) (persecution institutionalized and well-defined). It is a consistent policy, despite changes in its strategic implementation over past decades. See Bahá'í Community of the United Kingdom, *Supplementary Memorandum to the House of Commons, Select Committee on Foreign Affairs Written Evidence* (Feb., 2003), retrieved from <https://publications.parliament.uk/pa/cm200203/cmselect/>

cmfaff/405/405we06.htm (accessed 2/10/2019) (Iranian authorities shifted away from long-term imprisonment to “widespread pattern of short-term detention for Bahá'ís” as the “practice is more difficult to monitor and report to the international community, but serves well as an effective means of constant harassment”); Zabihi-Moghaddam, *supra*, at 14 (though the government has avoided outright death sentences and executions of Bahá'ís in recent years, there continue to be suspicious deaths and killings by unknown assailants).

As summarized for this author by the U.S. Bahá'í Office of Public Affairs, “The experience of the Bahá'í community has been one of unpredictable and arbitrary exercise of authority by police, judges and other governmental officials with or without the sanction of law. This has included the criminalization of ordinary religious practices of worship, religious training, and fellowship, since such practices, as those of an unrecognized religion, fall outside of legal protection. It has also included the denial of governmentally accorded rights and privileges of citizenship, such as the receipt of earned government pension benefits, access to higher education, business licenses in about two dozen fields, and even the security and safety of one's person from physical attack.”

In this third part of the series, I will attempt to explain why the Bahá'ís are being singled out by the Iranian authorities for such a relentless campaign of persecution.

In brief, the historical background is that the Bahá'í Faith has faced persecutions in Iran since its inception in the 1800s. Early followers encountered violent opposition from the combined forces of the Islamic religious authorities and the succeeding dynasties of the country's rulers. In a series of pogroms in the 19th Century, many thousands of believers perished for their allegiance to the Báb and Bahá'u'lláh, the two Founders of their Faith whom Bahá'ís revere as

the Bearers of a new revelation for this new period of history, the “stage of maturity” of the human race.

Bahá'ís believe that God progressively reveals religious truth to humanity through a series of divine Messengers, the Báb and Bahá'u'lláh being the most recent, but not the last, as other Messengers will appear in the ages to come. “Every one of them is the Way of God that connecteth this world to the realms above, and the Standard of His Truth . . .” *Gleanings from the Writings of Bahá'u'lláh* 1, 50 (2nd rev. ed. 1976). The idea that there should be a new Messenger of God after Muhammad is considered by many Muslims as heretical. There is verse in the Qur'an in which it is stated that Muhammad is “Seal of the Prophets” (33:40), and most Muslim scholars have interpreted this as meaning that He is the last of the Messengers.

Consequently, existence of a Bahá'í community is seen as presenting a “challenge to Islamic jurisprudence” in Muslim-majority states. See Johana Pink, *A Post-Qur'anic Religion between Apostasy and Public Order: Egyptian Muftis and Courts on the Legal Status of the Bahá'í Faith*, 10 *Islamic L. & Soc.* 409, 412 (2002) (focusing on a *Sunni* dominated country). In recognizing the three “religious minorities” under Article 13, the Iranian Constitution follows the classical Islamic distinction between “people of the Book” (*ahl al-kitab*, or adherents of Abrahamic religions mentioned in Qur'an) and similar others in a Muslim-majority state. As ascribed by a scholar of modern Islamic developments, “The Bahá'ís cannot be classified as ‘people of the Book’, like Christians or Jews -- from the Muslim perspective, the Qur'an is God's final revelation,” nor can they “be tolerated as a people clinging to traditional religion who have not yet gained sufficient knowledge of Islam to accept it as the true religion.” *Id.*, at 412-413.

This cannot fully explain the fierce opposition that animates the Iranian authorities. *Shari'a*, in its “creation of a covenant with other people of the book,” in effect “promotes a hierarchical system in society based on religious belief.” Jennifer F. Cohen, *Islamic Law in Iran: Can It Protect the Legal Right of Freedom of Religion and Belief?*, 9 *Ch. J. Int'l L.* 247, 259 (2006). The upshot is that Muslims are positioned “at the top and nonbelievers at the bottom” of the hierarchy, and *ahl al-kitab* (*ahl al-dhimmas* or *dhimmi*, to use the historical terms) being somewhere in-between. *Id.*

Inciting hatred and violence and depriving a population of basic human rights are not part and parcel to the system. Article 14 of the Iranian Constitution itself provides,

According to the Qur'an: “Allah forbids you not, with regard to those who fight you not for (your) faith nor drive you out of your homes, from dealing kindly and justly with them. For Allah loveth those who are just” [60:8], the government of the Islamic Republic of Iran and Muslims are required to treat the non-Muslim individuals with good conduct, in fairness and Islamic

justice, and must respect their human rights. This principle is valid for those persons who have not conspired or acted against Islam and the Islamic Republic of Iran.

See <http://www.wipo.int/edocs/lexdocs/laws/en/ir/ir001en.pdf>. Bahá'ís are law-abiding and they revere Muhammad and His Book, the Qur'an -- their persecution is contrary to the Constitution and standard of the provisions of the Qur'an to which it refers.

Moreover, it is argued that under classical Islamic jurisprudence the Bahá'ís are entitled to protected status. See, e.g., Mashood A. Baderin, *Islamic Law and the Protection of Minority Rights*, in *Islam and International Law* 309, 331 (2013); Eliz Sanasarian, *The Comparative Dimension of the Bahá'í Case and Prospects for Change in the Future*, in *The Bahá'ís in Iran: Socio-historical Studies* 156, 167 (2008) (*as dhimmi*); Ankita Sanyal, *Bahá'ís in Post-Revolution Iran: Views from the Ulema*, 6 *Contemp. Rev. Middle East* 58 (2019) (“one can witness a deviation from the homogenous perception”).

Opposition of the Iranian *Shi'ih* establishment stems more from a familiarity with the principles of the Bahá'í Faith. “In outlining His vision for a new world civilization, Bahá'u'lláh advocated a series of highly progressive social principles,” it is explained.

These include the elimination of all forms of prejudice; equality between the sexes; the elimination of extremes of poverty and wealth; universal education; the harmony of science and religion; a sustainable balance between human society and the natural world; and the establishment of a world federal system based on collective security and the oneness of humanity.

Bahá'í International Community, *The Bahá'í Question: Cultural Cleansing in Iran* 1, 70 (2005, 2008). To the *Shi'ih* establishment, the enlightened nature of such teachings “is not only theologically abhorrent but threatens the system of patron-

age, endowments, political influence, and social requisites to which they lay claim.” *Id.* See also Anja Pistor-Hatam, *Non-understanding and Minority Formation in Iran*, 55 *J. Brit. Inst. Persian Studies* 87, 96 (2017) (noting that recognition by *Shi'ih* clergy of Bahá'í Faith might “delegitimize their own theological and political power”).

So it is fear that has steeled the resolve of the Iranian authorities, particularly the *Shi'ih* clerics in charge, to stamp out the Bahá'í community. There is no issue of ethnicity or a political agenda involved, for the Bahá'í community in Iran is associated with neither. Rather, it is this: that should its progressive vision of a just society come to pass, their high position and many privileges assumed in Iranian society will be jeopardized.

Daniel B. Lord was Of Counsel with the law firm of Tindall Bennett & Shoup, as well as an assistant public defender and public advocate. He is a member of the International Law Section.

In this third part of the series, I will attempt to explain why the Bahá'ís are being singled out by the Iranian authorities for such a relentless campaign of persecution.

Inciting hatred and violence and depriving a population of basic human rights are not part and parcel to the system.

Mediator

Steven T. O'Hara

www.oharatax.lawyer

Estates • Trusts • Business • Tax

907.223.5911

steve@oharatax.lawyer



Lawyering Coach

Steven T. O'Hara

www.oharatax.lawyer

IT • Overhead • Values

907.223.5911

steve@oharatax.lawyer





LAWPAY IS FIVE STAR!



In our firm, it's actually fun to do our billings and get paid. I send our bills out first thing in the morning and more than half are paid by lunchtime.

LawPay makes my day!

– Cheryl Ischy, Legal Administrator
Austin, Texas

Trusted by more than **35,000** firms and
Rated '5-Star' on Trustpilot

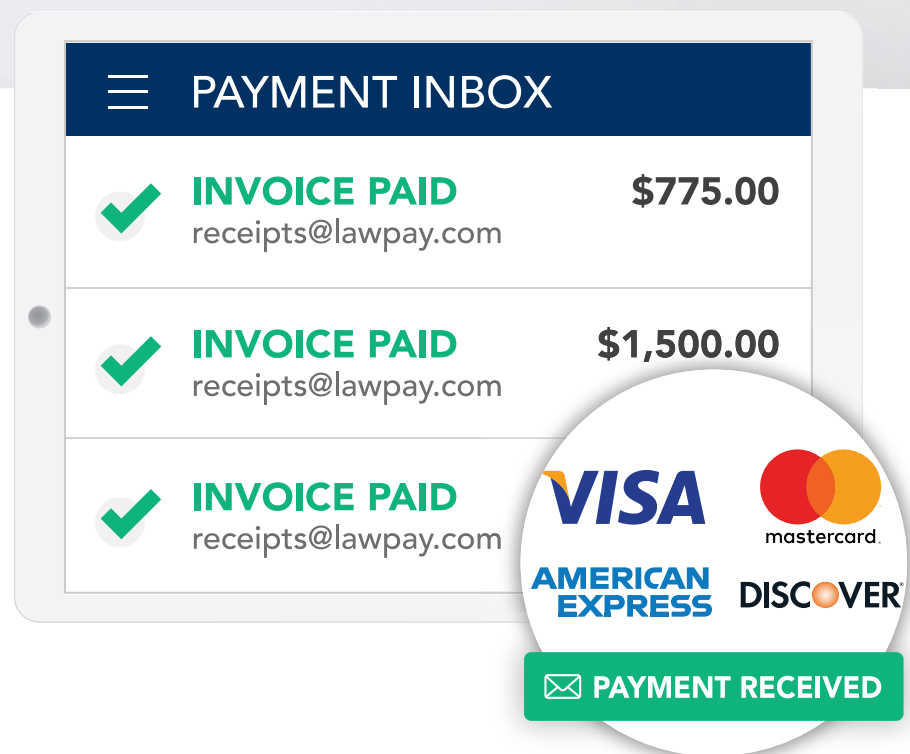
LAWPAY[®]

AN AFFINIPAY SOLUTION

THE #1 PAYMENT SOLUTION FOR LAW FIRMS

Getting paid should be the easiest part of your job, and with LawPay, it is! However you run your firm, LawPay's flexible, easy-to-use system can work for you. Designed specifically for the legal industry, your earned/unearned fees are properly separated and your IOLTA is always protected against third-party debiting. Give your firm, and your clients, the benefit of easy online payments with LawPay.

866-572-5611 or visit lawpay.com/alaskabar



LawPay is proud to be a vetted and approved Member Benefit of the Alaska Bar Association.



Special offer for bar members.
Call for details

In Memoriam

Judge William Fuld

Judge William Hallam Fuld died Nov. 13, 2018, in Anchorage after a long battle against pancreatic cancer.

Fuld was born to Ethel and Moritz Fuld Sept. 2, 1938, in New York City. He attended the Bronx High School of Science and Columbia College, and went on to Columbia Law School. He drove across the U.S. in 1963 seeking adventure in the new State of Alaska. After clerking in Fairbanks for Judge Jay Rabinowitz, Fuld decided to stay in Alaska, falling in love with the state and its people.

Hel joined a law firm in Anchorage, which eventually became variations on the firm of Kay, Christie, Fuld & Saville. He spoke often of memorable times with colleagues and clients. In 1983, Bill became a Judge. He fully retired only a few months ago to focus on his battle with cancer after originally partially retiring in 1999.

Bill was known around town as “Judge Fuld” or “Coach Fuld” from his days coaching youth soccer. He was active, adventurous, tough and fearless. He enjoyed biking, hiking and long ski runs at Alyeska. He rode his bike nearly every day down the Knowles Coastal Trail and enjoyed long walks with his wife, often accompanied by a family dog. He loved travel, both in and around Alaska, especially as a judge which allowed him to see and serve the various small towns and Bush villages throughout the State. Of all, his greatest joy in life was adventure with family and friends, whether driving the Alaska Highway (at least 20 times) with one of his children, grabbing happy hour after a long ski run at the Sitzmark, or traveling with his wife to Hawaii, Europe, Australia or New Zealand. Bill is survived by his wife of 39 years Gerri Pryme; his son, Ethan Fuld of Stuttgart, Germany; his daughter, Ilana (Dan) Kerschbaum of Anchorage; his youngest son, Billy Fuld (Alaina) of Seattle; and four grandsons, Matthias, Jonas, Leo and Roman. He also leaves a cousin, Eric (Mafalda) Neikrug of Sarasota, New York, who grew up with Bill.

All who encountered Bill will remember his pragmatism, humor, patience, love of his family and nature. Many will recall bumping into Bill around town, or in Girdwood, usually with a bright green neck warmer atop his head and a warm gentle smile for all. He was a true Alaskan, who died in the land he loved, after a fulfilling career in the law.

A celebration of life will be held on June 15, 2019 at 2601 Marston Drive in Anchorage. Please email whpfwashington@gmail.com to RSVP and for further details regarding the June 15 celebration of life.



Judge William Hallam Fuld

Judge James A. Hanson

Judge James A. Hanson, retired from the Alaska Superior Court, died Dec. 21, 2018, in Phoenix, Ariz., from complications after a heart procedure.

The Judge was born in 1934, in Northwood, N.D., the oldest child of Arnold and Jennie Hanson, big brother to Carolyn (Gadberry), Jeanette (Rau) and Ruth (Stefonowicz). A 1952 graduate of Fargo Central High School, he joined the Navy, serving in Florida and South Carolina during the Korean conflict

Following his Naval service, he returned to school at the University of North Dakota in Grand Forks, where he was a member of Sigma Alpha Epsilon. He graduated from law school in 1962, and arrived in Alaska that same year, working as a law clerk in Juneau before being appointed to the District Court in Anchorage in 1963. Appointed to the Superior Court in Kenai in 1970, he raised his family there with his wife, Mary, and was a widely respected and active community member.

He was instrumental in developing the youth hockey program on the Kenai Peninsula, and coached youth hockey and Little League. Hanson was a skilled pilot and shared many adventures with his family and friends. He was a member of the United Methodist Church in Kenai, where he sang in the choir.

He retired in 1986, but continued to use his legal expertise in private dispute resolution. He and Mary moved to Anchorage in 1990, where he continued his business, and they became snowbirds to Payson, Ariz., exchanging winter for sunshine. In Arizona, he was an ardent trap and skeet shooter with the Birdbusters of Payson.

In 2005, the couple left Alaska and moved to Glide, Ore., where he realized a life-long dream of owning a small ranch, then to Roseburg, Ore., in 2018. Jim was a tough but compassionate man who offered advice based on his convictions and was a counselor to many.

He was preceded in death by his oldest daughter, Charli; and his sister, Jeanette. He is survived by his wife, Mary; his sons, Robert Hanson and Jake Glotfelty (Beth); and his daughters, Laura Irby (Sherman), Greta Horn (Casey) and Heidi Conway (Patrick); 12 grandchildren; and his life-long friend, Bruce Levenson (Kay).



Judge James Hanson

Tim MacMillan

Four years after he was diagnosed with pancreatic cancer, Timothy Bernard MacMillan died at his Anchorage home Jan. 3, 2019, in the early hours of his 74th birthday.

Born in New Delhi, India, in 1945, to Mary (Andersen) MacMillan, an Anglo-Indian of British descent, and John MacMillan, a U.S. soldier serving in World War II Tim immigrated with his mother to the United States at the age of 2.

He graduated from Carnegie Institute of Technology with a Bachelor of Science in mathematics, followed by a Juris Doctor degree from the University of Pittsburgh. He spent the early years of his career practicing law in Arkansas, and then accepted a job setting up the Alaska Legal Service Office in Kotzebue, where he met his wife of 39 years, Linda (Harris) MacMillan.

Tim and Linda served as volunteers both in the Peace Corps in Honduras, then in Paraguay for Habitat for Humanity. In Anchorage, they raised their only daughter together while Tim worked as a worker's compensation attorney.

Tim was known as deeply ethical, an intellectual and challenging conversationalist, a courageous adventurer and a dedicated father.

Tim's life was to be honored by his closest friends and family in a private ceremony. In lieu of flowers, please make a donation in his name to the Nordic Skiing Association of Anchorage or Project for the People of Paraguay.



Timothy MacMillan

Dorothy Kameroff

Retired Magistrate Dorothy Kameroff from Emmonak died Dec. 12, 2018, at the Bethel Hospital. Dorothy was an important figure in the court system's history of rural justice delivery, and in 2013, we dedicated a courtroom in the Emmonak courthouse in her honor.

Dorothy Kameroff served as the sole judicial officer for Emmonak from April 1970 through August 1972, and from 1973 to 1998. In addition to Emmonak, Dorothy served the communities of Alakanuk, Kotlik and Nunam Iqua. She was the face of the Alaska Court System in Emmonak, and through her tireless and intrepid efforts she helped forge a path for justice that is followed to this day. Her dedication to the people of Western Alaska and her compassion and concern for those who appeared before her earned her the lasting respect and trust of the communities she served. For her many contributions to rural justice, the Alaska Supreme Court extended its deep appreciation, and dedicated a courtroom in Emmonak in her honor.



Dorothy Kameroff

Barton J. Wachsteter

Barton J. Wachsteter, 49, died Jan. 18, 2019, in Anchorage.

He was born in Jacksonville, FL, Oct. 18, 1969, to John and Lynda Wachsteter.

Wachsteter was a graduate of Millburn (NJ) High School, Vanderbilt University and received his law degree from the Northwestern School of Law of Lewis and Clark College in Portland, OR.

He worked as a lawyer in Anchorage focusing on construction litigation however his true passion was his family and love of outdoor activities. An avid fly fisherman, Bart would take full advantage of the bountiful fishing Alaska had to offer. He loved riding his motorcycle in the summertime over the open mountain passes of the Chugach Range. A lover of dogs, his chocolate lab Nush was always by his side. Bart was a great friend to those who knew him, his sharp wit and dry sense of humor made him a pleasure to be around. He cherished and adored his three children, Max, Ella, and Evan.

He is also survived by his parents John and Lynda and his brother Greg.

Services were Jan. 25 at Bernheim-Apter-Kreitzman Suburban Funeral Chapel in Livingston, NJ.

Contributions may be made to:

The Bart Wachsteter Memorial Fund

JSDD of MetroWest, Inc.

270 Pleasant Valley Way

West Orange, NJ 07052

(973) 272-7148

Jan Rutherfordale

Jan Rutherfordale, former Alaska assistant attorney general who lived and worked in Juneau, died Feb. 23, 2019, while finishing a charity snowshoe race.

Jan graduated from the University of California Hastings College of the Law in 1982 and moved to Juneau to clerk for then-Justice Allan Compton. Jan went to work at the state Public Defender office in Juneau after her clerkship, and later joined the AG's Office in 1992.

Jan worked in the Child Protection Section for more than 20 years, including as the deputy supervising attorney of the section, and served as a member of the Children's Justice Act Task Force. She retired from the AG's Office in the summer of 2013.

Jan was an active, vibrant person who was universally well-liked and highly respected by her colleagues in the Bar, particularly those in the Juneau office and in the Child Protection Section. In Nancy Gordon's words, "she was a sweetheart."

Colleagues said Jan was devoted to public service both during her career at the department and in retirement, volunteering for nonprofits and doing pro bono work. The Juneau Bar Association will have a remembrance ceremony in the Dimond Courthouse at a future time to be determined.



Jan Rutherfordale

Small-time gold dredging creates a legal maze in Alaska

By Adam W. Cook

Nome has been the epicenter of gold mining in Alaska since the Alaska Gold Rush blasted off in 1898. Prospectors and miners have been finding gold deposits in the hills and creek beds around Nome for more than a century. They have also been finding placer gold (i.e., unrefined gold) in the seabed of Norton Sound, an inlet of the Bering Sea.

Several waterways drain into Norton Sound off the Seward Peninsula, depositing fine quantities of gold into the shallow waters near the coast. For decades people have been dredging up sediment from the seabed, sluicing it, and collecting gold and other minerals. They dredge frantically during the four months of the year that low ice levels permit such work. This relatively obscure method of mineral extraction was pushed into the spotlight in 2012, when the Discovery Channel began airing the reality TV show *Bering Sea Gold*. The show follows various groups of colorful characters dredging the waters near Nome.

Suction dredging is tricky business. The placer gold does not appear in veins on the seabed, the way it does in rock formations on dry land. Some sediments are rich with “pay dirt,” but it is difficult to map profitable areas, and tidal forces or other geological activity might alter a rich location. The work itself is also very dangerous. Suction dredging often requires the work of a suited diver, who operates an airlift on the seabed, sucking sediment up to a boat and into a mechanical sluice. In the meantime, the waters of the Norton Sound are icy cold, and visibility underwater near the seabed is almost nil. And there are no guarantees. For unlucky dredgers, weeks of dredging might result in barely any gold at all.

Regulatory Control

Gold dredging in Alaska is also legally complicated. Like any other form of mining, dredging is heavily regulated by the Alaska Department of Natural Resources and the U.S. Department of Interior. Norton Sound is a protected salmon fishery. Starting in 1993, the U.S. Army Corps of Engineers and the Environmental Protection Agency implemented regulations on suction dredging in order to preserve the seabed habitat. A person with the daring and determination to plunge into the icy waters in search of gold must first plunge into an array of restrictions on dredging dates and permissible equipment and practices.

Also, unlike fishing, gold dredging is not a simple matter of heading out in a boat and then choosing a location that feels right. DNR

does allow some “recreational mining” in public areas off the Nome beach. But these areas are limited to small-scale operations, in seabeds with limited gold deposits. Dredgers who actually wish to make their fortune with suction dredging have to dredge in one of a limited number of claims, either “staked” by other dredgers, secured by patent, or leased out by the State of Alaska. Dredgers fortunate enough to hold an offshore claim or lease can sublease it to another party, or grant another dredger permission to dredge the claim, in exchange for royalties.

Suction dredging is thus a risky, legally complex, and very competitive way of making money. And, it has only gotten worse in the last 10 years. Since 2000, the price of gold has skyrocketed, from \$273 per ounce to about \$1,250 per ounce today (placer gold is worth slightly less than pure gold). These price movements sent droves of profit-seekers into previously-unpopular dredging locations. The runaway success of *Bering Sea Gold* (now in its ninth season) added fuel to the fire. In 2015, the Nome harbor master reported more than 100 gold dredges operating out of the Harbor.

Status of Operators

Once dredging near Nome started to take off, the State of Alaska moved to take advantage of the demand. In September 2011, DNR held its first offshore mineral lease auction in almost 12 years. DNR successfully auctioned 84 leases, constituting more than 24,000 acres off the coast of Nome. The State of Alaska made about \$9.3 million from the auction.

The outcry auction drew strong interest from bidders because there are a limited number of available parcels offshore for dredging — and the majority of them are currently held by large commercial operators. Anyone who does not hold a claim or mineral lease must purchase “operator authorization” from a claimholder in order to perform commercial operations. This situation has created its own miniature industry, as lessees and claimholders sign deals with small operators allowing them on the claims.

Around the same time that *Bering Sea Gold* peaked in popularity, two developments sent shockwaves through the dredging community. The first development was a decision by DNR to update its antiquated recordkeeping and approvals process. Prior to 2014, claimholders could grant operator authorization to anyone with a boat, with little govern-

ment oversight. But at the start of the 2014 dredging season the DNR modified the mandatory Application for Permit to Mine in Alaska (“APMA”) to include specific information about third-party operators. The APMA Operator Authorization Supplement required detailed information about the plan of operations, with the plan now a part of accessible public records.

The era of “Wild West” operators was over. The claimholders and lessees giving operator authorization were now assuring the various regulatory bodies that the dredging operations would be legal, safe and environmentally responsible. Many claimholders and lessees started insisting on bonding or insurance to provide protection in the event of an accident or violation of the law. The crude, simple watercraft used in the past — sometimes consisting of just an air pump on pontoons — were under enhanced

scrutiny.

The second development was the death of a diver working a dredge operation near Nome on Aug. 12, 2014. The death prompted the U.S. Coast Guard to classify gold dredges as “commercial vessels,” rather than recreational watercraft. The dredges now must maintain various safety gear, undergo dockside inspection, and get credentialed before sailing. The new regulations meant

additional expenses for dredge operators.

The Future

Today, gold dredging off Nome is more popular than ever. But the industry is marked by three ongoing trends: (1) consolidation of leases and claims into the hands of a few large commercial operators; (2) the increasing price of gold; and (3) increasing government oversight. These trends work to make dredging spots more rare, the payoff for success more lucrative, and the cost of compliance more burdensome. All of this works in the favor of very large operators — one company in particular holds more than half of the offshore leases issued by the State of Alaska in 2011.

Meanwhile, the smaller operators are feeling the squeeze. Large corporations can pay the cost of insurance and legal headaches with much greater ease than a twoman operation. Legal battles can and do erupt over the right to dredge, and large corporations have an easier time shouldering the cost of these legal battles. Alaskans have always grumbled that increasing regulation has yanked away the livelihoods of the “little guys,” whether the activity is hunting, fishing or mineral extraction. It remains to be seen if Nome’s small operators can weather the trend.

Adam W. Cook is a shareholder at Birch Horton Bittner & Cherot in Anchorage. He works primarily in construction law and contract litigation, with some work in mining and other land issues.

The placer gold does not appear in veins on the seabed, the way it does in rock formations on dry land. Some sediments are rich with “pay dirt,” but it is difficult to map profitable areas, and tidal forces or other geological activity might alter a rich location.



Best in Every Case.
NORTHERN LIGHTS
REALTIME & REPORTING

Our experienced and highly skilled reporters utilize the latest technology to provide the ultimate in instant transcription from voice to text, along with a wealth of additional reporting and access services, including:

- + Depositions
- + Arbitrations
- + Court Trials
- + Meetings
- + Voice to Text...Instantly!
- + Digital Video
- + Webcasting
- + Captioning
- + LiveNote
- + C.A.R.T.

Sandra M. Mierop, President + Certified Realtime Reporter
545 E. 12th Ave. + Anchorage, AK 99501 + info@nlrr.com
Tel 907.337.2221 + Fax 907.337.2231 + WWW.NLRR.COM

Want to purchase mineral and other oil/gas interests

Send details to:

P.O. Box 13557, Denver, CO 80201

TRIAL PRACTICE: A Wee Treatise

Know your facts, know your witnesses, know your law

EDITOR'S NOTE: *Jim Gilmore had a long-time trial practice in Alaska that began in 1967. Since his retirement he has written what he calls a "wee treatise" on trial practice. In this issue we are publishing the first of several portions of that treatise which offers Jim's advice taken from his years at trial*

By Jim Gilmore

First in a series.

Preface

Experience and logic lead you to the point of seeing to the heart of the case and saying, "there, that's what matters. That's where we'll stand, and we'll make our fight right here." That ability is very important. Part of that is decisiveness and intellectual curiosity. A trial lawyer is a good life for the life of the mind.

— Jim Brosnahan

... investigation is needed to find the right point of attack

— Ludwig Wittgenstein

It is a central premise of this treatise that each case has one key point that, once found, drives every part of your case from opening statement through closing. That point is not found by sitting in your armchair on a lazy Saturday afternoon, musing about your case. You find that point by investigation by you, not an investigator, reading every document and talking to every witness.

It was said by one of Abraham Lincoln's contemporaries that:

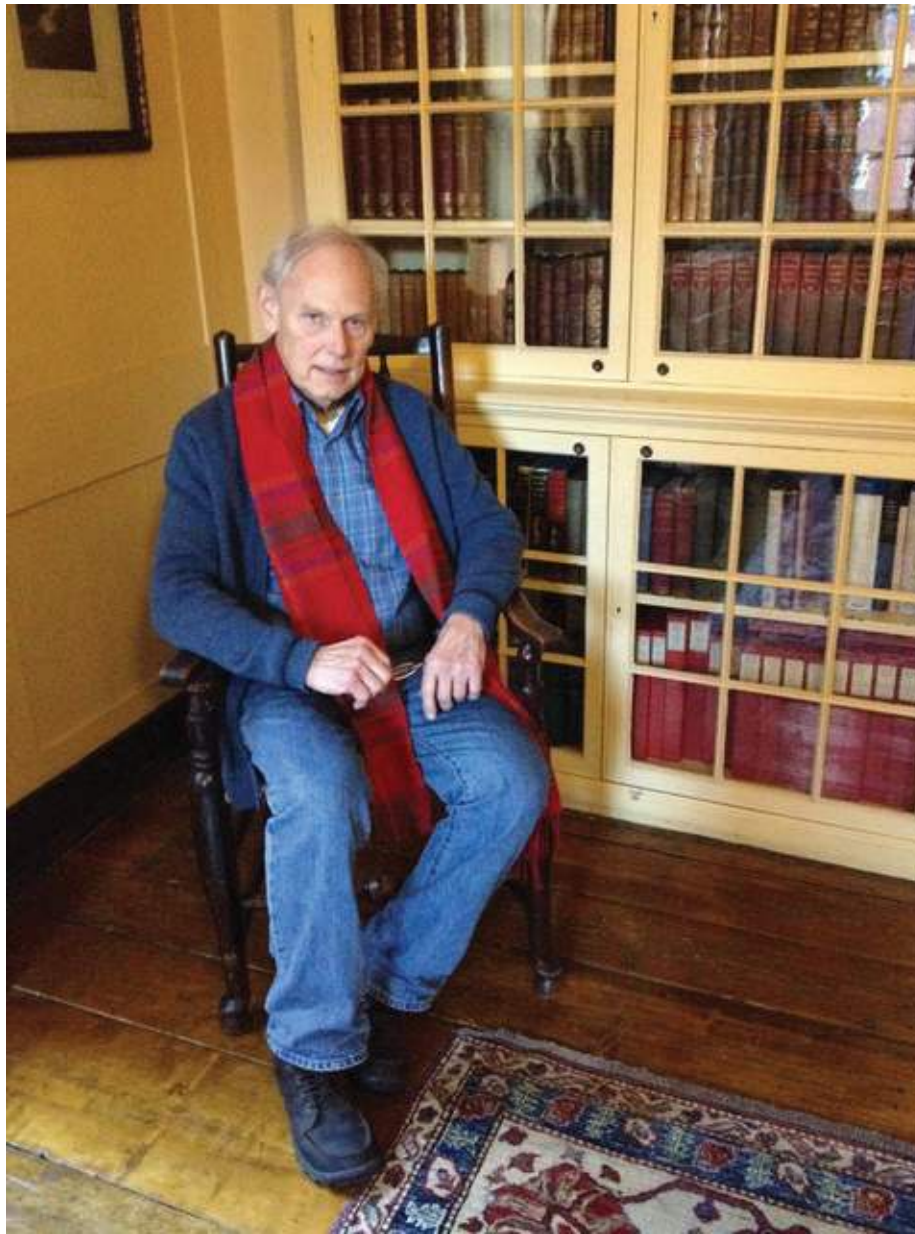
Mr. Lincoln had a genius for seeing real point of the case at once, and aiming steadily at it from the beginning to the end. The issue in most cases lies in a very narrow compass, and the really great lawyer disregards everything not directly tending to that issue. Mr. Lincoln saw the kernel of every case from the outset, never lost sight of it, and never let it escape the jury.

Introduction

What follows are my personal thoughts regarding trial practice. They may not work for everybody. I have tried to reduce them to a minimum. Reference is made to the personal injury case of Mrs. Commodore. Mrs. Commodore fractured her ankle when she stepped into a hole in a tree well that the City of Pasadena allegedly had a duty to keep filled with mulch.

The facts

Witnesses are easily the most important part of the case. Yet they are the most neglected by lawyers.



Jim Gilmore relaxes at a friend's place in London a few years ago.

Unlike answers to interrogatories, requests for production, oppositions to motions for summary judgment, and intervening trials, there are no hard deadlines requiring witness interviews. The task of interviewing is delayed. It becomes a chore. The malaise of procrastination sets in.

But you have to force yourself to do it. It's the most valuable thing you can do. Think of Telemachus in the third book of the Odyssey. He says to Athena, "How can I ask King Nestor if he knows whether my father is dead or alive? I'm just a kid. I don't know how to talk to a King." Athena responds, "Just go up and start — the Gods will give you the words to say."

Go to the scene of the crime and ask questions. Get out of the office. Knock on the front door of the witness. Words will come to you. Then you will have talked to the witness. You will have looked at the witness, face to face. New things will occur to you on your drive back to the office. Even if the witness does not have anything good to say about your cli-

ent, you will have profited from the interview. You will know what you can and cannot do with the witness. You will know what not to ask the witness at trial. "The arrow we see coming is already half spent."

Face to face is always best, although time consuming, but if you can't talk to the witness face to face, pick up the telephone and call the witness. Be a "virtuoso of the telephone." Think of it as a musical instrument that you have to practice to get good at. Even if you are not looking at the witness face to face, you will pick up valuable information — the tone of voice, the pauses, the asides tossed off during the conversation. In criminal and in civil cases, try to call all the police officers, even though you have their written reports. Of course the witness may not talk to you on the phone, and may slam the door in your face — but you will be stronger because of the experience.

Because you represent the bad guy, the witness may give you the cold shoulder, but if you have been appointed by the court to represent Mr. X, you may encounter less resistance if your opening line is, "I have been appointed by the court to represent Mr. X." This makes it sound like you are a member of the team of the good guys — that you have no choice — that you have to represent this scumbag, and that the witness really should talk to you. The witness may even think he or she will get into trouble if they refuse to talk to you.

The law

There are only two parts to a case: the facts and the law. The law

is where you look for your defense, so look at the law early on. Read the relevant statute. Read it slowly. Take your time. Read the statutory definitions of the significant terms. Look up all the words you think are important in Black's Law Dictionary, and also in a standard dictionary like Webster's. Even those you think you already know (like "negligence"). Finish off your investigation of the words of the statute by looking up the etymology of each. (Partridge's Etymological Dictionary, *Origins*, is my favorite). This approach really doesn't take too long, maybe an hour, maybe two, but it's time well spent.

Next take a look at the jury instructions. Everybody says you should prepare your instructions early — a hard chore but very useful. A clear understanding of the law will guide all phases of your investigation, everything from what facts to look for in the documents to what questions you need to ask witnesses.

And always read the cases. Comparing and contrasting cases activates your brain and stimulates your imagination. The more you compare and contrast your case with other cases, the better able you are to determine the precise question raised by your case, and to make your answer to that question simple and compelling.

Opening statement

Opening statement is more important than final argument. The Great Spence says that if he hasn't already won the case during jury selection, he has surely won it after opening statement. True or not, a simple, compelling, opening statement has great value. It sets the tone and establishes the throughline for the rest of the case.

Start by identifying the issues in the case generally, then double down on the issue — the point of attack, which I set off with the phrase: "But the gut issue in this case is whether he (your client) intended to do it, whether it was his conscious objective (using the terms of the statutory definition of 'intent')." Finish your introductory remarks by boldly declaring: "In this case we will prove that his conscious objective was not to kill her — that it was an accident."

Then launch into the facts of the case with the phrase "we will prove." Do not use the phrase "The evidence will show," which is flabby and weak. "We will prove" is much more powerful and compelling. Don't worry that you may not be able to prove it — the jury verdict will not turn on whether you used the phrase "we expect the evidence to show" instead of "we will prove." And the jurors will like it that you stood in front of them "bold as a lion" and said you were going to "prove" it, instead of using the simpering and mealy-mouthed "the evidence will show."

Follow this with a negation of the state's case as stated by the prosecutor in his or her opening. Lead into this section of your opening with the phrase, "it may be argued" or "the prosecutor has argued" or it may be best to simply negate the points made by the prosecutor, as in "Fred did not go to the dance, he did not drink ten beers, he did not shoot

Continued on page 11

Know your facts, know your witnesses, know your law

Continued from page 10

Dale, it was Friday night for Christ's sake, Fred was at Bible study at the Baptist Church, where he is every Friday night."

Use the last section of opening to tell the jury a little bit about Fred. Lead into this section by referring to the previous two sections, and say: "Those are the facts of this case, but the evidence will show you (the one time I use that phrase) something else, the evidence will also tell you a little bit about Fred. He's a young guy 24-years old, he works at Safeway where he has worked since he was 14 — starting as a carryout boy. He has worked his way up to assistant manger. He lives at home with his mom. He sings in the choir down at the Baptist Church."

If you are going to have character witnesses, you might say, "people who have known Fred all

his life, day in, day out will tell you that he does not have a violent bone in his body, that he would never shoot anybody, especially not Dale, his best friend." Unfortunately, the Washington rule limits character testimony to general reputation in the community, so the prosecutor may object. If so, simply say, "Oh that's right, Your Honor, I'm so sorry." But the damage will have been done — the jury will have heard some details about Fred that will stick with them throughout the trial.

I'm always surprised how interested the jury is in background information about your client — more so than in the facts of the case, no matter how grisly and interesting the facts of the case may be. The jury perks up when you say "that's what the evidence will show (it's OK to use that phrase to summarize), but the evidence will also tell you a little bit about Fred." They want

to know who that guy sitting there is — what he's like outside of court day-in, day-out, so let them know right away that he's a good guy, that he's no threat to them if they acquit him.

At some point during your opening the prosecutor may whine, "But your honor, opening statement is not argument. Mr. Danger is arguing his case." And the judge may admonish you not to argue your case in opening. If that happens, revert to the phrase "we expect the evidence will show," a couple of times, and then drop that phrase out, go back

to "we will prove" and go on with your argument.

Wrap up your opening with some short statement, such as, "That's the case, listen closely to the evidence as the trial proceeds, and we're convinced that, after you've deliberated, you'll return a verdict of not guilty."

Jim Gilmore was admitted to the Alaska Bar Association in 1967 and had a long time trial practice in the state. He is now retired and lives in Washington.

NEXT: Direct examination

'Till death do us part, not to exceed maybe a year or two

Continued from page 1

probably not intended. But such a series was not prohibited, either. It was 1980. Independence was in the air. Only six months later the voters would approve creation of the Alaska Statehood Commission, "to consider and recommend appropriate changes in the relationship of the people of Alaska to the United States."

Alaska's closest approach to Beirne proposal has been creation of a separate rule governing property division for certain marriages of short duration. *Rose v. Rose* (Alaska 1988) ("in marriages of short duration, where there has been no significant commingling of assets..., the trial court may... treat the property division as an action

in the nature of rescission, aimed at placing the parties in, as closely as possible, the financial position they would have occupied had no marriage taken place.")

Mike Beirne died in 2012 at age 86. A physician with an active record of public service, he was best known for his efforts to put land into the hands of Alaskans. Given the content of his marriage bill, it is surprising to say, but Beirne was a Republican (!).

House Bill No. 678 was introduced on Feb. 5, 1980, in time for Valentine's Day. The bill was itself of limited duration. It saw the light of exactly one legislative day, that of its introduction.

Mark Andrews is retired and living in Fairbanks. He is married to Cheryl Keepers, permanently.

Ptarmigan, raven square off in a legislative smackdown

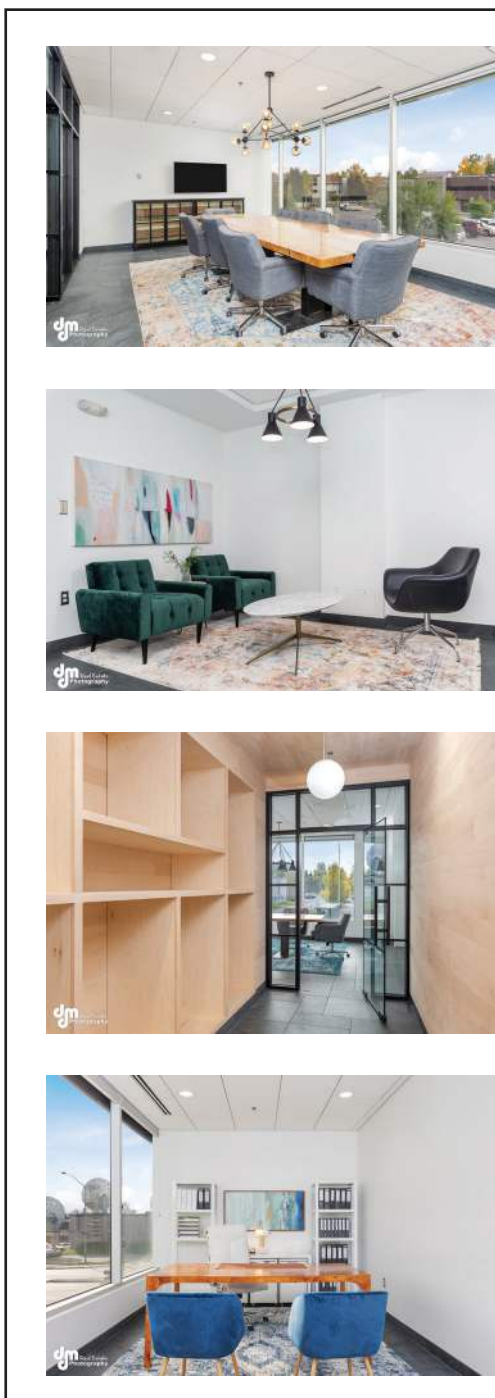
Continued from page 1

background. Rather than chase after the main flock, hunters target the ones that remained. The rest survive long enough to breed.

If the ptarmigan haters ever talked to the now grownup students who voted for the ptarmigan, they might learn that spring ptarmigan hunting occurred about the time the winter's supply of dry fish cache

was almost gone and the arrival of waterfowl from the Lower 48 was weeks away. They and their families must have been grateful to birds that would give themselves so freely so the hunters' families could eat during famine time.

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



SHARED MODERN LAW SUITES FOR LEASE

- 4 Private Offices*
- 2 Large Conference Rooms
- Client Waiting Area
- Internet Included
- IT Leasing Options Available

2665 E Tudor Rd Suite 202

*Price is based on number of offices leased.

Call for details today! 702-292-2317

Income tax alert: family entities can face an increase

By Steven T. O'Hara

In estate planning, limited partnerships and limited liability companies have been popular for decades. These entities are vehicles through which clients pass on asset-management skills as well as attain other nontax goals.

Unfortunately, family limited partnerships and family LLCs can have a significant cost in the form of increased income taxes. This cost is particularly unfortunate in estates that are not subject to estate tax.

Consider a client with three adult children. All reside in Alaska. The client has never made a taxable gift, and suppose for purposes of illustration that her only asset is a share of stock. Although she purchased the stock many years ago for \$100,000, it is now worth \$5,000,000. The client forms an LLC and contributes the \$5,000,000 of stock to the LLC.

Initially the client is the only member of the LLC. As such, she does not recognize gain when she contributes the stock to the LLC. Cf. IRC Sec. 721(b). So long as the client is the sole member of the LLC, the LLC is ignored for federal income tax purposes. In tax jargon, the LLC is disregarded as an entity separate from its owner. Treas. Reg. Sec. 301.7701-2(a) and 301.7701-3(b)(1)(ii).

Later, when the client brings in her children as members, the LLC is then, absent an election, treated as a partnership for federal income tax purposes. Treas. Reg. Sec. 301.7701-3(a), (b)(1)(i) and (f)(2); cf. IRC Sec. 721(b) and Treas. Reg. Sec. 1.3511(c)(5).

Over the balance of her lifetime, the client gives her children interests in the LLC totaling 13.3% per child. The value of the client's gifts each year are less than \$15,000 per child, and thus the client takes the position that the gifts are not taxable by reason of the annual gift tax exclusion. IRC Sec. 2503(b). The client is careful to file an annual gift tax return with adequate disclosure in order to preclude the Internal Revenue Service from raising any valuation or other issue in later years. Treas. Reg. Sec. 25.2504-2(b) and 301.6501(c)-1(f)(2).

At all points in time the LLC's only asset is the stock, worth \$5,000,000. The client makes no other gifts.

Suppose for purposes of illustration that at the time of the client's death, her only asset is the remaining 60% interest in the LLC. Under her Will or Revocable Living Trust, the client gives this remaining property to her children in equal shares. So now each child owns one-third of the LLC. The LLC's only asset is the stock, which is still worth \$5,000,000.

Also suppose that at the client's death the federal tax system is the same as is in effect for 2019. In other words, suppose over \$5,000,000 may



The upshot is that ownership of assets through family LLCs and partnerships could increase income taxes down the road.

pass at death free of federal estate tax. IRC Sec. 2010; cf. IRC Sec. 2001.

If the client had not formed the LLC and instead had continued to own the stock until her death, her children's tax basis in the stock would have been stepped up to \$5,000,000 based on tax law applicable in 2019. IRC Sec. 1014. So the children could then have sold the stock for as much as \$5,000,000 at absolutely no tax cost.

By contrast, with the LLC owning the stock and with the gifts of the LLC interests, the children have tax basis substantially less than \$5,000,000. In other words, if the stock is sold for \$5,000,000, there will be taxes to pay.

Specifically, under tax law applicable in 2019 the tax analysis is as follows:

First: The client's basis in the stock is her cost of \$100,000. IRC Sec. 1012. When she contributes the stock to the LLC in return for 100% of the LLC interests, the LLC takes a carryover basis of \$100,000 in the stock. Cf. IRC Sec. 723. The client receives a basis of \$100,000 in her LLC interests. Cf. IRC Sec. 722. Although the LLC is initially disregarded as an entity separate from its sole owner, the LLC becomes a partnership for federal income tax purposes on the day the LLC has two or more members. Treas. Reg. Sec. 301.7701-2(c)(1).

Second: Over the years the client gives 40% of the LLC interests to her children. The client does so without ever making a taxable gift. The children receive a carryover basis of \$40,000 in those interests. IRC Sec. 1015.

Third: At the time of her death, the client owns 60% of the LLC interests. Although the LLC owns stock worth \$5,000,000, the value of 60% of the LLC interests is less than 60% of \$5,000,000 (or \$3,000,000). The valuation expert assisting with the client's estate believes that a discount of at least 10% is applicable in this case (i.e., 60% times \$5,000,000 equals \$3,000,000; 90% times \$3,000,000 equals \$2,700,000). In any event, the valuation expert believes the value of 60% of the LLC interests was roughly \$2,700,000 on the date of the client's death. Cf. IRC Sec. 2032. Thus the children receive a stepped-up basis of \$2,700,000 in the LLC interests they inherit from their mother. IRC Sec. 1014.

Fourth: The children now own 100% of the LLC and their basis in those interests is \$2,740,000 — i.e., \$40,000 carryover basis plus \$2,700,000 stepped-up basis.

Fifth: By reason of the client's death, the LLC is allowed to elect to step-up 60% of its basis in the stock to \$2,700,000. IRC Sec. 743 and 754. So now the LLC's basis in the stock is \$2,740,000, which is the same as the children's basis in their LLC interests (i.e., \$40,000 carryover basis plus \$2,700,000 stepped-up basis).

Sixth: If the LLC sells the stock for \$5,000,000, it will have taxable gain of \$2,260,000 (i.e., \$5,000,000 sale proceeds minus \$2,740,000 basis equals \$2,260,000). Assuming an applicable capital gain rate of 20% and with the add-on 3.8% net investment income tax (also known as the Medicare surtax), the LLC members would owe \$537,880 in federal income taxes. IRC Sec. 1(h), 701, and 1411.

Again, if the client had not formed the LLC and had owned the stock until her death, her children's basis in the stock would have been stepped-up to \$5,000,000 under the law applicable in 2019. So the children could have then sold the stock for as much as \$5,000,000 without incurring any tax — a savings of \$537,880 under the facts of this case.

The upshot is that ownership of assets through family LLCs and partnerships could increase income taxes down the road. This possibility needs to be figured into the analysis of whether the advantages of this form of ownership outweigh the disadvantages.

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

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

Copyright 2019 by Steven T. O'Hara. All rights reserved.

PAUL COSSMAN

Freelance "Contract" Lawyer

Over 30 years of trial and appellate experience in all types of cases, from personal injury to commercial, from intake through appeal, for both plaintiffs and defendants.

Available for all types of work including:

- Research/Writing
- Motions
- Discovery
- Depositions
- Trial Assistance
- Case Analysis/Planning
- Arbitration panels
- Appeals

(907) 602-7984

paulcossman@hotmail.com

*Based in Anchorage, but in-state/out-of-state travel welcome.
Resume, recommendations, and writing samples upon request.*

NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,
dated 1/8/2019

MICHAEL J. WALSH
Member No. 0307037
Scottsdale, AZ

is transferred to
disability inactive status
effective January 10, 2019.

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

TALES FROM THE INTERIOR

Who could pass up a bargain like a limousine for \$3,000?

By William R. Satterberg Jr.

Idle hands are the devil's plaything. I have found over the years that, if I have time on my hands, I become involved in creative mischief. It is a character defect which has been with me since my earliest days. My parents often called me "Damn it Billy." I deserved the moniker. It was not until I was 21 before I learned that my name was really Bill.

In late 2017, I once again had spare time. Two good friends of mine, Tom Carter and Craig Campeau, and I were discussing the various options available. Craig, a mischief maker, himself, announced that he had an opportunity to purchase a used 28-foot Cadillac stretch limousine. To us, the price appeared reasonable, although our perception may have been clouded by alcohol. True, the limo could have mechanical issues also, but those would certainly be minor. After all, \$3,000 for a 1998 stretch Caddy limo was a steal.

Tom declared that he was in on the deal, so Craig and I followed, not to be shamed. We agreed to buy the limo. Besides a great price, there were a lot of advantages to owning one of the only stretch limos in Fairbanks. We would be the talk of the town.

When the effects of the previous evening's partying had worn off, I realized that, perhaps, we had not necessarily made the wisest decision. On the other hand, because the purchase price would split three ways, the downside risk was not significant. "A deal's a deal" as my contractor clients often say.

Soon, an issue was where to park our prized purchase. A stretch limo would not fit in an ordinary garage. Deep winter was fast approaching. Snow was already on the ground. The rig had slick summer tires on it. We were loathe to leave it outside for the winter parked in an abandoned RV park. Too many undesirable elements frequented the business, next door, namely Craig's snowmachine dealership. In the end, I was outvoted two-to-one. The limo would remain wintered in my home carport. The vehicle went nowhere until spring.

The spring of 2018 was a different matter. It was now time to put the limo to its long awaited use. During our regular company meetings, Tom, Craig and I discussed our business plan. We formed a business entity, "Sam Charlie Charters." Sam Charlie Charters was licensed with the State of Alaska. It was a legally recognized limited liability company. The three members were myself, Craig, and Tom. Tom would be the treasurer. After all, Craig and I had both already proven that we were not fiscally responsible with money when we bought the limo. Tom had been the voice of reason, even if he was first to announce the purchase. Craig was secretary. I was president. I was honored to have such an auspicious position, having never even been elected to elementary school student council.

We had a full mechanical analysis done on the vehicle. In retrospect, it would have been much more advisable to have the inspection before

purchase. Our qualified mechanic assured us that he would conduct a license plate to license plate review and let us know of any problems. And problems there were. The batteries were dead. The windshield washers were inoperative. One electric window did not even have parts installed. The soundproof window between the driver and the back party compartment did not work. The dual electric antennas were so full of S-curves that they could not extend or retract. There was a questionable leak in the exhaust system. The tires were bald. The electric trunk did not open on command and the transmission made funny noises.

Fortunately, the VHS system and cassette player systems worked. Retro. There was also a nice mahogany bar inside the passenger compartment. Moreover, the leather seats unexpectedly were stain free and still in remarkably good condition. Although the command control center claimed that there was a moon roof, Cadillac had apparently neglected to install one. This was a disappointment, since we all wanted to run around town looking like tank commanders with our heads popped out of the roof waving at our envious admirers. We would simply have to make due by hanging out of the side windows with wet tongues flapping in the wind like a gaggle of golden retrievers out for a family ride. To make the limo roadworthy, some of the work we did ourselves, although the mechanic did the heavy lifting. To do my part, I was eventually tasked with installing the batteries — arguably a simple task. Red to red. Black to black.

Primary repairs having been completed, one day we decided to do a shakedown tour around Fairbanks. We paraded around various locations and then eventually worked our way out to North Pole, eating Chinese food at the Pagoda restaurant owned by our good friend, Benny Lin.

Unknown to Benny, there was a nefarious purpose behind this trip. We also hoped to corner the growing Asian tourist market seeking to view the Aurora Borealis and wanting to make babies. Benny was a logical connection. Besides, the trip was deductible.

On our return to Fairbanks, our driver, Mike Beckley, started experimenting with switches. When Mike flipped the master control for the rear compartment, the limo promptly died on the side of the highway. When we opened the hood, it was clear that the front battery was smoking heavily. It was about to explode. Whoever had hooked up the front battery had reversed polarity, connecting positive to negative and negative to positive. Everybody blamed the lawyer. Fortunately, no serious damage was done, except to my ego.

Following additional regular



Once again, the limo was impressive, passing virtually every vehicle on the road.

company meetings at the local watering hole, we decided to adopt as the chauffeur's uniform a black and red checkered logger's shirt, orange Husqvarna suspenders, and a Yukon downriver hat which is essentially a blue hat with a white bow ribbon. The uniform for our driver was complete. Mike liked the outfit.

After even more company meetings, we voted to take a full-scale

shakedown trip from Fairbanks to Gakona, Alaska, to visit Mike Tinker and his attorney daughter, Aisha Tinker-Bray. Aisha works in Fairbanks in the Attorney General's Office as a tort litigator.

I was apprehensive about the



On the road, a pit stop at Black Rapids. Author is in the red shirt and that's his partner in Sam Charlie Charters Craig Campeau in green.

trip. Similar to having been thrown off of a horse once, it is often difficult to climb back on. My opinion was that the limo likely would not make it to Delta Junction and would probably burn up. Let alone to Gakona and back. My two other LLC members disagreed. Following an evening spent at Craig's cabin at Harding Lake, we left early the next morning for Gakona. It was our first big adventure. Once again, Mike was the driver, proudly wearing his chauffeur's garb. I was the right seat navigator. My job was to make sure Mike found his way to Gakona and did not hit too many chuckholes. Craig and Tom would act as customers in the passenger compartment of the vehicle, drinking beer and watching retro VHS tapes on the TV, primarily consisting of old pornography

and Worldwide Wrestling remakes, while rudely criticizing the driver and navigator and being generally obnoxious.

To my surprise, Mike, an experienced driver with more than one speeding ticket to his credit, actually did an excellent job of finding Gakona. Moreover, the vehicle was still running well. There was a slight problem when the theft alarm system fired when we stopped for gas, but that was easily resolved by turning the alarm off. Fortunately, it wasn't until a day after we returned back to Fairbanks before the transmission was blown while transporting a VIP. Four hours after leaving Harding Lake, we pulled into Tinker's fish camp on the Copper River. Craig, not to be outdone,

wore his rubber Donald Trump mask in order to try and trick our host into thinking that there were actually dignitaries in the vehicle. However, rather than being suitably impressed, Mike demanded in his characteristically loud voice for us to move the limousine off of his newly planted grass immediately. So much for host etiquette. As payback for bad karma, the grass washed away later that year in a summer flood.

Following a short visit at the camp, we left for Fairbanks. Once again, the limo was impressive, passing virtually every vehicle on the road. It was apparently a day off for the troopers. After another four hours of travel with only a couple of roadside stops to deal with the beer that had been extensively consumed in the passenger compartment, we arrived home. The limo was proudly

parked outside of my law office in order to impress that big fancy firm on the second floor of the Huntington Building across the street. That is until the transmission broke and it found a home at the mechanic's shop.

We have had numerous suggestions for the limo's use. One has been to charter trips to Chena Hot Springs where we can stuff scads of small tourists into the rig. We may farm ourselves out for high school proms and balls. The potential for extortion is evident. And then there is the local friend who owns a helicopter and wants us to pick up his girlfriends at the airport so he can impress them even more.

Whatever the task, there is also the home front to deal with. My wife, Brenda, has obviously a certain amount of concern with respect to my latest business shenanigan. Brenda has patiently seen many of my well conceived and not so well conceived ventures in the past fall flat on their face. But this venture will be different. We expect great success. We even plan to have a trailer hitch installed so we can tote various toys behind us to include barbecue grills, tents, lounge chairs and beer coolers. We plan to buy more limos. Still, in the end, I suspect this business, as well, could fade away too.

That said, if anyone is in the market for a 28-foot white Caddy stretch limo at a good price that only needs some minor transmission work, please contact me ASAP!

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

That said, if anyone is in the market for a 28-foot white Caddy stretch limo at a good price that only needs some minor transmission work, please contact me ASAP!

Anchorage Youth Court announces 2019 Gavel Games

By Matt Peterson and Noelle Fabiano

The Anchorage Youth Court invites lawyers, staff and families to its 2019 Gavel Games. This year is our 15th year.

Anchorage Youth Court is a juvenile justice system that trains and empowers students to serve as defense attorneys, prosecutors and judges in cases involving their peers. It gives students accountability, education, and the opportunity to have a positive influence on others' lives and provides the community with an effective and comprehensive alternative juvenile justice system.

Gavel Games is an annual trivia night and fund raiser for Anchorage Youth Court. It will be held:

Date: Saturday, March 23, 2019
Time: Doors open at 5:30 p.m.
Game begins promptly at 6:30 p.m.

Location: UAA Lucy Cuddy Hall
Gavel Games is an evening centered on a trivia game where 30 teams of supporters go head to head to test their trivia knowledge. The questions during the game are not legal questions. They are random, everyday trivia questions anyone can answer (think a cross between pub trivia and Jeopardy). During the event there is also dinner, a cash bar, a live and silent auction and a game of heads or tails.

Teams have two opportunities to win. They must have the highest score or most correct answers. Winners receive bragging rights for the year (and an awesome gavel trophy). The Anchorage Bar Association is the team to beat. Last year they took first place in the most correct answers category and have been in the top two for as long as we can remember.

By sponsoring a Gavel Games

team, law firms/businesses will have a direct and positive effect on Anchorage youth and the community as a whole. Thanks to BP's support, 100% of team sponsorships and money raised at the event will go

regardless of their career path. Youth in grades 7 through 12 interested in joining AYC take the introductory new member class. The class covers the basics of AYC and the judicial system. Upon completion of the

People can visit www.anchorageyouthcourt.org to purchase tickets or become a sponsor, or call AYC at 274-5986.

directly back to Anchorage Youth Court's juvenile diversion program.

Tickets are \$50 per person or \$200 for a four-member team. There are several levels of corporate sponsorships, ranging from \$500 to \$5,000, with additional benefits and recognition.

People can visit www.anchorageyouthcourt.org to purchase tickets or become a sponsor, or call AYC at 274-5986.

The Anchorage Youth Court mirrors the actual Alaska Bar Association in many ways. It provides education, training and real world experience which will be valuable throughout the students' futures, re-

class and passing the Youth Court bar exam, youth have the ability to volunteer their time in court, at community events and fundraisers.

There are additional educational classes throughout the year for members to expand their skills and knowledge of the judicial system. They start the learning process as a court bailiff to learn and observe court procedures. Subsequent years lead to experience as second chair then first chair trial lawyers both for prosecution and defense. Cases are decided by a three-judge pan-

Continued on page 15



Anchorage Youth Court members volunteer their time to help with the 2018 Gavel Games.



The Anchorage Bar Association took top honors in the "Most correct answers" category at the 2018 Gavel Games.

Bar People

Landye Bennett Blumstein LLP names new partner

The law firm of Landye Bennett Blumstein LLP has announced that **Elizabeth Saagulik Hensley** became a partner in the firm, effective Jan. 1, 2019. Saagulik is Inupiaq, a tribal citizen of the Native Village of Kotzebue, and is based at the firm's Anchorage office.



Elizabeth Saagulik Hensley

Saagulik focuses her law practice on representing Alaska businesses and Alaska Native tribes, organizations, and corporations in matters encompassing transactions, health care, employment, business organization, child welfare, hunting and fishing rights and responsibilities, co-management of natural resources, and state and federal policy.

Saagulik received her Bachelor of Arts degree from Dartmouth College in 2005 and her Juris Doctorate from the University of Arizona James E. Rogers College of Law in 2009. Her experience includes serving as general counsel to a regional tribal nonprofit organization, staff attorney and public policy liaison at an Alaska Native Claims Settlement Act regional corporation, Alaska legislative aide, and senior policy advisor for the Office of the Assistant Secretary for Indian Affairs, U.S. Department of the Interior. She provided international human rights law support to the United Nations Special Rapporteur on Rights of Indigenous Peoples through coursework and a legal fellowship.

Landye Bennett Blumstein is a regional firm with offices in Anchorage and Portland, and provides legal services to clients throughout the Pacific Northwest, including private and public corporations, Alaska Native corporations, tribes, tribal associations and housing authorities, municipalities, real estate developers, nonprofit organizations and individuals.

Former judge joins Hozubin, Moberly & Associates

Hozubin, Moberly, & Associates welcomes former **Judge Douglas H. Kossler** to the firm. Kossler's practice will focus on criminal defense, administrative law matters, appellate work, and insurance defense and coverage. Kossler's professional career includes working as an assistant public defender in its family law section from 1995 to 1996; as an associate attorney for Gilmore & Doherty from 1996 to 1997; and as an assistant attorney general and then as a supervising assistant attorney general for the appellate section of the state's Office of Special Prosecutions and Appeals from 1997 to 2013.

He was appointed a judge in 2013 and most recently served as a *Pro Tem* District Court Judge from 2016 to 2018. Kossler is a *magna cum laude* graduate of Temple University School of Law and received a Bachelor of Business Administration degree from the College of William & Mary. He first came to Alaska in 1994 to clerk for the Alaska Court of Appeals. His community service includes serving on the boards of both Challenge Alaska and Adam's Camp Alaska. He also serves on the Bar Association's Law-Related Education Committee and UAA's Paralegal Advisory Committee, and is a former instructor for Anchorage Youth Court.

DOWNTOWN OFFICE SPACE
"THE CENTRAL BUILDING"
308 G STREET, ANCHORAGE AK
WALKING DISTANCE TO ALL COURTHOUSES
SMALL OFFICE: 182 SQ FT \$355 PER MONTH
LARGE OFFICE: 246 SQ FT \$455 PER MONTH
INCLUDES JANITORIAL + ALL UTILITIES
CALL CLIF 907-229-3358
CLIF@ALASKATEXTILES.COM

Anchorage Youth Court announces 2019 Gavel Games

Continued from page 14

el consisting of more experienced Youth Court Bar members. Cases are selected for diversion from the

juvenile justice system, often first time offenders charged with crimes such as shoplifting. Court proceedings are held according to established court procedures, and a range

of sentences such as community service or training can be imposed. The handling of the proceedings by peers of the same age group is an effective means of applying the law to the situation, and recidivism or second offenses are low. The Youth Court has handled many hundreds of cases over the years which otherwise would have been processed through the state's juvenile justice system.

The Anchorage Youth Court has its own Bar Association. It has its own Ethics Committee.

Throughout the school year, and in the summer, there are many opportunities for training in court procedures, the law and its application to facts, public speaking and trial advocacy, and the workings of the justice system. The board of the Anchorage

Youth Court is comprised of both adult public members, and youth members selected by their peers in the Youth Bar Association.

The experience gained by the student volunteers is invaluable. One of the current youth Board members, Blaise Lochner, said "My time at Anchorage Youth Court has been positive and full of camaraderie...not only among youth members but among adults as well. I've been treated, not as a student or a child, but as an equal. This alone has been

incredible. We are judged by our character, rather than our age. Additionally, my fellow youth members have acted professionally to adults, youth members, and defendants alike. AYC also cultivates a positive environment of professionalism and responsibility. We are given plenty of opportunities to take on responsibility both in and outside of court: In court pertaining to taking up positions as a lawyer, clerk or bailiff, or a judge, in weekly cases; Outside of court, youth members are encour-

aged to participate in AYC bar meetings, as well as take part in annual elections. AYC has been, over all, an incredible and positive experience."

There are many opportunities for the legal community to provide support and training to

Youth Court, from serving as an adult advisor for court proceedings; legal, advocacy and ethics training; financial support; and by coming to Gavel Games for a fun evening of trivia.

Matt Peterson has practiced for nearly 40 years as a trial lawyer and mediator and serves on the Board of Anchorage Youth Court.

Noelle Fabiano has been with Anchorage Youth Court as their Events and Communications coordinator for the past six years.



Teams work together during the speed round of the game. Gavel Games consists of eight rounds of random everyday trivia — six rounds with eight questions each, a visual round and a speed round.

The Alaska Bar Association helps members save thousands of dollars on legal research every year.



Casemaker offers 50 state and Federal case law, statutes, regulations and more with free webinar training. Login to alaskabar.org and click the Casemaker logo to get started.



Substance Abuse Help

We will

- Provide advice and support;
- Discuss treatment options, if appropriate; and
- Protect the confidentiality of your communications.

In fact, you need not even identify yourself when you call. Contact any member of the Lawyers Assistance Committee for confidential, one-on-one help with any substance use or abuse problem. We will not identify the caller, or the person about whom the caller has concerns, to anyone else.

Anchorage

Gayle Brown
306-3527

Michaela Kelley
Canterbury
276-8185

Shannon Eddy
360-7801

Serena Green
777-7258

Megyn A. Greider
269-5540

David S. Houston
278-1015

Mike Lindeman
760-831-8291

Suzanne Lombardi
770-6600

Michael Stephan
McLaughlin
793-2200

R. Collin Middleton
222-0506

Nicholas Ostrovsky
868-8265

John E. Reese
345-0625

Joan Wilson
269-3039

Fairbanks

Greggory M. Olson
451-5970

Valerie Therrien
388-0272

Juneau

Yvette Soutiere
465-8237

Kenai

Liz Leduc
283-3129

Arizona

Jeffrey A. Gould
520-808-4435



Lawyers' Assistance Committee
Alaska Bar Association

Board of Governors Action Items January 31, 2019

- Voted to approve 16 reciprocity applicants and eight UBE score transfer applicants for admission.
- Voted to approve Rule 43 (ALSC) waivers for Matthew Bockey, Michael Cagle, and Luis Miguel Diaz Rivera.
- Voted to approve a Rule 43.4 (military spouse) waiver for Meera Caouette.
- Voted to approve 2 requests for non-standard testing accommodations for the February bar exam.
- Voted to adopt the amendment to Bylaw III, section 1(a) phasing out the senior lawyer discount as of February 1, 2020.
- Voted to grant authority to the office space subcommittee to spend limited funds to assess the feasibility of possible buildings for purchase, and to keep the board informed.
- Decided to further explore the possibility of moving the convention to the fall, and coordinating with the judicial conference; subcommittee is Brent Bennett, Rob Stone and Susan Cox.
- Approved the timeline for hiring a new Bar Counsel since Nelson Page will retire in mid-September.
- Voted to re-open the solicitation process for the vacancy in the 1st Judicial District on the Commission for Judicial Conduct at the request of the governor for more than a single nomination.
- Adopted three ethics opinions: "A Lawyer's Duty upon Receipt of Confidential Information: (1) Inadvertent but Unauthorized Disclosure; (2) Intentional Disclosure; (3) Obtaining Confidential Information."
- Voted to increase the staff's health reimbursement account to \$5,000.
- Voted to form a subcommittee (Susan Cox and Hanna Sebold) to design a PTO (personal time off) policy for staff that would combine vacation and sick leave.
- Added "Alaska Free Legal Answers" to the list of qualified legal services providers, so that Inactive and Retired Bar members could provide legal advice online per the Emeritus Attorney rule (Bar Rule 43.2).
- Approved the minutes from the October 2018 board meeting.

Chief Justice calls for attorneys to handle Rule 12(e) cases

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

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

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

ACAs maintain a list of attorneys eligible to receive court appointments in each judicial district.

Below is the contact information for the Area Court Administrators:

First Judicial District (Southeast Alaska):

Neil Nesheim
Area Court Administrator
P.O. Box 114100
Juneau, AK 99811
nnesheim@akcourts.us
907-463-4753; FAX 907-463-4720

Second Judicial District (Northern Alaska):

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

Third Judicial District (Southcentral):

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

Fourth Judicial District (Interior & Southwest):

Ronald Woods
Area Court Administrator
101 Lacey Street
Fairbanks, AK 99701
rwoods@akcourts.us
907-452-9201; FAX 907-452-9206

**PROTECT YOUR FIRM. HELP MORE PEOPLE.
BE THE LAWYER YOU WANT TO BE.**

Find out more about your endorsed carrier at
www.alpsnet.com/bar-rag



**MALPRACTICE INSURANCE FOR THE
LAW FIRM
WORTH PROTECTING**

Endorsed by more state bars (including yours) than any other carrier.
ALASKA BAR ASSOCIATION

ALPS THE NATION'S LARGEST DIRECT WRITER
OF LAWYERS' MALPRACTICE INSURANCE.

(800) 367-2577 • www.alpsnet.com • learnmore@alpsnet.com

**DO YOU
KNOW
SOMEONE WHO NEEDS
HELP?**



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

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

Fairbanks: Aimee Oravec, aimee@akwater.com
Mat-Su: Greg Parvin, gparvin@gparvinlaw.com
Anchorage: open (seeking volunteer)

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

NEWS FROM THE BAR

ALASKA BAR ASSOCIATION

ETHICS OPINION NO. 2019-3

A LAWYER'S DUTY UPON RECEIPT of CONFIDENTIAL INFORMATION – Intentional Disclosure

The Committee has been asked to revisit Ethics Opinion 97-1, addressing a lawyer's obligation upon receipt of intentionally disclosed confidential information, in light of subsequent formal opinions issued by the American Bar Association.

The receipt¹ of confidential information generally falls into three categories: 1) the inadvertent disclosure scenario; 2) the intentional disclosure by one with authority (i.e., a willing party); and 3) the intentional but unauthorized disclosure by a party's agent. This opinion addresses the "willing party" scenario only.²

Summary of Opinion

The lawyer who receives confidential information in an *intentional and authorized* disclosure is not required to notify the opposing party's lawyer.³

DISCUSSION

The Committee has previously addressed the situation in which a lawyer obtained confidential information belonging to an opposing party from a person *authorized* to make the disclosure. In Ethics Opinion 97-1, the Committee was asked whether a lawyer has an obligation to notify his or her opponent upon receipt of confidential information directly from an adverse party. In the first instance, the Committee noted the lawyer had merely received a copy of a confidential communication, which he neither invited nor anticipated. Because the communication came directly and intentionally from the party, who had authority to make the disclosure, the Committee determined the receiving lawyer had no obligation to disclose receipt of the material to his or her opponent.⁴

Since our opinion in Ethics Opinion 97-1, the American Bar Association (ABA) has adopted two formal opinions which support the Committee's position in 97-1. In ABA Formal Opinion 06-440, the American Bar Association determined that materials sent *intentionally* are not the subject of Rule 4.4(b). If the materials were not "inadvertently sent" then the receiving lawyer is not ethically obligated to notify the sender's lawyer or return the materials.⁵

Similarly, ABA Formal Opinion 11-460 addressed the duty of a lawyer when receiving copies of a third-party's email communications with counsel. In that case, an employer's lawyer received copies of an employee's private emails with counsel, which the employer had located on the employee's workplace computer. The ABA determined that Rule 4.4(b) did not apply because the emails were not "inadvertently sent." Instead, they were obtained from a public or private place where they were stored. The opinion notes that some courts have implied a notification requirement upon the receiving lawyer, but the ABA interpreted the rule more strictly. Consequently, the ABA opinion expressly declined to interpret Rule 4.4(b) as requiring notice to opposing counsel except in the situation

it expressly addresses (inadvertent disclosure).⁶

Still, the ABA Formal Opinion and other courts have noted general unease with the absence of clear guidance in Rule 4.4(b) as to how to proceed with the intentionally disclosed confidential or privileged information. Potential pitfalls await the receiving lawyer who seeks to make strategic use of an opponent's confidential communications.⁷ The receiving lawyer who chooses to sit quietly with an opponent's confidential information in hand and does nothing may risk disqualification.⁸

The Committee adheres to Ethics Opinion 97-1 and believes that a lawyer who receives the *intentional* disclosure of confidential information by one *authorized* to do so does not violate Rule 4.4(b) if he or she holds the documents without notifying opposing counsel, so long as the receiving lawyer *knows or reasonably believes* the sender was authorized to do so.⁹

In all situations involving receipt of confidential documents of an opposing party, the receiving lawyer would do well to remember that ethical issues should be "resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."¹⁰

Approved by Alaska Bar Association on January 23, 2019.

Adopted by the Board of Governors on January 31, 2019.

Footnotes

1 This opinion addresses the ethical issues for the *receiving lawyer*. The obligations of all lawyers to maintain the confidences and secrets of their clients are addressed in ARPC 1.6.

2 Ethics Opinion No. 2019-** addresses Inadvertent Disclosure by opposing counsel or a party, while Ethics Opinion No. 2019-** addresses the intentional but unauthorized disclosure by a party's agent.

3 The lawyer who receives confidential information in an intentional, but *unauthorized* disclosure must promptly notify the opposing party. Further, the receiving lawyer may find it appropriate either to follow the instructions of the adversary's lawyer, or to refrain from using the materials until a definitive resolution is obtained from a court. Additional obligations may also be imposed by law. See Ethics Opinion 2019-** addressing intentional disclosure by an *unauthorized* agent.

4 Ethics Opinion 97-1 at p. 2.

5 The ABA cautions that a lawyer may still be required to take action under court rules or other law. See ABA Formal Opinion 06-440 at p. 2.

6 ABA Formal Opinion 11-460 at p. 2.

7 Some courts still rely upon the old ABA opinion framework and retain a notification requirement. See, e.g., *In Re Meador*, 968 S.W.2d 346, 350 (Tex. 1998) (noting failing to comply with ABA opinion 94-382 may require disqualification of counsel). Other courts have adopted notification requirements based on analogy to Rule 4.4(b). See, e.g., *Merits Incentives, LLC v. Eighth Judicial District Court of Nevada*, No. 56313, Slip. Op. at 11 (Nev. Oct. 6, 2011) (adopting a notification requirement based on analogy to Rule 4.4(b) for a lawyer receiving documents from an anonymous source).

8 See *Gifford v. Target Corp.*, 2010 US Dist. LEXIS 70293 (D. Minn. July 13, 2010); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001).

9 As the Committee noted in its concluding comment in Ethics Opinion 97-1: "Ordinarily, it may be a good practice, as a matter of 'professional courtesy,' to inform the sending party's counsel of the receipt of the material. This will increase candor and trust between counsel and forestall allegations of wrongdoing." This admonition is just as applicable today.

10 ARPC Preamble.



Former law clerks joined Judge David Mannheimer at his retirement reception Feb. 28. Judge Mannheimer retired from the Court of Appeals in February after 28 years on the court.

THE ALASKA BAR ASSOCIATION IS SEEKING SCHOLARSHIP DONORS



Become a sponsor of the Alaska Bar Association's
SCHOLARSHIP FUND
for ALASKANS IN LAW SCHOOL
 who plan to return to Alaska to live, work and play.

Tax deductible donations via the Alaska Bar Foundation.

Donations accepted year round.

Student scholarships will be awarded in the spring.

More information available at

info@alaskabar.org | 907-272-7469 | AlaskaBar.org/Scholarships

ALASKA BAR ASSOCIATION

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2019-1
OBTAINING CONFIDENTIAL
INFORMATION

The Committee has been asked to provide an opinion about a lawyer's professional responsibility when offered evidence from a third party where such evidence is subject to confidentiality obligations, and where the third party requests payment for delivery of that evidence.

SUMMARY OF OPINION

A lawyer may not solicit or accept evidence from a person if he or she knows or reasonably should know that doing so violates the legal rights of a third person, which may include obtaining evidence in violation of confidentiality obligations. If obtaining the evidence violates the legal rights of a third person, it follows that the lawyer also may not pay for obtaining such evidence.

DISCUSSION

I. Facts

In the hypothetical facts presented to the Committee, a consultant approached a lawyer and offered to provide certain confidential information that would be helpful to the lawyer's client. The consultant had obtained this information in connection with a prior engagement in which the lawyer represented a party opposing the consultant's client. The consultant was subject to a duty to maintain the confidence of the information pursuant to a written confidentiality agreement. The consultant requested a sizable monetary payment for delivery of this in-

formation to the lawyer. The lawyer knew the information was subject to the confidentiality agreement, and proceeded to pay the consultant for the information.

II. Analysis

The conduct at issue implicates Rule 4.4(a) ("Respect for the Rights of Third Persons"), Rule 3.4 ("Fairness to Opposing Party and Counsel"), and Rule 8.4 ("Misconduct").

Rule 4.4(a) provides that, "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third person]." The Commentary goes on to note that, while a lawyer is expected and encouraged to be a zealous advocate for her or his client, the lawyer may not disregard the rights of third parties and must adhere to legal restrictions on methods of obtaining evidence. For example, a lawyer may not receive and use statutorily confidential documents that the lawyer is not authorized to have.¹ In the hypothetical facts provided here, irrespective of any payment requested or made, disclosure of the requested documents may well violate the terms of the confidentiality agreement and therefore violate the rights of the counterparty to that agreement.² The lawyer may not use methods of obtaining evidence that violate the legal rights of the counterparty to that agreement. "Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by . . . [an] agent of the opposing person, the receiving lawyer must not accept the information."³

In Opinion 06-440, the ABA's Standing Committee on Ethics and Professional Responsibility opined that a lawyer receiving confidential materials that were sent intentionally but without authorization was not required to notify the other party or that party's lawyer in order to comply with Rule 4.4(b), and that determining whether any action was required by the lawyer would be dictated by substantive legal considerations.⁴ Rule 4.4(b) relates to the receipt of information that was "inadvertently sent" and therefore does not appear to apply to the hypothetical facts present to the Committee, in which the information was intentionally delivered. Further, the remedy contemplated by Rule 4.4(b) is prompt notification to the sender, but no automatic restriction on the use of the information. By contrast, Rule 4.4(a) prohibits the lawyer from using certain methods to obtain the evidence at all.⁵ The stakes are considerable. If the attorney obtains information through a means deemed to violate the rights of a third party, the attorney may be subject to disciplinary sanctions. To the extent that there is some question about whether the methods of obtaining the evidence are appropriate, the attorney would be well-advised to seek guidance from Bar Counsel.

Rule 3.4(b) provides that "[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by law." The Commentary to the rule goes on to state that, while it is not improper to pay a witness's expenses or to compensate an expert witness, "[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying" While the hypothetical facts at issue here relate to the consultant's delivery of physical evidence, it is conceivable (and perhaps inevitable) that the consultant would also be asked to testify in this matter – particularly if and when the consultant's disclosure of the confidential documents becomes known. Rule 3.4(b) is concerned, in significant part, with the risk that payments to a fact witness may quickly lead to improper inducements to encourage favorable testimony in return for that payment.⁶ The consultant's demand for a sizable payment, particularly to the extent it exceeds the reasonable cost of gathering the information, runs the risk of blurring the line between the collection of evidence and buying favorable testimony.

The hazards associated with this type of evidence-gathering were explored in *In re Sablowsky*.⁷ In that case, Mr. Sablowsky had obtained the identity of a favorable witness for a medical malpractice case being brought by other attorneys. Mr. Sablowsky was a lawyer and offered to be a medical malpractice consultant in the case and informed the other attorneys that he had information about a helpful eyewitness, but indicated that he would only provide the name of the witness if the attorneys paid him \$25,000.⁸ While the case involved a lawyer's efforts to sell evidence, the court explained that both sides of the transaction were deeply problematic:

To permit one attorney to sell information is to permit another to buy it; thus, were the profession to countenance the selling of evidence (other than expert opinion

evidence for a fee), it would also endorse an attorney's decision, indeed obligation, to further a client's interests by purchasing harmful factual evidence, in order to assure the seller's silence. The buying and selling of factual evidence would thus needlessly cause a cloud on evidence ultimately presented in court, would threaten rational and fair settlements, and would bring the judicial process and its practitioners into even greater disrepute than they already suffer. Because a market in factual evidence would hinder the discovery of truth within the justice system and often taint the outcome of disputes, whether litigated or not, the division unanimously concludes that attorneys, as officers of the courts, may not participate in such a market either as buyers or as sellers.⁹

The Committee is aware that the New York State Bar Association issued an opinion stating that, generally speaking, a lawyer may pay for physical evidence, subject to certain limitations.¹⁰ One of the limitations highlighted in that opinion is the "foreseeable" risk that the person providing the physical evidence may be called as a witness, and that the payment at issue may be deemed to be an improper effort to circumvent the restrictions of Rule 3.4(b).¹¹ In the hypothetical facts presented to the Committee, the risk that the seller would be called as a witness appears to be more than simply foreseeable, and the size of the payment requested suggest that the lawyer would be purchasing more than just the information held by the consultant.

Ultimately, whether or not the conduct described above would violate Rules 4.4(a) and 3.4(b) (and thereby Rule 8.4(a) as well) is dependent on facts not known to the Committee and not included in the hypothetical provided. Certainly, however, this type of conduct carries significant risks of violating third parties' rights and crossing the line from evidence-gathering to "buying" favorable testimony.¹²

III. Conclusion

In all situations involving confidential information of a third party, a lawyer must remember that ethical issues should be "resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."¹³ To the extent that the information held by the consultant is protected by a confidentiality agreement, obtaining that information in violation of that contractual agreement may well violate the legal rights of a third person. Purchasing that same information raises the additional specter that the lawyer is improperly influencing anticipated testimony from the seller.

Approved by Alaska Bar Association Ethics Committee on January 23, 2019.

Continued on page 19

**The Perfect Downtown Location
no matter what
size space you need**

Just steps from great restaurants, the coastal trail,
health clubs and the courthouse

Carr Gottstein Building

310 K Street

Penthouse Suite - 8,000+ rsf on the 7th floor.

Sweeping views of Cook Inlet and Denali.

1100 to 8200 rsf - on the 3rd & 4th floors. West-facing windows offer outstanding views of Cook Inlet and Susitna.

Executive, Part-Time & Virtual Offices - on the 2nd floor. Pacific Office Center offers a professional work environment with access to receptionist, meeting rooms, office equipment and as many other services as you need. Support available for other building tenants as well.

Private Office Building

935 W 3rd Ave

1790 sf beautiful private office space with views in forest-like, landscaped setting. Full service, with 5 on-site parking spaces included, on-site shower and kitchenette.

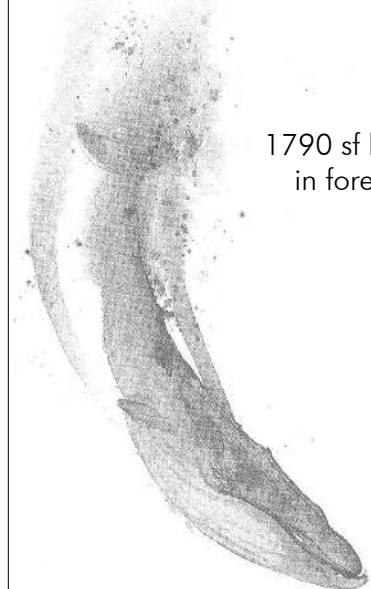
For leasing information contact:

Cyelia Gumennik

Denali Commercial

(907) 564-2424

Cyelia@DenaliCommercial.com



ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2019-2

A LAWYER'S DUTY UPON RECEIPT OF CONFIDENTIAL INFORMATION – Inadvertent but Unauthorized Disclosure

The Committee has been asked to provide an opinion about a lawyer's professional responsibility when presented with confidential information from an opposing party when the disclosure was *inadvertently* made.¹ Lawyers, their staff members and clients occasionally send confidential information to opposing counsel by mistake. In light of the rapid changes in technology for both lawyers and clients alike, and the frequency with which this issue arises, the Committee takes this opportunity to revisit the lawyer's essential duty upon receipt of inadvertently disclosed confidential materials.

In earlier times, these mistakes typically occurred when a fax was sent to the wrong phone number,

or an address label was switched on an envelope. With the proliferation of email, text messages, social media, cloud computing and electronically stored information ("ESI"), the potential for misdirection of confidential information has increased exponentially. Litigation cases now regularly involve thousands, and sometimes millions of client documents which need to be collected and reviewed for privilege and potential production. The sheer volume of information and documents can make even routine discovery a daunting task. As a result, the incidence of inadvertent disclosure is increasing.

Summary of Opinion

The lawyer who receives² confidential information in an inadvertent disclosure³ must promptly notify the opposing party's lawyer. The lawyer should either follow the instructions of the adversary's lawyer, or refrain from using the materials until a definitive resolution is obtained from a court. Additional

obligations may also be imposed by law.

DISCUSSION

Rule 4.4(b) addresses the ethical obligations of the lawyer who receives a document or ESI that was inadvertently sent.

A lawyer who receives a writing or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the writing or electronically stored information was inadvertently sent shall promptly notify the sender.⁴

The rule recognizes that lawyers occasionally receive information that was mistakenly sent or produced by opposing parties or their lawyers. Further, the comment makes clear the purpose of providing notice to the opposing lawyer is to permit the person to take protective measures. The comment goes on to note that whether the receiving lawyer must take additional steps, including return of the writing or electronic information are matters of substantive law beyond the scope of the rules of ethics.⁵ It also notes that some lawyers may choose to return a writing or delete electronically stored information unread. The decision to make voluntary return or deletion is a matter typically left to the professional judgment of the receiving lawyer. As a matter of professional courtesy, and to avoid unnecessary disputes, it may be advisable before using any such documents to obtain a definitive ruling from the court regarding whether the documents must be returned or deleted.

Alaska's rule is sometimes referred to as a "stop and notify" rule. Other states go farther and require the receiving lawyer to affirmatively set aside the material and take no further action on the documents, including reading them, in order to preserve the status quo.⁶ For example, the New Jersey rule provides: "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender."⁷

In Alaska Bar Association Ethics Opinion 97-1⁸, the Committee distinguished the mistaken or inadvertent disclosure of confidential information from other situations. The discussion regarding inadvertently disclosed information in Eth-

ics Opinion 97-1 was based, in part upon ABA Formal Opinion 92-368, which was later withdrawn due to the amendment of Model Rule 4.4.

In the Committee's view, the provisions of Rule 4.4(b) and its commentary control the obligations of the lawyer who receives any information from an opposing party or lawyer that appears to have been inadvertently disclosed. If the receiving lawyer knows, or has reason to know, the material was sent inadvertently, the lawyer must notify the opposing lawyer. The lawyer should also carefully review any legal requirements that may be imposed by other law. Finally, the lawyer may consider further voluntary action consistent with the lawyer's professional judgment under Rules 1.2 and 1.4.

Approved by Alaska Bar Association Ethics Committee on January 23, 2019.

Adopted by the Board of Governors on January 31, 2019.

Footnotes

¹ The receipt of confidential information generally falls into three categories: 1) the inadvertent disclosure scenario; 2) the intentional disclosure by one with authority (i.e., a willing party); and 3) the intentional but unauthorized disclosure by a party's agent. This opinion addresses inadvertent disclosure only. Ethics Opinion No. 2019-** addresses intentional disclosure by one with authority, while Ethics Opinion No. 2019-** addresses the intentional but unauthorized disclosure by a party's agent.

² This opinion addresses the ethical issues for the *receiving lawyer*. The obligations of all lawyers to maintain the confidences and secrets of their clients are addressed in ARPC 1.6.

³ All lawyers have a duty to maintain competence, including a basic understanding of the benefits and risks associated with relevant technology. See ARPC 1.1 Comment (Maintaining Competence). A number of state Bar Associations have issued Ethics opinions requiring lawyers to keep current on changing technology. See, e.g., Fla. Ethics Op. 10-2 (2010) (lawyer must keep current with developments in technology to protect confidential information stored on electronic devices); NY State Ethics Op. 842 (2010) (lawyer has duty to keep up with advances in technology used in law practice.)

⁴ ARPC 4.4(b).

⁵ Lawyers practicing in Federal Court will note that Federal Rule of Civil Procedure 26(b)(5) now contains a specific "claw back" provision relating to production, presumably inadvertent, of privileged material.

⁶ See generally James M. Altman, *Model Rule 4.4(b) Should Be Amended*, 21 Prof. Law., no. 1, at 16 n.7 (2011) (noting that nine jurisdictions prohibit the receiving lawyer from reading further after realizing the document is confidential).

⁷ New Jersey RPC 4.4(b) (2004).

⁸ Ethics Opinion 97-1 was adopted before the addition of Rule 4.4(b).

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2019-1

Continued from page 18

Adopted by the Board of Governors on January 31, 2019.

Footnotes

¹ See Pa. Ethics Op. 93-135 (1993) (applying Rule 4.4 and concluding that an attorney may not have an expert witness review confidential psychiatric records which happened to be housed at the institution where the expert worked).

² Whether or not any particular conduct constitutes a violation of the rights of the counterparty – for example, intentional interference with contractual relations – is an issue of substantive law that is beyond the scope of this opinion. The Committee notes that this may be a highly fact-dependent inquiry. See generally Maura I. Strassberg, *An Ethical Rabbit Hole: Model Rule 4.4, Intentional Interference with Former Employee Non-Disclosure Agreements and the Threat of Disqualification, Part II*, 90 Neb. L. Rev. 141 (2011).

³ Restatement (Third) of the Law Governing Lawyers § 60 cmt.m.

⁴ ABA Ethics Op. 06-440 (2006) at 2-3.

⁵ The Committee takes no view on whether or not the lawyer's purchase of these documents under the hypothetical facts presented would be wrongful, but simply notes that the legal rights of the third party could be deemed to have been violated and that significant consequences may follow. See *id.* n.8 ("If the sender of privileged or confidential material has engaged in tortious or criminal conduct, a lawyer who receives and uses the materials may be subject to sanction by a court.")

⁶ See, e.g., *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1526 (S.D.

Fla. 1994) (finding that Florida's analog to Rule 3.4(b) "clearly prohibit[s] a lawyer from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so.")

⁷ 529 A.2d 289 (D.C. App. 1987).

⁸ See *id.* at 292.

⁹ *Id.* at 293 (internal citation omitted).

¹⁰ New York State Bar Ass'n Ethics Op. 997 (2014).

¹¹ See *id.* The facts presented in that opinion involved a storeowner offering to sell a surveillance tape that recorded an automobile accident. This type of objective physical evidence may entail a lower risk that the seller would be called as a witness.

¹² Additional concerns exist if the consultant was a retained expert of the opposing party, either for testimonial purposes or as a consulting expert. The Committee has previously opined that *ex parte* contacts should not be made with expert witnesses retained by an opposing counsel or party. See Ethics Opinion No. 85-2 (Ex Parte Communication with Experts Retained by Opposing Counsel). In the facts presented, it appears the consultant was not retained as an expert by an opposing party. If the consultant had been a retained expert, the concerns in Ethics Op. No. 85-2 would apply as well. If the consultant was a retained testifying expert, the information purchased may have been subject to the attorney work-product doctrine. See Fed. R. Civ. P. 26(b)(4)(C). In either scenario, the lawyer may be deemed to have improperly gained confidential information in violation of the rights of the opposing party.

¹³ ARPC Preamble.

Experienced medical paralegal serving
your injury claim needs

- Specializing in litigation support for all types of MEDICAL cases/issues
- Medical records collection, analysis, summarizations/timelines, etc.
- Paralegal in personal injury and workers' compensation since 2003
- 17 years prior as a medical professional
- Flat rate services or hourly billing available
- Work samples and references available — CALL 277-1328



Joaquita B. Martin, BS, ACP

NALA Advanced Certified Paralegal – Workers' Compensation
907-277-1328 • www.meddiscoveryplus.com

Good to the Last Serve!



North Country Process, Inc.

274-2023



Anchorage attorney installed as Superior Court judge

From the Alaska Court System

Judge Thomas Matthews was installed as a Superior Court judge in a ceremony Jan. 17, 2019, at the Boney Memorial Courthouse in Anchorage. He was appointed to the Anchorage Superior Court by Gov. Bill Walker July 20, 2018.

Judge Matthews was born and initially raised in New Jersey before moving west to the San Francisco Bay Area with his family in 1972. He received his BS degree from UC Berkeley in 1981, and his JD from the Northwestern School of Law at Lewis & Clark College in Portland, OR.

Fresh out of law school, Matthews, along with his wife Jane, a yellow lab named Shawnee and a Volkswagen ventured north to Alaska. He joined the Anchorage law firm of Bradbury, Bliss & Riordan in 1985, eventually becoming a partner. In 1994, he and his long-time partner Mike Zahare started the law firm of Matthews & Zahare where he practiced until his appointment to the bench. Matthews enjoyed a long career in private practice focusing primarily on civil litigation and representation of small businesses. He has served for more than 25 years on the Ethics Committee of the Alaska Bar Association.

Matthews and his wife Jane have lived in Anchorage since 1985, and have two children, Charlie and Elizabeth who were both born and raised in Alaska. When he is not working, he enjoys ice hockey, cooking, spending time with family, and the peace and serenity of his family cabin in Hope.



Judge Matthews was joined at the ceremony by his wife Jane; his daughter Elizabeth; and his son Charles.



Samantha Slanders *Advice from the Heart*

Dear Samantha,

I need help. My dad took away my phone just because I got caught texting during a b*****ring Government class. The only way I can get it back is to write, like on paper with a pen (so Stone Age) 750 words about an Alaska hero. He has already told me that the guy who holds the Spenard record for Jell-O shots is not a hero. So I can't figure out who else to write about.

You might remember Dad as "Stuck in Spenard." He once sent you a letter signed with that name. If I told him you gave me the name of hero to write about, he would be cool with it.

Sincerely,
Flipped out with a Flip Phone

Dear Flipper,

First let me say thank you for your query even though it was sent as a text message. Child, you need to break out that paper and pen. When you do, write your essay on the man who helped make Spenard famous — Mr. Whitekeys. Your father may have proposed to your mother at the

Fly By Night Club after hearing Whitekeys sing "There's No Nuggets Like Moose Nuggets" or "Don't Let Me Go to Costco."

Sincerely,
Samantha Slanders

Dear Ms. Slanders,

This is the first time I have ever sought advice from a newspaper columnist. But I've been told that you are firm, fair, and that I can disguise my name. What, you may ask, drove me to desperation? The answer is my work supervisor who insists that I call him "Bobb" with two "b's." He strictly enforces casual Friday attire rules. I have repeatedly been chastised for arriving at work on Friday in a nice suit. Even though it was before Labor Day, he yelled at me once for wearing a ruffled seersucker ensemble. I am afraid that I'll be fired if I don't fall in line. I'm allergic to chinos and the fabric Land's End uses for their long sleeve shirts. Any ideas from you would be much appreciated.

Sincerely,
A.S. Simpson

Dear A.S.S.,

Show up next Friday in a vintage rock tee shirt (Metallica circa the black album for example) and a pair of your oldest linen trousers. If you have a nice potbelly be sure not to tuck in the shirttails. You boss won't mention casual Friday to you again.

Sincerely,
Samantha Slanders

Dear Samantha Slanders:

Please honor this as a demand for recompense. On Feb. 12, 2016, you responded to my query concerning the best present I could give to my beloved on Valentine's Day. In said response you advised me to forego the usual flower/candy ploy and give her the moose rifle that she never knew that she needed. Thrilled, I raced down to our neighborhood gun shop and bought her a .30-06 with a pink camouflage stock and an "Alaska Girls Got Game" case. The follow-

ing September, she ran off with a dentist from Wasilla she met while gutting her first moose. In a letter that she addressed "Dear Loser," she told me it was my entire fault for buying her the rifle.

The gun cost me \$758.39. I spent an additional \$2,049.78 on other gifts and entertainment pursuing the relationship. If you agree to reimburse me for these expenditures I will not press a valid claim for intentional infliction of emotional distress. You have 30 days before I sue.

Sincerely,
Not Kidding

Dear Not,

Threats like this may produce results in Los Angeles or any other city where the moose do not trod suburban streets. But here in Alaska, where woman hunt game and any man who buys his beloved a girly gun is despised, I laugh at your claim. Pound sand.

Sincerely,
Samantha Slanders



Forensic Document Examiner

- Qualified as an expert witness in State & Federal Courts.
- 30 years experience.
- Trained (and retired from), the Eugene Police Department.
- Certified by the American Board of Forensic Document Examiners.
- Fully equipped laboratory.

James A. Green
Eugene, OR
888-485-0832
www.documentexaminer.info



THE FIRST BRAND NEW SHIP IN 20 YEARS!

2020 CLE AT SEA

Cabo San Lucas, Mazatlan, Puerto Vallarta

February 8-15, 2020

Prices per person based on double occupancy, including taxes. Other cabin options are available, please ask.

\$845 Ocean view **\$1,031** Balcony
subject to change based on availability and promotion.

CLE INFO COMING SOON!

For more information and to book your cruise,
<https://www.rocktheboatcruiseandtravel.com/rw/view/81061>
or contact Rusty Pettit with Cruise Planners at 412-770-6511 or rpettit@cruiseplanners.com