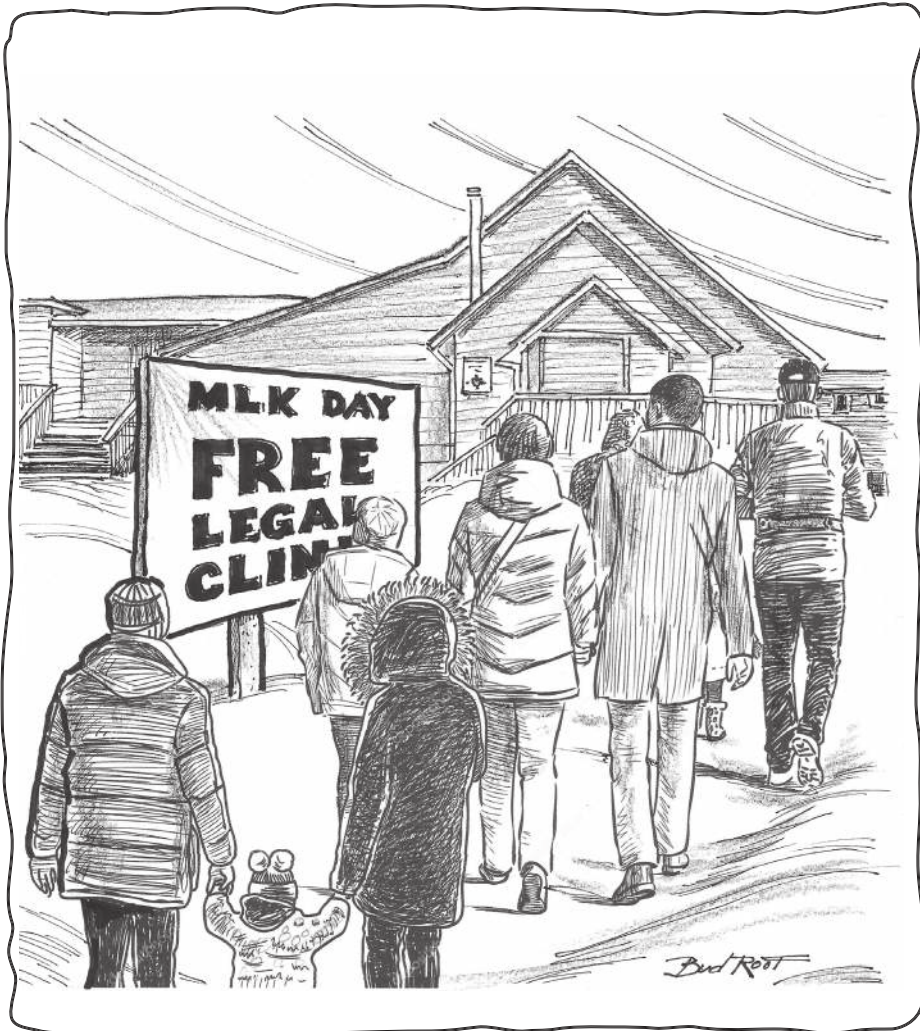


The Alaska BAR RAG

Dignitas, semper dignitas

VOLUME 47, NO. 1 January - March, 2023



Association brings MLK Day free legal clinic to Bethel

By Zach Manzella



For 14 years the Alaska Bar Association has been holding its Martin Luther King Jr. Day Legal Clinic. It has been a privilege and a lot of fun to serve the community through this event. This past year the Bar Association brought the MLK Day Legal Clinic to Bethel, and I am grateful that I could be a part of that effort, too.

How it began

The way I remember it, in 2009 Krista Scully, the Alaska Bar Pro Bono director, called me to ask if I would join an organizing committee to create a free legal clinic to be held on MLK Day. Having worked with Krista on other projects prior to that phone call, I trusted that she had a vision for the project and

saw how my presence added to the effort. She let me know Russ Winner proposed the concept, she was aiming to get six to eight people on the committee, she had looked into similar projects from other state bar associations, and she had some ideas and models for us to review. I was in.

The first MLK Day Legal Clinic in January 2010 was held at the Mountain View Boys and Girls Club which has continued to provide the Bar Association with a venue for the Anchorage MLK Day Legal Clinic when we have been able to hold it in person. In 2010 and for most of the years going forward, I found myself facilitating the Intake Section for the clinic. Intake was designed to be a triage type of area with paralegals, attorneys and judges meeting with clients to educate them on the process for the day and to identify the clients' legal issues so that the

Continued on page 10

Alaska Supreme Court takes deliberations to high school

By Meredith Montgomery

Supreme Court LIVE brings Alaska Supreme Court oral arguments in actual cases to student audiences in Alaska high school auditoriums. Designed to help stu-

dents better understand the justice system, this unique learning opportunity debuted in 2010, and has brought cases to Anchorage, Fairbanks, Juneau, Kenai, Ketchikan, Palmer, Sitka and Utqiagvik. LIVE offers high school students an opportunity to learn about the progress of an actual appellate case and to observe the Supreme Court in session. As part of its program, the court conducts oral arguments in high schools throughout the state. In November 2022, Fairbanks students and teachers gathered at Lathrop High School to hear oral arguments in *State of Alaska v. John William McKelvey III*.

The case illustrates the tensions between law enforcement and a citizen's right to privacy. This case arises from a criminal investigation near Fairbanks. After an Alaska State trooper received a tip about a marijuana grow operation at a person's residence and nearby greenhouse, the trooper took photographs from an airplane using a telephoto lens. The trooper relied on these photos and the tip to get a search warrant from the court. The homeowner was later charged with

LIVE offers high school students an opportunity to learn about the progress of an actual appellate case and to observe the Supreme Court in session. As part of its program, the court conducts oral arguments in high schools throughout the state.



The Alaska Supreme Court hears arguments before students and teachers at Lathrop High School in Fairbanks. (Photo by Meredith Montgomery)

drug-related offenses based on the evidence taken during the search. The homeowner argued that surveillance with an airplane and a telephoto lens was a search that violated his constitutional rights to be free from unreasonable searches and seizures. The Superior Court decided the police photography in this case was not a search, but the Alaska Court of Appeals disagreed, deciding that the trooper violated the Alaska Constitution by not getting a warrant first. The Alaska Supreme Court granted the State of Alaska's request for review of the Court of Appeals decision.

Volunteer attorneys visited classrooms in the week preceding the session to prepare students to understand the legal arguments in the case. They discussed the appellate process in general and the legal issues presented by this case. Students had access to briefs and other written materials relevant to the case. After the oral argument session ended, students had an opportunity to ask questions of attorneys and the justices.

The written materials used for this case and the briefs, including an *amicus curiae* brief submitted by the Alaska Public Defender Agency on behalf of the respondent, are available on the court's website under the "media" tab. Video footage of the session is available through KTOO Public TV in Juneau under "Gavel Alaska."

Meredith Montgomery is clerk of the Appellate Courts.

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Conditions for lawyers and their families are improving

By Diana Wildland

My son, Owen, was born during the pandemic — a baptism into motherhood unlike anything I could have expected or planned for. I, with the rest of the world, went into quarantine in March 2020. I was 18 weeks pregnant, fielding court hearings and client calls through my new work cellphone. My colleagues saw my transformation into motherhood through the square video tiles of Teams chats and Zoom bench trials: my face, a blank wall in my home or a blurred background, a mute logo when the baby was crying. Owen was 6 months old when I started considering a return to the office, still afraid of the risk of infection to my baby and hyperaware of the difficulty of finding safe and affordable daycare in a strained market.

The reconfiguration of my life in motherhood intersected with a restructured idea of what it meant to be a litigator. Although Alaska courts have long used telephonic participation for rural courts and special accommodations, moving to a solely virtual practice for trials and large calendar calls required everyone to be both creative and accommodating. Courts had to come up with new ways to receive and introduce exhibits at bench trials.

I was inspired to do this work by my father and my aunt, each of whom worked for the Alaska Public Defender Agency for over two decades.

Staff transitioned paper files to electronic ones. My relationships with my clients changed: Three years in, I have had well over 100 clients whom I have gotten to know, advised and advocated for without ever having seen one another face to face. I would not recognize them if I saw them at the grocery store.

This is a major change from what I expected my career as a public defender to look like. Growing up, I was inspired to do this work by my father and my aunt, each of whom worked for the Alaska Public Defender Agency for over two decades. I was quite literally born into the culture of what is now my office when my

parents elected to stop by the Fairbanks Public Defender before they brought me home from the hospital. Public defense was always an immense part of my family's identity.

As a teenager, I suffered eye-roll-inducing long pauses while running errands with my dad while he stopped to talk to people he knew from work (which was seemingly everyone). But, as I aged, these casual greetings did eventually transform



"The reconfiguration of my life in motherhood intersected with a restructured idea of what it meant to be a litigator."

into what I recognized as a ritual of community. The number of lives you touch in indigent defense expands well beyond the clients we serve. Their parents, grandparents, partners, children, friends and coworkers are all part of our advocacy. We get to know these people — and they get to know us.

But, especially with the technological limitations of the 1990s, the demands of this work put attorneys like my father in an impossible dilemma. Charged with serving hundreds of people on the worst day of their lives, my dad's ethical responsibility to his clients inevitably butted against time spent with his family. As young children, my sister and I would dial my dad's office phone and leave long voice-mails to ask when he would come home. He would arrive home late most evenings and work on Saturdays to meet with clients at the jail. My mom, in the meantime, adopted the title of "PD Widow," taking on the primary role of raising two kids while balancing a career of her own.

When I was hired to my current position in 2017, it was immediately apparent that office culture surrounding parenting had changed. My coworkers brought their children to the office after school while they finished writing motions. There

were forts built on the floors of our offices, toys and snacks housed next to statute books, and playful screams echoing down the hallways. One of my coworkers, faced with childcare limitations, potty-trained her toddler while she worked. We dealt with family emergencies as a team, covering hearings and taking client calls while a coworker cared for a sick child, ran to a dentist appointment, or retrieved a forgotten backpack. Work and family blended meaningfully and intentionally, and it was obvious that the kids and parents both benefitted.

But despite what I experienced in my office, I was aware that parenthood was still seen by many as a barrier to my legal career. I heard stories that vastly contradict what I see in my place of work: judges who scolded attorneys when they asked for comfort breaks every couple of hours to pump breast milk or required parents to stay in court — even if it meant scrambling to find someone else to pick their sick child up at school. Maternity and family

Continued on page 20

The Alaska BAR RAG

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EDITOR'S COLUMN

Legal profession doesn't require thick-skin, but it helps

By Ralph R. Beistline

I ended 2022 with a colonoscopy. I wanted a clean start for the new year. The nurse, though, was having trouble with my IV and just kept probing and poking my arm. Finally, she got me connected and then asked if I was a contractor or laborer of some sort. When I asked why, she responded that I seemed to have thick skin as do many of the contractors and laborers she sees. I explained that I was a judge and that we needed thick skin. Anyway, that is the last thing I remember.

But speaking of thick skin, I note that we recently lost two Fairbanks old timers: **Judge Warren William Taylor** and **Judge Gerald Van Hoomissen**, judges who would fall into the "thick skin" category. Both judges handled things in Fairbanks during the pipeline years, which were rough and rowdy times. These were two of the three judges that I first went to work for in December 1974, right out of law school — remember that was when I got the office under the Elk head and met Gov. Jay



"But you don't have to be a judge to have thick skin or to leave the Bar Association better than before ..."

Find Judge Taylor and Judge Van Hoomissen's obituaries on page 3.

Hammond. (If you didn't read my past columns, you are not going to be able to follow my train of thought.) Anyway, the only other judge I met before that was Judge Mary Alice Miller and that was in traffic court as a teenager.

It was Judge Taylor who, as presiding judge, hired me initially as a law clerk and started me off, but I worked equally with the other two judges. On occasion, I was able to fly with Judge Van Hoomissen, the Flying Judge, as he piloted his plane from one venue to another holding court. That was a rare experience. I went on to practice law before both judges until each retired and, eventually, I was able to occupy the same chambers they did. Both were great men and fine judges, and both added their unique styles to the court and left it better than

before.

But you don't have to be a judge to have thick skin or to leave the Bar Association better than before; attorneys can do that as well. For instance, you could be a contributing writer at the Bar Rag or even editor-in-chief. We are looking for

whatever we can get. Or you could be like Charlie Cole, one of Alaska's most senior and preeminent attorneys. Here, Charlie is pictured, looking as spiffy as ever, along-side librarian Tamara Borgen, as he visits the Law Library in Fairbanks this Valentine's Day, just to make



Attorney Charlie Cole visits with librarian Tamara Borgen at the library in Fairbanks on Valentine's Day.

sure everything was in order there.

So, join us, thick-skinned or not, colonoscopy or not, and have a great 2023.

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

In Memoriam

Superior Court Judge Bill Taylor dies in Washington

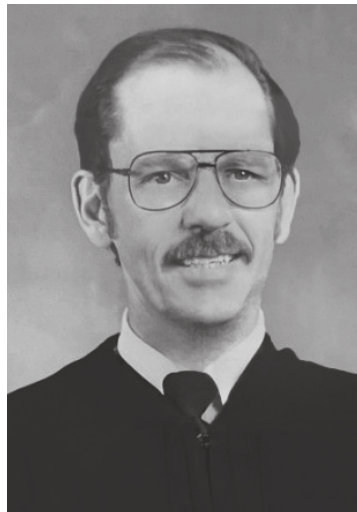
Judge Warren William (Bill) Taylor died Jan. 15, 2023, at 97. Bill was born Jan. 13, 1926, in Cordova to Josephine and Warren A. Taylor. He grew up in Cordova until moving with his family to Kodiak as a teenager. He graduated from Kodiak High School and joined the Navy Sept. 6, 1944. He was a member of the original crew on the U.S.S. Badoeng Strait.

Bill attended the University of Alaska from 1946 to 1949. He also attended the University of Washington. He was briefly married in the early 1950's. They had two children, Ross and Randy. He went to Cumberland School of Law in Lebanon, TN, obtaining a law degree in 1954. While working and attending law school he met Gloria Jennings, a local school teacher. They were married in September 1953. After finishing law school, they moved to Fairbanks, where they raised four children Warren, Karla, Scott and Sibyl.

Bill interned in his father's Fairbanks law practice while preparing for the bar exam which he passed in 1955. The State attorney general appointed Bill as the District Attorney for the Fourth Judicial District after Alaska was admitted to the union. He served in that position for two years. He then went into private practice with Bill Boggess, practicing law until he was appointed by Gov. William Egan to the Fairbanks Superior Court in 1965. While serving as a judge it was not uncommon for him to preside over cases in which his father, Warren A. Taylor was an attorney appearing before him.

In the early 1970's, Judge Taylor made national and international news when he empaneled a jury of students from Lathrop High School to sit in judgment of a 16-year-old charged with a violation of drug laws. This created quite a stir at the time. It drew an edict from then Attorney General John Havelock that there would be no more juvenile juries in state courts. Taylor was clearly ahead of his time as Fairbanks now has a Youth Court in which youth serve as judge, jury and attorney for youth charged with certain crimes.

Off the bench, Bill was very involved in the Fairbanks community. Elected to the North Star Borough assembly, he served as the presiding of-



**Judge Warren William (Bill)
Taylor**

ficer of that body for several years. He was named president of the Tanana Valley Bar Association and was a member of the American Legion and the Pioneers of Alaska. He served two years as the president of the Boy Scouts Midnight Sun Council. He was a den master for the Cub Scouts, and a scoutmaster for the Boy Scouts. He served as president of the Denali Elementary PTA, was a trustee at his church and the Sunday School superintendent for 10 years. He also served on the Executive Council of the Tanana Valley Baptist Association.

After 20 years on the bench, Bill retired in 1985, and moved to Friday Harbor, WA. He married Dorothy Rogers and spent many years traveling and sailing. They moved to Anacortes, WA, in 1997. He and Dorothy enjoyed sailing on their boat, *The Prelude*. Following Dorothy's death, Bill married Jennifer Weatherill. Even well into his 90's, Bill continued to play golf.

Judge Taylor was preceded in death by his parents, his sister Betty Larson; sons Ross Taylor and Scott Taylor, stepson Michael Rogers and stepdaughter Rhonda Litts. He is survived by wife Jennifer; children Randy, Warren, Karla (Scooter), Sibyl (Gary); eight grandchildren; and four great-grandchildren. He is also survived by stepchildren Debbie (Scott) Wilbur, Sherry Lippard, Ross Weatherill, Lisa (Jim) Wakley, Elizabeth Schmidt and Mark Weatherill.

A memorial service was planned for Feb. 24 at Westminster Presbyterian Church in Anacortes.

Father at the Bar and son on the Bench

EDITOR'S NOTE: This story originally appeared in Jessen's Weekly, predecessor of the All-Alaska Weekly, written by legendary Alaska journalist Tom Snapp.

By Tom Snapp
Editor, Jessen's Weekly

Ordinarily the father has the last word over his son.

But in Fairbanks this is no longer strictly the case. This week (in February 1965) 39-year-old William Taylor was appointed a Superior Court judge here. And, his father, Warren Taylor one of the city's leading attorneys, will have to accept his son's rulings in court.

Warren Taylor, the new judge's father, is now serving in the State House of Representatives in Juneau. After the legislature adjourns, in Superior Courts here it will probably be a familiar, if not unique occasion, to find the father on the bar and the son on the bench.

The situation will be even more unusual than in 1960-61 when the father and son battled each other in criminal cases here. The younger Taylor was the District Attorney and elder Taylor was a busy defense attorney.

At present Taylor is trying to clear up his law practice. He will then go to Seattle on business and will return to Juneau where it is indicated he will probably be sworn in.

He indicates that he would like for his father to be present for the ceremony which he hopes can be arranged in about 10 days.

Taylor was born in Cordova, was educated in the schools there, in Kodiak and at the University of Alaska. He graduated from Cumberland Law School in 1954, and was District Attorney here from 1960 to 1962 before going into private practice.

Apparently one writer could not fathom the son as judge and father being admonished. This Associated Press item appeared in the Nashville Tennessean, sent to the Taylors by a friend.

Now look, son!

FAIRBANKS, Alaska (AP). "I trust I will not have to admonish you again," the judge told the young lawyer.

"Such outbursts are completely inappropriate in a court of law."

The admonition from Judge William Taylor struck home with particular force. It was directed at his son, attorney Warren Taylor.

Retired Fairbanks Superior Court judge dies in Palmer

Former Superior Court Judge Gerald Van Hoomissen died Sept. 6, 2022, in Palmer. He was 88 years old. Judge Van Hoomissen was born July 10, 1934, in Portland, OR, into a prominent Oregon family and received his law degree from the University of Oregon School of Law.

In 1965, Judge Van Hoomissen became assistant United States attorney in Fairbanks. He served in that capacity for approximately three years before becoming a district attorney for the State of Alaska. After a three-year stint there, Judge Van Hoomissen went into private practice for a short period of time before being appointed to the Superior Court by Gov. Keith Miller at the young age of 36. Van Hoomissen retired from the bench in 1986.

Judge Van Hoomissen served as a judge in Fairbanks during the "pipeline years." According to the judge, this was a "boomtown situation," but, despite the lawlessness, "criminal justice was not breaking down." This largely was due to Judge Van Hoomissen's efforts.

As a private pilot, the judge flew around much of rural Alaska to hold hearings and try cases in the villages, something which no longer is done. In an interview with the University of Alaska Fairbanks Project Jukebox Oral History Project, Judge Van Hoomissen described traveling to the villages, holding court in Barrow as a visiting judge, and addressing the needs of rural justice. This included understanding the importance of the Native cultures. He also spoke of Alaska's judicial selection and retention system, and changes in Alaska's justice system over the years.

In her Senior Thesis Seminar entitled *Kitchen Courthouses and Flying Judges, Bush Justice in Alaska, 1958-1980*, Andrea Charlotte Floersheimer describes Judge Van Hoomissen's efforts at rural outreach and his efforts to consult with village elders in order to deliver effective bush justice. "One lawyer wrote about a time he joined Judge Van Hoomissen on a trip to Venetie, a small community northeast of Fairbanks. Judge Van Hoomissen set up court in a community building and conducted a circle sentencing. The intention was for the minor to hear, see, and feel the impact of what he had done to his community, while the community could see that the court system listened to and acted on their concerns."

Judge Van Hoomissen loved to fly and mingle with those he served, and he always had a choice phrase or memorable thought to share with anyone in sight.



Judge Van Hoomissen



Save the Date!

2023 AK Bar Annual Convention

September 20 - 22, 2023

Westmark Fairbanks Hotel & Conference Center

More than 200 attend annual diversity gathering

By Christine Williams

The Alaska Supreme Court's Fairness, Diversity and Equality Committee held its annual diversity event — Diversity: Stories Affecting our Lives — Dec. 15, 2022, in Anchorage. This year, through one of Anchorage's greatest snowfalls, more than 200 people from around the state came together in person and by Zoom to hear a variety of speakers including Ninth Circuit Court of Appeals Judge Morgan Christen; Qian Julie Wang, New York Times bestselling author of "Beautiful Country," NPR's Best Book of the 2021, featured on the Today Show, and a former law clerk for Chief Justice Peter Maassen, and Judge Christen; and Eleanor Andrews civics leader and entrepreneur.

The speakers shared authentic

The speakers shared authentic personal stories of challenges and triumph as they made their way through the world.

personal stories of challenges and triumph as they made their way through the world. Their presentations illustrated how much a hand reaching out or a word of kindness can mean. They emphasized how the ability to get back up after being knocked down or how

not to feel alone are important and to recognize others who will stand by you and with you.

Qian Julie Wang noted at the end of her

talk that she hoped her story was "a reminder that perhaps the most powerful thing we can do is tell ourselves the stories that we never talk about and as humans, as lawyers and as judges here, and heed the stories that more of our courtrooms and more of our society need to hear."

The event was moderated by retired Alaska Supreme Court Justice Dana Fabe, a co-founder of the

event with Christine Williams.

Hosts included the Alaska Bar Association and the Anchorage Association of Women Lawyers. Outlook Law LLC sponsored the

event and all who attended in person pitched in to package any leftovers for Bean's Café.

Christine Williams is a managing partner at Outlook Law LLC.



Attending, from left, are: Judge Morgan Christen, Justice Dana Fabe (retired), Eleanor Andrews and Qian Julie Wang.

Bar People

Landye Bennett Blumstein announces partner and associate

The law firm of Landye Bennett Blumstein LLP has announced Anna Chapman Crary is now a partner in the firm.

Anna began her legal career in Alaska clerking for Superior Court Judge Anna M. Moran in Kenai. She went on to practice with a defense litigation firm in Anchorage and joined Landye Bennett Blumstein in January 2015 as an associate.

Anna received her law degree from the University of Washington School of Law in 2012. As a law student she participated in the Tribal Court Public Defense Clinic, representing tribal members against misdemeanor criminal charges in Tulalip Tribal Court. Anna also worked as a legal assistant for immigration law firms in Seattle and Boston.

At LBB, Anna focuses her practice on working with Alaska Native Corporations, business organizations, nonprofits, and public entities. She represents both commercial and subsistence fishers in state and federal administrative proceedings and works closely with several tribal organizations on marine mammal subsistence hunting and co-management issues. In March 2017 and September 2022, she presented "Native Participation in Subsistence Decision-Making" to the membership of the Alaska Federation of Natives. She also regularly prepares and presents the annual Alaska Native Case Law Update to the Alaska Native Section of the Alaska Bar Association.



Anna Chapman Crary



Ryan J. Thomas

Ryan J. Thomas has joined the law firm of Landye Bennett Blumstein LLP as an associate attorney.

Thomas attended the University of Colorado School of Law and practiced commercial real estate law in the Lower 48 before returning to Alaska. He is a member of the Alaska Bar Association.

He was born and raised in Fairbanks and lives in Anchorage with his wife and two children. Thomas previously worked in project management in both academic and non-profit settings. He also worked for the State of Alaska Department of Natural Resources before returning to private law practice. At LBB, Ryan's practice will focus on real estate transactions, business law, working with Alaska Native corporations and other transactional work.

Davis Wright welcomes real estate partner in Anchorage

Sarah Gillstrom, an attorney with nearly 15 years of experience, has joined Davis Wright Tremaine LLP's market-leading real estate group in Anchorage.

Gillstrom comes to Davis Wright from Perkins Coie LLP, where she spent almost a decade representing construction companies, public utilities, telecoms, and other clients.

She will focus on real estate transactions and construction law at Davis Wright, handling all aspects of property ownership, acquisition, financing and sales. She will advise clients needing assistance before state and local agencies on permitting, entitlement, and leasing.

Gillstrom joins the Anchorage team at a time when the northernmost Davis Wright office is growing and becoming more diverse. The office has represented an ever-broadening spectrum of the state's business community since opening in 1980.

Early in her career, Gillstrom practiced at Lynch & Associates in Anchorage, specializing in commercial insurance litigation and construction. She has argued cases in federal and state courts, including the Alaska Superior Court, where she previously clerked for the Hon. Peter A. Michalski. As a summer associate, she conducted investigations at the Securities and Exchange Commission and worked in the general counsel's office at Ameriprise Financial.

Gillstrom received her J.D. from the University of Minnesota Law School and her B.S. in Finance from DePaul University in Chicago.



Sarah Gillstrom

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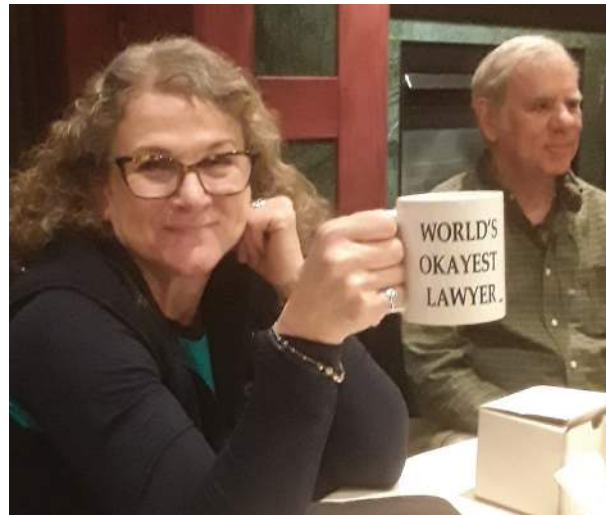

Official
Summons

Tanana Valley Bar members celebrate the Fourth of July

Members of the Tanana Valley Bar Association gathered Feb. 4 for the organization's annual Fourth of July celebration. The way the story goes, decades ago an annual summer picnic kept being delayed for one reason or another until it finally was held in mid-winter. That, of course, flipped the schedule and pushed the annual Christmas party to summer that year. Since then the organization has adopted that schedule and now the Fourth of July is celebrated in mid-winter and Christmas comes along in the summer, usually in July. Members still do a white elephant exchange at the winter party and entertain Santa Claus at the summer one. Photos here were taken at the Feb. 4 dinner by Gail Ballou who just likes to be referred to as a past TVBA president.



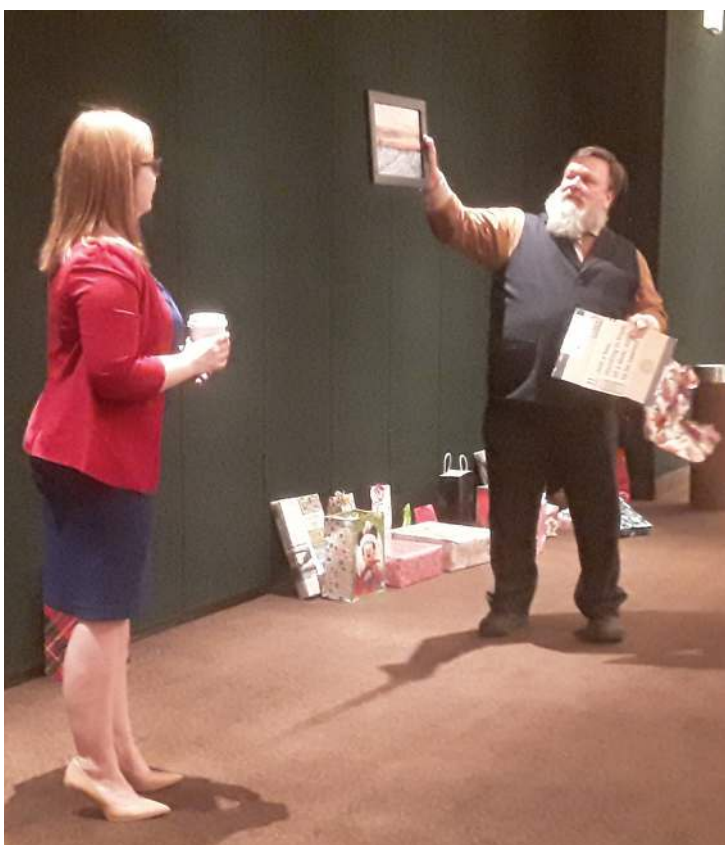
Terri Coleman (right) examines gift exchange item given to her by TVBA President Amy Welch.



Italia Carson (left) displays her trophy from the gift exchange.



Amy Welch the current TVBA president at the Feb. 4 dinner displays awards intended for past presidents who couldn't be found.



Judge Tom Temple (right) displays gift exchange painting by A. Rasley while TVBA president Amy Welch looks on.



Judge Ben Seekins (left) snagged the A. Rasley painting and his guest receives a Fairbanksopoly game.

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

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



President Amy Welch swapped her fashion heels ...



...for sensible footwear.

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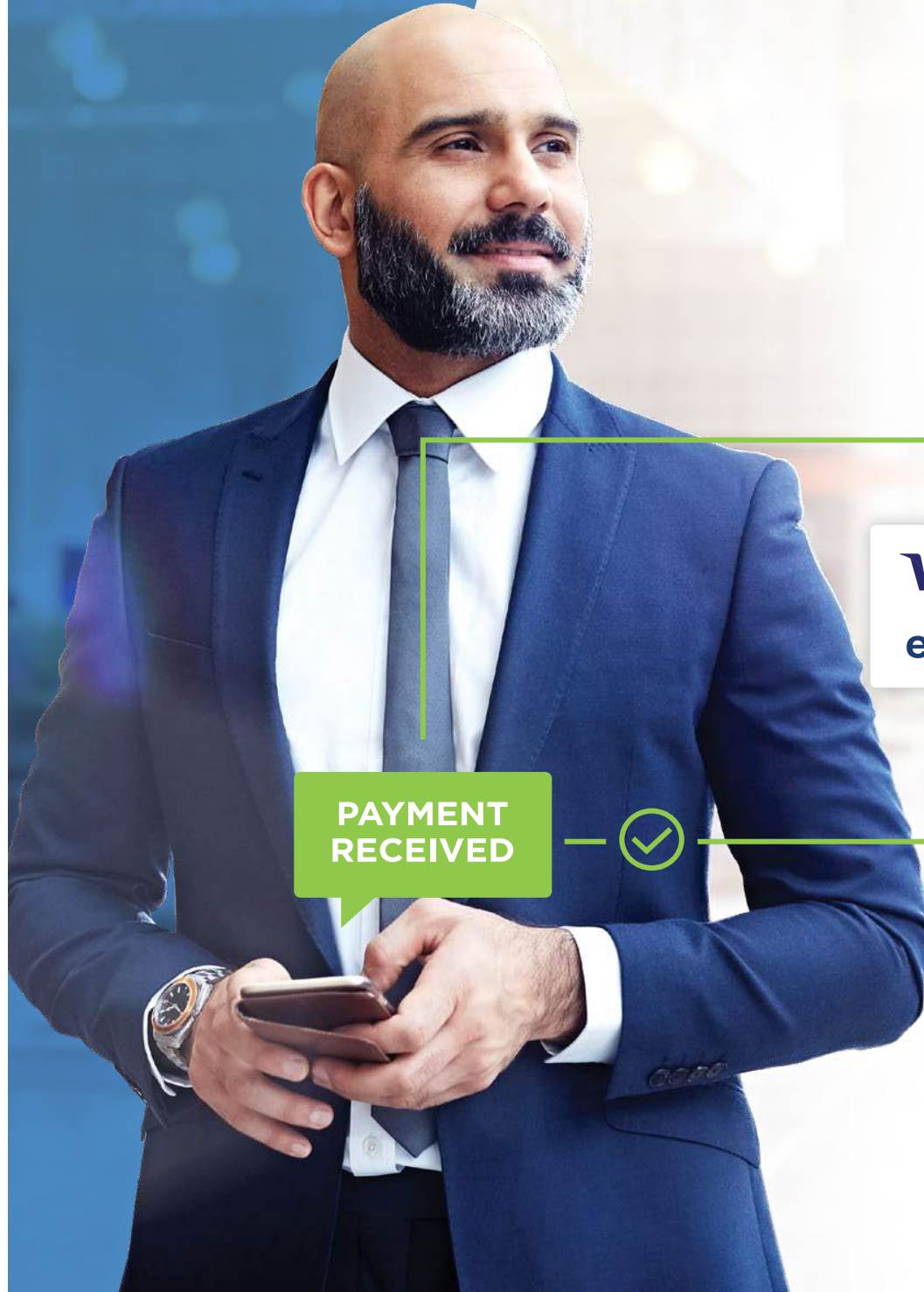
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New judge installed in Ketchikan Superior Court

Judge Katherine H. Lybrand was sworn in to Ketchikan Superior Court by Chief Justice Daniel Winfree at an installation ceremony Dec. 1, 2022, in the Ketchikan Courthouse. She was appointed by Gov. Mike Dunleavy June 13, 2022. Family members, judges, and members of the Ketchikan Bar Association and community attended the event. Remarks were provided by Chief Justice Winfree, Judge William B. Carey and Judge Kristian Pickrell.

Judge Lybrand was born in Ketchikan to Gary Lybrand and Karen Thompson Lybrand. She lived in Ketchikan until middle school before moving to Florida and then Maine.

Judge Lybrand attended Smith College, graduating in 2010 with a B.A. in Government. She earned her J.D. from the University of Maine School of Law in 2013. During law school, she interned for the

Ketchikan Gateway Borough Attorney's Office and decided she wanted to practice in Southeast Alaska.

After graduating law school, she returned to Ketchikan to clerk for Judge Carey. Following her clerkship, Judge Lybrand moved to Juneau where she worked for the Department of Law, first in the Civil Division with the Child Protection Section and later in the Torts Section, before she moved to the Criminal Division. At the time of her appointment, Judge Lybrand was an assistant district attorney in the Juneau District Attorney's Office.

Lybrand and her partner, Henrik, live in Ketchikan. She is sister to her older brother, Ethan Lybrand and older sister, Kyle Lybrand. She is also the aunt of two nieces, Anna and Kensie.



Attending are from left: Chief Justice Daniel Winfree, Senior Judge Trevor Stephens, Senior Judge William Carey, First District Presiding Judge Amy Mead, Judge Katherine Lybrand, Judge Daniel Doty, Judge Kristian Pickrell, Judge Jude Pate, and Magistrate Judge Amanda Schulz.



Judge Katherine Lybrand and Senior Judge William Carey share a laugh.

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Law Library

New librarian joins the Anchorage Law Library

By Susan Falk

The Law Library is excited to welcome our new Public Services Librarian, Danielle Devore. While Danielle is new to the Anchorage Law Library, she spent two years as a library assistant in the Juneau Law Library, so some of you may have met her already.

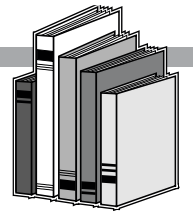
Danielle, a dual U.S. and Canadian citizen, grew up splitting her time between Anchorage and Calgary, Alberta — traveling the Alaska Highway with her family each summer was a highlight of her childhood. She earned a Bachelor of Arts in English Literature from Ambrose University and a Masters of Information in Library & Information Science and Archives and Records Management from the University of Toronto. Her very first job as a professional librarian was with the Anchorage School District.

Danielle has been reacquainting herself with the law library's collections

— she is particularly fond of the West Academic Nutshell series, which are very handy resources for learning about a new subject. In her free time, she enjoys hiking, camping, traveling, reading, writing and learning new things, especially new things related to the law library (You can try to stump her when you visit us, but you may not succeed).

After a year and a half in other positions, Danielle is thrilled to be back in a library, and is eagerly exploring our reference tools and research techniques. Want to help Danielle acclimate to her new role? Come visit her at the Anchorage Law Library and let her flex her information muscles by helping you find what you need. The Anchorage Law Library is open to the public Monday through Thursday, noon to 6 p.m., and noon to 5 p.m. Sundays. We are available via phone and email Monday through Thursday, 8 a.m. to 6 p.m.; 8 a.m. to 4:30 p.m. Fridays; and noon to 5 p.m. Sundays.

Susan Falk is the Alaska law librarian.



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Presiding judges for Alaska districts named

From the Alaska Court System

Former Chief Justice Daniel E. Winfree of the Alaska Supreme Court in December as one of his last official acts announced the re-appointment of three of the four Alaska District presiding judges: Superior Court Judge Amy Mead for the First Judicial District; Superior Court Judge Paul A. Roetman for the Second Judicial District; and Superior Court Judge Terrence P. Haas for the Fourth Judicial District. The Chief Justice appointed Superior Court Judge Thomas A. Matthews for the Third Judicial District.

The Chief Justice annually appoints a presiding judge for each of the four judicial districts. The appointments are for a calendar year, and incumbents are eligible for reappointment. In addition to regular judicial duties, the presiding judge has the administrative responsibility to review the trial court's operations in a district to assure adherence to statewide court system objectives and policies. The presiding judge works also with the district court administrator to ensure efficient administration of the district courts including hearing and trial schedules and staffing needs.

Judge Amy Mead was appointed to the Superior Court in Juneau in 2018. She earned her undergraduate degree from Boston University and law degree from Tulane Law School. Originally from the East Coast, she moved to Alaska in 1996 to serve as a Superior Court law clerk in Ketchikan. She went on to practice law as an assistant district attorney, an assistant attorney general, and in private practice, working in all areas of law. In 2010 Judge Mead joined the City and Borough of Juneau's Law Department and was appointed a few years later to serve as the CBJ's municipal attorney, continuing in that position until her appointment to the bench.



Judge Amy Mead

Judge Mead was appointed to the Alaska Commission on Judicial Conduct as an attorney member in 2012, serving in that capacity until 2018. She was re-appointed to the commission as a judicial member in 2022.

The First District covers Angoon, Haines, Hoonah, Juneau, Kake, Ketchikan, Petersburg, Prince of Wales, Sitka, Skagway, Wrangell and Yakutat.

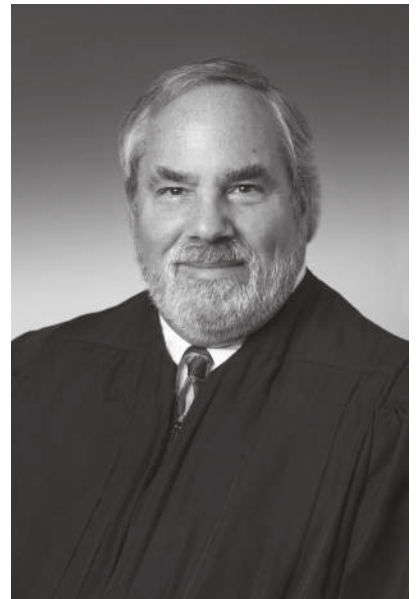
Judge Paul A. Roetman moved to Alaska in 1972 and has lived in Kotzebue for 16 years. He was appointed to the Superior Court in 2010. He earned a B.A. in economics from the University of Alaska, Anchorage, and received his law degree from Regent University School of Law. Prior to law school he worked out of Valdez as a commercial fisherman and as executive director of the Prince William Sound Economic Development Council. After law school, he worked for a civil law firm, the Alaska Legislature, and as a prosecutor for the State of Alaska. Judge Roetman currently serves on the Alaska Fairness and Access Commission, the Statewide Security and Emergency Preparedness Committee, and is Chair of the Alaska Commission on Judicial Conduct.



Judge Paul Roetman

The Second District covers Kotzebue, Nome, Unalakleet and Utqiagvik and more than 20 villages.

Judge Thomas A. Matthews was appointed to the Anchorage Superior Court by Gov. Bill Walker in 2018. He received his undergraduate degree from UC Berkeley in 1981, and his law degree from the Northwestern School of Law at Lewis & Clark College in Portland, OR, in 1985. Judge Matthews enjoyed a long career in private practice focusing primarily on civil litigation and representation of small businesses. Matthews has served for more than 25 years on the Ethics Committee of the Alaska Bar Association. He also served as a member of the Civil Pattern Jury Instruction Committee and serves as a mentor judge to newer judges. He also established and runs a bi-weekly meeting for civil judges around the Third Judicial District.



Judge Thomas Matthews

The Third Judicial District includes Anchorage, Cordova, Dillingham, Glennallen, Homer, Kenai, Kodiak, Naknek, Palmer, Sand Point, Seward, St. Paul, Unalaska, and Valdez.

Judge Terrence P. Haas was appointed to the Superior Court in Bethel in 2018. He earned his B.A. in philosophy from Purdue University and his law degree from Roger Williams University. After law school, he clerked for the Rhode Island Supreme Court. He practiced law as a public defender in Bethel for 10 years and as supervisor of a region including the Yukon-Kuskokwim Delta and Bristol Bay. Judge Haas currently serves as a member of the Child in Need of Aid/Delinquency Rules Committee, ICWA Court Improvement Project Subcommittee, and Alaska's Children's Justice Act Task Force.



Judge Terrence Haas

The Fourth Judicial District spans an area from the Canadian border on the east to the Bering Sea on the west, and includes Fairbanks, Tok, Delta Junction, Galena, Nenana, and Fort Yukon in the east and Bethel, Hooper Bay, Aniak, and Emmonak in the west.

The mission of the Alaska Court System is to provide an accessible and impartial forum for the just resolution of all cases that come before it, and to decide such cases in accordance with the law, expeditiously and with integrity.

**Lawyer
joke ...**

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MLK Day free legal clinic travels to Bethel for the day

Continued from page 1

program could match the clients up with the appropriate attorney for providing advice.

I recall that as the start of the first clinic approached some clients had lined up outside the Mountain View Boys and Girls Club waiting to receive legal services while braving the elements. When we officially opened the doors, we got everyone inside and began assisting them. As the day progressed a rhythm developed of clients coming through the line to the Intake Section, meeting with an intake volunteer, and then being matched with an attorney for legal services. The day went well.

The MLK Day Legal Clinic organizing committee learned a lot from that first clinic: the importance of knowing the strengths of each of the volunteers — such as language skills and diverse areas of legal practice, both of which might be employed to assist clients; the ability to adjust the clinic space to make sure the clients felt safe in their conversations with the professionals; the need for quality snacks and coffee for the volunteers to access throughout the day; and our own understanding of how best to handle clients who might be experiencing mental health or emotional crises while at the clinic. The list of what we learned from that first year helped shape the future of the legal clinic over the next 13 years.

MLK Day Legal Clinic in Bethel 2023 . . .

In 2022, I began traveling out to Bethel serving Table of Grace Lutheran Church and the occasional Bethel based legal client. Bethel felt like a place that could use a legal clinic. Table of Grace encouraged the idea of bringing a legal clinic to Bethel, and several members offered to provide the hospitality portion of the clinic. In October 2022 I spoke with Superior Court Judge Nate Peters at a cross-country race in Bethel. Judge Peters supported the idea of the legal clinic and offered to staff the art room for the children at the legal clinic. The art room is the area where the parents or guardians drop off youth which allows the adults to spend limited, quality time with the attorney while the children are occupied doing something fun.

When I relayed the information to Krista about Bethel and the interest to get a legal clinic to Bethel, Krista seemed optimistic and we be-



Bethel judges and volunteers included (Back row from left): Judge Nate Peters, Presiding Judge Terrence Haas, Judge Will Montgomery, Zach Manzella, Magistrate Judge Michael Smith and Joy Anderson. (Front row) Russ Winner, Judge Kari McCrea, Coralette Waite, and Ambriel Sandone.

gan discussing details for the clinic. There are a lot of details in the background of every clinic that Krista has always navigated well and often I am only aware of the outcomes. This was also true for the Bethel MLK Day Legal Clinic. However, one administrative issue that I did work on with Krista was finding the venue for the clinic. Finding the best

venue proved challenging at first. We initially thought that the Community Center would be the best place for the clinic, but we were unable to secure that space. Close by to the Community Center and near the courthouse was the Bethel Evangelical Covenant Church (BECC) which hosts a Friday night Supper Club meal from October through March for the whole community with a focus on those in need. When approached with the idea of the legal clinic Pastor Adam London, of the BECC, welcomed the legal

clinic to his church. After showing me around, how to get onto the internet, and how to use the printer/photocopier, Pastor Adam gave me a master key to the church because he had plans to be out of town on MLK Day.

With the venue secured, Krista had been in contact with Joy Anderson who is an attorney working for



Judge Nate Peters and his wife Addy, volunteered by entertaining children in a craft room while their adults attended to legal matters.

the Association of Village Presidents in Bethel. Joy, besides providing legal advice at the clinic, acted as the point person in Bethel for receiving paperwork and art supplies from the Bar Association. Joy also coordinated efforts such as providing rides to and from the airport and meals for the two Anchorage based attorneys Russ Winner and Ambriel Sandone and the two Anchorage based Judges Hon. Kari McCrea and Hon. Michael Smith who the Bar Association flew out to Bethel as a part of

the effort. Coralette Waite, another AVCP attorney, and I rounded out the five attorneys who were on hand to provide legal assistance for the clinic. Judges McCrea and Smith, who had served previously at the Anchorage MLK Day Legal Clinic as intake volunteers, staffed the Bethel Intake Section.

Table of Grace Lutheran Church provided snacks, coffee, bottled water and some boxed lunch type foods as we expected that the open church would also act as a warming center during the clinic hours. Judge Peters and his wife Addy came out to assist the Legal Clinic effort by staffing the art room. There were four children dropped off at the art room and Judge Peters reported success on the day as there was no crying by any of the children or adults. Bethel medical providers Drs. Elizabeth Roll and Anne Komulainen were on hand at the clinic and assisted some clients with accessing medical resources and navigating the medical system. Bethel Judges Haas and Montgomery also came out to the event to lend their support to the effort and encourage us to come back again next year.

I think the count on the day was 13 people served but often there were more issues presented when the clients sat with the attorney. And sometimes other accompanying family members brought up their own issues as they saw how the clinic worked. During the clinic we almost always had more than five people inside the church warming up and eating or drinking. The Bethel MLK Day Legal Clinic got off to a good start in 2023 and I look forward to building upon its success next year.

To provide a legal clinic, a lot of folks have to be invested in its success. The MLK Day Legal Clinic in Bethel spoke to that commitment by all who served that day and those who worked hard behind the scenes to make it happen. The Alaska Bar Association has a solid model that our cities and hub communities can employ to bring legal services to their context. Feel free to reach out to learn how. For any communities interested in hosting a clinic, contact Krista Scully: (907) 272-7469 or scullyk@alaskabar.org.

Zach Manzella is an Anchorage based attorney who also serves as a vicar in the ELCA congregations of Table of Grace in Bethel and Central Lutheran in Anchorage.

Zach Manzella is an Anchorage based attorney who also serves as a vicar in the ELCA congregations of Table of Grace in Bethel and Central Lutheran in Anchorage.



Attorney volunteers: Joy Anderson, AVCP general counsel; Coralette Waite, AVCP attorney; and Ambriel Sandone, from Ahtna Inc. who also serves as the new lawyer liaison on the Alaska Bar Association Board of Governors.

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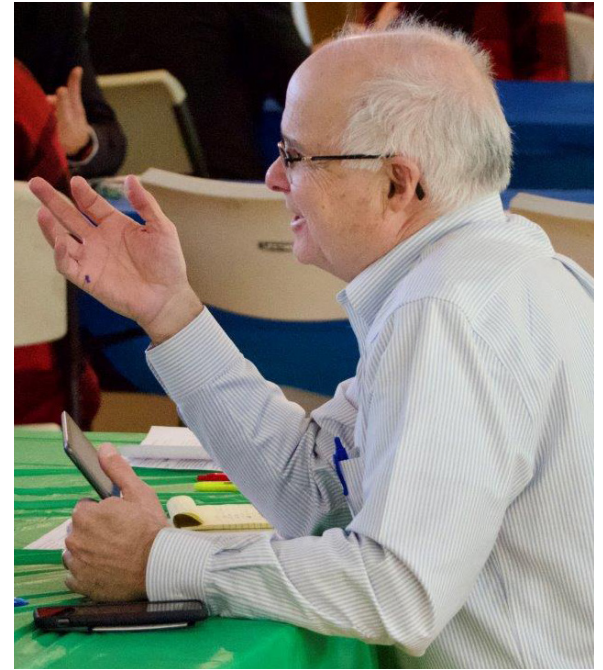
Photos by Judge Kari McCrea



Dylan Hitchcock-Lopez of Ashburn & Mason consults with a client.



Lauren Sommer, a member of the MLK Day leadership team, takes a breather.



Marc June, who has volunteered at nearly every MLK Day clinic since inception, shares a lighter moment.

Bar Association sponsors legal clinics on Martin Luther King Day

The Alaska Bar Association sponsored free legal clinics at four locations around the state on Martin Luther King Day, Jan. 16. Clinics were offered in four locations — Anchorage, Fairbanks, Juneau, and Bethel. Eighty volunteers donated 265 combined hours to serve 185 clients at the clinics.

See related story about the clinic in Bethel on Page 1

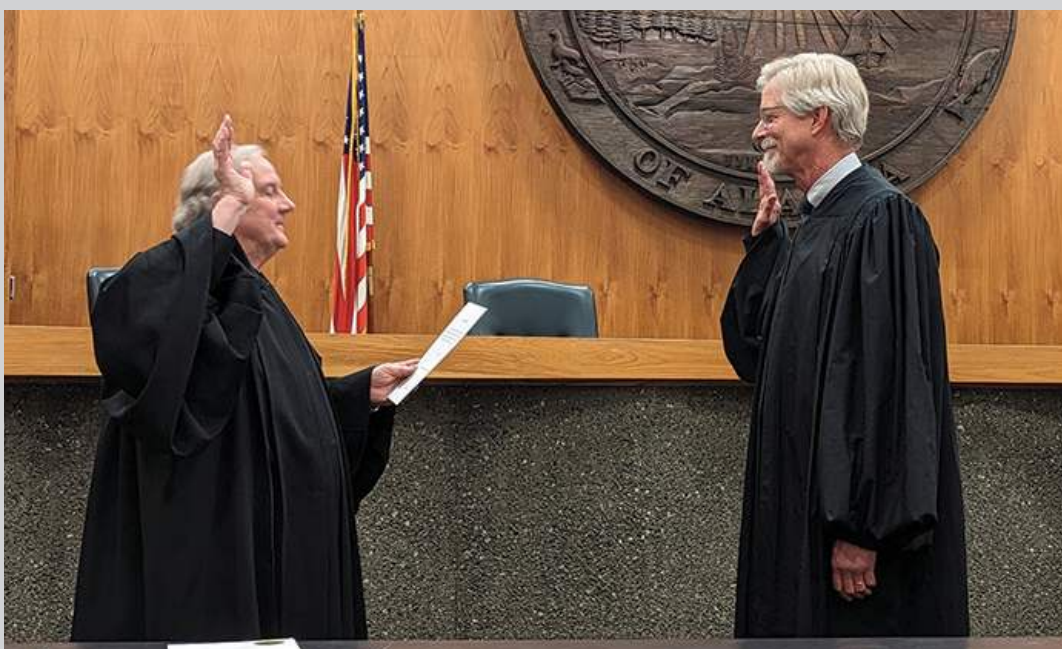


MLK window poster

Photos of the Anchorage clinic by Amy Mackenzie



Judge Pam Washington conducts a client intake interview.



Justice Peter J. Maassen recites the oath delivered by former Chief Justice Daniel E. Winfree. (Photo by Lillian Maassen)



Maassen's wife Kay E. Maassen Gouwens and daughter Lillian Maassen join him at the ceremony. (Photo by Justice Susan Carney)

Peter Maassen sworn in as Chief Justice

From the Alaska Court System

Chief Justice Peter J. Maassen was sworn in as Chief Justice of the Alaska Supreme Court by Justice Daniel E. Winfree Feb. 6, 2023, in the Boney Courthouse Supreme Court Courtroom in Anchorage.

The state officially announced Justice Maassen would serve as the Chief Justice beginning Feb. 7 after the retirement of current Chief Justice Winfree Feb. 6. Justice Maassen was first appointed to the Supreme Court in 2012.

In private practice for much of his career, from 1994-2000 Maassen served as editor-in-chief of the Alaska Bar Rag, the official publication of the Alaska Bar Association.

In 2006 he received the Professionalism Award from the Alaska Bar Association's Board of Governors. He was a member of the Board of Governors from 2009-2012, serving as treasurer, president-elect and discipline liaison. He also served for 10 years on the board of the Anchorage Youth Court, an alternative, peer-driven justice system for young offenders. He is a Fellow of the American Bar Foundation.

Under Alaska's Constitution, the Chief Justice is selected from among the justices of the Supreme Court by majority vote of the justices. The Chief Justice serves as the administrative head of the judicial branch of government, presides over Supreme Court arguments and conferences, appoints presiding judges for Alaska's four judicial districts, and serves as the chair of the Alaska Judicial Council.

See a previous article about the Justice's appointment in the December 2022 issue of the Bar Rag: <https://bit.ly/31kqjxg>.

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2023-1**

ISSUE PRESENTED

What ethical duties does a lawyer have regarding the retention of former clients' files in criminal matters?

SHORT ANSWER

Files relating to criminal matters may have future vitality even after judgment, sentence, and statutory appeals have concluded. In criminal matters, lawyers cannot always foresee the future utility of information contained in the file. New technology, newly discovered evidence, and changes to the law can make post-judgment relief appropriate, and a complete copy of the client file may be critical to obtaining that relief.

The Committee concludes that lawyers and legal agencies involved in criminal defense should formulate and adopt client file closing and retention policies that are reasonably related to the likelihood that the file will be relevant in future years. Lawyers should retain a copy of client files in criminal matters for an amount of time commensurate with the potential future need for the file, which in some situations could be indefinitely, and in many situations may be for a substantial period of years. The Alaska Rules of Professional Conduct, however, do not create a hard and fast rule regarding criminal file retention covering all possible scenarios.

ANALYSIS

Lawyers have a number of ethical and legal obligations related to client files and property. The applicable Rules of Professional Conduct include:

- Rule 1.1: A lawyer shall provide competent representation.
- Rule 1.3: A lawyer shall act with reasonable diligence and promptness.
- Rule 1.4: A lawyer shall communicate with a client and comply promptly with all of a client's reasonable requests for information.
- Rule 1.6: A lawyer shall keep a client's confidences.
- Rule 1.15: A lawyer shall safeguard the property of the client.
- Rule 1.16(d): A lawyer shall, upon termination of representation, take reasonable steps to protect a client's interests including surrendering all papers and property to which the client is entitled.¹

The Rules of Professional Conduct do not prescribe a minimum period of time for the retention of client files, nor is a lawyer required to permanently preserve all files of current or former clients.² In civil matters,

the Committee is advised that Alaska lawyers generally retain client files for seven to ten years—essentially, until the chances for a reopening of the matter have dwindled to a minimum.

Criminal files are different in that they can be the subject of post-conviction relief litigation many years after the matter has been closed. "Files relating to criminal matters may well have future vitality even after judgment, sentence and statutory appeals have concluded. In criminal matters, the attorney cannot foresee the future utility of information contained in the file."³ An application for post-conviction relief, even if resulting in the filing of a certificate of no merit, requires a thorough investigation by the attorney into the applicant's claims.⁴ The court reviewing a post-conviction relief petition needs an adequate record to determine whether the applicant was adequately advised and represented.⁵ Relevant evidence may consist of lawyer notes, the presence or absence of discovery materials provided by the prosecution, and evidence related to the lawyer's investigation and thoroughness in preparing the defense.

Post-conviction relief litigation can also be based on evidence related to issues of innocence and guilt. Technological advances and newly discovered evidence or testimony may make the evidence in the client's file material to post-judgment relief years after conviction.⁶ The criminal client has the legitimate expectation that counsel will safeguard that information. Alaska has many forms of mandatory minimum and presumptive sentencing schemes, making client files in criminal matters resulting in conviction extremely important to future sentencing exposure, or even the level of charging for future criminal allegations.⁷ In addition, time limits for seeking post-conviction relief are long and difficult to determine, which complicates setting a fixed period for file retention.⁸

Bar Ethics Committees in other jurisdictions have highlighted that criminal case files "should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer, or the administration of justice."⁹ Alaska's public criminal defense agencies maintain their felony client files for up to 35 years.¹⁰ The Alaska Department of Law keeps most felony criminal case files and records either for 50 years past the case closing date or permanently,¹¹ and the Alaska Court System similarly maintains many criminal case files and records permanently.¹² Advances in electronic record-keeping and electronic file security have greatly lessened the cost and inconvenience for a lawyer to maintain records for long periods of time, although precautions must be taken to assure that the files are secure and kept confidential.¹³

The length of time to retain a file is a matter of sound discretion for the lawyers involved.¹⁴ The Committee recommends that a lawyer consider the severity of the crime, possible consequences to the client from the conviction, the complexity of the matter, the likelihood that post-conviction relief will be sought, and whether the file contains information or evidence that cannot be readily obtained from other sources. The lawyer should consider the cost and means of long-term storage, security of the information, and how retrieval of the information will be possible in the future.¹⁵ The Committee recommends that the lawyer notify the client of the lawyer's plan for retaining and destroying the file, offer to provide the client with the file at the time it is closed, and notify the client and afford the client a reasonable period of time to request the file prior to destruction if the lawyer is not keeping the file indefinitely.¹⁶ A lawyer retiring from the practice of law

Continued on page 12

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**Board of Governors Action
Items**

December 5, 2022

- Approved three reciprocity and two UBE applicants for admission.
- Voted to affirm the 2023 budget and salary raises.

**Board of Governors Action
Items**

February 2 and 3, 2023

- Approved October and December 2022 Board meeting minutes.
- Approved eight reciprocity and nine UBE applicants for admission.
- Approved non-standard testing accommodation.
- Approved Rule 43 ALSC Waiver to allow for Cory Gordon, an employee of the Alaska Network on Domestic Violence and Sexual Assault (ANDVSA), to practice on behalf of referral clients of Alaska Legal Services Corp (ALSC) under a Memorandum

of Understanding between the two agencies.

- Appointed a subcommittee of the Board to evaluate past and current attorney pipeline initiatives: Hofmeister, Oravec, Ostrovsky, and Patterson.
- Approved resolutions that designated new Board of Governor members as signers on bank accounts.
- Voted to submit Bar Rule amendment to the Supreme Court that would lower the Alaska Bar exam cut score from 280 to 270. The Board also voted to make this change retroactive five years from adoption.
- Voted to increase Bar admission fees to \$1,000 for UBE transfers, \$850 for Bar exam applicants, \$550 for Bar exam reapplicants, and \$125 for Bar exam laptop fees. Change effective March 1, 2023.
- Appointed a subcommittee of the Board to recommend direction for Bar Health Plan Rebate funds: Granger, Hofmeister, and Ostrovsky.
- Voted to enter into a three-year exclusive contract with Clio.

Continued from page 11

should take appropriate steps to assure that criminal client files are not lost or destroyed after their retirement.

In sum, criminal files are unique in that they are more likely to require future inspection and more likely to be relevant for a longer period of time. Lawyers handling criminal matters therefore must act with special care in thinking through file retention practices. While the Rules of Professional Conduct do not contemplate a specific minimum period of time that all such files must be kept, a lawyer's ethical duties to the client dictate that the lawyer carefully consider criminal file retention issues. The Committee recommends that lawyers and legal agencies handling criminal defense matters take all reasonable precautions to preserve and protect their client files for an appropriate length of time, based on the considerations described in this Opinion, after the matter is completed and the file is closed.

Approved by the Alaska Bar Association Ethics Committee on December 1, 2022.

Adopted by the Board of Governors on February 3, 2023.

FOOTNOTES

¹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) §46 (“(1) A lawyer must take reasonable steps to safeguard documents in the lawyer’s possession relating to the representation of a client or former client. (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.”). The Committee notes that in addition to obligations under the Rules of Professional Conduct, a lawyer may have file retention obligations arising from contractual obligations, malpractice insurance requirements, or agency policies and practices, among other sources.

² See ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1977) (applying former Code of Prof'l Responsibility) (“[a] lawyer does not have a general duty to preserve all of [the lawyer’s] files permanently But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers’ files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed, to the client’s detriment. We cannot say there is a specific time during which a lawyer must preserve all files and beyond which [the lawyer] is free to destroy all files.”).

³ California Bar Formal Ethics Op. No. 2001-157 (2001), quoting Los Angeles Co. Bar Ass’n Committee on Legal Ethics Formal Op. No. 420 (1983). Based on these concerns, the California Bar concluded that “client files in criminal matters should not be destroyed without the former client’s express consent while the former client is alive.” Op. No. 2001-157 at 5.

⁴ Criminal Rule 35.1(d)(4) and (f)(2); see also *Belluomini v. State*, 2020 WL 2551859 (Alaska App. May 20, 2020) (“Under Rule 35.1(e)(3), a certificate of no merit must include a full description of the claims the attorney considered, the materials the attorney reviewed, the investigations the attorney conducted, and the reasons why the attorney has concluded that all of the applicant’s potential claims have no arguable merit. With regard to this final requirement, the attorney ‘must provide the court with a full explanation of all the claims the attorney has considered and why the attorney has concluded that these claims are frivolous.’” (quoting *Griffin v. State*, 18 P.3d 71, 74 (Alaska App. 2001))).

⁵ *Tazruk v. State*, 67 P.3d 687, 690 (Alaska App. 2003) (“Even if a zealous and competent attorney could not have done anything more to advance Tazruk’s claims, without an actual record indicating that the attorney investigated the claims, ‘sought to adduce support for them through discovery,’ or attempted to ‘reformulate them so that they might survive a motion to dismiss,’ we were unable to perform our constitutional duty in ensuring that Tazruk received zealous and competent representation.”); *Beshaw v. State*, 2012 WL 1368146, at *6 (Alaska App. Apr. 18, 2012) (noting that without the record of the materials reviewed, the court has no basis to meaningfully assess whether the attorney zealously represented the applicant as required by *Griffin*, 18 P.3d at 75-77, and Criminal Rule 35.1(e)(2)).

⁶ *Tazruk*, 67 P.3d at 689 n.2 (“[W]hen a defendant seeks post-conviction relief based on newly discovered evidence, . . . the defendant must show that the evidence was not known at the time of the defendant’s trial or plea despite the defense team’s diligent efforts, and that this new evidence (if presented) probably would have led to the defendant’s acquittal.” (citing *Lewis v. State*, 901 P.2d 448, 450 (Alaska App. 1995) and *Gonzales v. State*, 691 P.2d 285, 286-87 (Alaska App. 1984)).

⁷ For example, sentences of imprisonment for felonies are premised upon the presumptive sentencing structure set forth at AS 12.55.125. Similarly, in the arena of crimes against the person, the Alaska Legislature has determined that a history of prior misdemeanor assaults can turn what is otherwise future misdemeanor conduct into a felony offense. See AS 11.41.220(a)(5).

⁸ The Committee is advised by public defense counsel that a direct appeal to the Court of Appeals can take anywhere from two to six years to be resolved, which can be followed by a petition for review to the Supreme Court, which can take an additional six months to several years to resolve. The post-conviction relief deadline is presumptively one year following the end of the direct appeal, but this time limit is subject to legal justifications for tolling or extending the deadline. Post-conviction relief appeals can take as long as direct appeals and may be followed by habeas corpus litigation, or by an ineffective assistance of counsel claim relating to the post-conviction relief or habeas proceeding.

⁹ Alabama Bar Ethics Op. 2010-2, “Retention, Storage, Ownership, Production and Destruction of Client Files,” at 7; see also California Bar Formal Ethics Op. No. 2001-157 (2001), *supra* note 3 (criminal files should be maintained until the client’s death); Ohio Bd. of Prof'l Conduct, Ohio Ethics Guide Client File Retention (2016) at 3 (“For example, files related to . . . criminal law . . . should be retained until the files no longer serve a useful purpose to the current or former client.”).

¹⁰ State of Alaska Records Retention and Disposition Schedule, Public Defender Agency, at 2 (“If original paper records are scanned, they can be disposed of once the electronic copies have been certified as being a ‘true and correct’ copy of the original. Justification for ‘C+35’ year retention: Cases are often re-opened years after a conviction is entered and the case file is closed. If a felony conviction is appealed, a new appeal case file is opened, but original felony case file must be available. Appeals often take up to 2 years, and sometimes 3-5 years. After an appeal, per the AK Rules of Criminal Procedure, a defendant has up to a year to apply for post-conviction relief. These can be lengthy proceedings, sometimes taking 2 years or more. PDA also needs to retain felony/appeals files if probation and parole revocations proceedings

take place - often after a defendant serves a lengthy sentence. Defendants sometimes reoffend and are subject to enhanced sentences based on the original conviction. In all these cases effective representation requires the original case file.”).

¹¹ State of Alaska Records Retention and Disposition Schedule, Department of Law – Criminal Division (adopted Jan. 16, 2013), <https://archives.alaska.gov/documents/rims/schedules/law/03-679-2.pdf>.

¹² See Administrative Order No. 25, Appendix B (retention schedule for felony case files), <https://courts.alaska.gov/adbulls/docs/ab25.pdf>; see also AS 40.21.010 et seq. (“Management and Preservation of Public Records”).

¹³ The Committee believes that retaining electronic copies is sufficient to meet the lawyer’s obligations, so long as reasonable precautions are taken to assure that the complete file is preserved, that it is secure, and that it can be accessed if necessary. See, e.g., Alabama Bar Ethics Op. 2010-2, *supra* note 9, at 13 (“[D]ocuments that are originally created and maintained electronically must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document. The lawyer must ensure that the process is at least as secure as that required for traditional paper files. The lawyer must have reasonable measures in place to protect the integrity and security of the electronic file.”); Alaska Ethics Op. 2008-1; AS 09.80.090(a).

¹⁴ Alaska Ethics Op. 84-9 at 1 (opining, under now-superseded Disciplinary Rules, that file retention considerations “should be based on a case by case review of files and documents”).

¹⁵ Cf. Nevada State Bar Formal Opinion No. 33 (Feb. 9, 2006) (“[A]n attorney may use an outside agency to store confidential client information in electronic forms, and on hardware located outside the attorney’s direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent.”).

¹⁶ Transfer of closed files to clients is particularly plausible given technological advances allowing lawyers to separately scan and retain closed files in secure electronic settings. We note, however, that there are certain materials defense attorneys are prohibited from transferring or delivering to their client. See, e.g., AS 12.61.120(a) (prohibiting disclosure of certain personal information to the defendant); Criminal Rule 16(b)(9) (setting forth restrictions on availability of certain material), and see, Alaska Bar Ethics Op. 2003-3 (“Documents to be Included in File Returned to Client on Termination of Services”) and 2011-1 (“Must a Lawyer Provide the Original File to a Former Client on Request, Rather Than a Copy?”).

Alaska Court of Appeals chief judge appointed for 2023

Outgoing Chief Justice Daniel E. Winfree in December announced the appointment of Judge Marjorie K. Allard to a two-year term as chief judge of the Alaska Court of Appeals for 2023 and 2024.

Judge Allard has served on the Court of Appeals since January 2013. This will be her third term as chief judge.

Allard received her B.A. from Yale University and her law degree from Yale Law School. Prior to joining the Court of Appeals, she served as an assistant public defender at the Alaska Public Defender Agency and as an assistant public advocate at the Office of Public Advocacy. She also taught legal research and writing at Stanford Law School and served as a clinical instructor at Santa Clara Law School.



Judge Marjorie Allard

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Outgoing Chief Justice reports on State of the Judiciary

Chief Justice Daniel E. Winfree

Report to the first regular session of the 33rd Alaska Legislature Feb. 1, 2023

President Stevens, Speaker Tilton, Honorable Members of the 33rd Alaska Legislature, guests, and all those otherwise joining to hear about Alaska's judiciary, good morning. Thank you for allowing me here for my final State of the Judiciary Address, which I like to refer to as the last stop on the Chief Justice Winfree farewell speaking tour. As required by the Alaska Constitution, I must retire by my 70th birthday on Feb. 12, and my last day in office will be next Monday, Feb. 6. A friend recently commented on the irony that I'm about to be too old to remain an active justice on our court, while based on the last two presidential elections, I may not be old enough to run for president.

As I mentioned last year, Chief Justice George Boney, Alaska's second Chief Justice, appeared here in January 1972 for the first State of the Judiciary Address. I am the 13th person — and the first Alaska-born — to address you as Chief Justice; I am delighted, and deeply honored, to be here as I close out my time on the Alaska Supreme Court. Because there are so many new legislators this year, I'd like to first quickly introduce you to some people, then talk about some of the judiciary's successes and challenges, and finish by expanding on my remarks from last year about our different roles in Alaska's contemporary democracy.

Judiciary members

The next Chief Justice will be Justice Peter Maassen, who was appointed by Gov. Sean Parnell in 2012 and sits in Anchorage. I will swear in Justice Maassen as Chief Justice as late in the day as possible, perhaps just before midnight, on Feb. 6.

Justice Susan Carney was appointed in 2016 by Gov. Bill Walker and sits in Fairbanks. Justice Carney came to Fairbanks in 1987 for a one-year clerkship with Justice Jay Rabinowitz; as she often says, it's been a very long year.

Justice Dario Borghesan was appointed in 2020 by Gov. Mike Dunleavy after a decade with the Attorney General's Office. Justice Borghesan came to Alaska in 2008 to clerk for me; he now sits in Anchorage.

Justice Jennifer Henderson was appointed in 2021 by Gov. Dunleavy and also sits in Anchorage. Justice Henderson came to Alaska in 2001 to clerk for Justice Warren Matthews, and she joined us after serving on both the District and Superior courts for a total of eight years.

Successor

Finally, I'd like to introduce my successor and soon-to-be newest justice on the court, just recently appointed by Gov. Dunleavy. Superior Court Judge Jude Pate came to Alaska some 30 years ago and has been a mainstay in Sitka all these years. He will maintain his chambers here in Juneau, and he will bring a wealth of experience

to the court. My colleagues hope he joins the court as soon as possible to share the workload.

I also want to introduce our Administrative Director, Stacey Marz, who has over 20 years with the court system and became director in November 2019. Stacey worked incredibly hard to help us navigate the pandemic and then a cyberattack, and she speaks nationally to other court administrators on a variety of issues. She is inspirational.

General Counsel Nancy Meade came to Alaska in 1987 to clerk for Justice Ed Burke. She joined the court system in 2004 as our court rules attorney and moved to her current position in 2011. Her goal is to help you understand court system operations and how proposed legislation might impact the judicial system. I hold her in very high regard and thank her for her nearly 20 years with us.

As you may know, the bad news for us last year was former Deputy Director Doug Wooliver's retirement after nearly 30 years with the court system. The good news is that we were able to find someone willing to work in a temporary role to fill at least part of the void created by his departure. Let me introduce Doug Wooliver, our new acting deputy director. I think this is his 27th appearance in Juneau for the court system; I understand some of you aren't even that old yet.

Judicial council

I'd also like to acknowledge Susanne DiPietro, executive director of the Alaska Judicial Council for about the last decade. The Council plays an important constitutional role in the judicial selection process and is a key reason our judiciary is so highly regarded across the country. Susanne has been a public sector attorney for over 30 years, and she has volunteered internationally to help establish judicial systems in emerging democracies.

I'll now highlight a few of the court system's successes and challenges. Most notably, I'm pleased to report that we are, and have been for nearly the entire past year, operating with all engines firing. We are at virtually the same levels of activity, and productivity, with all the same services (and actually a number of expanded services) that we had before pandemic disruptions.

What do I mean by productivity? That seems an odd word to describe a court system's work. A court system's success in its mission, serving the public fairly and efficiently and handling every matter that comes in the door, obviously can't be measured the same way as for-profit businesses, but we might roughly apply that notion by looking at trial court output. And statistics show that our judges and staff have been delivering. Let me highlight just a couple of those statistics, because boring numbers sometimes really do tell a story:

**First, we track the total number of court hearings. In calendar year 2022 we had about 333,000 hearings, almost exactly the same as we had in 2019, before pandemic interruptions.

**Breaking that down a little, about a third of those hearings were in felony cases; that's about 6-



Former Chief Justice Daniel E. Winfree addresses the Legislature.

or 7,000 more felony hearings than we had in 2019.

**Looking at criminal change of plea hearings, when the court is asked to accept a negotiated plea agreement to end the entire case or at least most of the issues, we held over 16,000 of them. Again, this is more than we had in 2018, before the pandemic, and the number of those in felony cases was higher than in any of the last five years.

Pandemic effect

Although numbers reflect a recovery from pandemic limitations, I must acknowledge one data set much less satisfactory than we would like. The number of pending criminal cases remains higher than normal as a result of pandemic disruptions and subsequent unexpected events. This is especially frustrating given all the efforts and incremental progress made during pre-pandemic years to shorten the time between opening and resolving a criminal case.

Part of our mission is to bring every case to final resolution as fairly and as quickly as is reasonable. Resolving criminal cases in particular provides some closure for victims, settles a defendant's status, and provides an ending of sorts for everyone involved. To further that, we have a strong policy and practice of making judges and courtrooms available when prosecutors and defense attorneys are ready to proceed with a plea agreement or a trial in any criminal case.

So, why this "backlog" of open criminal cases? If you were here last year, you learned that historically 96 to 97% of criminal cases are resolved without a trial. Criminal cases generally are dismissed or settled with plea agreements, only rarely is there a trial. But cases that should have been resolved without trial did not get resolved during the pandemic, reportedly because prosecutors, defense lawyers, and defendants wanted or needed real trial dates to prompt real action on their cases.

Backlog

Last year, after authorizing all criminal jury trials to resume, I expressed confidence that agency lawyers would get back to resolving cases without trial and whittle away

the backlog. That whittling has been much slower than we would like. Some agencies have ongoing staffing problems in various locations, and trial scheduling and logistics can be a tremendous challenge. We know the agencies are working hard to stabilize their staffing and clear cases, and we know your help with agency lawyer pay increases will play an important role. That's encouraging, and I remain optimistic about this.

Just like those agencies, and all of state government, we, too, have been facing recruitment and retention challenges. Many of our staff, and even our judges, are somewhat new to their jobs; yet, as a whole, the pace is quick, filings are promptly processed, proceedings are taking place in person and remotely, and expectations are high. We are hopeful that we'll continue to retain a professional, helpful, and motivated staff and that the public will see our branch of government as responsive to their needs.

Beyond recovering from the pandemic, we've focused on enhancing and expanding ways to provide service to all Alaskans. First, remember that budget crisis back in fiscal year 2016? The court system took the proactive step of closing our courthouses to the public on Friday afternoons, resulting in fewer work hours and a corresponding salary decrease for many of our front-line people. That saved the state over two million dollars in FY 2017 and every year thereafter. I'm pleased that, with your help in our current budget, all the large courts have reopened on Friday afternoons and remaining courts will open incrementally as we move forward. Alaskans again can access the court system on Friday afternoons; thank you for your help in making this happen.

Friday closures

Since arriving in Juneau, I've heard that some of you are wondering whether the Friday afternoon closures contributed to the criminal case backlog. The answer is no. The Friday afternoon closures, which began July 1, 2016, had no effect on case settlement rates. And the closures were well received by judges and agency lawyers because it freed

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up case preparation time. We had no abnormal backlog prior to the pandemic; the current backlog is a direct result of pandemic-related failures to resolve cases without trial in the normal course.

Second, we have greatly expanded courtroom video technology as a direct result of previous pandemic health and safety concerns. Our IT employees are travelling to jails and other detention facilities to install necessary equipment so more arraignments, status conferences, other criminal case hearings, and civil commitment proceedings can take place remotely. This cuts down on security and safety risks inherent in transporting prisoners or vulnerable Alaskans on roads and inside courthouses, and it should result in significant cost savings for the Department of Public Safety as well. We also are working on creating a list of civil and criminal hearings that presumptively should be held remotely with audio or video technology. We intend that any new process be convenient, cost-effective for everyone involved, fair to litigants, and less burdensome for all participants. I'm hopeful that by this time next year we will have substantially more use of this technology in a variety of hearings.

Video technology

Our increased use of video technology also will help the public observe and participate in court proceedings. Through our court system website, we now are live streaming key hearings and trials in cases with high public interest, and I know some of you have taken a look at this. A recent trial had over 100 people watching or listening online; I suspect the vast majority of them wouldn't have ventured to the courthouse, found a parking spot, cleared security, and sat on those wooden benches in the courtroom gallery to watch the trial. Indeed, this will allow people all across the state to watch matters of great public interest that may be happening, say, in Anchorage, Fairbanks, Palmer or Juneau. We're proud to showcase our work and make it easier to see firsthand what we do.

Finally, last year I spoke about our nationally recognized Access to Justice Services department, focusing on helping those who are self-represented in court matters. We've launched a brand-new program for landlords and tenants dealing with evictions. With grant funding from the National Center for State Courts — and we are one of only 12 court systems nationwide to receive this funding — we now have a designated staff member creating a pathway for landlords and tenants to resolve housing disputes before entering the courthouse doors. We'll provide information on rental assistance, financial counseling services, mediation, and legal assistance to help parties avoid the cost and time involved in traditional eviction litigation. We think this program will mitigate the collateral damage of evictions, improve housing stability across the state, and allow judges to dedicate more time to other matters needing attention.

Now to finish up, I'd like to return to last year's theme: our dif-

fering roles in maintaining a contemporary democracy. Since last year, we've had a post-redistricting election for pretty much everyone in this brand-new, 33rd Legislature, and we've had another election for governor. In two years, there will be the 34th Legislature, and in four years, there will be a new governor. Alaska's legislatures and individual legislators come and they go. Alaska's governors come and they go. Alaska's supreme court justices, like me, come and they go. Yet as Alaska approaches 70 years old, six years behind me, it remains vibrant and alive despite myriad political pendulum swings. Democracy is alive and well in Alaska.

Politics

You may be surprised to hear that I admire you, and every other Alaskan who has thrown a hat in the ring for elected public office. I couldn't do what you do — fighting political policy battles, entering the public square and debating, civilly

or otherwise, heated political disputes of the moment, asking donors for money for campaigns, and engaging with the public every day to discern the political winds and act accordingly. I do sometimes enjoy watching you from a distance, although often I shake my head and wonder about politics of the day. But I believe that each of you has a sense of duty and that each of you acts in what you believe are in Alaska's best interests.

I would hope that you have a similar regard for us. But as I did last year, I want to contrast how you go about your business with how we go about ours.

The political branches control and conduct the state's day-to-day business. Generally speaking, political parties and politicians seek to influence government conduct through public policy debates and calls to action, electing particular politicians to positions of power, and governing in a manner promoting particular public policy and related goals. To be successful, you must

express your personal and political views and, perhaps more importantly, listen to your constituents' views. You seek information from many sources, get advice from your closest political confidants, look at opinion polls, and then you decide which public policy is best, or at least which public policy is consistent with your constituents' wishes and your future re-election plans. But to get things done, you make temporary political arrangements: Who will be in the next coalition, and why? Who will vote yea or nay on a bill, and why? Who will vote for a budget, and what will their constituents get in return? You do all this in the public eye — well, some of it anyway — but your considerations are ever-changing political transactions.

We all generally like the concept of majority rule — how many times do we hear that elections matter? But unconstrained transactional

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politics and majority rule have dangers that may place minority rights and privileges at risk. So, what constrains political-transaction, majority rule? Well, there is that pesky Alaska Constitution. One of my few recollections of law school classwork is a professor's description of the law as riverbanks — in this context, the political branches generally can do what they want as long as they stay in the flow between the riverbanks. But they can't jump over or unilaterally change those riverbanks. Then, of course, the question arises: who guards those riverbanks?

Constitutional duty

Enter stage left, or stage right, depending on your viewpoint, the judicial branch. Our most basic constitutional duty is deciding disputes brought through the courthouse doors. We don't go looking for things to decide. All Alaskans have the right to bring a dispute to the courts, and we don't get to pick and choose which ones to consider. We are always mindful that our work involves some of the most important matters in people's lives, like divorces, child custody disputes, criminal charges, civil commitments, guardianships, parental rights terminations, personal injuries, contract disputes — you name it, we decide it. And, of course, there are those few occasions when we are asked, and tasked, to decide political disputes — perhaps election or redistricting challenges, turf wars between the legislature

and the governor, citizen challenges to legislatively enacted statutes, or challenges to citizen rights of initiative and referendum.

How do we go about that? It's completely unlike how you go about your business. A central feature of being an Alaska judge is making the conscious effort to put aside personal views and public opinion when deciding cases. We don't go asking friends and confidants how we should rule, and we don't conduct opinion polls to see how people think we should rule or what their reaction to a decision might be. We don't check with personal friends in the legislature or executive branch to see how they feel about it. We consider only the evidence presented in court and the relevant law, and we disregard everything else that could inappropriately influence the outcome, whether the decision affects one person, a family, a community or everyone in Alaska. If we instead simply rule according to the swirl of public opinion or to what some in the legislative or executive branches want, then the judiciary means nothing.

And unlike in your world, there is no room for a transactional analysis. A trial court judge works alone. In the Supreme Court, what I bring to the table in every case is my hard work to understand the case, my

analysis of the legal issues, and my ultimate conclusion about the correct legal resolution. We do not talk with each other about the merits of a case unless all of us are present, and our memos about a case go to all the justices at the same time. We meet together in the conference room to discuss our individual views of a case, and we discuss those views until there is a majority consensus on its resolution. We then spell it all out in a written decision; everyone has access to our decisions to see exactly why we decided what we decided.

Rule of law

This all comes in to play as the rule of law, and democracy relies on the rule of law. Some of you are thinking, what a crock, of course politics are at play in our decisions and we're just a bunch of activist judges. But that's because you see everything through a political transaction lens. You see a political dispute and conclude that any decision we might make to re-

A trial court judge works alone. In the Supreme Court, what I bring to the table in every case is my hard work to understand the case, my analysis of the legal issues, and my ultimate conclusion about the correct legal resolution.

solve that dispute therefore must be political. I see the political dispute as just another legal dispute, one of the hundreds and hundreds and hundreds of disputes I've seen in my time as a justice. I look to the facts, I look to the law to determine the correct analysis, and I reach a legally based resolution of the dispute just like I do in a divorce dispute, a contract dispute, or a citizen's claim against the state. That's my judicial lens. And that's why, when I watch you through my judicial lens, I don't always understand what you're doing and why you do it. But then I remind myself that you see things through a different lens than I do. So, when you're wondering about one of our decisions, please make an effort to see things through our judicial lenses.

I do want to make a couple of comments about that activist judge label. The practical definition of an activist judge has been clear to me for years: it's the judge who rules against you. The losing side is certain that the judge must be an activist because the losing side is always certain that it couldn't possibly be wrong about its version of the facts or its interpretation of the law. And with respect to our decisions on important political disputes of the day, it seems that many people base their judgments solely on how their internet sources characterize the result, without ever reading or caring about our written explanation of the relevant facts and the law and why we came to our conclusion. If they don't like the result, we're corrupt, incompetent, or, even worse, radical activist liberals or radical activist conservatives. When they like the result, we're incredibly smart and wonderful, or at least the blind pig who found a truffle. And this view is easily encouraged and amplified by those who should know better.

Democracy and the rule of law depend upon an independent judiciary willing to make the hard calls

without favor or bias. I recognize that some here don't believe in an independent judiciary, but rather believe Alaska's judges should be hand-picked and controlled by politicians so the judges will render decisions the politicians want. Our Constitutional Convention delegates were aware of that view, and they expressly rejected it — along with rejecting the notion of elections for judges — in favor of the merit selection process. The delegates wanted politics out of the judicial selection process all the way up to the governor's constitutionally authorized appointment of a judge from the list of the most qualified applicants provided by the Alaska Judicial Council. With apologies to Led Zeppelin's *Stairway to Heaven* — and those too young to get the reference — the judiciary was intended to be a rock, and not get rolled.

Separate duties

Not long ago I saw something attributed to U.S. Supreme Court Justice Clarence Thomas that resonated with me, and it goes something like this: "We should be careful about destroying our institutions simply because they don't give us what we want when we want it." I couldn't agree more. Our three branches of government have separate duties and separate ways of fulfilling them. But we have important common ground. We strive for fair and predictable government, equitable law enforcement, and respectful resolution of disputes. Alaska has had these linchpins of a functional government and democracy for nearly 70 years, and I remain confident it will continue to do so.

The delegates signed the Alaska Constitution just before my third birthday, and just a couple of miles from my house. I again note the little-known resolution the delegates directed to Alaska's children, which I have hanging on a wall outside my office:

"We bequeath to you a state that will be glorious in her achievements, a homeland filled with opportunities for living, a land where you can worship and pray, a country where ambitions will be bright and real, an Alaska that will grow with you as you grow. We trust you; you are our future. We ask you to take tomorrow and dream; we know that you will see visions we do not see. We are certain that in capturing today for you, you can plan and build. Take our constitution and study it, work with it in your classrooms, understand its meaning and the facts within it. Help others to love and appreciate it. You are Alaska's children ..."

I am one of those children, a kid from Fairbanks with the teenage dream of someday helping make important decisions for Alaska. And 15 years ago, I suddenly found myself one of five people heading the judicial branch of Alaska's government. I have given it everything I have to give, and loved every minute of every day. To all you other children of Alaska out there, *young and old*, live your dreams and make Alaska an even better place for all of us.

It's been an honor and privilege to speak to you, and to all Alaskans, on behalf of the nearly 800 Alaska Court System employees around the state. Farewell.



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An impaired lawyer raises insurance questions

By Mark Bassingthwaighte

Multiple lawyers and firms have reached out to me over the years, each concerned about impairment and wanting to discuss their options. In light of these conversations, and with a desire to put one significant misconception to rest, I have asked and answered several questions as a way to share what my response has been.

What is your definition of lawyer impairment

While I often define this phrase quite broadly, for the purposes of this article I am going to narrow it slightly. Lawyer impairment can encompass impairments that to varying degrees our society tends to stigmatize such as mental illness and chemical dependency. Lawyer impairment also includes long-term disabilities that can arise out of an accident or illness, or a terminal illness, for example, cancer. This definition of lawyer impairment is important because any one of us can become impaired and we need to be more open and proactive about addressing impairment when it arises. The longer an impairment remains unaddressed, the more severe the impairment or its consequences can become.

Lawyers struggling with a mental health impairment are often quite resistant to seeking help due to a fear of being viewed as weak, crazy or even dangerous; as unable to cut it as a lawyer; as different because there's something wrong with them; or of being told that their problem is self-inflicted so they should just get over it. Those struggling with a chemical dependency face similar fears.

Those suddenly dealing with a disability or terminal illness sometimes hide the truth due to embarrassment; a belief that they have let others down and will be viewed as such; and a fear that they may no longer be competent or will be viewed as incapable.

When all of this is considered in the context of impact on livelihood, such feelings and fears can be a substantial roadblock to dealing with an impairment in a healthy way. It needn't be this way.

What is the significant misconception?

The one significant misconception is that there will be some type of negative repercussion if a firm's malpractice insurer somehow learns that one of its lawyers is impaired. Worries include being charged higher premiums, being denied continuous coverage, having someone forced into quitting the practice of law, being told how the firm must manage the situation in order to remain insurable, and the list goes on. The overriding concern is one of insurability.

Here's the reality. There is no truth to any of this. Malpractice insurance applications don't ask firms to disclose the number of firm attorneys who are currently struggling

with depression, being treated for a terminal illness, or have an opioid addiction. The fact that one or more firm attorneys may have an impairment in and of itself doesn't matter. Should an insurer come to learn of an impairment, perhaps in the process of handling a claim, the concern will be whether the impairment is being responsibly addressed.

Think about it this way. There's a huge difference between a lawyer who refuses to acknowledge he is an alcoholic and a lawyer who recognizes that a drinking problem exists and seeks appropriate help. Life happens, and insurers understand that. It's the fallout of failing to address the issues appropriately that can result in adverse consequences with your insurance coverage, not the impairment itself.

Look at it from an insurer's perspective. Which firm would you rather insure: 1) a firm that has a culture of zero tolerance for even acknowledging that someone might be impaired, or 2) a firm that recognizes life happens and is culturally supportive of whoever might be dealing with an impairment?

I assure you the zero-tolerance firm is a much higher risk. Denial, intentional ignorance, and intolerance create conditions that allow potential problems to fester and multiply. That's high risk. Openness, empathy, and support leads to the exact opposite outcome. This is a far more acceptable risk.

Insurers are in the business of evaluating risk and you are in control of what that risk looks like. Stated another way, individuals and even firms are not always defined by the circumstances they find themselves in. They are more often defined by how they respond to the situation. Again, life happens. Rise to the occasion.

Do you have any advice for dealing with impairment?

Here is a little practical advice for dealing with an impairment:

1) Failing to deal with an impairment individually and as a firm has consequences. Should the legal interests of clients be adversely affected as a result, malpractice claims and disciplinary complaints may not be far behind. In light of this, my best advice is to do all you can to create an environment that seeks to prevent such a thing from ever happening. If not already in place, a firm culture that prioritizes well-being would be a great place to start.

2) In order for an individual to responsibly address an impairment, recognize that some type of temporary or permanent transition may need to take place. As a firm, do everything you can to identify and work through the transition issues together. This is a time when the efforts of a team can make a huge difference for all involved. Issues to consider might include workload, file review, schedule changes, role changes, file handoffs, client contact, client introductions, conditions of remaining with the firm, conditions of returning to the firm after an extended absence, capturing any

intellectual capital before the opportunity is lost, impact on the impaired attorney's income, necessary workplace accommodations, and the list goes on. A solo practitioner should work with a trusted colleague on many of these same issues.

3) Should you ever find yourself having to accept the reality that you have an impairment, don't try to go it alone. Reach out to and rely upon your personal support systems. Allow spouses, friends, family members, colleagues and the like to be there for you. Be open to accepting their support, respect, and care. Your journey will be all the better for it.

Any parting words of wisdom?

A misconception that needlessly creates risk by preventing someone from prioritizing their health is a misconception that must be dispelled. My hope is that by correcting the record, this will lead to different and better choices. Individuals who might have been reluctant to seek treatment may feel more inclined to do so. Firms that have been unwilling or unable to acknowledge that their lawyers and staff do struggle with serious problems at times may now be more open to taking both proactive and responsive actions.

Lawyers and firms have wide latitude in how impairment can be addressed. Just know that it starts with 1) recognizing that impairments are common and 2) understanding that no one should have to work through the challenges of personal impairment alone.

Since 1998, Mark Bassingthwaighte has been a risk manager with ALPS, the nation's largest direct writer of professional liability insurance for lawyers. In his tenure with the company, he has conducted more than 1200 law firm risk management assessment visits, pre-

sented numerous continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School. He can be reached at mbass@alpsnet.com



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TALES FROM THE INTERIOR

Say what? Wise words heard along life's journey

By William R. Satterberg, Jr.

Over the years, I have adopted various favorite sayings. Many were from my Dear Old Dad. Others were from folks I've met. For anyone reading this article, please feel free to steal them. After all, that's what I did.

A friend recently died unexpectedly. His name was Jim. Jim was a highly accomplished airline pilot who occupied an executive position with an Alaska air carrier. When Jim would become frustrated, he would opine "I guess I can always go back to McDonalds and start flipping burgers again."

Another saying which floated around the airline's staff, stolen from me, is "Use your words!" That admonishment crops up any time somebody is having problems putting thoughts together. I stole that saying, in fact, from my wife, Brenda. Brenda was a former elementary school teacher who taught first and second grades. The phrase makes much sense for older folks, too, even though some take offense.

One of my mechanic friends, Pat, once confessed about diagnosing vehicles that the way to pinpoint a mechanical problem was to "Develop it." When I asked what that meant, he told me to drive

On equipment:

"All things manmade are destined to eventually break."

On friendship:

"Normally I kill people for money but because you are my friend, I kill you for free."

On marriage:

Referring to his beloved wife Ki, "What's hers is hers and what's mine is hers too."

On physical fitness:

"Of course, I'm in shape. Round is a shape."

On scuba diving:

(Ben was a very accomplished dive instructor) "Plan your dive and give your plan."

An old University of Alaska Fairbanks instructor, Tom Duncan at KUAC radio, once advised me on business development ideas that, "Don't build an airplane only you can fly."

But, by far, the best sayings evolved from my Dear Old Dad:

"When you get to be my age, I'll do the same thing for you!"

"Don't go anywhere empty handed."

"Give credit where credit is due."

"Faint heart never won a fair maiden."



"But, by far, the best sayings evolved from my Dear Old Dad ..."

their lungs."

"The child lives with you, not you with them."

"The worst sound in the world is the crying of a starving child."

"Every kid should eat a peck of dirt in their life."

"Don't talk with your mouth full."

On drinking and driving:

"The car knows the way home."

On his failing vision:

"I don't look so good, I've got glaucoma."

On memory:

"When your memory goes, forget it!"

"I get to hide my own easter eggs."

"Give an honest hour for an honest dollar."

On a person's condition:

"Never criticize someone for something they can't change."

On gold mining:

"There's a lot of gold in that mountain, but there's a lot of dirt mixed in with it, too."

On why I chose college:

"It'll teach you that you don't want to be a plasterer for the rest of your life, kid!"

And on my being a lawyer:

"Billy, at the end of a hard day of plastering, I go home and put some Vaseline on my dry hands. Your mom cooks a steak, and we have a martini. You, on the other hand, stay up all night worrying about tomorrow."

On business:

"If someone says to you, because you're my friend, can I get 10%

And on my being a lawyer:

"Billy, at the end of a hard day of plastering, I go home and put some Vaseline on my dry hands. Your mom cooks a steak, and we have a martini. You, on the other hand, stay up all night worrying about tomorrow."

On flying:

"Remember, you never have to be anywhere."

"You're not done flying until the airplane's tied down."

On flying and clouds:

"There's a lot of rocks in those clouds."

Also on flying and clouds:

"Remember when thinking about flying through a cloud, the guy on the other side may have the same idea as you."

On fighting:

"You knock the other guy out, but he knocks out your two front teeth. Who do you think won in the end?"

On life's adversity:

"It's like beating your head against the wall — It feels so good when you stop."

On work ethic:

"The boss should be the first one on the job every day and the last one to leave."

"Mud on the board by 8a.m." (My dad was a plasterer)

"When you don't have anything else to do, Billy, shovel your sand. And I was his hod carrier.)

"When I say jump, you say how high? And you'd better already be in the air when you ask!"

"When you're done with the job, don't just stand there. Ask for something else to do."

"Do what you say you're going to do."

off? Tell them, 'Because you're my friend, can I have 10% more?'"

On being frugal:

"You don't raise the bridge, you lower the water."

On thinking I'm special:

"Graveyards are full of indispensable people."

On meeting God:

"One of these days you're going to wake up dead."

On explaining himself when he meets his Maker:

"Can't you take a joke?"

On making his peace with God:

"I didn't know we were arguing!"

And finally, to close out my rambling missive, please consider some imponderables that were passed on to me by John Bennett, who found them somewhere else:

"All those who believe in telekinesis, raise my hand."

"If it's zero degrees outside today and it's supposed to be twice as cold tomorrow, how cold is it going to be?"

"If you are driving at the speed of light and turn your headlights on, what happens?"

That's enough for now, devoted fans. Did you miss me?

See you next issue... Maybe.

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.

On work ethic:

"The boss should be the first one on the job every day and the last one to leave."

"Mud on the board by 8a.m." (My dad was a plasterer)

"When you don't have anything else to do, Billy, shovel your sand. And I was his hod carrier.)"

the vehicle until it broke. Once that happened, we would know the problem.

Retired Judge Randy Olson once commented, "People ask why I'm so happy. It's because I'm a pessimist. Things always turn out better than I expect."

A very good friend of mine in Saipan, Ben Concepcion, who is now deceased, used to have a plethora of legendary statements -

On disagreements:

"Here's to you and here's to me. And if, by chance, we disagree to hell with you and here's to me!"

"I'd hate to be seen with a girl who'd go out with a guy like me."

"I learned to walk pushing a wheelbarrow."

"There's nothing worse than a head-on car wreck. Use the ditch!"

"Never tease someone about their paycheck."

"Never take a loan from the IRS."

"A deal's a deal."

"I don't get tired. I get sleepy."

"I was just resting my eyes."

"Quit clomping! Walk on your toes, not on your heels."

"Pick your feet up when you walk."

"Let the baby cry. It's good for

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How to prove delivery of your tax return to the IRS

By Steven T. O'Hara

Suppose the Internal Revenue Service cannot find a tax return you filed by mail. The IRS claims that the return was never filed. What evidence do you have of filing? How persuasive is that evidence?

The answer can be found in Section 7502 of the Internal Revenue Code. The IRS has referred to this section as the timely mailed, timely filed rule. Rev. Rul. 73-133.

The Ninth Circuit Court of Appeals has ruled on IRC Section 7502 and distinguished it from the common-law mailbox rule. The Ninth Circuit stated: "Under the common-law mailbox rule, proof of proper mailing — including by testimonial or circumstantial evidence — gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive." *Baldwin v. U.S.*, 921 F.3d 836, 840 (9th Cir. 2019). The court further stated that under IRC Sec. 7502 "recourse to the common-law mailbox rule is no longer available" and that IRC Section 7502 provides the only means for taxpayers to prove delivery to the IRS where direct proof is lacking. *Id.* at 841-842.

Regulations have been promulgated under IRC Sec. 7502, and in Treasury Regulation Section 301.7502-1(e)(2)(i), the government lists "the exclusive means to establish prima facie evidence of delivery." Four ways are identified. These are presumptions of actual delivery of documents, such as a tax return or an automatic extension form, that the IRS claims were never filed because it cannot find a document in its records. *See Baldwin, supra*, at 842. The title of Treasury Regulation Section 301.7502-1(e)(2) refers to these presumptions as "Exceptions to actual delivery." These presumptions or exceptions do not apply to payments because payments are booked as received only when received — i.e., payments must be "actually received and accounted for." Treas. Reg. Sec. 301.7502-1(b)(3)(iii) and *see* Treas. Reg. Sec. 301.7502-1(e)(2)(i) (which excludes payments from the presumptions of delivery).

First, the regulation identifies "direct proof of actual delivery." Treas. Reg. Sec. 301.7502-1(e)(2)(i). No example is provided. I believe an example of direct proof would be the receipt received where you walk into the Internal Revenue Submission Processing Center at 333 W. Pershing Road in Kansas City, MO, and hand an IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, to an IRS employee with authority to issue a receipt of delivery for the 706 and who in fact issues a receipt. The Kansas City address used in the preceding sentence is used for illustration purposes only.

Second, the regulation identifies U.S. registered mail to establish prima facie evidence of delivery to the IRS. Treas. Reg. Sec. 301.7502-1(e)(2)(i). This option is also identified in IRC Sec. 7502(c)(1).

Third, the regulation identifies U.S. certified mail to establish prima facie evidence of delivery to the IRS. Treas. Reg. Sec. 301.7502-1(e)(2)(i). Here, the IRS is exercising its

authority to treat certified mail generally the same as registered mail in terms of establishing prima facie evidence of delivery. See IRC Sec. 7502(c)(2).

Finally, the regulation identifies private delivery services to establish prima facie evidence of delivery to the IRS. The regulation provides: "[t]he Commissioner may, in guidance published in the Internal Revenue Bulletin ... prescribe procedures and additional rules to designate a service of a PDS for purposes of demonstrating prima facie evidence of delivery of a document pursuant to section 7502(c)." Treas. Reg. Sec. 301.7502-1(e)(2)(ii). The IRS has a web page on private delivery services, IRS.gov/PDS.

For years I mailed important tax returns to the IRS by registered mail because not only the regulations but section 7502(c)(1) of the IRC expressly provides that registered mail is prima facie evidence of delivery. However, sending a tax return by registered mail is a pain: to seal the appropriate wrapper, I bring to the post office my special three-inch brown paper tape on which the postal employee makes numerous markings; and I bring my special blue water dispenser with which to moisten the glue on the brown paper tape. The postal employee will sometimes appear irritated that I am using registered mail and not certified mail, which is easier for everyone.

So what about certified mail? For years the thing I did not like about certified mail is that the IRC does not expressly state that certified mail is prima facie evidence of delivery. However, I have since taken comfort in the fact that the IRC authorizes the IRS to equate by regulation certified mail with registered mail. IRC Sec. 7502(c)(2). And as discussed above, the IRS has done so.

There are several commonsense mailing requirements under IRC Section 7502. The tax return or other document or payment must be "in an envelope or other appropriate wrapper." IRC Sec. 7502(a)(2)(B). Recently, I prepared a federal estate tax return that, with attachments, filled roughly a banker box. The return along with the box weighed in at 20 pounds, 11.6 ounces. The box was the "appropriate wrapper" mailed to the IRS. (I used certified mail.)

Another commonsense requirement is that postage on the wrapper must be prepaid. *Id.* The wrapper must be "properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made." *Id.* The wrapper must be deposited in the mail in the United States. *Id.*

To be timely filed, the wrapper must have a postmark stamp that is dated on or before the applicable due date, such as within nine months after the decedent's death in the case of a federal estate tax return due without extensions. IRC Sec. 7502(a)(2)(A); *cf.* Rev. Proc. 2022-32 (allowing a five-year dead-



"The Ninth Circuit Court of Appeals has ruled on IRC Section 7502 and distinguished it from the common-law mailbox rule."

line to file an estate tax return in certain circumstances).

With the above requirements satisfied, the date of delivery to the IRS is deemed to be the date of the postmark stamp. IRC Sec. 7502(a)(1). However, the postmark stamp is not everything. Actual delivery to the IRS must occur, which brings us back to the Treasury regulation (discussed above) that identifies four ways to establish prima facie evidence of delivery to the IRS.

For example, if certified mail is used, the postal employee will hand you a U.S. Postal Service Certified Mail Receipt. This receipt must have a postmark stamp with a legible date on it for it to be proof of proper use of certified mail and to create a presumption that the document sent was delivered to the IRS even if the IRS later claims not to have received it.

But how do you connect the contents of the appropriate wrapper with the postmarked certified mail receipt? I use an affidavit or declaration of mailing. See the illustration below. *Cf.* IRS Letter Ruling 201442015 (where the IRS states: "Affidavits, however, are not prima

facie evidence that the Form 8939 was delivered to the IRS").

In addition to a postmarked certified mail receipt, you may request that a green card, known as a Domestic Return Receipt, be returned to you with a signature from the recipient and the date of delivery. However, return receipts do not always find their way back to the sender, and often there is no signature of an IRS employee. And the Treasury regulations do not mention a return receipt as evidence of delivery.

Also, the regulations do not mention a Postal Service tracking number as evidence of delivery. The Postal Service may give you a tracking number for use at USPS.com and ultimately a message you can print stating (for example): "Shipping Activity: Delivered; Location: Cincinnati, OH 45999; Date & Time: December 29, 2022 8:44 am." Tracking information may bring comfort in real time. However, tracking information cannot be counted upon

as prima facie evidence of delivery.

In addition to filing important tax returns by certified mail, I also prepare an affidavit or declaration of mailing to connect the contents of the appropriate wrapper with proof of proper use of certified mail. Below is an illustration of a declaration of mailing.

But how do you connect the contents of the appropriate wrapper with the postmarked certified mail receipt? I use an affidavit or declaration of mailing. See the illustration below.

DECLARATION OF MAILING UNDER PENALTY OF PERJURY

1. I work for [name and address of law firm];

2. Pursuant to Internal Revenue Code Section 7502(c)(2) and Treas. Reg. Sec. 301.7502-1(e)(2)(i), on the date identified below, I mailed by United States certified mail (return receipt requested) the IRS Form identified below with respect to the taxpayer or decedent identified below, whose SSN or TIN ends with the four numbers identified below, to the Internal Revenue Service at the address identified below, enclosed in a properly-addressed, first-class-postage prepaid envelope or other appropriate wrapper;

3. The date of the mailing is evidenced by the attached receipt;

4. A copy of the IRS Form mailed is attached to this Declaration. The attached copy is complete and identical to the original of the IRS Form mailed; and

5. I declare, under penalty of perjury, that the preceding sentences are true and correct this ___ day of _____, 2023.

Declarant

IRS Form Mailed: _____

Date of Mailing: _____

Taxpayer or Decedent: _____

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

Nothing in this article is legal advice, tax advice, or investment advice. Nonlawyers 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.

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In Memoriam

Long-time Alaska attorney dies

Long-time Alaska lawyer William (Bill) Matthews Erwin died May 10, 2022, in Anchorage of complications associated with old age and good living.

Bill was born March 23, 1933, in Seward, the middle child in the family, growing up with older brother Jack, younger brother Robert and younger cousin Jo Ann.

He graduated from Seward High School in 1951. He worked as a laborer, longshoreman, cement worker and road surveyor during his high school and college breaks.

After attending the University of Colorado in Boulder with his brother Bob, Bill graduated in 1955 with a BA in History and then attended the University of Washington for education credits. He returned to the Alaska Territory in 1956, qualified for a teaching certificate and settled in Seward to teach seventh and eighth grade.

In 1958, as Alaska moved toward statehood, Bill ran as a Democrat for a seat in Alaska's first state Legislature. He represented Seward in the House, for two terms.

While on a break to visit his brother Bob, who was then the district attorney in Nome, Bill met teacher Sheila O'Brien, who was working for the Nome School District. They were married in Nome at St. Joseph's Church in May 1962.

He enrolled in the University of Washington Law School and he and Sheila moved to Seattle. When Bill graduated with his LLB in 1965, he and Sheila headed back to Alaska. While studying for the Alaska bar exam, Bill accepted a job at a law firm that would become Savage, Erwin and Curran, P.C. As the new attorney, he had the opportunity to appeal several cases and secured several wins. One of these cases involved an injured employee in the developing field of Alaska's workers' compensation law. This would become the key focus of his future solo practice for the next 50-plus years. In 1994, he was awarded the Alaska Bar Association's Pro Bono Award.

That year also marked the arrival of Bill and Sheila's first children, twins Lynn and Eileen, followed by daughter Maureen in 1968, and son Patrick in 1971.

Bill continued practicing law until his early 80s, when increased hearing loss and the need to spend more time with Sheila led to his retirement.

He is survived by his four adult children; eight grandchildren; three great-grandchildren, his cousin Jo Ann Kraly, and many close nieces, nephews and their families. His wife, Sheila, had died five months earlier in December 2021.

A memorial mass and celebration of his life was held July 2, 2022 at St. Patrick's Parish in Anchorage.



Bill Erwin

Conditions for lawyers and their families are improving

Continued from page 2

leave were considered a superfluous luxury. It was clear that the legal profession still carried that uniquely American misconception that we — and, by context, our families — must suffer for our work.

Covid, for all its hardships, resulted in significant advances away from this notion.

All members of our usually tight-knit legal community shared the stress (and sometimes trauma) of our abrupt separation, and this broke the dam between our professional lives and our "real" lives. It gave us the gift of seeing one another as complete human beings. Now it's no longer a black mark on your professionalism when your child *needs* you. We no longer flinch at discussions in a professional setting of setting boundaries that prioritize this. Even judges, some of whom strive to emit a kind of impermeable professionalism, have begun to openly express their own need to take time for their children and other family obligations.

The pandemic gave me the gift of time with my son. Rather than placing him in daycare at 12 weeks old, I was able to continue bonding with him full-time for months beyond what I had hoped for at the start of my pregnancy. I nursed and changed diapers through trial calls and contested hearings. I relied heavily on my husband, also working from home, to make sure that I had some focused time to meet with clients or cross-examine witnesses at trial. In parenting, as in

my work, I have drawn on a lesson that all public defenders must learn early in their careers to accommodate our high caseloads: I cannot do everything, but I can do the important things well.

There are still substantial barriers for parent-attorneys. Our nation still has no federal paid leave for parents or for people addressing family emergencies. The stigma of

parenthood — or choosing not to parent — continues to affect our legal community as much as any other professional group. And in the era of connectedness, we struggle to make time to put away our work. But the

truth is that my clients benefit from being represented by me when I am fulfilled and actively engaged in the things I love and care about. Baring the many dimensions of our lives makes us better advocates because it fosters connection on a deeper level than we permitted before. We are shedding the black-robed, suit-and-tie formalities in favor of something more honest. Our community is stronger from this effort — and the people we serve, including our families, will continue to reap the benefits.

Diana Wildland is president of the Alaska Bar Association. She was born and raised in Fairbanks. She has been a member of the board since 2020, and previously served as the Board New Lawyer Liaison from 2018-2020. She graduated from University of Oregon School of Law in 2017. She is currently a supervising attorney in Fairbanks with the Alaska Public Defender Agency.

I have drawn on a lesson that all public defenders must learn early in their careers to accommodate our high caseloads: I cannot do everything, but I can do the important things well.



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