The Alaska
BAR RAG
Dignitas, semper dignitas
VOLUME 43, NO. 3 July - September, 2019

Autumn

By Cam Leonard

As I kick the leaves
Brown and scattered on the ground
I think of the lives
Lived, the graves well-laid
In neat rows. I think of those
Who walked before me
Down these aisles between the trees
Holding hands, or alone.
I hear their laughter
In the breeze that stirs the leaves
Left hanging still. I hear cries
Of children now grown
And moved away. And I wish
I could just lay down
And let the leaves cover me
Like the child we all were
Who leaps into the pile
Raked up so carefully
By the parent we become.

Cam Leonard is a Fairbanks woodburner managing cabin fever.

Photo by Tim Jones

Alaska pro bono team assists border refugees

By Mara Kimmel

In response to the refugee crisis at the nation's southern border, the Alaska Institute for Justice organized a group of nine Alaska lawyers and interpreters to volunteer in a family detention center in Dilley, Texas, in June. We spent a week with some of the most resilient, brave human beings we had ever met: moms terrified for their children, kids terrified for their moms. They traveled, often by foot, through two or three countries, crossed rivers and deserts, and turned themselves in to U.S. border agents to seek a safe haven, just as our laws require. This is their right under U.S. and international law — every single person on this planet has the legal right to ask for asylum.

These women tell horrific stories of violence to themselves and their children. One woman showed us the scars that her husband left on her and on her child. Another pointed to each leg where she had been shot by a masked member of Barrio 18, one of the main gangs in the region. Another sat holding her 9- year-old child, a child whose eyes were devoid of hope, reflecting the trauma of life at home, their long journey and their time in jail. The mother recounted how gangs recruited her daughter to be their girlfriend and threatened her with rape and murder if she didn't comply. These women were not much older than my daughter, who volunteered with me, carefully interpreting every word they said so we could help as best as we could.

Almost worse than hearing the stories of why they fled was learning about what happened to them when they arrived in the U.S. After crossing the Rio Grande and turning themselves in to the U.S. government to ask for asylum, our government puts them into a metal room, kept so cold that it is nicknamed the "hielera" — or icebox — where they stay for days. After that, they are put into an open air fenced space called a "perrera" — a word that means dog kennel — and fed two bologna sandwiches a day. Eventu-

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The Juneau team (from left) includes: Tricia Collins, Julie Willoughby and Louis Menendez

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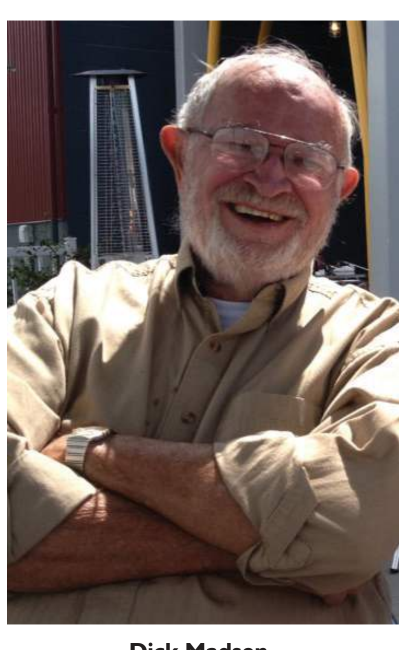
Fairbanks attorney remembered for colorful career



Dick Madsen

By Jean and Heidi Madsen

Dick Madsen a long-time attorney in Alaska, died Feb. 24, 2019, in Tacoma WA. Dick was born Sept 4, 1935, in Keewatin, MN, and grew up in nearby Hibbing. He graduated from the University of Minnesota with a degree in mining engineering, stumbling into the field when his academic options were running out. He married his wife, Jean in 1956 and they had three daughters, Heidi, Gretchen and Karin.

Dick's job with the Bucyrus-Erie required relocating with the family many times across several states. Eventually, back in Minnesota, on yet another wearisome road trip and tired of inspecting drill bits, he had an epiphany. He recalled the law students from the university who were so serious and well-dressed. He didn't know what lawyers did but he decided he wanted to be one. He enrolled in the William Mitchell College of Law in St. Paul, took another mining related job and attended classes at night.

While working for the Bureau of Mines, Dick visited Fairbanks to promote his novel method of gold mining (which did not "pan" out). He was always intrigued by Alaska and he decided to start his law career in Fairbanks. Armed with no job, a new $15 suit and a spirit of adventure, he, Jean, the three girls and a poodle, rattled up the Alaska Highway in 1968. With his mining back-

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PRESIDENT'S COLUMN

Board considers exam scores, discrimination issues

By Rob Stone

Should the Supreme Court Lower the "Cut Score" for Admission to the Alaska Bar?

And,

Should the Alaska Bar Forward Proposed Bar Rule 8.4(f), Addressing Harassment and Discrimination, to the Alaska Supreme Court?

The Board of Governors met on Sept. 5. It was a full day for the 12 volunteer members of the board. The Board is comprised of four attorneys from the Third Judicial District, two attorneys from the Second and Fourth Judicial Districts, two attorneys from the First Judicial District, one attorney state-wide, three members of the public, and one new lawyer liaison. The attorney members are elected by the membership, the public members are appointed by the governor, and the non-voting new lawyer liaison is appointed by the Board. All full members serve 3-year terms, whereas the new lawyer liaison serves a two-year term. We meet four times per year (early May, early September, late October and late January). This September, the Board spent its time addressing a number of important issues, including whether the Bar should lower the minimum bar examination score necessary for admission to the Bar ("cut-score"), a potential disbarment case, a petition for reinstatement to the practice of law after suspension, and a controversial proposed bar rule on the subject of harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. Below, I will discuss the bar examination "cut-score" and harassment issues.

In March, the Alaska Supreme Court asked the Board of Governors to review the continuing validity of Alaska's 280 cut-score. Justice Daniel Winfree noted that Alaska's cut-score of 280 is the highest among the 33 Uniform Bar Exam (UBE) jurisdictions. He remarked that 26 of the UBE states use a cut-score of 260-270, and then inquired, "What is it about practicing in Alaska that we would think minimal competency on the bar exam requires a score of 280?" At the conclusion of Justice Winfree's detailed analysis of the Alaska Bar Examination in the context of the UBE, the Board of Governors was asked to provide a recommendation whether to maintain or lower the current cut-score, and justify such recommendation.

"The committee welcomes any additional comments. "

The minimum score for admission into the Alaska Bar was set in 1981-82, when Alaska stopped using the California bar exam. Generally speaking, the cut score adopted in 1981-82 was intended to represent the equivalent of a 70% on the examination. One could argue that the current cut-score of 280 still represents a 70% examination score.

This, notwithstanding, some question whether the bar pass rate is too low. Others opine that the Alaska Bar should not lower its cut-score just because the pass rate is low. But, since many other jurisdictions have lowered their cut-scores, Alaska now finds itself as an outlier; the highest of the UBE states. The following represents the cut-scores for the 33 UBE states:

- 280 cut score — 1 state (Alaska)
- 276 cut score — 3 states (Colorado, Maine, Rhode Island)
- 274 cut score — 1 state (Oregon)
- 273 cut score — 1 state (Arizona)
- 272 cut score — 1 state (Idaho)
- 270 cut score — 10 states
- 266 cut score — 11 states
- 260 cut score — 5 states

The Board of Governors discussed the issue at its May meeting and formed a subcommittee to study the issue. Several lawyers from the Law Examiners committee participated and provided experience and insight. The committee was unable to find empirical evidence supporting a change from the 280 cut-score. There also exists an absence of empirical evidence supporting the continuation of the 280 cut-score. And there exists no data supporting any correlation between any particular cut-score, minimum competence, and ethical behavior. As such, the committee could not recommend a change from the 280 cut-score. The committee concluded that the decision whether to change the cut-score is a policy decision.

After thoughtful discussion and deliberation, the Board of Governors agreed with the committee's recommendation that the cut-score should remain at 280. This recommendation will be forwarded to the Alaska Supreme Court. Will the Alaska Supreme Court leave the cut-score where it is, or will it lower the score to those of other western states like Colorado (276), Oregon (274), Arizona (273), Idaho (272), or Washington and Utah (270). Stay tuned.

Our September meeting also found the Board addressing proposed Bar Rule 8.4(f). This proposed rule was presented to the Board at its May meeting and was published for comment in the June issue of the Bar Rag. The rule addresses "harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status." The publication resulted in the submission of a few hundred pages of comments to the Board of Governors. The Board also accepted oral testimony from approximately

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EDITOR'S COLUMN

Like the four seasons, this too shall pass

By Ralph R. Beistline

Fall is in the Air. In Fairbanks this means the smell of smoke is departing, while the sound of chain saws is on the rise as wood piles grow in anticipation of winter, and the local moose has returned to harvest my garden. Like the busy squirrel gathering spruce cones, it is time to plan ahead. But even the best of intentions can go astray by unanticipated events. I was painfully reminded of this several weeks ago when a pesky kidney stone interfered with all my plans, interfered with everything.

Bar Rag Editor Ralph Beistline hands out eggs at the Tanana Valley Bar Association picnic in July. More pictures on Page 7.

" Like the busy squirrel gathering spruce cones, it is time to plan ahead. But even the best of intentions can go astray by unanticipated events."

"Sounds like you've joined the club," my Emergency Room nurse speculated after listening to my symptoms. This was verified a few moments later when the ultrasound revealed a four-millimeter stone right over the kidney. And what a club. The initiation alone isn't worth it. The technician wheeling me to the x-ray room noted that her husband had kidney stones for years and collected them in an old film cannister. One of my clerks later revealed that her husband had one last year at moose camp and had to be helicoptered out. Others talked of deposition trips being interrupted and overseas flights re-scheduled by unanticipated trips to the E.R. I could easily fill the paper with such tales of woe. Fortunately, all that I heard from survived the ordeal and ultimately returned to their worlds.

The experience, however, was certainly humbling and a stark reminder of our vulnerability. But like most unexpected interruptions, be they physical, financial or emotional, we can be comforted by the words expressed to me by two E.R. physicians, "This too, will pass."

So, let's get on with our planning. Let's make the best of the new season and, importantly, let's drink lots of water.

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

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The Alaska BAR RAG

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Advertising Agent:
Alaska Bar Association
840 K St., Suite 100,
Anchorage, Alaska 99501
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Help shape the next generation of the bar exam: Participate now in this survey

Attorneys across the country have the opportunity to participate in the NCBE Testing Task Force 2019 practice analysis survey, which is gathering current data on the knowledge, skills, abilities, other characteristics, and technology newly licensed lawyers use to accomplish the job tasks they perform.

This survey is part of the Task Force's three-year study to consider the content, format, timing, and delivery methods for the bar exam to ensure it keeps pace with a changing legal profession. The results of the practice analysis, which will be available at the beginning of next year, will be used by NCBE to develop the next generation of the bar exam and will benefit the profession as a whole.

Let's make sure the survey includes the voices of attorneys from our state! To participate in the survey and learn more about the study, visit https://www.testingtaskforce.org/2019PAsurvey.

Deadline: Sept. 30, 2019.

TRIAL PRACTICE: A Wee Treatise

Cross examination: following the rule of threes

By Jim Gilmore

Third in a series

What follows are my personal thoughts regarding trial practice. This installment addresses cross examination, They may not work for everybody. I have tried to reduce them to a minimum.

Reference is made to the personal injury case of a Mrs. Commodore. Mrs. Commodore fractured her ankle when she stepped into a hole in a tree well that the City of Pasadena allegedly had a duty to keep filled with mulch.

The rule of threes

Make cross-examination short and simple. Do not get bogged down. Do not let the witness lead you out into left field, nothing is more painful for you and the jury. Remember the old song, "accentuate the positive, eliminate the negative, and don't mess with Mr. In-between." (Also not a bad rule for opening statement.)

To prepare for cross, make a folder for each witness and put summaries of the written statements of the witness in the folder. If the witness has been deposed, put your summary of the deposition in the folder. The summary should be prepared by you (hand-written in my case), not by a paralegal or another lawyer. It usually consists of three or four pages of numbered sentences with the most important points underlined and the page number in the document or deposition circled.

Have a transcript of the deposition nearby with the pages marked, usually with just a torn piece of paper for a bookmark, or sticky note. Hopefully there will only be a few of these markers in the depo transcript. If you are going to use the reference, you want to make sure you can get to it fast — that is key — nothing is worse than fumbling around trying to locate the piece of testimony you want to use. If there are other written statements by the witness, or police reports that refer to a statement of the witness you are cross-examining, they also should go into the folder, appropriately marked. Know the three points you want to make with the witness, and write them out in paragraphs, long-hand on a separate piece of paper. For example, for Mrs. Commodore, I may have written:

1) You worked at the nursing home every day for 10 years. You were in an administrative position. You cared about your residents. You wanted to make sure they were safe. You walked by the tree-well every-day, and you never said anything about it being dangerous, and nobody ever reported to you that it was unsafe.

2) If you had looked to see where you were going, if you had just exercised ordinary care, you would not have broken your ankle, and we would not be here today. You were at fault for the accident.

Jim Gilmore

3) You really are able to do today all the same great stuff that you could do before the accident— just not in the same way. You still are out and about, seeing your friends and socializing.

You get the idea — just three things fast and pretty safe. Usually they are things that you may want to use in your final argument. The important part is to get in, accomplish your objective and get out — like a Special Forces rescue party. Land on the beach, grab your guy, and get back to the ship — fast.

Experts

In some ways, cross-examination of an expert is easier than cross of a lay witness. First, you have the expert's opinion in writing, so the testimony is more predictable. Second, like police officers, you can treat experts more roughly than an innocent lay witness. The jurors will forgive you if you beat up on experts.

But you are not going to get the better of them in their field of expertise. I've seen plaintiffs' lawyers spend hours reading all the medical texts and every article the doctor has written, haul all those medical books into the courtroom — only to wander around in their cross; because the expert usually is able to explain why his or her opinion in this case is different from the cases being discussed in the literature.

If you have time, it is good to know what the doctor has said before in other cases, or in medical journals, not because you are going to be able to impeach him or her with it, but because knowing what he or she has said in other cases helps you clarify in your own mind how best to question him in your case. But remember, the expert is always going to be able to distinguish this case from what he said elsewhere by explaining, for example, why the patient he was talking about in his writing had appendicitis, but the patient in this case only has a stitch in his side.

What you do know — much better than the expert — are the facts. You know what all the other witnesses in your case have said or are going to say, which the expert does not know unless he has been in the courtroom throughout the trial. Be in a position to say to the expert, "You say X, but that's not the critical fact in this case. In this case the critical fact is Y." Sometimes you can catch the expert out on a little fact that may not be all that relevant or important, but the expert does not know enough about the case to know that the fact is unimportant. He may get flustered. He may, in the words of Terry MacCarthy, "look bad" and in the encounter, you come off "looking good." (See teeter-totter illustration in his book, *MacCarthy on Cross-Examination.*)

This is well illustrated in the cross of Dr. Doughwaite by Barrister Lawrence in Sybille Bedford's book *The Trial of Dr. Adams*. Lawrence's client, an English doctor, is charged with overdosing an elderly woman patient with heroin. Barrister Lawrence takes Dr. Douthwaite through the medical chart pointing out that all the other doctors who treated the deceased before the defendant, also gave her similar doses of heroin.

The moral of the story is that your time is best spent on absolutely mastering the particular facts of the case, not only to prepare to cross the expert, but to be in total control of your case, to know more than anyone else — to "look good."

Otherwise, the normal rules apply in crossing an expert. Is his testimony reliable? Is he in a position to know what he is talking about? Does he have the right education, training, and experience? And did he spend as much time with this particular case as he needed to?

Your goal is to show that his testimony is not reliable, that he or she does not know as much about your client as your expert. In final argument, you can tell the jury that in this particular case his opinion is not reliable, and, (if you have an expert), that his findings are not as reliable as those of your expert.

MacCarthy points to the cross of the pathologist in *Presumed Innocent* as an example of an excellent cross-examination, and he may also

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Board considers scores, discrimination

Continued from page 2

a dozen members of the Bar, including comments from the chair of the Alaska Rules of Professional Conduct Committee. Between the written and oral comments, there were a variety of issues raised, including, but not limited to, very concerning reports of harassment of lawyers based upon gender, whether certain speech prohibited by this rule is constitutionally protected, whether the rule violates the free exercise of religion and association, and whether the rule is unconstitutionally vague or overbroad.

At the conclusion of the testimony, the Board voted to send the proposed rule back to the committee for revisions. All written and oral comments have been forwarded to the committee. The committee welcomes any additional comments. Such comments should be sent to the Alaska Bar Association, attention Bar Counsel.

Well, after another exciting and enlightening Board of Governors meeting, it is time to enjoy the rest of the fall season before the snow begins to fall. As always, if you have any comments or concerns you would like addressed by the Board of Governors, please do not hesitate to reach out to me. We represent all members of the Alaska Bar Association.

Rob Stone is president of the Alaska Bar Association.

Cross examination: following the rule of threes

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have some trial transcripts of the cross of experts in the back of his book.

One-word cross

MacCarthy is the creator of the "one-word cross." The idea is to turn your questions into a number of short statements — lined up to establish each of the three points you want to make with the witness, and then get the witness to affirm them.

For example, with Mrs. Commodore, the first point to make is that she was very familiar with the tree well: that she saw it every day, that she never reported it to anyone as being dangerous or a hazard, and that no one ever complained to her about it.

The cross would go: "Now Mrs. Commodore, as I understand it (I like to start with "as I understand it" which is kind of friendly and conversational), you held an administrative position at the nursing home for 10 years. (Yes.) You worked there every day. (Yes.) Five days a week. (Yes.) Eight hours a day. (Five hours a day.) You walked by that tree well hundreds of times a day. (Yes.) It did not appear to be dangerous to you. (No.) You never reported it to anybody, or even complained to anyone about it. (No.) And no one complained to you about it. (No.) As administrator, you would be the appropriate person for him or her to complain to. (Yes.) But they never did. (No.) No resident complained. (No.) No relative of a resident complained. (No.)"

Then turn to your second point. Separate it from your first point by a topic sentence:

"Now I would like to ask you about the day of the accident."

"It was a clear day. (Yes.) You were there to pick up your aunt. (Yes.) You helped her out of the nursing home to the car. (Yes.) Her son was also helping. (Yes.) Walking on the other side of her. (Yes.) You loaded her into the passenger seat. (Yes.) You stepped over to get in the back. (Yes.) You stepped in the tree well. (Yes.) You didn't look down. (No.) You stepped in the hole. (Yes.) You wouldn't have stepped in the hole if you had looked down. (No.) You wouldn't have fallen. (No.) And we wouldn't be here today (No.)"

Move on to the third point.

"Now, I'd like to ask you about your injuries":

"Dr. X fixed your ankle. (Yes.) When you left the hospital he told you to let him know if you had any difficulties. (Yes.) With walking. (Yes.) With engaging in social activities. (Yes.) But you never went back to see him. (No.) You never called him (No.). And the same with your treating physician. You never told him you were having trouble. (No) Despite the fact you were seeing him regularly about your other problems. (Yes)."

And so on.

At some point, you may draw an objection from the other side: "He's not asking questions, your Honor, he's just making statements" Your response is to add a question on to your statement, e.g. "Is that correct?" As in "You didn't look down. Correct?" You can do the same thing if the witness asks, "Is that a question?" Then, after a few more questions you can go back to just making the statements.

The thing I like about the "one word cross" is that you are able to set the pace, to keep the story going, and to move quickly to the next point if you start to get bogged down. And, most important, you look good.

MacCarthy is a Rule of Threes guy. He says your goal should be to:

Look good.
Tell a story.
Use short statements.

Impeachment

Having the prior written statement or statements of the witness before you cross is critically important. It is the only protection you have from being at the mercy of the witness. So, the question is, what to do if the witness says something at trial that is inconsistent with something he or she has said in a prior written statement?

First, do nothing unless it is important. If it is about a trivial matter — let it go. Lawyers look pretty stupid trying to make a big deal out of a slip of the tongue the witness made sometime before, about something of little or no importance. You want to move your narrative along, and messing around with minor inconsistencies between what the witness said before and what he or she says now, slows everything down, is confusing, and breaks up your momentum.

If the prior statement was made in a deposition, and if it is about something of great importance, take your time and build it up. Don't just say, "Didn't you testify in your deposition that the light was red?"

Jurors don't know much about depositions and may not understand what they are. Simply pointing out that the witness said something different in a deposition means little or nothing to them. So savor the moment. Throw a little drama into it, e.g. "As I understand your testimony here today, you say the light was green. You're sure of that? Do you recall having your deposition taken two months ago? It was in your lawyer's office. A court reporter was there. You had talked to your lawyer about it beforehand. Several times? You knew it was important. It was under oath. A transcript was made of it. You were given a copy of it. You read it. You talked to your lawyer again about it. And you read it again in preparation for testifying here today. You have a copy with you. Didn't you say then that the light was red?"

Show the witness your transcript. Tell the witness, "Look at page 366, beginning line 17." Then you, not the witness, read, "Question: what color was the light? Answer: "Red." If you have the witness read the inconsistent statement, it will probably not be very dramatic. You want to milk as much drama out of it as you can. So you, not the witness, read the question and the answer.

You can do the same thing with a statement made to a police officer right after the accident — simply note that the statement was made right after the accident, that the witness was not groggy when the statement was made, that the witness was trying to be accurate, etc. But if you overdo it, and say "wasn't your memory of the incident better then than it is now?" the witness will probably say, "No, I've thought a lot about it, and the light was definitely green. I was just confused by the impact of the collision when I said it was red."

You can do the same thing with prior inconsistent statements the witness may have made to other witnesses or even to you, in person or on the phone. If it was to you, hold up your notes, read the time, date, and place of the interview off your notes — that adds credibility to your version. But be aware the other side may ask to see your notes, so make sure they don't have anything in them that would be more harmful to you, such as editorial comments, like "this guy is really credible." Also be aware the other side may object, because they can't cross-examine you about the circumstances surrounding the interview. Being able to impeach a hostile witness on a statement made to you one-on-one (nobody else present) does not often occur, and the risks of doing so may outweigh the benefits.

Remember, the same rules apply for impeachment on cross as to the rest of the case: be brief, don't lose the momentum of your story, don't get bogged down, don't bore the jury.

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

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NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court, Dated 8/28/2019

SUZANNE H. LOMBARDI
Member No. 9106016
Boise, Idaho

is transferred to disability inactive status effective August 28, 2019.

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

New book continues saga of life in 1950s Seward

By Betty Arnett

At the invitation of the Alaska Bar Association I have been given the opportunity to announce the publication of my second book which came out this summer. This follows my first book entitled *"22 and the Mother of 11"* that was sold at the Territorial Bar Party in Anchorage in 2017.

My two books are about my early years in Alaska when I came to Seward right out of college without any parenting skills, and suddenly I was the mother to 11 little boys in the historic Jesse Lee Home. Yes, the same home where Benny Benson, the designer of the Alaska flag, was raised. However, Benny was an adult with grown daughters and living in Kodiak by the time I arrived.

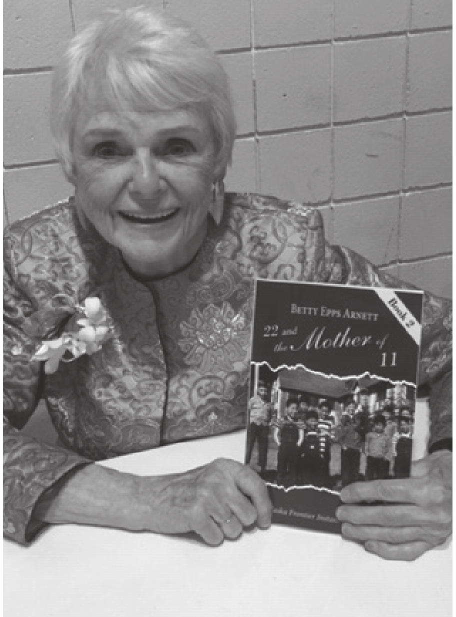
I arrived fearful that someone would learn of my unexpected romantic experiences on the Alaska Steamship, the Aleutian, and find them unbecoming of a young woman sent by the Methodist Church as a short-term missionary to work as a housemother to small children.

The boys responded to my Tennessee accent with, "How come you talk like dat?" and asked, "How long you gonna stay?" I wondered myself when my first meal was unpalatable moose soup and my first day of supervision turned into a disaster, not to mention the mountain of mending, washing, and ironing that would become my responsibility.

Unable to get all of that unique experience into one book, I have written a second one that continues with what life was like living at the Jesse Lee Home in the early 1950's. It is entitled, *"22 and the Mother of 11 - Book 2."*

None of the children were orphans for each had a single parent living somewhere in Alaska who could no longer care for them. Some were there because their parent(s) had tuberculosis and were in the Seward TB Sanatorium. Others were the offspring of a widowed parent or a GI who had returned to the states and left wife and child behind. It was difficult for some of the children to understand why they could not live with a remaining parent and that frustration came out in the form of enuresis, temper tantrums and incompatible behavior.

I wrote, too, of the social life in Seward. A young man who had recently graduated from Northwestern Law School left his job as U.S. commissioner in Nome and joined the many bachelors in Seward wondering what to do next in their lives. That was Russell Arnett, who enjoyed dating all of the eligible young women in Seward before he walked into my life. Book 2 presents how the two of us got together. I have strived to record my 1950's experience in an engaging, entertaining and humorous manner.



Betty Arnett displays her new book "22 and the Mother of 11 - Book 2."

Betty is the widow of Russell E. Arnett. Russ was one of Alaska's territorial lawyers and a former member of the Alaska Bar Association Board of Governors. Betty and Russ, along with Dave and Priscilla Thorsness, organized the first territorial Bar parties. The very first party was held at the Arnett residence on the Hillside in Anchorage.

If you would like a personalized copy of ***22 and the Mother of 11 Books 1 or 2,*** *contact Betty at* ishka@gci.net.. *Book 1 is $17.95 and Book 2 is $18.95. For each book add postage of $2.75 for surface mail or $7.35 for priority mail. These books can also be purchased as an ebook from Amazon or as a hard copy from the publisher, Publications Consultants, 8370 Eleusis Drive, Anchorage, AK 99502 or email them at* books@publicationsconsultants.com. *They may soon be available in Anchorage stores and the Anchorage Museum.*

Samantha Slanders

Advice from the Heart

Dear Samantha,

My marriage is about to explode. I hope you can help me save it. Yesterday I asked my wife if we could have kids. She said that I am not mature enough to be a father or husband. It's my room full of action figures. I started curating Star Trek Next Generation pieces while in high school. After taking an environmental law course at the Panorama City School of Law, I obtained a rare "Of Men and Mountains" figure of Justice William O. Douglas. Now I have a chance to add a mint condition Thurgood Marshall "Brown v. Board of Education," the one where he is holding a miniature version of his winning brief. My wife told me to choose between having babies and this rare chance to expand my Heroes of the Supreme Court collection. Ms. Slanders, can you think of any way I can have a family and the supremes' collectables?

Sincerely,
The Collector

Dear TC,

The answer to your problem is obvious. Grow up and get rid of your toys. If you can't handle that at least use your family's fortune to buy a Ruth Bader Ginsberg or a used Sandra Day O'Conner.

Sincerely,
Samantha Slanders

Dear Samantha,

Even though judges think he received his law degree from Wossamotta U, my law partner manages to work Latin into every conversation. For breakfast he usually orders eggs per facilis, coffee et crepito and sourdough toast. He arrives at work each day wearing a Brooks Brothers three piece and an Iterum Magna Fac Americae hat. Once, when under a deadline to file a brief he told our scriba it was a job refrenantem, Our secretary blew the filing deadline because he thought "refrenantem" meant "back burner." This has to stop. How can I get my partner to speak English?

Sincerely,
Down to Earth

Dear Downer,

Perhaps you should be the one wearing a Make America Great Again hat. Your partner has worked hard to learn a difficult language and is proud of his accomplishment. Praise him for his mastery of Latin then tell him that no one likes a show off. Sapientis clelat ardor emis (A wise man hides his brilliance).

Sincerely,
Samantha Slanders

Anchorage, Alaska

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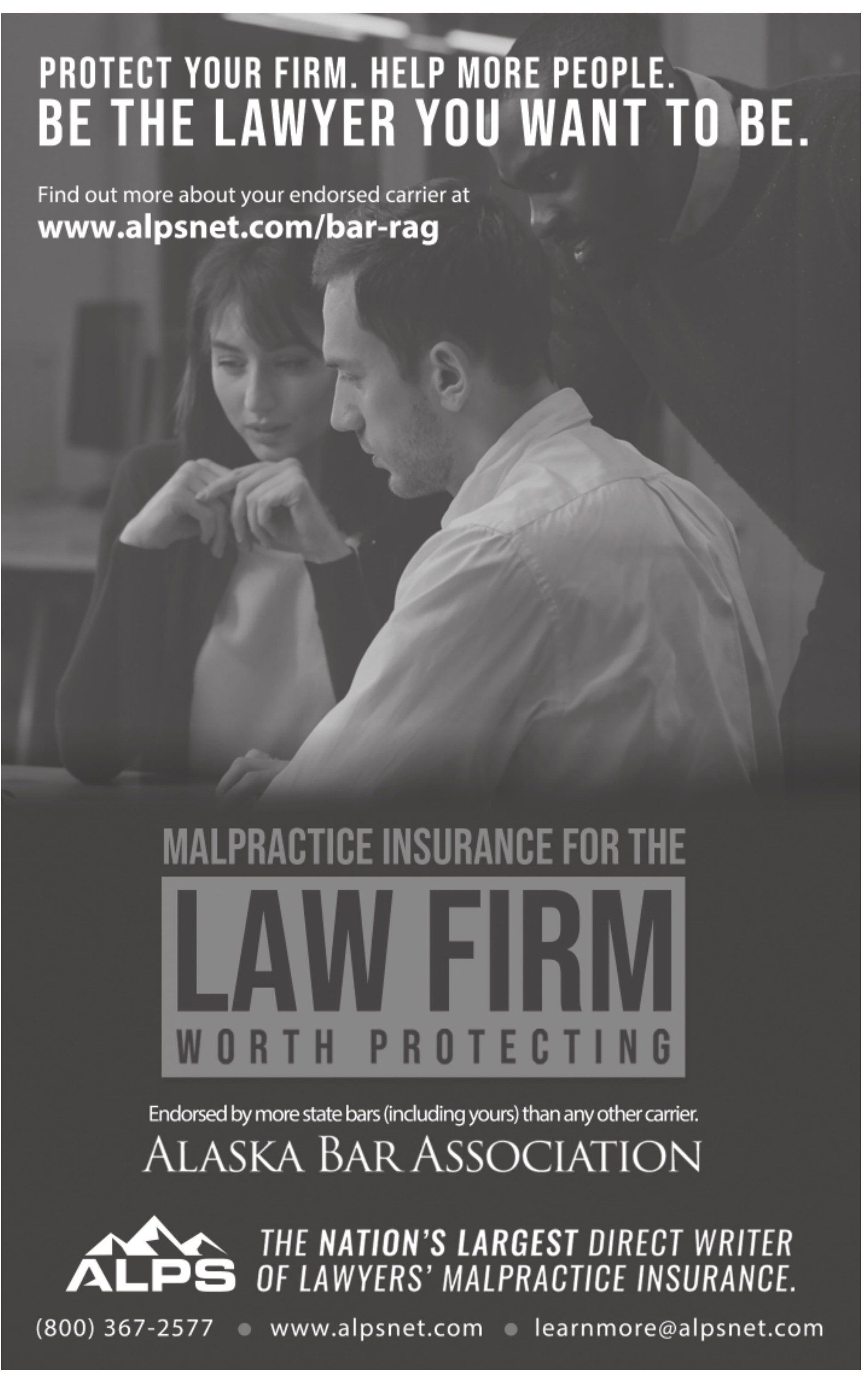


Members sat for a group photo during the party.

Photos by Lynn Coffee

More than 50 Legal Trailblazers join 21st annual party

Members of the Legal Trailblazers gathered July 10 for the group's the 21st annual party.
Legal Trailblazers are Alaska Bar members who have been admitted to the Alaska Bar Association for 40 years or more.

Two Trailblazers, Ann Rabinowitz and Vic Carlson joined more than 50 others at the party.

Roger DuBrock, '68, leads off the story-telling at the Legal Trailblazers reception.

Art Peterson, Linda O'Bannon and retired Judge Peter Michalski enjoy the reception.

Sorting out payment responsibility for indigent defendants

Robert C. Erwin

Who represents the indigent criminal defendant and pays the bill when the public defender cannot?

Article I Section 11 of the Alaska Constitution provides that the "accused in all criminal prosecutions shall have the assistance of counsel for his defense."

Section 18.85.010 of Alaska Statute provides that "there is created in the Department of Administration a Public Defender Agency to serve the needs of indigent criminal defendants."

This agency was created in 1969 and has grown to about 100 lawyers supervised by the public defender appointed by the governor from persons recommended by the judicial counsel.

The increased populations and the passage of a new criminal statute puts an intensive increased work load on the public defenders particularly where the law requires all criminal defenders to be arraigned in 48 hours; Alaska criminal rule 5(a)(1) and be brought to trial within 120 days (Criminal Rule 45) unless the provision is waived by the defendant.

In spite of their provisions and the war on crime the governor vetoed $400,000.00 from the public defenders agency itself and $180,000.00 from the agencies travel budget in spite of the fact the individual attorneys were working to near capacity.

The question clearly becomes who provides for the defense of an indigent criminal defendant as required by Alaska Constitution if the public defender cannot and who pays for that defense?

Prior to the establishment of the public defender agency, the individual members of the Alaska Bar Association were appointed by the court to represent indigent criminal defendants without compensation. *Jackson v. State,* 413 P.2d 488 (Alaska 1966). The basis for such action was that such obligations were part of the professional responsibilities of each lawyer. In *Jackson,* Justice Dimond noted this as follows: *Id* at 490

> "The requirement of the attorneys oath and Canon [of professional ethics] 4 reflect a tradition of deeply rooted in the common law – that an attorney is an officer of the court assisting the court in the administration of justice, and that of such he has an obligation when called upon by the court to render his services for indigents in criminal cases without payment of a fee except as may be provided by statute or rule of court. This principal is so firmly established in the history of the courts and the legal profession that it may be said to be a condition under which lawyers are licensed to practice as officers of the court … [T]he lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services".

This legal position was followed in *Wood v. Superior Court,* 690 P.2d 1225 (Alaska 1984) where the attorney sought to avoid the appointment for lack of experience in criminal law as well as a plea of poverty. *Id* at 1230.

Thus, this matter of appointment of lawyers to represent indigent criminal defendants without compensation appeared settled until 1987 when the Alaska Supreme Court reversed *Jackson & Wood,* over a strong dissent by Justice Rabinowitz, and held that requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdened an attorney and was an unconstitutional "taking" of property without compensation violating Article I Section 18 of the Alaska Constitution. *DeLisio v. Alaska Superior Court,* 740 P.2 437, 449 (Alaska 1987).

This decision was proceeded by a per curium opinion by the Alaska Supreme Court that held that where there was no funding from the public defender, that defendant's would be provided with counsel at the expense of the Alaska Court System. *State v. Superior Court,* 718 P.2 466 (Alaska 1986).

Can the governor shift the Constitutional requirement of indigent criminal representation and payment for an attorney to the Alaska Court System.

While the court must proceed in cases where funds are not available through the normal legislative process or have been vetoed by the governor, the court has inherent power to obtain those funds necessary for the court proper functioning. *Lavelle v. Koch,* 617 A2 319 (Penn. 1992); Pena U.S. District Court of the Second Judicial District for Denver, 681 P.2d 953 (Colo 1984). Clearly the failure to provide funds for the constitutional right to a lawyer by an indigent criminal defendant fits into such a category.

We are back to the words in the dissenting opinion of Justice Rabinowitz in his discussion of the constitutional right to public education in *Hootch v. State Operated School District* 536 P.2 793, 814 (Alaska 1975) "that a constitutional right cannot be limited or abridged to balance the budget. The size of the dividend does not cancel constitutional rights."

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

Scrambled eggs

Members of the Tanana Valley Bar Association gathered July 14 at Pioneer Park in Fairbanks for the group's annual Christmas Party. The highlight of the party is always the highly competitive egg toss.

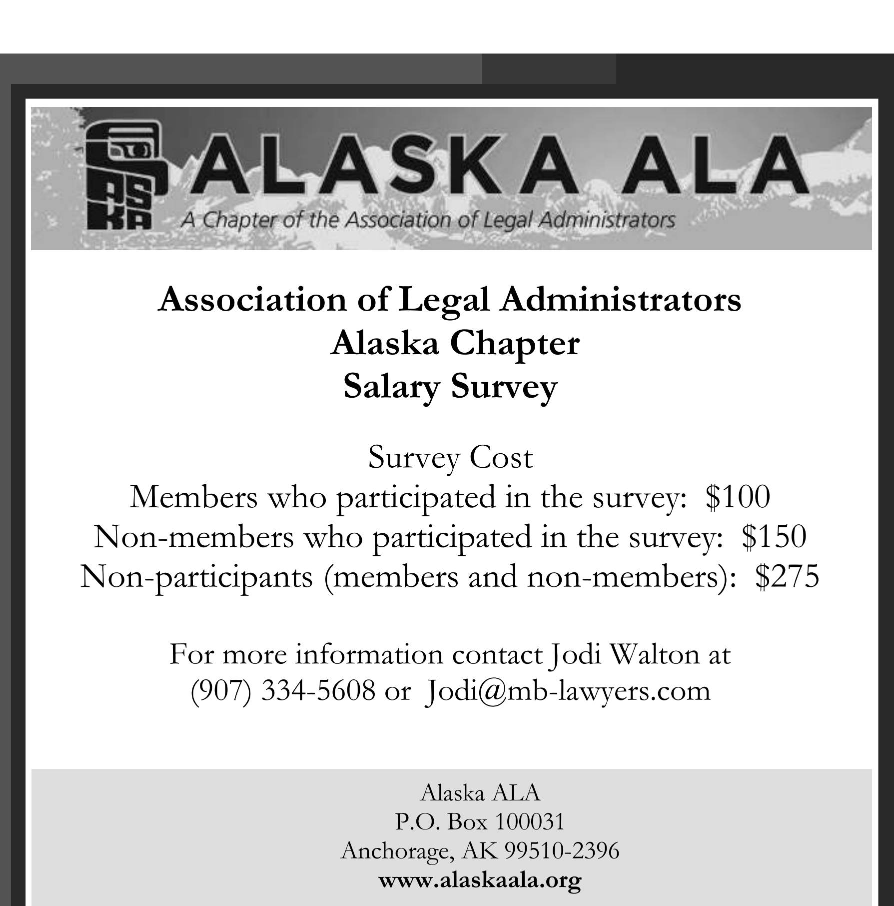
Ralph Beistline, senior U.S. District Court judge and Alaska Bar Rag editor, hands out eggs for the tossing.

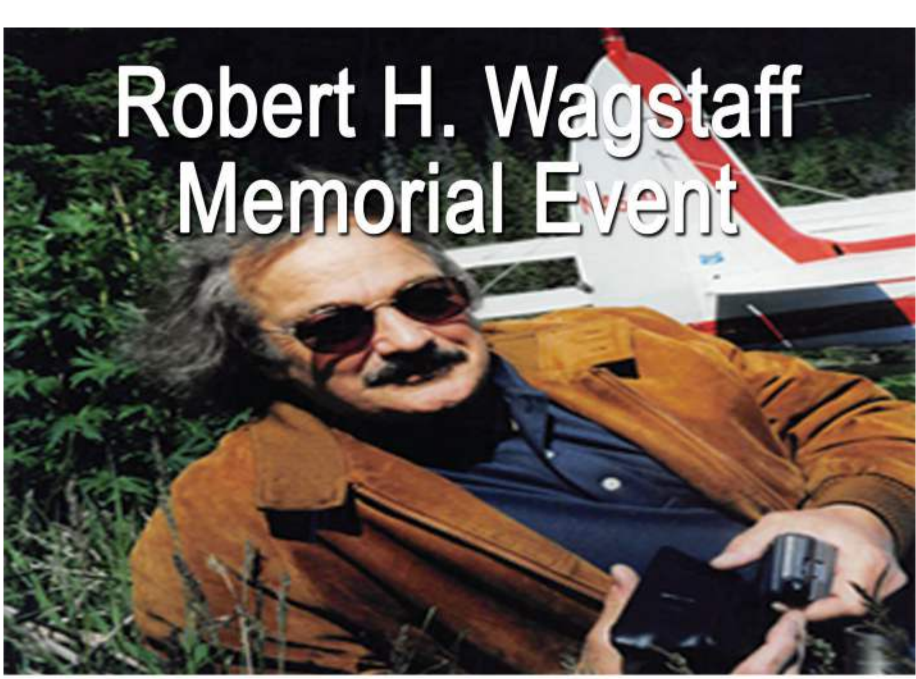
Supreme Court Justice Susan M. Carney had a little trouble with the catch.

Egg toss champions Cameron Leonard and Gary Stapp display their trophy.

Kirk Schwalm prepares for the catch.

Photos by Gail Ballou





You're invited to join us in celebrating his legal legacy and love for Alaska aviation.

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ESTATE PLANNING CORNER

An irrevocable trust may be a tax nothing

By Steven T. O'Hara

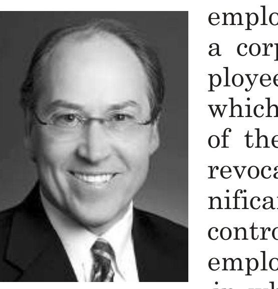
The grantor trust rules, found in the Internal Revenue Code at Sections 671-678, provide surprising results. You may even meet experienced tax professionals who cannot believe what the grantor trust rules say.

For example, you may have worked with a client to design an irrevocable trust to be a tax nothing. But then the trustee retains a tax preparer, perhaps out of state, who apparently has no time to look beyond the assumption that irrevocable trusts are always separate taxpayers whose income is subject to tax on IRS form 1041. Indeed, a tax preparer once told me that the only trust that has a blank federal income tax return is a revocable trust.

When you take the time to apply the grantor trust rules to the facts surrounding an irrevocable trust, you may very well discover that an irrevocable trust, just like a revocable trust, can indeed be a tax nothing during the lifetime of the settlor. In other words, the grantor trust rules, when triggered, treat the settlor of an irrevocable trust as the trust's owner for federal income tax purposes.

What makes a person a settlor, or grantor under tax law, are one or more contributions to an irrevocable trust. Treas. Reg. Sec. 1.671-2(e)(1). While the funding of an irrevocable trust may be a completed transfer for gift, estate, and generation-skipping transfer tax purposes, and while an irrevocable trust may be off the settlor's financial statement from a state-law and creditor standpoint, all of an irrevocable trust's income, gain, loss, deduction, and credit may be reportable on the settlor's individual tax return. IRC Sec. 671.

In situations where the settlor would prefer to be treated as the owner of an irrevocable trust for federal income tax purposes, the grantor trust rules can present significant planning opportunities. Grantor trust status may result in less income tax, more assets available to fulfill the settlor's intent in funding the irrevocable trust, and more flexibility in structuring transactions between the settlor and the irrevocable trust. For example, if the settlor is treated as the owner for federal income tax purposes of the irrevocable trust, the settlor may be able to substitute her own assets for trust assets without recognizing gain or loss. Rev. Rul. 85-13, 1985-1 C.B. 184.



"If the settlor or her spouse has borrowed from the irrevocable trust and has not repaid the loan prior to the current taxable year, the trust's income may be taxable to the settlor."

On the other hand, where the grantor trust rules are ignored during the drafting of an irrevocable trust or later, the grantor trust rules present traps for the unwary.

In determining whether the grantor trust rules apply to an irrevocable trust, consider who the trustee is, and consider whether the trustee's power to make distributions is limited by an ascertainable standard. A distribution power is limited by an ascertainable standard if a court could determine the circumstances that trigger a duty to make a distribution and then compel compliance by the trustee or restrain threatened action. Jennings v. Smith, 161 F.2d 74, 77 (2nd Cir. 1947). For example, a distribution power is limited by an ascertainable standard if the extent of the trustee's duty to exercise and not exercise the power is reasonably measurable in terms of the health, education, or support needs of the beneficiaries. See Treas. Reg. Sec. 20.2041-1(c)(2), 25.2514-1(c)(2), and 25.2511-1(g)(2).

Under the grantor trust rules, if the trustee is the settlor, the settlor's spouse or, indeed, any person who does not have a substantial beneficial interest in the irrevocable trust, then trust income may be taxable to the settlor. IRC Sec. 674(a) and 672(a), (b), and (e). This rule has three common exceptions.

First, the rule will generally not apply if the trustee's discretion is limited by an ascertainable standard and the trustee is neither the settlor nor her spouse. IRC Sec. 674(b)(5)(A) and 674(d), and Treas. Reg. Sec. 1.674(a)-1(b)(3) and 1.674(b)-1(b)(5)(i).

Second, the rule will generally not apply (a) if the trustee is not the settlor or the settlor's spouse or a related or subordinate party subservient to the settlor or (b) if there is more than one trustee and no trustee is the settlor nor her spouse and no more than half are related or subordinate parties subservient to the settlor. IRC Sec. 674(c). For these purposes, a "related or subordinate party" means the settlor's spouse if living with the settlor, the settlor's parent, sibling or descendant, an employee of the settlor, a corporation or any employee of a corporation in which the stock holdings of the settlor and the irrevocable trust are significant in terms of voting control, and a subordinate employee of a corporation in which the settlor is an executive. IRC Sec. 672(c).

Third, the rule will generally not apply if distributions of trust principal are chargeable against a beneficiary's separate share and (a) accumulated income is ultimately payable, in general, to the beneficiary or (b) income may be accumulated only while the beneficiary is under the age of 21 or disabled. IRC Sec. 674(b)(5)(B), 674(b)(6), and 674(b)(7).

Nonfiduciary powers and interests granted or retained by the settlor may also cause grantor trust status. If the settlor retains or grants her spouse the power to purchase, exchange, or otherwise deal with or dispose of trust income or principal for less than adequate consideration, the irrevocable trust's income may be taxable to the settlor. IRC Sec. 675(1) and 672(e). This result may also occur where the settlor gives such power to any person who does not have a substantial beneficial interest in the trust. IRC Sec. 675(1), 672(b), and 672(a).

If the settlor names herself or her spouse as a current beneficiary or if trust income may be accumulated for future distribution to the settlor or her spouse, the irrevocable trust's income may be taxable to the settlor. IRC Sec. 677(a)(1) and (2). By the same token, if the settlor retains the right to get the trust property back on the happening of certain events and if the value of this right is worth more than five percent of the irrevocable trust's value as of the trust's inception, the trust's income may be taxable to the settlor. IRC Sec. 673(a). If, instead of retaining such right, the settlor gives her spouse the right to receive trust property on the happening of certain events, the irrevocable trust's income may be taxable to the settlor. Id. and IRC Sec. 672(e).

Also consider whether the settlor has given any person the power to add any one or more persons to the class of beneficiaries. If the settlor has given any person this power, the irrevocable trust's income may be taxable to the settlor. IRC Sec. 674(b), (c), and (d). A possible exception to this rule is where this power is exercised in order to add children born or adopted after the trust's creation. Id.

Settlor-retained interests or powers that result in grantor-trust status include some that are less obvious than retained beneficial interests or dispositive powers. For example, if the trustee may apply trust income to the payment of premiums on a policy insuring the life of the settlor or her spouse, the irrevocable trust's income may be taxable to the settlor. IRC Sec. 677(a)(3). This rule will generally not apply if the insurance policy is irrevocably payable for a qualified charitable purpose. Id.

If the settlor or her spouse has borrowed from the irrevocable trust and has not repaid the loan prior to the current taxable year, the trust's income may be taxable to the settlor. IRC Sec. 675(3). This rule will generally not apply where the trustee is not the settlor, her spouse, or a related or subordinate party subservient to the settlor and the loan provides for adequate interest and security. Id.

Even if a loan is not made but the settlor retains for herself or grants her spouse the power to borrow trust principal or income without adequate interest or security, the irrevocable trust's income may be taxable to the settlor. IRC Sec. 675(2) and 672(e). This rule will generally not apply where the trustee is neither the settlor nor her spouse and the trustee is authorized under a general lending power to make loans to any person without regard to interest or security. Id.

If the trustee may use trust income to discharge the settlor's or her spouse's legal obligation to support, for example, the settlor's children, the irrevocable trust's income may be taxable to the settlor to the extent trust income is used to discharge that support obligation. Treas. Reg. Sec. 1.677(b)-1. Moreover, if the trustee may use trust income to discharge any other legal obligation of the settlor or her spouse, the irrevocable trust's income may be taxable to the settlor to the extent of that obligation. Treas. Reg. Sec. 1.677(a)-1(d).

If the settlor retains or grants any person a so-called power of administration that is exercisable in a nonfiduciary capacity, the irrevocable trust's income may be taxable to the settlor. IRC Sec. 675(4). For these purposes, a "power of administration" is (a) a power to reacquire trust assets by substituting other assets of equivalent value, (b) a power to control the investment of trust assets to the extent trust assets consist of corporate interests in which the holdings of the settlor and the trust are significant from the viewpoint of voting control, or (c) a power to vote such corporate interests. Id.

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

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

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Opinion

Are governor's budget cuts meant to cut population also?

By Cliff Groh

"These reductions are not meant to harm Alaska or Alaskans, but to turn the corner and make the necessary changes in order to put Alaska on a sustainable path forward."— Alaska Governor Mike Dunleavy Tweet, July 29, 2019

Is an ideological desire for a much less populous and less-educated — and less Democratic — Alaska the real motivation behind Gov. Mike Dunleavy's draconian budget vetoes?

Dunleavy vetoed more than $440 million in funding for the University of Alaska, Medicaid, and other public services this year, and he has telegraphed his plan to cut <u>another</u> $400-500 million in funding next year — mostly in K-12 education.

The governor has said that his proposed budget cuts and vetoes reflect the reality of the State of Alaska's much lower oil revenues since 2014 as well as his confidence that putting our state's fiscal house in order will draw a flood of job-creating investment to the Last Frontier.

Those defenses offered by Dunleavy run headlong into some inconvenient facts. First, the State of Alaska has other fiscal options, which include less drastic budget cuts made over a longer period; a restructuring of the uses of the Permanent Fund earnings; levying of broad-based taxes such as income or sales taxes; and/or changes to the oil tax system.

Second, people who handle big money in Alaska do not see any rush of private investment triggered by the governor's approach to big-time fiscal austerity. Instead, these CEOs, bankers, and business owners and operators warn that the Dunleavy meat axe will hurt — not help — the Alaska economy. Notably, both the Anchorage Economic Development Corporation (AEDC) and the University of Alaska's Institute of Social and Economic Research (ISER) predict that the governor's vetoes will bring a recession.

Substantial evidence suggests that the particular budgetary choices made by the governor stem at least in part from a goal of shrinking the Alaska population down to much lower than Alaska's current 735,000 people.

- While a state senator, Mike Dunleavy told a reporter that Alaska needed to have 100,000 fewer people. (This statement implies more than a 13 percent drop in the population.)
- A high-ranking official in the Dunleavy administration told a business executive this year that Alaska would be better off if the state's population was 300,000 smaller, as that number of people would be one that the economy could support. (This statement implies more than a 40 percent drop in the population.)
- Dunleavy told the Ketchikan Chamber of Commerce in April that "I'm going to take us back to the '60s. We were a state of 250,000, maybe 300,000, and our budgets back in the mid-to-late '60s were about $175 million per year." (The higher figure of 300,000 people implies almost a 60 percent drop in the population, and this quotation comes from an Alaska Public Media report from April 9, 2019 found at that organization's website.)

Population declines in Alaska of these magnitudes require both a massive out-migration coupled with depressed in-migration, which is a pattern last seen in the mid-to-late 1980s. (The one Dunleavy administration official I have personally spoken with about these reports has specifically denied that the administration seeks a major population drop in Alaska.)

Who Does Dunleavy Want to Live in Alaska? And Why?

Beyond the size of the governor's desired population for Alaska, there are also the question of its composition. Under this scenario, who are the people left on the Last Frontier?

A long-time Alaska political observer has told me that Dunleavy apparently believes that it would be the poorest people who would leave Alaska in a crash. The governor's budget cuts and vetoes do seem to cruelly target the most vulnerable Alaskans given the slashing of funding for homeless services, housing programs, pre-K, dental services and Medicaid. On multiple levels, however, the idea that the governor's vetoes would disproportionately drive the poorest people out of the state is just silly. It's not only that many of the poorest Alaskans have some of the deepest roots in the state; as one of my friends pointed out, the poorest Alaskans couldn't afford bus fare to the airport, much less buy an airplane ticket.

Less silly, however, is the idea that gutting the University of Alaska — and decimating K-12 education, the obvious plan next year — will help drive the better-educated people out of Alaska. It's the people with options who are more likely to leave Alaska if/when the state economy goes into another recession. The governor's proposal to hack funding for research — an element of the university that draws in $6 for every $1 spent by the State of Alaska — especially seems to show a desire to start a brain drain. (Drastically cutting research funding would also cripple climate research, a step that might give joy to the Koch brothers, the Kansas-based energy magnates who are the governor's ideological allies.)

Speaking of ideology, an oil industry executive suggested a more baldly political motive for the governor's cuts to the funding of the university, the biggest single target of the vetoes. Chopping funding for the University of Alaska would tend to drive Democrats out of Fairbanks — where the university plays a particularly big role in the economy — and thereby create more Republican seats in the Legislature.

More generally, the governor's vision for Alaska relies much more heavily on oil and hard-rock mining to the apparent exclusion of other job-creating fields. As more than one observer has noted, natural resource warehouses — like all warehouses — do not require many people. If Dunleavy's cuts result in a dearth of skilled labor in Alaska and thereby shrink the labor pool, our state may see an increase in transient out-of-state workers.

Does Dunleavy believe creating chaos helps him politically?

The governor's proposed budget and budget vetoes are so devoid of standard logic that two other sentences come to mind. David Teal, the ordinarily mild-mannered director of the Alaska Legislative Finance Division, said in February after Dunleavy issued his proposed budget that "Looking at the lack of justification, I began to wonder whether the budget was designed in some way to create chaos." Another relevant saying is one frequently attributed to the Bolshevik revolutionary Vladimir Lenin from the days that the Czar ruled Russia: "The worse, the better."

Whether Dunleavy's extreme budget cuts and vetoes are aimed at a much smaller population more matched to a smaller economy or at a more docile and less Democratic Alaska — or both — you need to know that he will continue to push for more lacerations to the budget. Alaskans must prepare for a multi-year fight and support those who offer less destructive alternatives.

The governor's vision of how many people — and what kinds of people — should live in Alaska could loom in the recall effort, particularly for some Alaskans who voted for Mike Dunleavy last November. Republicans tend to be business-oriented and have traditionally favored a much bigger population for the Great Land that is fueled by government spending — think of Wally Hickel and his boomer philosophy of wanting the State of Alaska to spend on costly megaprojects to juice the economy. A much smaller population for Alaska would make it hard for many businesses to stay open; it would also be difficult to sell a home.

Alaska does need to change course, but Dunleavy's burn-down-the-house approach is not the only road open. I personally support a continuing search for budget efficiencies; a restructuring of the uses of the Permanent Fund earnings to both constitutionally guarantee a sustainable Permanent Fund Dividend and allow greater revenues for vital public services; a reinstatement of a personal income tax like Alaska used to have that would capture some of the hundreds of millions of dollars made by out-of-state workers; and an examination of the oil tax system to see if it can generate more revenues while remaining internationally competitive. Your mileage may vary, but the time for falling for fantasies or staying on the sidelines is over.

Cliff Groh has observed and participated in the debates regarding Alaska fiscal policy for almost 40 years. He was the legislative assistant who worked more than any other on the legislation in 1982 creating the Permanent Fund Dividend Alaska has today. He was heavily involved in a successful effort to pass major oil tax legislation while serving as Special *Assistant to the Alaska Commissioner of Revenue in 1987-1990. He taught a course he created at the University of Alaska Anchorage entitled "Navigating Alaska's Fiscal and Economic Challenges."*

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ECLECTIC BLUES

Two bicyclists brave a rugged British Columbia mountain trail

By Dan Branch

"He was large and we are old so we followed his instructions to a four-wheeler track that plummeted onto a gravel bar. We chose not to test the river."

The sun beat down on the Captain and me as we peddled mountain bikes up the Kettle Valley Trail. Even though we were riding into a British Columbian mountain range it was 95 degrees. I was worried. The German cook at that night's B & B refused to serve anyone after 6 p.m. It was already 5. If we didn't speed up, we'd be having protein bars and warm Canadian beer for dinner. None of this was our fault.

We did choose to spend the week riding on an old railway right-of-way in Southeastern British Columbia, even paid American money to do it. But I blamed the outfitters who didn't get us to the starting point at Rock Creek, B.C. until 4 p.m. I also blamed the farmers and their trail-blocking fences.

Every kilometer or so one of us had to get off his bike and open a fence. The other one had to close it. Then there were those 15 minutes we spent trying to find a way across a trail washout.

At quarter past 5 we pulled onto a paved road and picked up enough speed to arrive at the B & B in time to be seated for a dinner of speazle washed down with cheap but cold Canadian beer. After dinner we debated forestry policies with the German's husband, who leased a woodlot from the government. He still let us stay the night.

The next morning, after our hosts cautioned us against bears and mountain lions, we returned to the trail, which soon deteriorated into a gravel path. Our bikes had hydraulic forks and springs in the seat stems. After a few hours into the second day of riding, I couldn't imagine surviving on the trail without such shock absorbers.

The trail guide provided by our outfitter suggested that we stop when we see a bright-red outhouse for a refreshing dip in the Kettle River. The outhouse was there, as promised, as was the river. But a beater pickup truck blocked the trail to the swimming hole. The truck's occupant barely looked up from his phone when we inquired about swimming. He grunted in the polite way of Canadian rural folk and told us to try a little way upriver.

He was large and we are old so we followed his instructions to a four-wheeler track that plummeted onto a gravel bar. We chose not to test the river. Salmon might have been able to hold their own in the current flowing over the shallow bar but we could not. The heat rose the rest of the day as did the trail. We peddled above the river along high cliffs marked with "Warning, it's Rattlesnake Season" signs. I scanned the cliffs for coiled rattlers and mountain lions waiting in ambush. I remembered the outfitter's story about a group of cyclists who had to slam on their brakes when a dead deer fell off one the trailside cliffs and landed in front of them. If this happened we were to ride away from the carcass before the bear or mountain lion assassin could challenge us for the meat.

We overnighted in Beaverdale, an old mining town with a name that Tolkien might have given to a hobbit settlement if he had spent time in Canada. Beaverdale had a store that sold beer and a take-away restaurant that had an excellent collection of Elvis Presley memorabilia but was just about out of food. They had an eclectic offering of crystallized ice creams and just enough milk to make the Captain a shake.

It was still hot when we left the next morning. We rode by a display of porcelain dolls and stuffed toys nailed to a wall on the outskirts of Carmi. I understood then that clown phobia is a real thing. Spurred to ride faster, the Captain and I were challenged by a trail that changed without warning from gravel to sand to cobs. There was no time for Zen reflection or even daydreaming.

Late in afternoon we spotted a sign for Idabel Lake resort — that day's final destination. Elated because both of our water bottles were empty and it was 90 degrees, we swung onto a gravel road. We thought we were mere minutes away from the little lakeside cabin our outfitter promised. Then the climbing started. We peddled up a long, steep grade, glided into a shallow valley and started up an even longer climb. There was a short go-down to the lake and we were done for the day.

The Isabel resort reminded me of a summer camp. It had giggling children, canoes, rowboats and common loons. Three Canadian mining officials, who had beaten us to the resort, sat on the boat dock in Adirondack chairs made from plastic. They drank the Canadian equivalent of Moose Drool beer. Our beer had not been delivered yet. Out of jealously, I started to think bad thoughts about our Canadian friends until they flipped over a canoe trying to board it. After witnessing the three Canadians' lack of skill with a canoe — the most Canadian of all watercraft — I questioned whether people of the Great White North really like maple syrup, hockey and Justin Trudeau.

We spent the next day, another scorcher, at the lake watching loons, hummingbirds and goofy kids. Homer's rosy-fingered dawn appeared at 6 a.m. on the third day but was chased away by a heavy rainstorm at 6:30. That day the temperature never rose above 55 degrees. The rain fell, sometimes driven into our faces by a strong wind. We wore every piece of clothing we had. When the rain stopped, we noticed that we had crossed the summit and were losing elevation.

By lunchtime we had reached the famous Myra Canyon section of the trail with its 18 gut-clinching trestle bridges. Each spanned a ravine like a Roman aqueduct. We had had the trail to ourselves up to this point. But from Myra Canyon on it was crowded with day riders taking selfies on the trestles or stopping to chat where the trail narrowed.

At Chute Lake Lodge we stopped to warm up and dry out. In its crowded dining room we ate sandwiches that we had cobbled together from breakfast leftovers and waited for lodge staff to refill coffee urns previously drained by members of a bike club from Vancouver. I overheard one of the bikers invite a woman from another bike club to call him "The Flying Dutchman." His wingman was to be addressed as "Maverick."

The Dutchman and Maverick must have struck out with the lodge ladies after we returned to the trail. While we carefully negotiated a sandy stretch that cut across a steep hillside, the Dutchman and his pals flew past us on skinny tired bikes, shimmied in the soft sand and stopped. We plodded past them as they contemplated their brush with death.

The trail dropped down toward Okanagan Lake in a series of long switchbacks, passing paths leading to rock ovens built to bake bread for the workers that built the Kettle Valley Railway. Not understanding the attraction and tired of being soaked by rain, we didn't stop to explore the ovens. Neither did the Dutchman, who pressed on to wineries and fleshpots of Naramata. Hours later, the captain and I celebrated completion of the ride in Naramata with a dinner of African-Canadian fusion food at Bongo's. Ours were the only bikes parked in front of the restaurant.

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

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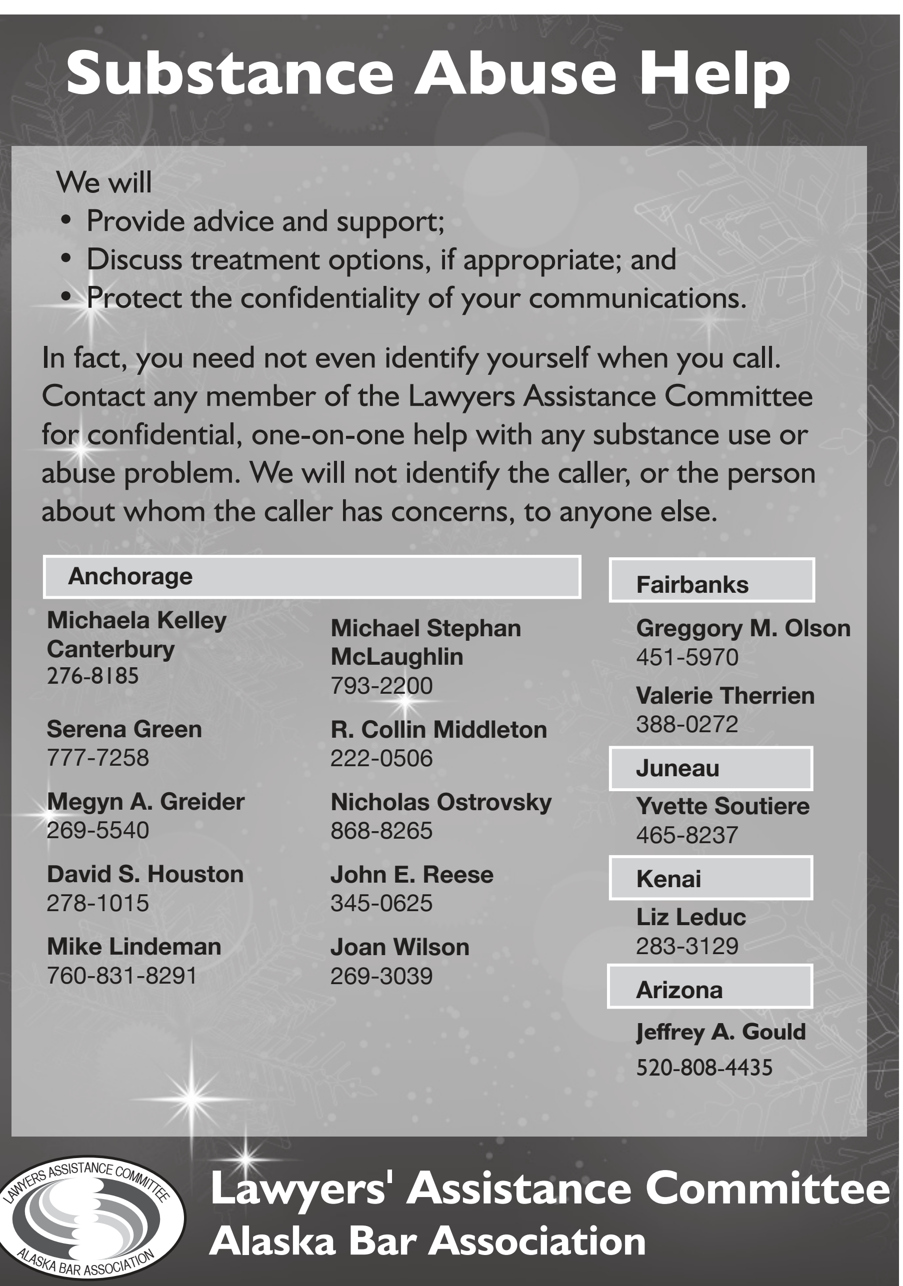

Marijuana industry landlords, tenants face complicated rules

By Jason Brandeis

Alaska's first retail marijuana store opened its doors in the fall of 2016. Since then, a few hundred Alaska businesses have formed to support the industry, and the marijuana legalization movement is expanding nationwide. Currently, 11 states and the District of Columbia have legalized marijuana for general adult use, and a total of 33 states and D.C. have broad medical marijuana programs.

Despite these state-level changes, federal law continues to prohibit the use, possession, or sale of marijuana — a jurisdictional conflict that remains problematic for marijuana businesses. Businesses face challenges along a spectrum of minor inconveniences, such as being unable to alter a facility's physical layout without regulatory approval, to major frustrations like unfavorable federal tax rules. Some of these challenges are downright dangerous and present public safety concerns, like lack of access to banking services, thereby forcing businesses to manage, store, and move large quantities of cash on and off site.

Indeed, despite an increasing market size and growing mainstream acceptance, marijuana businesses still cannot run like normal businesses; everything they do is a little harder and more complicated. This is true even in the realm of private agreements, where typical contract law proves insufficient. For example, and as discussed below, there are unique lease agreement considerations for all licensed marijuana establishments.

Leases play a critical role in marijuana licensing. Having exclusive legal access to the property where the facility is located is a precursor to licensure and a key component of the state's regulatory framework. Unlike the alcohol industry, where licenses can be transferred from one operating location to another, marijuana establishment licenses are tied to a specific location. Therefore, if a licensee loses the right of possession, the business will be unable to operate, and the license itself will be jeopardized. Because a lease is such a critical part of a successful marijuana business in Alaska, it is important to understand the characteristics of this industry and pay close attention to them when representing clients in marijuana-related transactions. When entering into a commercial lease for a licensed marijuana establishment — either as a landlord or tenant — there are a number of unique factors to consider.

Current, exclusive possession required

An applicant for a marijuana establishment license in Alaska must prove: (1) access to the proposed licensed premises at the time of application; and (2) possession of the premises with each annual license renewal application — an ongoing requirement. Thus, it is important to ensure that leases do not lapse, and that the extension and renewal terms or options are clear and exercised as necessary.

A marijuana establishment must also demonstrate the right to possession of the entirety of the licensed premises — no portion of it may be subleased to another party for any reason. Accordingly, no one else can occupy the space and/or be paying rent at the time of license application. This can create unanticipated problems due to the length of the licensing process. In addition to Alaska's typical weather-related or fishing season and construction delays, it takes a minimum of several months for the state's Marijuana Control Board (MCB) to review the application, and then additional time before local requirements can bet met. Factoring in time for build-out, permitting, and licensing, some licensees can expect to pay rent for almost a year before actually opening for business.

This is obviously a significant expense for a new business, and few can afford to absorb it. But without the ability to sublease while a license application is pending, that's what marijuana businesses must do. Both landlord and tenant must understand that a gap between signing a lease and beginning operations is inevitable and can factor that into the rent—either through a pre-licensure grace period or with rental payments that escalate over time. "Lost" rental income during this early stage can be ameliorated by requiring a longer lease term, amortizing the "lost" year into the rent payments due following licensing, or negotiating rent that includes payment of a percentage of business revenue.

Clearly establish and explain permitted uses

The MCB will review the lease as part of each licensee's application, and will look there for acknowledgement that the property can be used for marijuana establishment purposes. The lease must also clearly establish the type of marijuana establishment activity that will be permitted on the property (e.g., cultivation, product manufacturing, retail sales or testing). Landlords may also want to require that the permitted use is conditioned upon the tenant remaining in compliance with all applicable laws and regulations.

Landlord Cooperation

Marijuana laws and regulations are constantly shifting, so leases may need to be revised, and other related regulatory filings may be required to maintain compliance. For instance, some local jurisdictions will require a supplemental statement from the landlord acknowledging that there will be a marijuana facility on the premises, many months after the lease is drafted. Landlords may also be asked to appear at local community council or planning commission meetings.

Landlords should understand their potential involvement in the licensing process and agree to not unreasonably withhold such assistance. Writing a clause into the lease acknowledging the ever-shifting legal framework can help avoid problems down the road. For example, a clause that provides, "The parties agree to make any amendments to the lease that are reasonably necessary to avoid failing to satisfy the requirements of local, state or federal guidelines regarding marijuana enforcement, as those laws, regulations, and guidelines may be amended from time to time," can protect the interests of both parties.

Limited access to the premises

A standard lease gives landlords the right to access the property at any time with reasonable notice in order to conduct inspections, perform maintenance/upkeep, and make any needed repairs. Toward the end of a lease term, landlords will require access to show the property to prospective tenants. However, if the leased property is a licensed marijuana establishment, marijuana regulations impact a landlord's right of access, and both landlord and tenant must agree to comply with certain access conditions in order to successfully obtain a license.

Specifically, the landlord must acknowledge that they cannot enter or remain on the property unescorted, and that a tenant representative must serve as an escort during any entry; the landlord must agree to comply with the tenant's established and approved visitor policies whenever accessing the premises; and if the landlord must enter the premises and the tenant cannot be reached or does not provide access, the landlord will agree to first contact the State of Alaska Alcohol and Marijuana Control Office (AMCO), or other relevant government authority, prior to accessing the premises. Similarly, in the event of the tenant's default, the landlord must first contact AMCO prior to any re-entry or re-possession of the premises.

Restricted ability to take possession of property

Because only licensed marijuana establishments are authorized to possess regulated marijuana and marijuana products, the landlord may not take possession of or remove such property to satisfy any outstanding debts. Similarly, if a tenant abandons the property, or if there is any other event that would otherwise permit the landlord to repossess the premises, or to enter the premises and remove personal property, the landlord must first contact AMCO for guidance and assistance.

The lease should be drafted to include a disclaimer that acknowl-

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My Five . . .

My Five selections come to us this issue from Alaska Bar Association President Rob Stone; Jeff Waller, chief assistant Alaska attorney general; and new Bar Association Board Member Aimee Oravec.

Rob Stone

"Spirit in the Sky"— Norman Greenbaum
"Born to Be Wild" — Steppenwolf
"Friends in Low Places" — Garth Brooks
"The Gambler" — Kenny Rogers
"Shout" — Otis Day and the Knight

Jeff Waller

"Walk" — Pantera
"Du Hast" — Rammstein
"Judith" — A Perfect Circle
"Jekyll and Hyde" — Five Finger Death Punch
"Piggy Pie" — Insane Clown Posse

Aimee Oravec

"Eine Klein Nachtmusik" — Mozart; Fun to play when I played an instrument. Now it reminds me that I used to play an instrument.
"Cumberland Blues" — Grateful Dead; – love to sing and dance to this. Makes my heart happy as most Grateful Dead songs do.
"Closer to Fine" — Indigo Girls; most inspirational, also reminds me of being a young woman and singing with my girlfriends on the debate van.
"Watershed" — Indigo Girls; helps me keep perspective during times of change.
"Sugar Me" — Def Leppard; I don't even know all of the lyrics and after googling, I laughed a bit. But every time this song comes on, I get itchy to dance.

Marijuana industry landlords, tenants face complicated rules

Continued from page 12

edges these regulations, and landlords should be aware from the outset that taking possession of marijuana inventory will not be security against a breaching tenant.

Percent rent

While a graduated or percentage rent agreement can be appealing, regulatory considerations extend beyond standard economic questions. The Alaska marijuana regulations are unclear on this topic, providing only that "rental charges on a graduated or percentage-lease rent agreement for real estate leased to a licensee" are not prohibited. This gives landlords and tenants latitude to negotiate a percentage of profits payment in addition to base rent, but regulators will closely scrutinize any lease that appears to use a percent rent payment as a way to circumvent other licensing or ownership requirements. Landlords and tenants should err on the side of reasonableness and negotiate a percent-rent rate that will pass regulatory muster.

Mortgages

If a landlord's property is financed, a marijuana establishment on the property could jeopardize the landlord's mortgage. Traditional lenders (i.e., banks) are conservative by nature, and most will not risk association with marijuana businesses. These lenders abide federal law. As far as most mortgagors are concerned, because marijuana is illegal under federal law, it is illegal. Full stop.

Mortgage loan agreements almost always provide for "compliance with all laws," and make non-compliance grounds for default. Thus, renting mortgaged property to a marijuana business that operates outside federal law could violate the loan agreement. In that case, lenders have various rights and remedies, including declaring a default and calling a loan due in full, or commencing foreclosure proceedings. Some lenders might provide an opportunity to cure by allowing time for the offending tenant's eviction. But that is a far from ideal solution; it leaves the landlord without a tenant and the tenant without a place to operate its business and will likely lead to a messy dispute.

Landlords should know that their lenders could hold them in breach and consider that risk before renting to a marijuana establishment. To protect themselves, landlords may want to include a lease term that allows early termination without penalty in the event of a threatened mortgage default. Of course, that is risky for a tenant, whose business would always operate under a cloud of uncertainty.

Tenants likewise should seek to protect themselves. In the best-case scenario, a marijuana tenant would only lease property owned outright by the landlord or is otherwise not subject to a loan agreement with such compliance requirements. But with commercial property suitable for marijuana businesses in short supply, that is not always an option. Tenants should therefore similarly be aware of the possibility of these mortgage-related risks and determine the status of a property's financing before signing a lease. If the property is mortgaged, tenants could try to negotiate a lower rent price that accounts for this risk and seek terms that would otherwise minimize their damages. Tenants could also work with the landlord to provide alternative means for refinancing without a traditional lender.

Exclusion of the federal CSA from "unlawful purpose" or "Illegal use"

Finally, as with any marijuana-related contract, a lease agreement must address the federal-state law conflict. Standard lease agreements typically contain a term providing that the tenant shall comply with all laws, shall not use the property for any unlawful purpose, or that illegal activity is prohibited, and that failure to comply constitutes a breach. Such a broad clause could arguably allow a landlord to evict a marijuana establishment tenant at any time, because marijuana remains illegal under the federal Controlled Substances Act (CSA). It would probably be difficult for a landlord to evict solely on these grounds in a state where commercial marijuana activity is legal and where the lease expressly allows such a use, but this issue could be avoided entirely if the landlord and tenant stipulate that any unlawful purpose or illegal use excludes violation of the marijuana-related sections of the CSA.

Standard lease agreements typically contain a term providing that the tenant shall comply with all laws, shall not use the property for any unlawful purpose, or that illegal activity is prohibited, and that failure to comply constitutes a breach.

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Lease agreements play a key role in helping to regulate the marijuana industry. But commercial marijuana landlord-tenant relationships can be difficult to navigate and are ripe with potential problems due to strict regulations and a continually shifting legal framework. However, with proper planning and attention to unique details, the marijuana landlord-tenant relationship can help ensure full compliance with the law and can allow both parties to benefit and function almost like "normal" parties to a lease.

Jason Brandeis is an Associate Professor of Justice at the University of Alaska Anchorage and is of counsel at Birch Horton Bittner & Cherot, where he advises clients on marijuana law and policy matters.

SEC takes inventory of exemptions relating to capital formation

By Julius J. Brecht

First RASA & then federal inventory

First, it was Alaska throwing out the old (the Alaska Securities Act) and replacing it with a new suit of clothes. In 2018, Alaska became the most recent state to adopt Uniform Securities Act 2002 in the form of the *revised* Alaska Securities Act (AS 45.56, "RASA").[1] RASA became effective January 1, 2019.

Now, the feds, although awash in securities offering registration exemptions, are reassessing those exemptions specifically pertaining to small business capital formation ("exemptions")! The Exemptions are from registration under the Securities Act of 1933, as amended ("SA").

The release, framework & capital formation

On June 18, 2019, the Securities and Exchange Commission, the federal entity charged with administering SA ("SEC"), issued a concept release on *harmonizing, simplifying and improving* securities exemptions under SA ("release").[2] The release solicits public comment, to be received no later than September 24, 2019

Origin of the exemptions stems, in part, from amendments to SA through the years. Some of the exemptions arise through SEC administrative actions.

Reasons given in the release for soliciting public comment are that, with the numerous amendments to SA and actions taken by the SEC directly, the overall framework of the exemptions ("framework") has changed significantly. It raises a question as to whether that framework has strayed from that which United States capital markets can best take advantage in small business capital formation and from that which allows continued investment opportunities to prospective investors in that arena (collectively, "capital formation").

The release suggests that the process may have caused gaps and complexities in the framework. It suggests further that these shortcomings may be identified by stepping back to view the overall effect of the current framework on capital formation. However, the release cautions that, in doing so, one must not lose sight of another important purpose of SA — to maintain appropriate investor protection.

The release is comprehensive, consisting of more than 200 pages, in describing the framework. The purpose in this article is not to attempt to address any one or more of the exemptions in any amount of detail. Rather, it highlights several of the issues pertaining to the framework. The interested reader ought to review the full Release to get an appreciation for the scope and depth of the SEC's contemplated action regarding the Exemptions and its possibly profound effect on Capital Formation.

Federal regulation & capital formation

To understand the importance of the release, let's pause for a moment to consider how securities regulation affects capital formation. The SA requires that every offer and sale of securities must be registered with the SEC, with limited exception. That exception is where there is an available exemption from registration under SA.

Under SA, a security is defined by identifying a number of instruments and transactions which by their nature are included within the definition. Examples of those instruments are stocks and bonds. Similarly, examples of those transactions are investment contracts and options.

The release further states the purpose of registration as providing full and fair disclosure of material facts to investors. This information is necessary to enable those investors, in part, to make informed investments.

The release also states the United States Congress realized in enacting SA, that, as a practical matter, certain situations do not need registration or otherwise fall outside the scope of benefits of registration. As a result, SA contains a number of securities registration exemptions, including the exemptions. The release further notes SA specifically authorizes the SEC (at Section 28 of SA) to adopt additional Exemptions by administrative action.

The release notes that exemption requirements may exempt an offering if it is restricted to sales to certain sophisticated or "accredited" investors, as the term is defined in Regulation D, adopted by the SEC ("Regulation D"). Here, the investor is presumed to possess sufficient financial sophistication and ability to withstand the risk of loss of the investor's entire investment or otherwise able to hire that expertise, rendering SA registration protections unnecessary.

Whether the exemption reorganization provides a net benefit to capital formation remains to be seen. However, it may result in substantial encroachment on RASA and Blue Sky Laws, generally.

So, the Exemptions are then divided into three categories:

- *Certain securities as identified in Section 3 of SA* — Ones, most of which are included based upon characteristics of the instruments, e.g., securities issued or guaranteed by the United States or a state or territory thereof.

- *Certain transactions as identified in Section 4 of SA* — Ones falling outside of that which the Congress determined as needing registration protection, e.g., issuer transactions not involving any public offering.

- *Certain exemptions as identified by the SEC under authority of Section 28 of SA* — Ones identified by the SEC as exempt persons, securities or transactions, e.g., offerings under Regulation D, Rule 506(c), freeing the issuer of the Regulation D limitation on manner of offering.

Blue Sky Law & capital formation

As an aside, securities regulation in the United States is not just on the federal level through the SEC. It is also accomplished through separate security laws of the various states and territories of the country. This level of regulation is traditionally called "Blue Sky Law." In the case of Alaska, that Blue Sky Law is manifested as RASA and actions taken by the state in administering RASA, e.g., regulations, rules, orders, etc. Generally, and in the context of securities offerings, Blue Sky Law takes the form of requiring registration of those offerings, with limited exception. That exception is where there is an available exemption from registration under the Blue Sky Law of that state or territory, as the case may be.

Back to the release--

The release addresses, from the perspective of investor protection, limitations on who can invest in certain exempt offerings and the amount of investment per investor as set forth in the Framework. It looks to whether existing limitations are insufficient, appropriate or excessive in the Framework. At the same time, the release seeks comment whether those limitations pose undue obstacles to, or limit access by prospective investors to, capital formation.

The Release specifically addresses whether investor eligibility limitations ought to be revised. It suggests further whether the more appropriate focus ought to be on the sophistication of the investor, the amount of the investment per investor or other criteria, rather than simply focusing on the income or wealth of the investor.

It also acknowledges that the exemption requirements might limit the amount of securities that may be offered or sold, while others might limit the manner in which the offering is made. For example, the Exemptions might prohibit the use of general solicitation or general advertising to solicit investors.

Covered securities & qualified purchasers

One of the more recent amendments to SA provides that the SEC may preempt state registration and review of transactions involving "covered securities." That amendment identified specific categories of covered securities (addressed in Section 18 of SA). One of those categories is a security offered or sold to a "qualified purchaser." Furthermore, that amendment gives the SEC authority to define a qualified purchaser, with little restriction on that effort.

While the SEC had previously considered a proposed definition of qualified purchaser, it did not adopt it. Now, the SEC is, through the release, apparently revisiting the need of a definition of the term in the context of Capital Formation.

Summary

In summary, the scope of the release is broad and significant. The resulting exemption reorganization, coupled with the SEC authority under Section 28 of SA, could result in a far more expansive role for the SEC in regulating securities offerings in the United States, e.g., through a new definition of qualified purchaser. If this expansion occurs, the role played by Blue Sky Law in regulating capital formation securities offerings would be significantly reduced, if not eliminated.

Whether the exemption reorganization provides a net benefit to capital formation remains to be seen. However, it may result in substantial encroachment on RASA and Blue Sky Laws, generally.

While the release is lengthy, it behooves those persons who practice in the securities law area or otherwise advise small business to be aware of its nature and scope. Best wishes in your read of the release.

This article was prepared solely to provide general information about the topic. The content of this article was not prepared as, and must not be construed as, legal, tax or investment advice to anyone. Nothing in this article is intended in any way to form an attorney-client relationship or any other contract.

Julius J. Brecht is an attorney in private practice and Of Counsel with the law firm of Bankston Gronning Brecht, P.C. with offices in Anchorage, Alaska. His concentration of practice is in state and federal securities law and corporate and finance law.

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Mediator
Steven T. O'Hara
www.oharatax.lawyer
Estates • Trusts • Business • Tax
907.223.5911
steve@oharatax.lawyer

Lawyering Coach
Steven T. O'Hara
www.oharatax.lawyer
IT • Overhead • Values
907.223.5911
steve@oharatax.lawyer

Learn benefits, pitfalls of 'tail' insurance policies

By Mark C.S. Bassingthwaighte

To this day I still get the occasional call from an attorney wanting to know how to go about purchasing a tail policy and my response is always the same. I need to make sure that the caller understands there really is no such thing as a tail "policy." Clarification on this point is important because confusion over what a tail is and isn't can have serious repercussions down the road. To make sure you don't end up running with any similar misperceptions, here's what you need to know.

An attorney leaving the practice of law can't purchase a malpractice insurance policy because he or she will no longer be actively practicing law. There simply is no practice to insure. This is why an attorney can't buy a tail "policy." What you are actually purchasing when you buy a tail is an extended reporting endorsement (ERE). This endorsement attaches to the final policy that was in force at the time of your departure from the practice of law. In short, purchasing an ERE, which is commonly referred to as tail coverage, provides an attorney the right to report claims to the insurer after the final policy has expired or been cancelled.

Again, under most ERE provisions, the purchase of this endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. So for example, if a claim were to arise several years post retirement out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like never write a will for someone while in retirement. I know it can be tempting, but don't practice a little law on the side in retirement because your tail coverage will not cover any of that work.

Another often misunderstood aspect of tail coverage arises when an attorney semi-retires and makes a decision to purchase a policy with reduced limits in order to save a little money during the last few years of practice. The problem with this decision is that insurance companies will not allow attorneys to bump up policy limits on the eve of a full retirement, again, because no new policy will be issued. For many attorneys, this means the premium savings that came with the reduced limits on the final policy or two will turn out not to have been worth it and here's why. All claims reported under the ERE will be subject to the available remaining limits of the final policy that was in force at retirement and this may not be enough coverage.

By way of example, if you were to reduce your coverage limits from one million per occurrence/three million aggregate to five hundred thousand per occurrence/five hundred thousand aggregate during the last year or two of active practice in order to save a little money, you will only have coverage of five hundred thousand per occurrence/five hundred thousand aggregate available to you for all of your retirement years assuming there was no loss payout under that final policy. In terms of peace of mind, for many that would be an insufficient amount of coverage. Therefore, if you anticipate wanting those higher limits of one million/three million during your retirement years, keep those limits in place heading into retirement.

Unfortunately, while many attorneys hope to obtain an ERE at the end of their careers, the availability of tail coverage isn't necessarily a given. For example, most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductible amounts paid on prior claims. An attorney's failure to comply with the terms and conditions of the policy; the suspension, revocation, or surrender of an insured's license to practice law; and an insured's decision to cancel the policy or allow coverage to lapse may also create an availability problem.

An attorney's practice setting is also relevant. Particularly for retiring solo practitioners, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a stated number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one's practice isn't a good idea as the opportunity to obtain a free tail could be lost. Review policy provisions or talk with your carrier well in advance of contemplating retirement in order not to unintentionally lose this valuable benefit.

The situation for an attorney who has been in practice at a multi-member firm is a bit different. Here, when an attorney wishes to retire, leave the profession, or is considering a lateral move and worried about the stability of the about-to-be-departed firm, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm's existing policy will continue to be in force post attorney departure. This isn't as much of a problem at it might seem in that the departing attorney will be able to rely on former attorney language under the definition of insured. However, because the definition of insured varies among insurers, you should discuss this issue with your firm's malpractice insurance representative so options can be identified and reviewed well in advance of any planned departure. That said, I can share that under two ALPS policies and as long as certain conditions are met, we provide some of the most comprehensive tail coverage options in the industry, to include free individual EREs in event of retirement, death, disability or a call to active military service.

Be aware that the period in which one can obtain an ERE can be quite limited. Most policies provide a 30-day or shorter window that will start to run on the effective date of the expiration or cancellation of the final policy. There are even a few very restrictive policies in the market that require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Given this, you should review relevant policy language well in advance of contemplating departing the profession as the opportunity to purchase an ERE is one you can't afford to miss.

The duration of tail coverage or more accurately the length of time under which a claim may be reported under an ERE varies depending upon what is purchased. Coverage is generally available with a fixed or renewable one, two, three, four, or five-year reporting periods or with an unlimited reporting period. If available to you, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice.

The premium charge for an ERE is usually specified in the policy. Often the cost is a fixed percentage of the final policy's premium and can range from 100 percent to 300 percent depending on the duration of the purchased ERE.

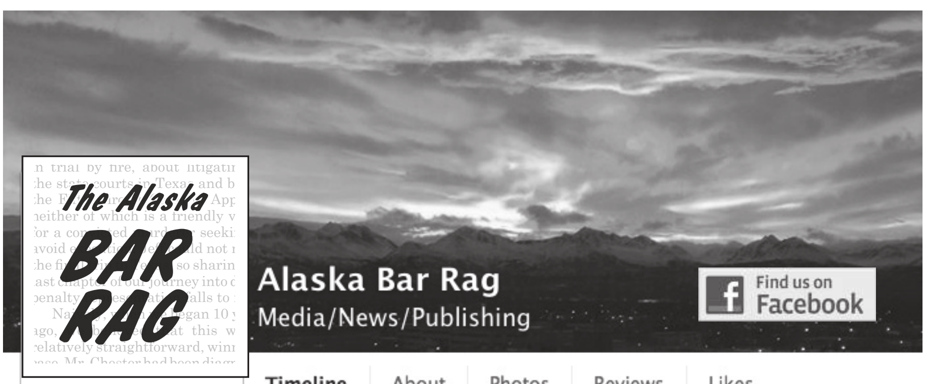
Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed, now's the time. One final thought, be aware that if the unexpected ever happens such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney's estate if timely pursued in accordance with policy provisions. This is why even attorneys who are not nearing retirement should still have some basic awareness of ERE policy provisions because one just never knows.

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

Presenting the 2019 Benjamin Walters Distinguished Service Award is Ken Jacobus, treasurer of the Anchorage Bar Association, left; with Retired Judge Donald Hopwood, center: and Anne Helzer, president of Anchorage Bar Association.

Superior Court judge receives award

This spring, the Anchorage Bar Association awarded Donald D. Hopwood the 2019 Benjamin Walters Distinguished Service Award for his outstanding service to the Bench and Bar Community. Judge Hopwood has facilitated both administrative and substantive training sessions for new judges and has conducted settlement conferences sometimes at no charge. He has volunteered many hours in the legal community.



Known for its often-irreverent and always-topical content, the *Alaska Bar Rag* is the official newspaper of the Alaska Bar Association. www.alaskabar.org

www.facebook.com/AlaskaBarRag

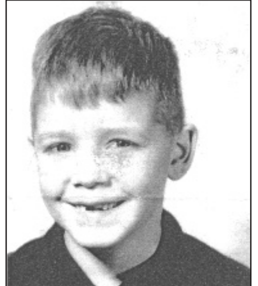
Recalling a career of touchy courtroom encounters

By William R. Satterberg Jr.

Over the years, I have had various encounter sessions with judicial officers. Generally speaking, they have been fun and often rather humorous. Some, however, have proven more difficult.

As I approach the fall of my legal existence (not yet winter), I decided it would be didactic to set forth some of my more memorable sessions with judges for the benefit of other practitioners.

My first memorable encounter session was before Judge James Blair in 1978. The State of Alaska had condemned property from Alaska Continental Development Corporation. It was a $750,000 parcel. It was my first trial. I know that the case involved a $750,000 parcel because that's what the state lost at trial after the state's serious $112,000 offer to settle. After the decision, I was in front of Judge Blair contesting the defense claim for attorney's fees. I lost that issue too. From the bench, Judge Blair, lacking any compassion for my first loss, stated as if we were fierce competitors in a backstreet basketball game, "You lose, Satterberg!" Admittedly, I was nerdy at the time. Also a bit chubby. On the other hand, I felt that I had been suckerpunched. Unfortunately, the Supreme Court agreed with Judge Blair. I lost at that level, as well. Remarkably, State of Alaska v. Alaska Continental Development Corporation went on to become a landmark condemnation case addressing enhancement value and has benefitted more than one landowner. I now like the case.



"My first memorable encounter session was before Judge James Blair in 1978."

Later, I appeared before Judge Gerald Van Hoomissen. It was another condemnation case. The landowner's attorney had repeatedly attempted to try to present evidence to the jury which was previously ruled inadmissible on partial summary judgment. The landowner wanted $1.3 million. The state had seriously offered less than $1,700 for the acquisition. Surprisingly, I won that case, Triangle v. State. Triangle also went to the Alaska Supreme Court and set precedent for circuity of access being non-compensable. But the interesting facet was that, prior to the actual condemnation action having been filed, the Triangle Bar, owned by a rather disreputable group of people, had suspiciously burned to the ground. To explain the wide disparity in values, it should be noted that I had successfully argued in a motion for partial summary judgment that the property was bare and vacant and thus should be valued as such. The landowner, on the other hand, claimed that Triangle was still a working nightclub, even though it was only a pile of burned debris at the time of condemnation. In my opinion, Judge Van Hoomissen had properly excluded the evidence. But that still did not dissuade the landowner's counsel from attempting several times to do an end around the ruling before the jury. The tactics even included a spontaneous shout out of the inadmissible evidence by the defense expert. Eventually, apparently having been bullied into submission by the constant defense antics, Judge Van Hoomissen allowed the $1.3 million figure to come in as evidence.

The cat was out of the bag. The jury now knew what was at stake. We obviously were not arguing over a nominal case.

The cat was out of the bag. The jury now knew what was at stake. We obviously were not arguing over a nominal case.

As I quietly sat dejected at counsel table, Judge Van Hoomissen began to look concerned. In fact, the judge became obviously more troubled over the next 20 minutes and suddenly announced, sua sponte, "Counsel approach the bench now!" Both defense counsel and myself complied and were directly marched into the anteroom for a conference. In the privacy of the anteroom, Judge Van Hoomissen uncharacteristically unzipped his black robe and jammed his hands into his jeans pants pockets. To my relief, at least he wasn't wearing a weapon this time. Then, looking at the floor and slowly shaking his head from side to side, he announced "Gentlemen, I have really f--ked up!" As I was still recovering from the shock of this unexpected dictum, we were interrupted by a loud knocking on the door. The judge's loyal in-court clerk, Thelma, then stuck her head in and curtly stated "Your Honor. You are still on the record!" Suitably chastised, Judge Van Hoomissen politely thanked Thelma for her reminder. After Thelma left, the court then stated "Counselors, that was inaudible, wasn't it?" I quickly agreed that I had a hard time hearing the comment (especially given my politically sensitive ears). Opposing counsel, on the other hand, wanted to make the comment of record. Although still a fledgling counsel, I wisely stayed out of the battle. In response, Judge Van Hoomissen sternly looked the attorney directly in the eyes and loudly stated, once again, "Sir, the comment was inaudible!" Ultimately, recognizing that discretion often is the better part of valor, counsel capitulated.

The trial went on to its conclusion and to an appeal. When the appeal transcript was produced by the Alaska court system, I immediately raced to the anteroom conference portion to see what appeared. Sure enough, the comment was "inaudible." The court system had protected its own.

Once, I was before Judge Mary Greene. It was a serious criminal case. Voir dire had concluded. We were in the preempting jurors phase in the anteroom. The State of Alaska had just exercised a peremptory challenge and had surprisingly eliminated our next chosen target. Judge Greene had asked me to exercise our next peremptory challenge. She obviously was wanting to expedite the process. At the time, however, I needed to consult quickly with my client to determine what substitution to make in the batting order of preempting jurors. I politely asked Judge Greene if I could have "just a moment to consult with my client." In response, she announced quite firmly, "Mr. Satterberg, exercise your preempt now. Either use it or lose it!" I then replied, "I believe your Honor would be making a mistake with such a ruling. I have a right to consult with my client." The judge then responded "Mr. Satterberg, I don't make mistakes!" Pushing the issue, I retorted "The Supreme Court disagrees." Apparently, my bravado worked. Judge Greene reluctantly did allow me to consult with my client. I later learned from other local counsel that they often tried their best to not appear in front of Judge Greene after I had been in her courtroom. Apparently, much similar to an opening warm-up act, the next attorney to appear before her after one of my appearances would often receive the after effects of my presentation. It was either that, or maybe it was time for a cigarette.

One time when I was handling a condemnation case in Nome, I had decided to be personally present with my client for oral argument. The State's attorney had instead elected to appear telephonically in an unusual effort to conserve public finances. The speakerphone in the courtroom was sitting on a table halfway between where I was sitting and the judge's bench. The State's attorney, who could be rather long winded, had launched into an extended argument before Judge Tunley. About halfway through her argument, Judge Tunley tried to interrupt to ask a question. Unfortunately, the attorney could not hear the interruption because she was busily arguing her case. She was clearly on a roll and obviously picking up speed. In retrospect, counsel must have had the lungs of an opera star, since I do not believe that she ever really stopped to take a breath. After approximately a minute of Judge Tunley trying politely to interrupt the argument, he had yet to be heard. Judge Tunley clearly was growing red in the face. Increasingly frustrated, he next left the bench and virtually ran around to the table where the speakerphone was located. He then bent over the phone. He put his face 10 inches away from the device and began loudly yelling "Counselor! Counselor! Counselor! I am trying to speak, Counselor!" But it didn't work that way because the relay was still switched in the direction of the attorney who was blithely continuing her discourse. However, when the attorney finally did come up for air, the exchange was not pretty. Judge Tunley, by now, was beet red. Veins were protruding on his neck. As I recall, following an

Continued on page 17

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Bar People

Birch Horton Bittner & Cherot welcomes two new lawyers

The law firm of **Birch Horton Bittner & Cherot** is pleased to announce that attorneys **Michael Schwarz** and **Matt Widmer** have joined the firm.

Michael Schwarz

Schwarz joined the firm in January 2019 after practicing with a prominent law firm based in Westchester County, NY, for 13 years. He has represented and counseled clients in a wide variety of matters including: real estate, land use and zoning, municipal law, environmental law, foreclosure (commercial and residential), contracts, commercial disputes, and business torts. In addition, Schwarz has represented national and regional title insurance underwriters in connection with coverage matters, and has also served as defense counsel for underwriters' insureds. He is a welcome addition to the firm's municipal, land use, real estate, and litigation practice groups.

Widmer joined the firm in November 2018, bringing more than 13 years of civil and criminal litigation experience throughout Alaska. He began his legal career in private practice in Bethel. After five years, he moved to Anchorage where he worked for the Office of Public Advocacy and the Public Defender Agency, handling felony-level offenses, parole and post-conviction relief. Widmer graduated from William & Mary Law School. He is also involved as an instructor with Anchorage Youth Court and is on the Board of Directors for Junior Achievement of Alaska.

Matt Widmer

Recalling a career of touchy courtroom encounters

Continued from page 16

extended lecture on courtroom decorum and judicial respect, it was made quite clear that *all* future arguments in which this particular state's counsel was involved, of whatever significance, in whatever cases, would henceforth be conducted in person in Nome, Alaska. Fortunately, I could still appear telephonically. Both myself and my client kept our thoughts to ourselves and quickly sneaked from the courtroom when given the chance.

I had an extended bench trial before Judge Harbison approximately four years ago. My client was spreading human septage as fertilizer on a farm. That case, Lanser v. Riddle, also went to the Alaska Supreme Court. (In retrospect, I seem to take a lot of those trips.) It was a judge trial in equity. Several days into the trial, I asked the judge to visit the site of the farm. Personally, I wanted her to gain a firsthand appreciation for the project. Judge Harbison declined. She said she had smelled sewage before and did not need to do so in this case. I realized then that perhaps things were not going well for me, and that my case stunk. But, that was not the reason for my request. Rather, I was hoping the court would visit in order to see that it was not simply a septage spreading operation, but a real farm. True, there were septage pits. These were for cultivation, I claimed (although later the Supreme Court disagreed).

But, I digress. During one of the arguments in the case, I explained to Judge Harbison that farms are really repugnant operations. Contrary to popular opinion, farms are not serene, green fields in rolling hills surrounded by shiny white fences and populated by cute, cuddly, baby animals. Rather, I disclosed that farms actually are dusty, noisy, smelly, and even have open death and animal sex. It probably was the last comment that troubled the court the most. My reference to animal sex. From my perspective, I was referring to farm animals creating more little baby farm animals. Still, for some reason, my comment apparently was considered offensive by the court. Fortunately, it was not the essence of the case. In the end, Judge Harbison was the paradigm of patience, as usual, although I did get a brief cautionary instruction. (I have often been accused of lacking a fully functioning filter system.)

In contrast, patience was not necessarily always a virtue in now retired Judge Richard Savell. During one proceeding in a courtroom full of counsel, I apparently had tried Judge Savell's patience enough. I received a spontaneous $100 contempt sanction as proof of my insolence. Unflustered, I politely asked if I could approach the court. Permission was granted. I next pulled a $100 bill from my wallet and placed it on the court's bench. Apparently expecting instead some sort of bench dialogue, my actions apparently were a surprise to the court. Taken aback, Judge Savell loudly declared, "Counsel! Do you know what this looks like?" I responded, "Yes, your Honor. I do. It looks like I pay my bills on time!" My response got a good laugh from all present. The sanction was later vacated.

I remember a DUI trial before Judge Winston Burbank. As I stood to begin my opening statement, the seam along my fly ripped open. Not just the zipper. Actually, I am used to open flies in the courtroom and am reminded often of such. I can fix that problem quickly. This time, however, I had done a Van Hoomissen. I had forcibly jammed my hands into my pants pockets causing the seam on the fly to rip. I clearly was in trouble. The only thing I could do realistically was to ask the court for a recess so that I could find a safety pin to address an actual wardrobe malfunction. Surprisingly, Judge Burbank denied my request. He ordered me to proceed. Apparently, safety pins were in short supply. Or he was worried about my aim. (With the sharp pin, that is.) In a rare show of modesty, I grabbed my legal pad. During my opening statement I kept the pad strategically placed before me much like the fig leaf on Biblical Adam. At the conclusion of my discourse, I then remarked to the jury that I felt that this was probably the most memorable opening ever seen in the courtroom. The ice was broken. I got a good laugh and a friendly jury out of it. Also an acquittal.

Finally, recently, I had a complex criminal defense case before federal District Court Judge Tim Burgess in Anchorage. My client, an airline pilot, had been accused of a crime. At the pretrial conference, I objected to the government referring to the accuser as "Doctor." Rather, I felt that the accuser should be referred to simply by the title of "Mr." Denying my request, the court indicated that the government could refer to the accuser by any title it chose. Similarly, I could use whatever title I chose. I then asked the court if, accordingly, could my client now be referred to as "Captain" since he was an airline pilot? Judge Burgess said "You can call him anything you want, Mr. Satterberg, *Esquire*." I then politely corrected Judge Burgess, clarifying that I, too, was actually a doctor. Incredulously, Judge Burgess asked "You are a doctor?" I responded, "Yes I am, your honor. As are you." Proudly adding, "I'm a Doctor of Jurisprudence!" Judge Burgess' response was a simple "Touché." Still, as an appropriate show of respect, in subsequent hearings, the court occasionally addressed me as "Doctor Satterberg."

There are other anecdotes. But, they will have to wait for later since I have exceeded my word limitations for this missive. However, as a hint, let's just say that the whole area of Alaska cannabis law is now a growing area for puns. Stay tuned.

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

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NOTICE TO CLIENTS OF DECEASED ATTORNEY AND CLIENT FILE DISPOSITION

Longtime Alaska Attorney Frederick "Fritz" H. Hahn V passed away on 7/30/2019. Mr. Hahn's family is attempting to locate former clients of Mr. Hahn who engaged his services prior to 7/21/2006, and who wish to retrieve their client file. Should you wish to retrieve a client file, please contact Dawn M. Hahn for assistance at (907) 570-7884.

Any file not requested by September 20, 2019, will be destroyed.

Former prosecutor joins Kenai Superior Court

From Alaska Court System

Jason Gist was installed as a Kenai Superior Court judge in a ceremony June 14, 2019, at the Kenai Courthouse.

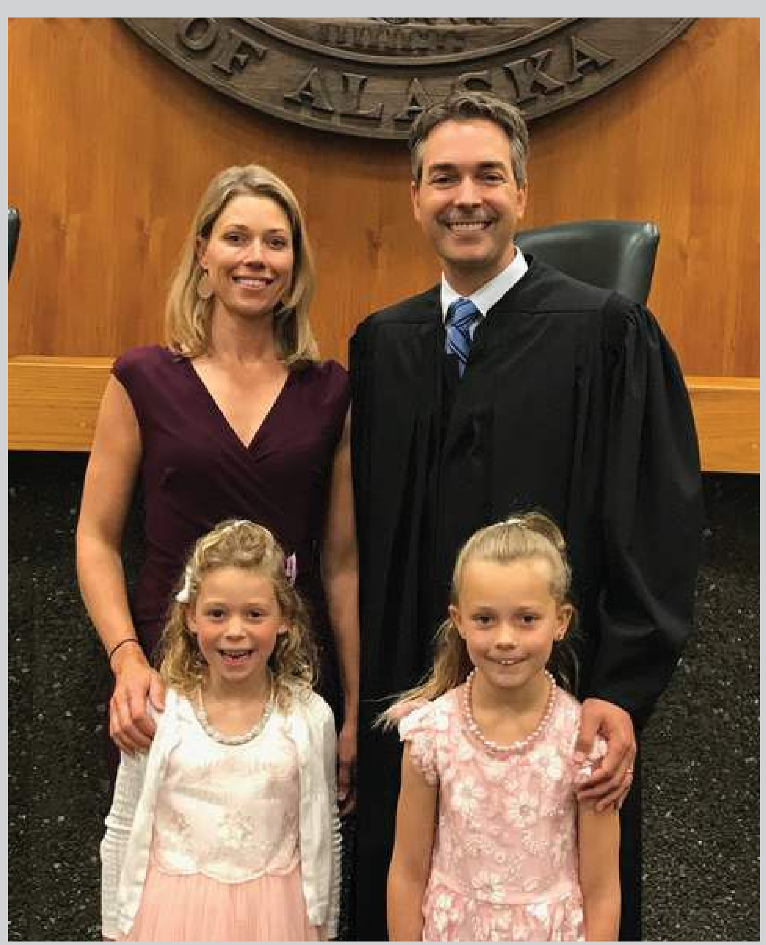
Gist was appointed Nov. 21, 2018, by former Gov. Bill Walker. Gist, along with his brother Scott, was raised in Clovis, CA, by his parents Richard and Betty Gist. He graduated *summa cum laude* from California State University, Fresno, in 2001 with a bachelor's degree in criminology. He received a law degree from the University of California Berkeley, Boalt Hall School of Law in 2004. Following his graduation from law school, Jason, his wife Michelle, and new daughter — born just two days before Jason's law school graduation — headed to Alaska for a one-year adventure. Jason came to Alaska in 2004 to clerk for Chief Justice Alexander Bryner of the Alaska Supreme Court, with plans to return to California the following year. After only a couple of months in Alaska, he and Michelle decided that one year would likely not be enough time to explore all the state had to offer.

Attending the installation ceremony are from left: Judge Jason Gist, Judge Andrew Peterson, Chief Justice Joel Bolger, Judge Sharon Illsley.

Following his clerkship, Jason worked for the Anchorage law firm of Kemppel, Huffman & Ellis, focusing on real estate, employment and regulatory law. In 2008 he became an assistant district attorney in Anchorage. During his 10 years at that office, Jason prosecuted nearly every type of criminal case, including drug trafficking, domestic violence, property crimes and homicides. During the last five years of his time as a prosecutor, Jason primarily prosecuted sexual assault and sexual abuse of minor cases, and other crimes against children. Since being appointed to the bench, Jason and Michelle have relocated to Kenai with their two children, Kaitlynn and Alex.

District Court judge installed in Anchorage

From the Alaska Court System



Judge David Nesbett is joined at his installation by his wife Michelle and daughters from left: Marion and Charlotte.

Judge David Nesbett was installed as a judge of the Anchorage District Court in a ceremony at the Boney Memorial Courthouse in Anchorage July 11, 2019. He was appointed by Gov. Michael Dunleavy March 21, 2019.

For nearly the past 10 years, Judge Nesbett was a partner in the law firm of Nesbett & Nesbett, PC, representing parties in civil disputes and criminal defendants, and debating whether his or Michelle's last name was listed first on the firm letterhead. Prior to owning his own firm, he was a prosecutor in our local state and federal courts. Highlights from close to 20 years of trial work include prosecuting armed bank robbery and murder-for-hire cases, guiding and supporting clients through life-changing legal decisions, and declining an interview request form NBC Nightly News. Whether small or large, civil or criminal, he has always found his time helping others, practicing law in the courtroom, and enjoying the comradery among colleagues, to be among this most rewarding experiences. He also cherished his two years clerking for U.S. District Court Judge H. Russel Holland, learning to appreciate the role of the judge and the judiciary, and being gently corrected on the proper pronunciation of the company name, Schlumberger.

David is an avid general aviation pilot and treasurs joining his wife, Michelle, in teaching daughters Charlotte and Marion, ages 5 and 7, to unplug and to love flying, fishing, friends and family, and spending time at the family cabin on a lake in the woods, just as he did with his father, and his father did with his father before him.

Do you know someone who needs help?

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

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

Fairbanks: Aimee Oravec, aimee@akwater.com

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

Anchorage: open (seeking volunteer)

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

Alaska pro bono team assists border refugees

Continued from page 1

ally, days later, they are transferred to Dilley, Texas, to an internment camp where they await a "credible fear interview" that will determine whether they will have the opportunity to plead their case in front of an immigration judge. That is where we met these brave moms.

The Dilley Pro Bono Project has made a profound difference in the lives of the families who are detained there. Since the project began, well more than 90 percent of the detainees have received a positive finding in their credible fear interview. This rate is even more impressive because immigrants appearing in asylum hearings have no sixth amendment right to counsel. As the Dilley Pro Bono Project shows, having access to lawyers truly matters.

But legal representation is scarce for too many immigrants who have a legal right to seek asylum and safety. A 2015 study of more than 1.2 million deportation cases decided between 2007 and 2012 revealed that only 37 percent of all immigrants (and 14percent of detained immigrants) had legal counsel. The study also showed that immigrants with counsel were five and one-half times more likely to obtain a successful outcome than those without. Our experience bears witness to the benefit of legal counsel. Of the 400-plus women we worked with during our week in Dilley, every one of them received a positive result in their credible fear interview.

The work we did in Dilley made a tremendous difference in the lives of the women and kids we met. Unfortunately, there is a vast chasm between the legal help these women received in Dilley, Texas, and the lawyers they will need for the duration of their asylum process. Once these families receive a positive credible fear finding, they join their sponsors in the U.S. where they will be able to pursue their asylum claim in an immigration court. Each of these families would benefit from access to legal counsel. Sadly, many will be unable to afford or find an attorney. The inability to access representation is a huge gap in our justice system.

Organizations like the Alaska Institute for Justice try to fill this gap. As the state's only non-profit immigration legal service provider, AIJ runs a pro bono asylum project. The agency needs help — volunteer attorneys and donations to support the program are vital to ensure that people fleeing horrific violence can find safety and shelter in our state.

During the week we spent with these moms and their kids, we barely made a dent. There is so much to do it feels overwhelming. We continue to do what we can. We give what we can. And much more is needed. If you can't give your time, give your money. If you can't give your money, give your kindness. Take the time to learn about this crisis. Understand that it is every human being's basic human right to seek safety for ourselves and our children.

The Anchorage team (from left): Ziva Berkowitz Kimmel, Mara Kimmel, Anne Wilkas, Jennifer Wagner, Lindsay Walker Hobson and Kristina Kvernplassen.

As the state's only non-profit immigration legal service provider, AIJ runs a pro bono asylum project. The agency needs help — volunteer attorneys and donations to support the program are vital to ensure that people fleeing horrific violence can find safety and shelter in our state.

As I write this piece, our nation reels from mass violence that shakes us to our core. Motivated by hate and xenophobia, the consequences of groundless anti-immigrant fear lay bare tragic consequences and challenge our fundamental beliefs. In fact, the truths of immigration speak to a nation made stronger and richer when we adhere to our values that we are better together. We are better when we acknowledge the values upon which our country rests — values of stewardship, of belonging, of welcoming and of respect.

Unfortunately, we have strayed far from these ideals. Our world is bearing witness to an unprecedented refugee crisis where almost 70 million people have been forcibly displaced — nearly half of whom are children. The numbers have not been this high since the Holocaust. The refugee crisis is mounting at our nation's southern border as families are driven from their countries in search of safety and a life free of violence. Some find their way to Alaska.

It is time to stand up and speak out for the right to seek safety for ourselves and our children. It is well past time that our government upholds that right in decent and humane ways. There are so many lessons learned from the moms and children who braved deserts and rivers, endured hieleras and perreras, and held on to some hope that there will be a better life for their families if they persevere. Let us honor these women and families, and pledge to fight for their right to seek the safety they deserve under law.

For more information, or to donate time or financial support, please see The Alaska Institute for Justice www.akijp.org

Note of thanks: The AK Dilley team was supported in-kind with MI-FI devices from GCI to allow for uninterrupted on the go connection.

The First Lady of Anchorage, Mara Kimmel has a long career in Alaska public policy focused on issues of rights and justice, including being on faculty at both Alaska Pacific University and the University of Alaska Anchorage.

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Board of Governors Action Items May-August, 2019

May 6 & 7, 2019

- Voted to approve the results of the February 2019 bar exam.
- Voted to approve 14 reciprocity applicants and 14 UBE score transfer applicants for admission.
- Appointed a board subcommittee, along with members of the Law Examiners committee, to review the cut score on the Alaska Bar Association, at the request of the Supreme Court.
- Approved participating in the NCBE Testing Task Force survey on the future of the bar exam and to distribute the survey to Alaska Bar members.
- Approved two one-year extensions on the office space lease at 840 K Street.
- Reviewed the applications for Bar Counsel, and determined which applicants to interview on June 20.
- Voted to publish an amendment to the Bylaws that Board member and officer terms run until the close of the next annual business meeting.
- Voted to amend the staff leave policy to follow a Personal Time Off policy, combining vacation and sick leave, and following the state pattern, effective May 27, 2019.
- Adopted the stipulation for discipline by consent, as modified, in the matter involving case no. 2016D058, for a one year suspension.
- Adopted the findings and recommendations of the area hearing committee in the reinstatement matter of Jody Brion, and denied his request for reinstatement.
- Issued reciprocal discipline for a public reprimand in the discipline matter involving Krista White (from Washington state.)
- Voted to publish proposed amendments to ARPC 8.4(f) as modified, for comment.
- Voted to make the following appointments to the ALSC Board: 1st District regular Joseph Nelson and alternate Janice Levy; 3rd District regular Greg Razo and alternate Melanie Osborne; 4th District regular Nicholas Gasca and alternate Natasha Singh.
- Voted to approve the Board of Governors meeting minutes.
- Voted to recommend the following slate of officers: Rob Stone, President, Ben Hofmeister, president-elect, Molly Brown, Vice President, Bill Granger, Treasurer, Cam Leonard, Secretary.

June 20, 2019

- Interviewed applicants for the position of Bar Counsel, and voted to offer the Bar Counsel position to Phil Shanahan.
- Voted to grant two requests for special testing accommodations for the July 2019 bar exam.

August 19, 2019

- Reviewed the seven applications for the vacant board seat due to the appointment of Brent Bennett to the bench, and voted to appoint Aimee Oravec to fill the position until the next election.

Photo by Annette Blair

Bar counsel

Three Alaska Bar counsel past, present and future visited the office recently. They are from left in order of succession: Maria Bahr, Nelson Page and Phil Shanahan.

Bylaw change proposed

The Board of Governors is proposing the following amendment to the Association Bylaws. This confirms the ending terms of Board officer terms due to the Board moving the annual convention from May to October, in order to coincide with the Judicial Conference. Comments may be sent to oregan@alaskabar.org.

ARTICLE VI

Officers; Staff

Section 1. OFFICERS. The officers of the Association are a President, President-elect, Vice President, Secretary and Treasurer. The President-Elect, Vice President, Secretary, and Treasurer shall be elected from among the members of the Board by a majority vote of the active members of the Alaska Bar in attendance at the Association's annual business meeting. Nothing in this Article prohibits an appointed non-attorney governor from being elected an officer of the Association. Newly elected officers of the Association shall take office at the close of the annual business meeting at which they have been elected and shall serve [a one year term] until the close of the next annual business meeting.

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Has the time come to allow dedicated taxes?

By Mark Andrews

Can the State of Alaska enact a tax and dedicate the revenue to the university? The state Constitution says no. But maybe the time has come to allow such earmarking, within limits.

The Constitution's nondedication clause is brief but powerful. "The proceeds of any state tax or license shall not be dedicated to any special purpose ..." (Article IX, section 7)

But an amendment could permit such dedicated funding, within limits to curb potential abuse. For example, dedication of revenue could be allowed not more than 10 years, only by popular vote, followed by one renewal by the Legislature. Here are the details.

1. By a three-fifths majority vote, the Legislature sends to the voters a proposition to dedicate revenue to a particular purpose, not to exceed 10 years. The proposition passes upon a majority popular vote. The proposition identifies the revenue source, its purpose and its duration, and is limited to a single subject.

2. By a majority vote, the Legislature can renew the original proposition.

3. When the dedication expires, the unspent balance lapses back into the general fund.

Under the proposed amendment, several unsuccessful legislative efforts would survive court challenges which were based on the current nondedication clause.

In State v. Alex (1982), the challenged statute was held to be an unconstitutional dedication. The law created "an assessment on the sale of salmon by commercial fishermen to processors." The assessment was administered by a local "qualified regional association;" its purpose was to provide revenue for the association to finance the development of fisheries.

Under the proposed amendment, the same assessment would survive as a lawful dedication for a special purpose, but would nonetheless fail as a delegation of the Legislature's taxing power to an entity besides a city or borough.

Sonneman v. Hickel (1992) involved a challenge to the Alaska Marine Highway System Fund. The court upheld most of the act. But part of the act limited state departmental power to request that the fund be appropriated for capital improvements; that part was held a violation of the nondedication clause. Under the amendment proposed here, the dedication process would avoid the prohibition and the same provision would be lawful.

In Southeast Alaska Conservation Council v. State (2009), the Alaska Supreme Court struck down an effort to earmark revenue to the university. In that case, the Legislature granted the university title to certain lands, then dedicated the rents to an endowment. This well-intentioned effort was held unconstitutional.

Under the proposed amendment, granting a temporary title might still be impractical, but the Legislature could identify state land and steer the rents toward the endowment.

The amendment allows flexibility to deal with specific problems and projects. The dedication can expire after a period shorter than ten years. Dedicated taxes can stop when a stated dollar amount has been raised. A new fund might dedicate only half of an already-existing revenue stream and leave the remainder to the usual appropriations process.

So if dedication might be worthwhile, why not allow it without restrictions?

Upon creation of a dedicated fund, political problems arise immediately. With considerable insight, the Alaska Statehood Commission observed: "dedication of revenue leads a particular group of taxpayers to feel that revenues derived from certain licenses or fees belong to them as a group ..." That group resists repeal.

Public pressure favors proliferation of special accounts, resulting from basic considerations of fairness to all residents. Why should one group be denied a dedicated funding source when their next-door neighbor has one?

At the time of the Constitutional Convention, the signs were already there. In 1955, 27 percent of the Alaska territorial budget was earmarked.

Although this percentage was among the lowest in the nation, the situation was seen as the beginning of a problem. In some western states, 80 to 90 percent of tax collections were earmarked and off-limits to legislative discretion.

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During deliberations over the state Constitution, delegates recognized the benefits of earmarking. Delegate Dorothy Awes commented, "certain things like capital improvements are more apt to be taken care of if you allow earmarking," and the public is more willing to accept a tax dedicated to a popular purpose. But the loss of legislative discretion bore too many risks, and the dedication prohibition was adopted.

So the challenge is how to prevent good intentions from engulfing the state budget. Together, the limits on dedication would disfavor the creation of many small funds.

1. The requirements of a three-fifths legislative vote and a majority popular vote assure statewide interest in funding a project.

2. The time limit reduces the sense of ownership to the dedicated fund.

3. The single-subject rule helps to assure that proposals focus on issues of statewide interest, rather than on a batch of local issues.

A limited dedication of state revenue can be crafted so as to preserve the intentions of the constitution's founders, while raising predictable and stable revenue for special purposes.

Have an account at Academia.edu? An in-depth version of this article is available. Use the search term "dedicated taxes".

Mark Andrews is retired and living in Fairbanks.

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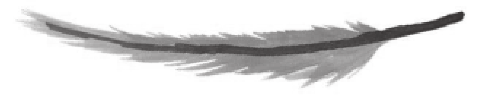

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Judge Nelson Traverso speaks at his installation as Supreme Court Justice Susan Carney looks on. (Alaska Court System photo)

Superior Court judge installed in Utqiagvik

From the Alaska Court System

Nelson Traverso was installed as a Superior Court judge for Utqiagvik in a ceremony June 19, 2019.

He was born in New York City to Pedro and Carmen Traverso, along with two sisters and a younger brother.

After years of a nomadic military life, the family moved to Connecticut. He graduated from Central Connecticut State University in 1974. Following college he joined Volunteers in Service to America and worked with migrant farm workers with a myriad of social and health issues. After VISTA he returned to New Haven where he worked at a crisis intervention hotline which led to his interest in studying law. He graduated with a law degree from Northeastern School of Law in Boston in 1981.

While workng for a home remodeling company in Cambridge, MA, a friend working in Alaska told him about openings in the Alaska Public Defender Agency. He applied and was hired. He worked 15 years in the public sector mostly in the rural areas from Bethel to Utqiagvik. During that time he met his future wife Melva in the former Barrow and they were married June 24, 1989. They now have two children, Elsa and Sol.

After 19 years in private practice he applied for a judgeship and was appointed to the Superior Court by Gov. Mike Dunleavly in April 2019.

Attending the installation ceremony are (from left): Judge Jonathan Woodman, Chief Justice Joel Bolger, Judge John Cagle and Judge David Zwink. (Photo by James Kwon, Alaska Court System)

Judge Cagle joins Palmer Superior Court in July

From the Alaska Court System

John Cagle was installed as a judge of the Palmer Superior Court July 19, 2019, in a ceremony at the Palmer courthouse. He was appointed by Gov. Michael Dunleavy March 21, 2019.

Judge Cagle began his law career in 2004 as an assistant district attorney in North Carolina's 25th Prosecutorial District, moving on to private practice working primarily on plaintiff's side personal injury and medical malpractice covering Charlotte and surrounding areas.

In 2010, John and his family moved to Kotzebue, where he served as assistant district attorney. He later transferred to the Kodiak, Palmer, and Anchorage District Attorney's Offices. In 2018, he was appointed as the director of the Alaska Medical Fraud Control Unit within the Office of Special Prosecutions, which is charged with the civil and criminal prosecution of Medicaid provider fraud and patient abuse.

Cagle received his J.D. with honors from Gonzaga University School of Law in 2003, where he served as managing editor of the *Gonzaga Law Review*. He later received an LL.M. in health care law, with honors, from the Delaware School of Law at Widener University.

Judge Cagle and his wife Angie, who was born and raised in Anchorage, have two sons, William and Charles.

Former district attorney installed as Superior Court judge

From the Alaska Court System

Stephen B. Wallace was installed as a judge of the Superior Court of Kodiak Aug. 15, 2019, at a ceremony in the Kodiak Courthouse. He was appointed by Gov. Mike Dunleavy March 21, 2019.

Wallace grew up in metropolitan Detroit. He received his BA in Criminal Justice from Michigan State University before coming to Alaska in 1982 to work as a police officer in Kodiak. He attended the Public Safety Academy in Sitka during that fall.

While a police officer, Wallace was elected to the board of the Kodiak Women's Resource Crisis Center. In 1985 he left KPD to attend the University of Oregon School of Law. He returned during summers to Kodiak. The first summer he worked for the police department. The second summer he clerked for the Kodiak firm of Jamin, Ebell, Bolger and Gentry. He interned with the United State District Court in Anchorage in the chambers of Judge James Fitzgerald before graduating in the spring of 1988.

Without sufficient funds to take the Bar exam, he returned to work as a police officer, this time with the North Slope Borough Department of Public Safety. In the fall of 1988 he began a clerkship with Judge Victor Carlson. Anchorage Superior Court. He was admitted to the Alaska Bar in June of 1989 and worked as an assistant district attorney in Palmer, Bethel and Anchorage before being appointed to the District Attorney office in Kodiak in 1993.

Wallace left public practice to join the local law firm of Jamin, Ebell, Schmitt and Mason in 1998. He practiced primarily in the areas of criminal defense, estate planning and domestic relations. Upon entering private practice, Gov. Tony Knowles appointed him to serve on the State Violent Crimes Compensation Board.

In 2002 Wallace returned to public practice in the Anchorage District Attorney's office where he supervised the sexual assault prosecutions unit. In 2004 he was appointed an itinerant prosecutor and worked throughout Southcentral and western Alaska appearing as trial counsel for the state before courts in Homer, Seward, Kenai, Palmer, Dillingham, Naknek, Bethel, Nome and Kotzebue. In 2006 he returned home to Kodiak as an assistant district attorney before being re-appointed district attorney in 2007, an office he held until 2017 when he accepted an appointment to serve as the Bethel District Attorney. He was serving in Bethel when he was appointed to the bench.

Attending the installation ceremony are from left: Magistrate Judge Sidney Billingslea, Judge Stephen Wallace, Chief Justice Joel Bolger and Judge John Cagle. (Photo by Lesa Robertson, Alaska Court System)

Wallace has maintained a home in Kodiak since 1994. His wife Jill, who was born and raised in Minnesota, first came to Kodiak in 1986. When not working, he enjoys just generally being in Kodiak, the opportunity to interact with friends, old and new, and, as the weather permits, carpentry, boating and fishing in no particular order.

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In Memoriam

Help plan a memorial

A giant of the law in Alaska passed from this earthly jurisdiction in February of this year. Dick L. Madson is gone. I am contemplating a Dick Madson memorial scotch party for those of you who did or didn't ever come over at 4:30 on Fridays for a wee dram. I am uncertain if I should hire a hall and have 8 people show up or have it at the office and have 200 people show up. Those who might be interested in attending, if we can find some date workable for many, can write a note to covelladmin@gci.net, subject line: Dick Madson Memorial Scotch Party; including your phone number, email and October availability.

— Kenneth Covell

Attorney remembered for colorful career

Continued from page 1

ground, he landed a job and a touch of gold fever with Warren Taylor Sr., who represented gold miners (and other non-paying clients) and was involved with the Busty Belle mining operation.

In 1970 Dick became one of Fairbanks' first public defenders and could finally rely on a steady paycheck. He enjoyed the challenges and camaraderie of the office, from trials in Barrow, to transporting an accused murderer from Bethel to the Fairbanks jail, to suffering the indignity of Judge Mary Alice Miller cutting his shaggy hair in her chambers. He sometimes received spontaneous "visits" from clients. Acting as a Good Samaritan, Art Robson once brought a man who was on the lam to his house. Dick urged him to turn himself in while Jean served coffee and the girls sat nearby, oblivious, as Fairbanks' Most Wanted Man's mug shot flashed across the TV. Dick also endured many sleepless nights on high alert with a rifle after a psychopathic convicted murderer unleashed his paranoia on him. Whether it was a case of murder for hire, a drug deal gone bad, drunk driving an airboat on the highway, intoxicated sailors, and any malfeasance in between, Dick always represented his clients with compassion, dignity, and above all, a sharp wit.

About five years later, Steve Cowper lured Dick into private practice. After Steve became governor, Dick started his solo practice, focusing on criminal defense. Without a steady government paycheck he embraced the barter system. He acquired a fleet of vehicles from clients of dubious reputation. When Jean drove one of these easily recognizable pimp mobiles to her teaching job at Nordale Elementary School, it raised more than a few eyebrows. Clients with special skills could often (slowly) work off their bill, depending on their sentences. Cases of scotch were not refused. Dick could have acquired a thriving porn shop, but Jean balked at that. During the booze-soaked, drug-induced boom days of the pipeline years the legal fees were paid more consistently. This sometimes required trips to undisclosed locations to retrieve cold, hard, cash from a freezer (pre-forfeiture days). For those other clients, Dick had a display case with an array of antique rectal dilators and a caption that read, "Please Pay Promptly."

Dick served as president of the Tanana Valley Bar and the Alaska Bar Associations. The minutes from those meeting probably had to be destroyed to protect the dignity of the profession. As an avid classical music lover, he also served on the Symphony and Concert Association boards. Dick enjoyed hunting and fishing with many friends who shall remain nameless due to statute of limitations issues. These adventures (or mishaps) often involved float planes, black bears, copious amounts of scotch, gourmet dinners at moose camp, but little meat or fish.

During his later years, Dick and Jean loved to travel, from road trips in one of his restored vintage cars, to discovering his roots in Slovenia. When he officially retired (after several bar association retirement parties and a wake) they spent winters in Key West, FL. fishing, sailing, and recovering from hurricanes. As an amateur fishing guide, Dick usually brought home a good catch without incurring any fishing infractions.

After moving to Tacoma, WA, to be near family, Dick and Jean spent winters in Gold Canyon, AZ. Even as his memory began to fail, he enjoyed visits from many of his old friends and colleagues from Fairbanks.

Reflecting on his life, these were some of his last writings: "Looking back on my life, I can contribute it only to one thing — plain luck. I was lucky to be born when I was and where, lucky to have escaped war, lucky to go to law school, and lucky to have moved to Alaska."

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