

# The Alaska BAR RAG

Dignitas, semper dignitas

VOLUME 40, NO. 4 October - December, 2016

## Got your head in the cloud? Here's how it all works

By Steven T. O'Hara



In the early 1980s technology helped me during law school exams. The technology was an Adler J5 portable typewriter. When I graduated in 1984, I also used it during the bar exam. It had been a gift from my father. He was in the boxing business and wanted me to stay in school, always mindful that the fight game is a way out, not a way up.

In 1982 a law firm in Anchorage hired me as a summer law clerk. The firm had electric typewriters with built-in erasers. And it had a computer monitor with a West Publishing account for computer re-

search. West Publishing started in my hometown of St. Paul, Minnesota. My dad knew a salesman at West Publishing, who commented that there were few accounts for computer research in Alaska. So I noted that the firm valued technology, and I still work for the same firm today.

We all know the term "server" means computer equipment and programs that serve you and your computer, allowing you to get things done on your computer. "Online" means you are connected to a computer network, such as the Internet, as contrasted with, for example, your editing a document you created or downloaded to your desktop.

The "Cloud" or "Cloud computing" means you are online and using offsite servers owned and supported by others to whom you pay a fee.

*Continued on page 14*



## Visualization changes, challenges litigation in the 21st Century

By Joe Kashi

### First of a series

This is the first of a series of articles examining the practical aspects and case law regarding the use and misuse of now-ubiquitous still and video photography in litigation. The Alaska Supreme Court's



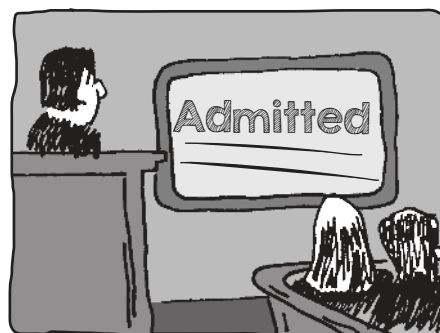
recent decision in Cornelison<sup>1</sup> highlighted both the persuasiveness of visual evidence and its potential pitfalls.

Since Daniel Webster, and probably since the Magna Carta or before, litigators have used evocative words in occasionally successful efforts to "paint" mental

pictures for the trier of fact and to evoke emotion. However, anyone who has tried a few cases soon realizes that by and large most people neither use nor interpret specific words consistently and that it's all too easy for the finder of fact to either misinterpret our word pictures or miss the point entirely when we try a case using a largely verbal approach to persuasion. And, it's slower and less efficient.

Such a hit or miss approach is incongruent with our professional obligation to present a case as accurately and persuasively as possible. The diminished effectiveness of a predominantly verbal trial technique becomes even more evident as we enter the maturity of an era saturated with images and video, with mature and responsible jurors who grew up with video games, selfies and instant messaging rather than reading columns of gray text in traditional newspapers. "Visually-impaired" lawyers are at an increasing disadvantage.

The memory-enhancing benefits of multimedia presentations have been apparent since at least the



1930s when Eastman Kodak popularized overhead projectors as an accompaniment to lectures and found that a typical audience might retain 10% of spoken words but retain 30% to 70% of content presented both audibly and visually. As our knowledge of the neuropsychology of the brain improves, we can see why: Tactile, audio and visual data are processed and stored in different parts of the brain. When multiple kinds types of sensory data are simultaneously presented, memory is mutually reinforced. For that reason, jury consultants often recommend that trial counsel not only make an audiovisual presentation but also provide the jury with related objects in evidence to pass around and physically handle during the counsel's presentation.

Since the development of Gestalt cognitive psychology a century ago, psychologists have understood that the human brain is usually better at perceiving even incomplete patterns visually rather than comprehending linear text and that the whole pattern is different from, and greater

than, the sum of its parts. Our common sense also tells us as much, hence the old adage about a picture being worth a thousand words.

As litigators, we traditionally had some serious practical problems using visual and other multimedia presentations. Those techniques were generally expensive and slow to produce, inflexible, and limited. Most or all of these limitations have greatly diminished over the past few years when nearly everyone carries a smartphone that can record audio, video and still photographic data as well high-quality digital cameras, digitized video depositions, inexpensive digital projectors, and easy to use software.

Transitioning to a more visual approach to trial presentations has a number of advantages:

- Bringing a case to life in a manner that's less tedious for the trier of fact
- Simplifying complex issues
- Better control over the pace and flow of your case
- Better comprehension of your presentation by the trier of fact
- Greater efficiency, saving time and costs

In the next several issues of the Bar Rag, we'll take a look at the case law from Alaska and around the country that affects the use, admissibility, and authentication of visual evidence.

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## A look back at what there was to be thankful for in 2016

By Susan Cox

With Thanksgiving a week away and the holiday season looming, it seems a good time to take stock of the year. For me personally, 2016 has had its ups and downs. The loss of a close family member and novel health issues have posed unexpected challenges. Election fatigue – and some of the results – have been hard to handle. But, rather than dwelling on negative experiences and emotions, I'd prefer to focus on the positive, to experience gratitude. Here's just a partial list of the many things I am thankful for:

After the long, drawn-out election season, I especially appreciate our constitutional system and the role of law in protecting the rights of all citizens. Despite hard-fought election contests and fevered debates about our country's future, we can take comfort in knowing that checks and balances are in place to ensure a non-violent transfer of power. There is a lot of uncertainty and anxiety about how things will play out nationally and in Alaska, with new leadership and policies on the horizon. Lawyers in particular will continue to serve a major role in upholding the rule of law, safeguarding civil liberties, and fighting for social progress within our constitutional framework.

All Alaskans should take pride in our judicial selection and retention system. The Alaska Judicial Council does an admirable job of thoroughly vetting applicants for our judiciary, making tough decisions about which ones are the most qualified to nominate for the governor's consideration, and exhaustively evaluating appointed judges standing for retention. This year that work has been particularly

challenging and somewhat unique, with vacancies on every level of the court system to fill – as well as 33 judges on the fall ballot to evaluate for retention. I applaud the council's hard work and the constitutional framers' foresight in designing a system that minimizes the impact of politics on judicial selection.

As Alaska Legal Services celebrates its 50th anniversary, now is a great time to appreciate its central role in helping to meet the legal needs of low-income Alaskans. Congratulations to ALSC on this milestone. And thanks to the many private and public lawyers who have stepped up to donate their time and talents as well, through pro bono programs like the Early Resolution Project, MLK Day and Elizabeth Peratrovich legal clinics, and the Bar's newly launched website [Alaska.freelegalanswers.org](http://Alaska.freelegalanswers.org), among other things.

There are exciting new initiatives on the horizon to help us assess and bridge the gap in access to justice. The Alaska Bar Foundation is awarding up to \$1.2 million in grants to legal services providers to assist qualifying Alaskans with housing and foreclosure issues. The Alaska Court System was recently awarded a \$100,000 grant from the Justice For All project of the National Center for State Courts and the Public Welfare Foundation to assess the scope of unmet legal needs in the state and develop strategic plans to improve access to justice. Alaska is fortunate to be one of only seven states selected, out of 25 that applied.



"Lawyers in particular will continue to serve a major role in upholding the rule of law, safeguarding civil liberties..."

We can all be grateful for the dedication – and longevity – of the staff of the Alaska Bar Association. Remarkably, our Bar director Deborah O'Regan and controller Karen Schmidtkofer have served the association for a combined total of 64 years, and numerous employees have more than a decade (or two) of service. The staff continually adjusts to changing needs and looks for new efficiencies in meeting the needs of Bar members. And, thanks to their excellent manage-

ment, I'm happy to report that Bar dues will remain the same in 2017!

The practice of law and legal education are constantly changing and evolving. Our Bar continues to gain new members – not only people who have taken the bar exam in Alaska but also many who have successfully passed the UBE in other states and applied for Alaska admission. Law students now have an option to take their third year of law school in Alaska. Thanks are in order for those who mentor law students and legal interns and encourage new lawyers to join our ranks. We all benefit from the opportunity to work with and learn from our newest Bar members.

I am also grateful for the involvement and contributions of Alaska lawyers to the Bar and the public. Until I became Bar president, I didn't fully appreciate how many lawyers serve on the numerous Bar committees, ranging from the Law Examiners to Ethics to Law Related Education. And so many more have leadership roles in the Bar's 31 – count them! – sec-

tions. I've had the pleasure of meeting many of you who are active in local bar associations, support youth court, civics education projects like Supreme Court Live, and efforts to increase the diversity of our profession like the Color of Justice. Your visibility and outreach are inspiring – thanks for all you do.

Finally, my gratitude goes to all the writers and contributors who put the Alaska Bar Rag together for our education, entertainment, and enjoyment. In particular, hearty thanks and a round of applause to Meghan Kelly, who's served more than two years as the ninth editor of the Bar Rag. And to Senior United States District Judge Ralph Beistline, who was the Bar Rag's 4th editor from 1988 through 1992 and is returning to the editor's desk – welcome back.

Susan Cox is the president of the Alaska Bar Association.

### The Alaska BAR RAG

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

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## EDITOR'S COLUMN

### A new editor lays the groundwork for moving forward

By Ralph R. Beistline

Thank you Meghan Kelly for your exceptional service as editor of the Bar Rag for the last several years. It has been referred to as a "thankless job" but you were incredible and we do sincerely thank you.

The next question is, what am I doing here? I am old and on Senior Status with the federal court. But I have always had a special affinity for the Bar Rag and felt I still had something to contribute. So, when the call went out for an editor, I made inquiry. That is all it took and here I am. But we will be looking for a new editor shortly. Like I said, I am old.

Let's go back to December 1992 – Volume 16, No. 6 of the Alaska Bar Rag. That was 24 years ago and it was my last edition of the Bar Rag as editor, my farewell edition. Four years earlier Harry Branson and Gail Fraties met with me for lunch at the Captain Cook Hotel and literally begged me to become editor. Jim Bendell was editor at the time but had announced his retirement. Now they needed an editor and Branson and Fraties had apparently been tasked with finding one. As is often the case, no one else was available. I agreed and spent the next four years with the paper until I was appointed

to the bench in Fairbanks. I never dreamed at that time that I would be back.

That farewell edition was interesting and demonstrates what can happen with the passage of time. For instance, I would love to use the picture I used back then, but it is not quite what I look like now. Nor do I look like the caricatures depicted of me over the years by court sketch artists.

And I am not alone. Steve O'Hara, who must get some kind of award for longevity for his Estate Planning Corner, has changed a little himself over the decades and we just got an updated photograph of John Havelock. We are all changing. Such is life.

I think the greatest change however has been with advice columnist *Samantha Slanders*. We found her living in a dry cabin far from civilization in the White Mountains. She apparently hadn't been seen in public since retiring from the Bar Rag in disgrace decades ago. A review of some of her old columns, reprinted on page 4, indicates that her advice is as relevant as ever – timeless – and why she retired in disgrace.



"I have always had a special affinity for the Bar Rag and felt I still had something to contribute."

again. Our needs today though are still the same. We need relevant articles of interest to the bar and we need your input and suggestions. WE NEED YOU! So, let's make this a team effort and see what the next 24 years has to offer.

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



Changes. Here are couple of sketches courtroom artists have produced of Judge Beistline over the years.

EDITOR'S COLUMN

# As a new editor joins the Bar Rag, another departs

By Meghan Kelly



**"I hope to contribute to future issues of the Bar Rag and will keep you all apprised of the happenings on our Kodiak island hamlet."**

It is hard to write a farewell column ... it is a challenge to write any column, really, but this one seems to carry some extra weight in my mind following the election that took place earlier this week. I'm proud that all of our 33 judges were retained as recommended by the Judicial Council. I believe that the council is one of our greatest assets in Alaska and appreciate the work it does to evaluate each judge's legal ability, impartiality and fairness, integrity, temperament, diligence and overall performance, including judgment and ethical conduct. I always make an effort to spread the word about the judges' evaluations to friends and colleagues – anyone who will listen. I believe that it is our responsibility, as members of

the Bar, to take whatever steps we are able to help inform the electorate about our judiciary and the process by which its members are evaluated.

The weeks leading up to the election and these days following have left me feeling like my head is in a cloud. It seems that no matter one's politics, we have all seen unexpected sides of ourselves, and our friends and family. It is an unsettling feeling. It could be said that

hope is passé – having gone out of fashion in 2008 – but I plan to carry on in a hopeful way. What other option is there, really?

I was thrilled to learn that Senior Judge Beistline will be taking over the reins at the Bar Rag. His previous tenure predated my arrival in Alaska (and my arrival in middle school, in fact) and so I am looking

forward to his leadership and editorial wit. He joins a stellar staff of Deborah O'Regan, Tim Jones and Sue Bybee, all of whom make this publication possible.

I hope to contribute to future issues of the Bar Rag and will keep you all apprised of the happenings on our Kodiak island hamlet. It has been an honor to work with you and on your behalf over the last several years. Keep reading!

*Meghan Kelly was editor of the Alaska Bar Rag from May 2014 until the Fall of 2016.*



## Historical list of Bar Rag editors

Harry Branson: .....	~ 1978
Gail Roy Fraties: .....	8/1985
James Bendell: .....	8/1986
Ralph Beistline:.....	8/1988
Michael Schneider:.....	1/1993
Peter Maassen:.....	3/1994
Tom Van Flein:.....	5/2000
Gregory Fisher: .....	3/2011
John Crone & Meghan Kelly: .....	5/2014
Meghan Kelly: .....	10/2014
Ralph Beistline:.....	11/2016

John Abbott published a "Bar Brief" for about a year in about 1977. Harry Branson says when John Reese got it in the legal services office where they were both working, John dismissed it as that "Bar rag" and when Harry became editor, the name was born.

In 1984 issues, there was no masthead, but in the early 1985 issues, it lists the publication done by "The Alaska Group" which I believe was Sally Suddock and someone else for a couple of years, until Sally formed "Details" to take it over.

### Managing editor

Sally Suddock:.....	early 1980s – 5/2014
Tim Jones: 9/2014 –	

## Alaska Bar Association member stats

The Alaska Bar Association has 4,379 members in the following categories:

### By Status:

Active in Alaska: .....	2,451
Active Outside: .....	698
Inactive in Alaska: .....	166
Inactive Outside: .....	626
Retired: .....	438

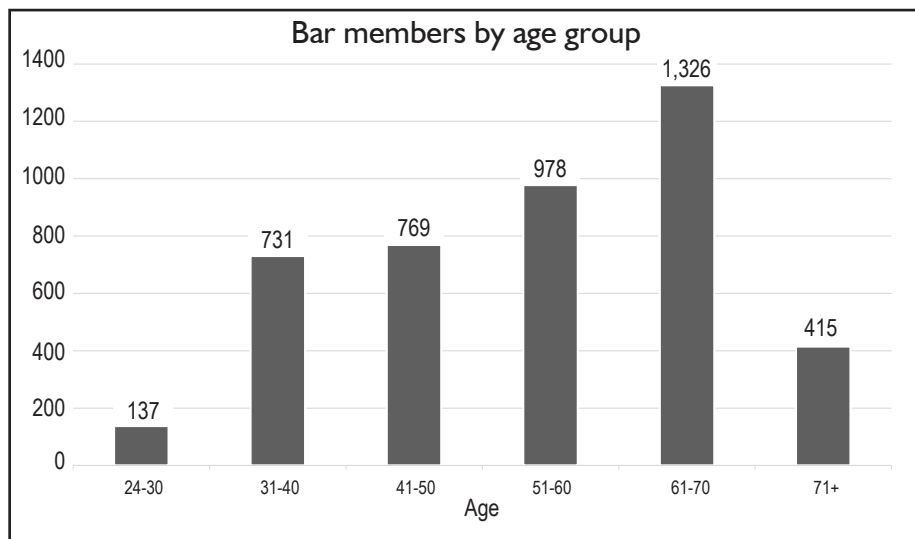
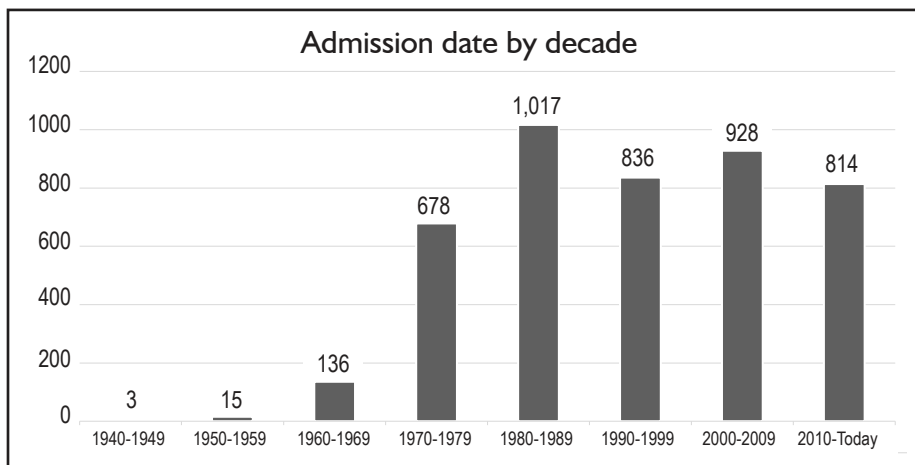
### Active in Alaska, by Judicial District:

District 1:.....	278
District 2:.....	31
District 3:.....	1,905
District 4:.....	237

### Female Attorneys:

Active in Alaska: .....	955
Active Outside: .....	198
Inactive: .....	332
Retired: .....	96
Total Female Attorneys: .....	1,581

(Updated 11/8/2016)



### The way it was, stories from the past

## Lawyer raises a big stink, says prosecutor fouled the case

By Ron DeLacy

SONORA. California – A defense attorney in a 1988 California case said he would appeal his clients' conviction, charging among other things that the prosecutor disrupted the four-week trial by repeatedly passing gas.

"It was disgusting," said Clark Head, a Calaveras County lawyer who represented burglary defendant Gary Davenport of Long Barn.

Davenport, 37, was convicted of five felony counts and one misdemeanor stemming from a September 1986 break-in at a state highway maintenance yard.

Head said he was considering basing the appeal, in part, on "misconduct" by Tuolumne County Assistant District Attorney Ned Lowenbach.

"He farted about 100 times," Head said. "He even lifted his leg several times."

Head said he went on the record to protest the tactic after Lowenbach passed gas during the defense's closing argument.

"The closing argument is supposed to be sort of sacred," Head said. "It's like the defendant's last chance, and you aren't supposed to interrupt it. Certainly not by farting and making the jury laugh."

Head said Lowenbach apolo-

gized once, and said it was an accident.

"But I don't think it was," Head said. "He just kept doing it, as if to show his disrespect for me, my case and my client. I have been through 50 jury trials, and I have never seen anything like this."

Head said the prosecutor also continually "moved around and ripped pages of paper" during trial.

"And then he would fart again," Head said "It was impossible to concentrate."

Lowenbach, who does not have a listed telephone number, could not be reached for comment immediately.

His boss, District Attorney Eric DuTemple, declined to put The Bee in touch with Lowenbach

"We simply are not going to respond to such a ridiculous charge," DuTemple said. "It's absurd, and we are not going to dignify it with a response."

Defendant Davenport was found guilty of five felony counts – first-degree burglary, second-degree burglary, two counts of auto theft and one count of receiving stolen property. He was also convicted of misdemeanor negligence in a fire that destroyed a truck, and he was acquitted of one burglary charge.

*Reprinted from Modesto Bee, October 1988*



# A history of Alaska appeals from 1960 to 1980

By Robert C. Erwin

Alaska had no territorial court system and prior to statehood it relied on the United States District Court for the Territory of Alaska for trials with appeals being handled by the United States Court of Appeals for the Ninth Circuit.

After statehood it was assumed the new state could go forward on the same system until it could financially afford its own court system. The assumption was shattered in 1959 by the decision of the Ninth Circuit Court of Appeals in *Parker v. McCarrey*, (268 F2d 907 (9th Cir. 1959) holding that the federal courts could not hear cases arising in the new State of Alaska.

The new Alaska Court system was established in 1960 to hear criminal and civil cases and the new Supreme Court was established to hear appeals from the trial courts to establish the law of Alaska to guide Alaskans.

A relatively small number of lawyers participated in the new appeal process to help establish the legal guidelines. These lawyers basically helped Alaska to select those legal precepts from other jurisdiction which would most clearly fit the need of the new state and its citizens.

Initially the total Alaska population of lawyers in 1960 was 175 lawyers. That population has grown to more than 2,000 lawyers some 50 years later. The few lawyers who specialized in appeals the first 20 years of statehood thus had an enormous impact on the body of the law which today guides the Alaska legal system.

This article is to acknowledge their contributions to Alaska Law.

These lawyers were as follows together with the number of appeals handled from 1960 to 1980:

Robert C. Erwin .....57  
(exhibit A)

Robert Eastaugh.....50  
(exhibit B)  
Ken Jacobus ..... 36  
(exhibit C)  
Charles Cole..... 35  
(exhibit D)  
Dorothy Haaaland ..... 31  
(exhibit E)  
William Hawley ..... 24  
(exhibit F)

About 2/3 of the initial appeals involved criminal cases and thus only Charlie Cole and Ken Jacobus handled civil appeals primarily. Charlie Cole pioneered the appeal of early civil cases from 1960 to 1970. He was joined in 1970 by Ken Jacobus.

Dorothy Haaaland and "Mick" Hawley spent their entire appellate career in the criminal appeals area. Dorothy was assigned to the Anchorage District Attorney's office during the 1960s and later to the Anchorage office of the attorney general until her retirement in the mid 1980's. Mick Hawley handled criminal appeals as the district attorney in Ketchikan. He then was transferred to the District Attorney's Office in Anchorage and ultimately to the Office of Criminal Appeals. Mick retired in 2014. Mick Hawley participated in more than 250 criminal appeal cases, an almost unbelievable number of appeals for one person to accomplish particularly in view of his other duties in the District Attorney's Office.

Charlie Cole handled cases involving commercial matters, construction and employee law; city government problems, negligence liability for owners, aircraft, etc. Cole is still practicing law in Fairbanks and is the oldest practicing lawyer in Alaska having been admitted to practice in 1955.

Ken Jacobus was admitted to

practice in Alaska in 1970 and still practices law in Anchorage as a single practitioner after retiring from the law firm of Hughes, Thorness, et. al. He has participated in more than 150 appeals to date. Ken Jacobus handled primarily civil cases from the defense of personal injury claims and the multiple liabilities of various parties to such lawsuits during the first 15 to 20 years of his appellate practice.

Robert C. Erwin and Bob Eastaugh handled criminal appeals initially and then after leaving the District Attorney's Office handled civil appeals. Erwin and Eastaugh handled civil appeals primarily in personal injury and damage areas as well as the areas of oil and mineral leasing and insurance defense. Robert Erwin was admitted to practice in 1961 and is practicing law in Anchorage and participated in more than 135 appeals after retiring from the Alaska Supreme Court.

Robert Eastaugh was appointed to the Alaska Supreme Court in April 1994 and retired in 2009. He participated in the appellate process amassing more than 120 appeals before his appointment.

This writer will provide copies of any exhibit(s) to anyone who requests to review such. The exhibits are too extensive to publish with this article.

Bob Erwin was admitted to practice in 1961 and had done over 200 appeals. He served on the Alaska Supreme Court from 1970 - 1977. Bob is the only lawyer in the state who has appeared before every Supreme Court justice appointed since statehood, except the newest member, Justice Carney, and he has an appeal pending, so that will change soon.

## Samantha Slanders



Advice from the Heart

## A reminder while we search for a columnist from the past

We've begun a search for a columnist who appeared in these pages years ago but somehow slipped into history. As the search proceeds, here is a selection of Samantha Slanders' best offerings from previous columns.

DEAR SAMANTHA: I am a 27 year old, unmarried attorney who has recently become very active in the Anchorage Bar Association. Several months ago, I began dating a wonderful young veterinary assistant (LS) and have fallen in love. LS's working conditions are filthy but we want to get married. Lately, however, I have noticed a strong smell on my clothes at the end of the day and have discovered fleas in my hair. I know that I will not be able to live this way forever. How can I solve this delicate problem?

Lovesick in Anchorage.

DEAR LOVESICK: Take hot showers and soak well after any contact with members of the Anchorage Bar Association.

DEAR SAMANTHA: I am a middle-aged Alaska judge who is up for retention soon. I have recently developed a problem that sets me apart from other Judges and that I fear may affect my chances for retention. I burp continually in court, I can't keep awake during argument, and I develop hiccups whenever I do legal research. What do you suggest I do to be like other Judges.

On Pins and Needles

DEAR PINS: Just have your law clerk do your legal research and you will fit in fine with your colleagues.

DEAR SAMANTHA: I have a problem. Last week I flew to the village of Kipnik on the Bering Sea with several prospective clients that I wanted to impress. Enroute we landed at Bethel and transferred to a small single-engine plane. Shortly after leaving Bethel, I started to get a little woozy and my temperature began to rise. Within 20 minutes I was totally sick to my stomach and could not help but vomit. I grabbed the plane's sick bag in hopes of minimizing my embarrassment. Unfortunately, someone had cut the bottom out of the bag and my stomach contents covered the floor, as well as the shoes and clothing of my prospective clients.

Kipnik was fogged in.

We circled for about an hour before heading back to Bethel. By the time we reached Bethel, I had developed uncontrollable diarrhea. My earnest apologies didn't seem to impress my prospective clients.

By the time the doors of the small plane were opened my clothes, which I bought especially for this trip, were a total mess and my potential clients literally sprinted away from me.

Is there anyway of salvaging this situation?

Sick and tired.

DEAR SICK: You didn't say how new your clothes were but, if it were me, I would exchange them for new ones.



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# Color of Justice program meets students in Sitka

## Alaska Court System

The Alaska Court System, Mount Edgecumbe High School and Sitka Bar Association hosted the Color of Justice program Nov. 7-8, 2016, at Mount Edgecumbe High School. Color of Justice is a law-related education program founded by the National Association of Women Judges designed to promote diversity in the legal profession and judiciary by encouraging diverse youth to consider careers as lawyers and judges.

More than 100 students from communities and villages across the state participated in two days of workshops and other activities presented by representatives from Gonzaga University School of Law, Seattle University School of Law and University of Washington School of Law. The program is also supported by the Alaska Bar Association, Alaska Federation of Natives, Alaska Native Justice Center, Council on Legal Education Opportunity, Law School Admission Council, and the Northwest Indian Bar Association. The two-day program took place at Mount Edgecumbe High School.

Students who participated came from more than 50 villages and communities including: Akiak, Alakanuk, Aleknagik, Anchorage, Bethel, Buckland, Chalkyitsik, Chenega Bay, Craig, Dillingham, Eagle River, Eek, Ekwok, Emmonak, False Pass, Fort Yukon, Glennallen,



Color of Justice Students at Mount Edgecumbe High School with mentors.

Haines, Holy Cross, Hoonah, Hyda-burg, Iliamna, Kipnuk, Kobuk, Kodiak, Kotlik, Kotzebue, Kwethluk, Marshall, McGrath, Mountain Village, Nanwalek, Napaskiak, Nelson Lagoon, Nome, Nunapitchuk, Old Harbor, Palmer, Pilot Station, Point Hope, Port Lions, Saint Marys, Savoonga, Scammon Bay, Shishmaref, Sitka, Togiak, Tuntutuliak, Unalakleet, Wasilla and Yakutat.

Color of Justice sessions included "MentorJet: A Speed Mentoring Experience," where students met with lawyers, judges and justices,

including Chief Tribal Judge Peter Esquiro of the Sitka Tribe of Alaska, and Mount Edgecumbe graduates and attorneys Nicole Borromeo and Peter Boskofsky. "Constitutional Cranium," a quiz show on constitutional knowledge, a "You be the Judge" program, and an Indian Child Welfare Act (ICWA) case study on Alaskan tribal courts were some of the programs that took place.

Increasing diversity on the bench is important to fostering public

trust and confidence in our justice system, according to Senior Justice Dana Fabe. Color of Justice serves this goal, she says, "by affirming for our young women and youth of color that the judiciary is a career path that is open to them." Mount Edgecumbe and Gonzaga University School of Law graduate and mentor Peter Boskofsky in recent publication explained how Color of Justice can spark students' interest in law and promote diversity. [-goo.gl/7xZ5jC](http://goo.gl/7xZ5jC)



Volunteer attorney Teka Lamade working with students during Constitutional Cranium.



Magistrate Judge Mike Jackson mentoring students.



Chief Tribal Judge Peter Esquiro of the Sitka Tribe of Alaska.



## Color of Justice 2016

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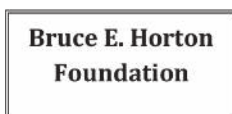
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# Alaska Supreme Court LIVE travels to Palmer



Alaska Supreme Court back row from left: Justice Joel Bolger, Justice Daniel Winfree, Chief Justice Craig Stowers, Justice Peter Maassen, Justice Susan Carney. Students Front row: (l-r): Corbyn Benjamin, John Brahaney, Makenna Watkins, Braden Bowker, Coleen Geraghty, Brett Knighten, Sierra Ring, and Skyler Wood.



Alaska Supreme Court back row: Justice Joel Bolger, Justice Daniel Winfree, Chief Justice Craig Stowers, Justice Peter Maassen, Justice Susan Carney. Alaska State Troopers front row.

By Marilyn May

In its first excursion to the Matanuska-Susitna Valley, the Alaska Supreme Court heard oral arguments at Colony High School in Palmer Oct. 19.

The court heard argument in *Robert Riddle dba Fairbanks Pumping and Thawing v. Eric Lanser*, a dispute between property owners. Robert Riddle, the owner and operator of a septage hauling company, stored septage on land he used to grow crops and raise livestock, and he also applied some of the septage as fertilizer. Eric Lanser purchased nearby land and constructed houses on the property. Lanser and some of the landowners complained about the odor from the storage facilities and farm, and asked a judge to order Riddle to stop the odor.

After a trial, a Superior Court judge ruled in Lanser's favor, issuing an order for Riddle to stop or minimize the smell. Riddle appealed to the Alaska Supreme Court seeking to reverse the lower court's ruling. Much of the argument centered on the application of Alaska's Right to Farm Act.

The program also included question-and-answer sessions with the attorneys arguing the case, and with members of the Supreme Court. Chief Justice Craig F. Stowers scored a laugh with his answer to a question about how an argument in a school gym differs from one heard in a normal courtroom: "We can't shoot hoops in the courtroom."

Volunteer attorneys from the Alaska Bar Association and staff from the court system visited participating Mat-Su area classrooms in the days preceding the program to help students understand the appellate process and the case itself, using a case summary and other information from the court system's website: [goo.gl/ipkuSt](http://goo.gl/ipkuSt)

Supreme Court LIVE has taken the court to high schools in Anchorage, Juneau, Fairbanks, Sitka, Barrow, Ketchikan and now Palmer. The 6-year-old project brings oral argument in actual cases to student audiences, to help them better understand the justice system and perhaps to plant a seed about possible justice careers.

*Marilyn May is the clerk of the Appellate Courts.*

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# Alaska's fiscal woes worse — and more urgent — than you think

By Cliff Groh

The State of Alaska digs a deeper fiscal hole every day, and the savings that finance our persistent budget deficits continue to shrink.

Given that a lot of lawyers are used to reading complaints, this collection of critical and undisputed facts is numbered. Unless otherwise noted, the figures below come from the Alaska Legislative Finance Division and describe the Unrestricted General Fund, which is what people in Alaska usually mean when they say “the budget” or “state spending.”

1. The budget is \$4.3 billion this year, and revenues are projected to be \$1.2 billion.
2. The resulting deficit of \$3.1 billion works out to about \$4,200 for every man, woman, and child in Alaska for this fiscal year (Fiscal Year 2017 or FY17 — July 1, 2016 through June 30, 2017).
3. For the fifth straight year, the State of Alaska is financing its deficit by spending savings, primarily the Constitutional Budget Reserve Fund.
4. Assuming the current level of spending and the current revenue laws as well as the Alaska Department of Revenue's most recent revenue projections, those savings accessible by the Legislature — excluding the Permanent Fund Earnings Reserve Account — will be exhausted no later than June 30, 2019 (and very likely by Dec. 31, 2018).
5. That definition of “savings accessible by the Legislature” used in the previous paragraph sweeps in the pots of money available for appropriation (with the exception of the Permanent Fund Earnings Reserves Account). Those “savings accessible by the Legislature” include all the money in “undesignated reserves” such as the Constitutional Budget Reserve Fund, the Statutory Budget Reserve Fund, and the Alaska Housing Capital Corporation Fund plus all the money in “designated reserves” such as the Alaska Capital Income Fund, the Alaska Higher Education Investment Fund, the Public Education Fund, the Community Assistance Fund, and the Power Cost Equalization Endowment.
6. If the State of Alaska spent all the Permanent Fund Earnings Reserve Account in addition to spending all the savings accessible by the Legislature described in the previous paragraph, the State of Alaska would be out of savings no later than the end of Fiscal Year 2021 — assuming the current level of spending and the current revenue laws as well as the Alaska Department of Revenue's most recent revenue projections.
7. Permanent Fund Dividends are paid out of the Permanent Fund Earnings Reserve Account, and under current law exhausting the Permanent Fund Earnings Reserve Account would end Permanent Fund Dividends.
8. The budget has been cut by 44 percent (\$3.5 billion) between

Fiscal Year 2013 and Fiscal Year 2017.

9. The budget was \$4.2 billion in Fiscal Year 2007 and is \$4.3 billion in Fiscal Year 2017.
10. Adjusted for inflation and population, the budget in Fiscal Year 2017 is the lowest it has been in 10 years.
11. More than 55 percent of the Fiscal Year 2017 budget goes for K-12 education and the Department of Health and Social Services.
12. All State of Alaska employees could be laid off, and the State of Alaska would still have a deficit. (To explain this apparently counterintuitive fact, note that the expenditures for K-12 education and Medicaid are mostly paid as grants — not salaries to state employees — and that debt service on state bonds is paid to bondholders, not state employees.)
13. The Alaska Department of Revenue has reported that the price of oil (Alaska North Slope West Coast or “ANS West Coast”) has ranged between \$38 and \$52 per barrel since July 1, 2016 (the beginning of Fiscal Year 2017).
14. The price of oil (ANS West Coast) would have to average between \$100 and \$110 per barrel during Fiscal Year 2017 to balance the Fiscal Year 2017 budget without using savings.
15. The Alaska Department of Revenue's most recent forecast (Spring 2016 Sources Book) projects that oil prices for Alaska will be below \$66 per barrel for each fiscal year through Fiscal Year 2025.
16. The State of Alaska's oil revenues fell more than 90 percent from Fiscal Year 2012 to Fiscal Year 2016, according to the University of Alaska Anchorage's Institute of Social and Economic Research (ISER).
17. Oil revenues provided an average of 90 percent of Unrestricted General Fund revenues for the period of Fiscal Year 2005 through Fiscal Year 2014, according to ISER.
18. Oil production in Alaska is projected to average less than 550,000 barrels per day in Fiscal Year 2017, according to the Alaska Department of Revenue's most recent forecast (Spring 2016 Sources Book).
19. Oil production in Alaska is expected to drop every year from Fiscal Year 2017 through Fiscal Year 2025, according to the Alaska Department of Revenue's most recent forecast (Spring 2016 Sources Book).
20. Oil production in Alaska averaged more than 2 million barrels per day in Fiscal Year 1988 (the peak year for Alaska oil production), according to the Alaska Department of Revenue.
21. Pursuant to a formula set out in state statute, the Legislature appropriated \$1.362 billion from the Permanent Fund Earnings Reserve Account to pay Permanent Fund Dividends in the



Cliff Groh

fall of 2016. The governor vetoed \$666.35 million from that amount, leaving \$695.65 million to be paid in Permanent Fund Dividends (pending a legal challenge to the veto).

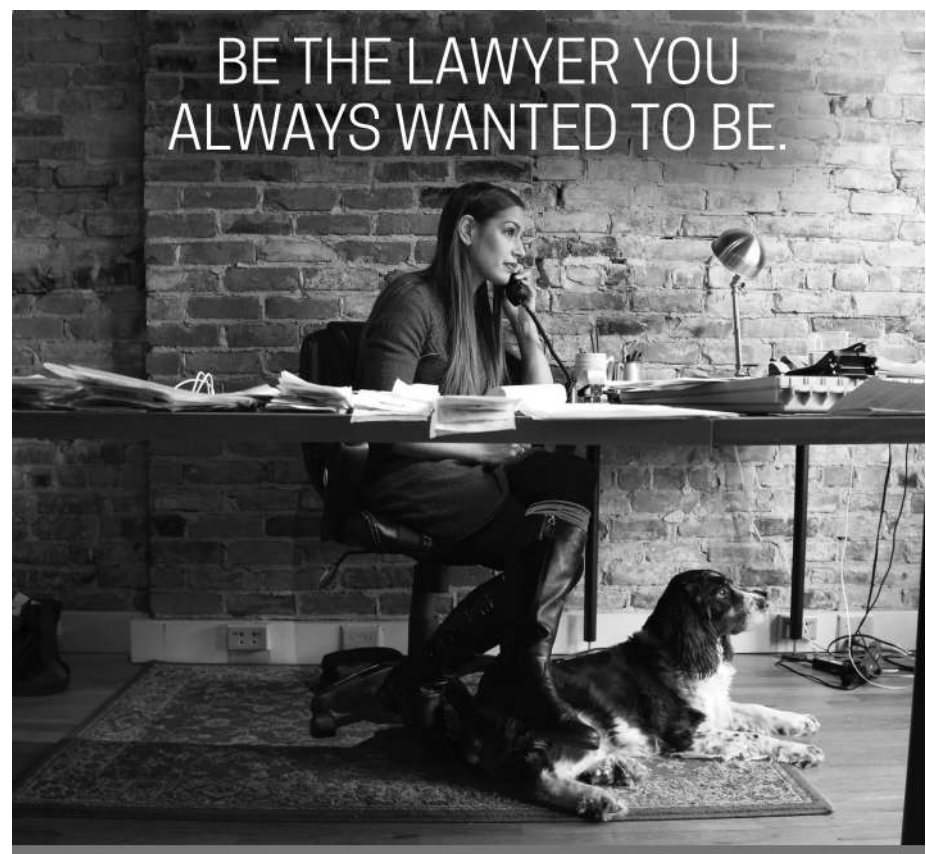
22. The Permanent Fund Dividend is a form of universal direct distribution of cash to residents, and Alaska is the only state that has it.
23. Alaska is the only state with no form of state income tax paid by individuals and no statewide general sales tax, according to ISER.
24. Imposing an income tax of 15 percent of federal tax liability would raise \$571 million per year, according to the Alaska Department of Revenue in 2015.
25. Imposing a three percent sales tax without exemptions would raise \$418 million per year, according to the Alaska Department of Revenue in 2015.
26. Alaskans pay the lowest broad-based state taxes in the country, according to ISER.
27. Alaska has the lowest gasoline tax of any state, according to the Tax Foundation.
28. To eliminate the deficit with marijuana tax revenues alone, every person over 21 years of age in Alaska would have to buy more than four pounds of legally taxed marijuana each year, ac-

ording to the Alaska Department of Revenue.

29. The earliest year for production from the proposed Alaska Liquefied Natural Gas (AK LNG) project is projected to be 2025, according to the Kenai Peninsula Borough (the local government where the southern terminus of the project's pipeline segment is located).

Alaska's fiscal challenge is giant and pressing. You should get more informed and more involved. Speaking to your legislator is an excellent idea as well.

*Cliff Groh is a lifelong Alaskan, a lawyer, and a writer. He is also chair of Alaska Common Ground, a public policy organization focused on helping Alaskans seek consensus on the major issues facing the state. Alaska Common Ground has held eight events in the fall of 2016 on Alaska's fiscal challenge and Alaska's future economy. Groh worked on oil tax legislation while serving as Special Assistant to the Alaska Commissioner of Revenue in 1987-1990 and was the principal legislative assistant on the legislation creating the Permanent Fund Dividend in 1982. Groh has authored or co-authored four chapters in academic books about the Permanent Fund Dividend and Alaska fiscal policy, and he teaches a course at UAA on Alaska's fiscal and economic challenges. He welcomes your bouquets, brickbats, tips, and questions at [cliff.groh@gmail.com](mailto:cliff.groh@gmail.com).*



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## In Memoriam

# Ketchikan attorney Geoffrey Currall dies

Geoffrey Griffin Currall, 72, of Ketchikan died Tuesday, Sept. 20, 2016. Geoff died in his sleep due to complications related to kidney failure while with his family in Dubrovnik, Croatia.

Geoff was born July 10, 1944, to William and Catherine Currall in Brunswick, Maine, and was raised in Westfield, New Jersey, with his brothers Mark and Peter and his sister Lynn. Geoff graduated from Jesuit Holy Cross University with a degree in history in 1966 and earned a Doctorate of Jurisprudence from Seton Hall University School of Law in 1969. Fresh out of law school, and with a sense of adventure (and on a dare from his little brother), Geoff drove his green "Monster" Dodge van to Alaska, where he was hired as a clerk with the Alaska Supreme Court. By 1971, he was working in Ketchikan as assistant district attorney with his good friend, Hal Brown, a position he held until 1978.

Geoff married his wife Sandra "Sandy" Kay Currall in 1974, starting their marriage and family in Ketchikan with their first home across the highway from Bugge's Beach. From the District Attorney's Office, Geoff went into private practice with Clark Stump until 1980 when Geoff and Clay Keene opened the Keene & Currall law office in the Mary Frances building. Geoff and Clay practiced law together until 2011 when Geoff retired from

the practice of law, but not from spending time at the office, where he came for his morning coffee and to read the Ketchikan Daily News, a habit that was apparently hard to break.

Geoff was the consummate attorney, known for his quick wit, intellect, and fairness. Geoff valued his many clients, and served them all well. He was elected by his peers throughout Southeast Alaska to serve on the Alaska Judicial Council, tasked the responsibility to screen applicants for judicial positions throughout Alaska. He was very proud of the many good selections of judges made during his tenure from 1998 to 2004, and was equally proud of the people he served with.

Geoff's practice of the law was legendary, he was a lawyer's lawyer, often called upon by other attorneys to give advice and assistance on complicated legal issues. He was known for his fairness and congeniality, and his willingness to work collaboratively to reach a solution.

Although Geoff was a dedicated attorney, and worked very hard at his profession, he was also known as the "king of fun" when it came to time away from the office. Geoff treasured the annual duck hunting trips to Camp Island on the Stikine River with many friends who made that annual trip. Geoff enjoyed hunting, but most of all he enjoyed the fellowship with friends, the story telling, cribbage games and the

great food.

Geoff also treasured and enjoyed the fishing, ski and travel adventures with Sandy and his six children, Nathaniel, Christopher, Benjamin, Patrick, Timothy and Genevieve, which ranged from outdoor adventures with family and friends at their Saltry Cove cabin, to skiing in Smithers and trips throughout the U.S. and abroad.

Geoff was most proud of his children, and their accomplishments, and particularly that all attended not only college, but that they graduated from Catholic colleges and universities. The rule of law in the Currall home was strict, following in the footsteps of Geoff's father, a retired FBI agent, Geoff was a consummate disciplinarian, as the kids remember. Geoff was a man of faith, attending mass at the Holy Name Catholic Church with Sandy and the children every Sunday morning. After mass Geoff would treat the family to breakfast at McDonald's, which was considered extravagant spending for Geoff. Geoff was legendary for his innate ability to stretch a dollar, which was essential with six kids, all of whom were educated with Geoff and Sandy's substantial support.

Geoff was also proud of his service with the Holy Name Church, being instrumental in the construction of the new church, and of his service with the noon Rotary Club, and his memberships in the Ketchikan Bar Association, Alaska Bar Association, The Elks Club, Camp Island Duck Club and Skowl Arm Waterfowl Society.

Aside from his dedication to a very successful law career and his numerous involvements in the com-



A glass or bottle of wine along with Mario Lanza or Andrea Bocelli was Geoff's favorite finish to an evening with his family.

munity and charities, Geoff would tell everyone that his greatest accomplishment was his family. He bragged that with his five boys he had his own basketball team. Geoff and Sandy finally had their girl, Genevieve, number six, a celebratory event that had Sandy "dancing on tabletops" in the hospital as noted in the Ketchikan Daily News. The Currall children have treasured memories of their life in the home the family built on the water, as apparent from their annual return for July 4 festivities with family and friends.

Geoff is survived by his three siblings, his wife Sandra, his sons Nathaniel (and wife Melanie), Christopher (and wife Beverly), Benjamin (and wife Renata), Patrick (and wife Katie), Timothy, his daughter Genevieve and his grandchildren Lindsey, William, Catherine, Alexander, Rosemary and another one of the way.

In accordance with his final wishes, Geoff's ashes were to be spread in Bostwick Bay near Ketchikan. The family suggested a donation to the Holy Name Elementary School, 433 Jackson Street, Ketchikan 99901.

## Albert Maffei practiced law in Alaska for 62 years

Albert Maffei, loving husband, father, brother, grandfather, great-grandfather, passed away surrounded by his family on Aug. 24, 2016.

Al was one of three children born to immigrant Italian parents in Eagle Creek, Ore. He met and married Bonnie in 1976 and raised four children.

Al was an avid gardener; he loved fishing and outdoor recreation.

He began his law practice in territorial days in Alaska in 1953. He was an attorney in Alaska for 62 years, making him the longest active practicing attorney in the state.

Al was a 58 year member of the American Legion, 20-plus year member of the Pioneers of Alaska, a third-degree member of Knights of Columbus and was very involved with the BPO Elks of Alaska, serving as Past Exalted Ruler, Past District Deputy, Past State President, then serving on the National level as a member of Judiciary, Grand Form and finally serving as Chief Justice of the BPO ELKS of America.



Albert Maffei

Al was a World War II Veteran serving in the Army/Air Force 384 Bombardment Group as a gunner.

Al is survived by his wife of 40 years, Bonnie; his children, Gina Luciano (Eddie), Lisa Stevens (Ron) and Matthew Farr (Maritza); brother, Pete Maffei (Gail); nieces, Laura and Sarah; grandchildren, Michael (Laura), Jeffery

(Charlsea), Corey, Tyler, Samantha, Jenna, Bria, Jacob, Natalie and Nicole; and great-grandchildren, Zoe, Cooper, Jax, Sophia and Carter. Al is preceded in death by his daughter, Kristen; sister, Louise; parents, Erminia and Sante (Sam) Maffei; and numerous cousins.

Memorials may be sent to Claire House, Brother Francis Shelter or a charity of choice. Arrangements are with Janssen's Evergreen Memorial Chapel.

Visitation was Aug. 31, 2016, at Evergreen Funeral Home in Anchorage. He was buried Sept. 2, at Anchorage Memorial Park Cemetery. See more at: [goo.gl/7VSKcr](http://goo.gl/7VSKcr)

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## TALES FROM THE INTERIOR

## Stress tests reduce patient to declaring 'round is a shape'

By William Satterberg

I turned 65 on April 1, 2016. I was officially a "senior citizen." Googling the definition of "elderly" I learned that I actually entered the genre at age 55. My primary drugs of choice had now become Metamucil, Geritol and Viagra. As one statement went, "When you find yourself going to bed at the same time that you used to go out to play, you have entered old age."

The prior summer, I had enjoyed my second in a series of two colonoscopies. Each time, I underwent the test cold turkey. "Take it like a man, Bill" one friend said. Not only did it allow me to witness what was being done to a highly protected area, but I also avoided the memory loss drug, the name of which I forgot.

Contrary to my first colonoscopy, which was conducted by a male physician, my second colonoscopy was conducted by three females who seemed to enjoy joking during the task. Fortunately, the examination went well, but I did leave the clinic with new self-esteem issues, having learned far more about myself than I cared to know. In the end, everything came out well.

Following the colonoscopy, I decided to have a cardiac stress test. For years, I had heard about the rigors of the stress test and, thus, did not want one. However, when one of my best friends had a serious heart attack, my perspectives changed. Initially, my friend tried to tough it out. He almost died in his house before he relented and called the ambulance. Following some stents and cardiac rehabilitation, he returned to normal. But his experience did impress upon me that such coronary events do occur.

I had been a medic for several years and had witnessed many heart attacks. Some were fatal. Although the symptoms are relatively classic, serious attacks also took place without any typical symptoms. In older people, when transporting patients to the hospital who did not survive, we would simply advise dispatch that the patient had succumbed to "TMB," or "Too Many Birthdays." For younger folks, however, it was tragic to witness an individual in perfect health not survive a cardiac event. Ironically, fat people, like myself, actually seemed to do better. One of my friends used to state, "I am in shape. Round is a shape." But a heart attack eventually got him, too.

So I contacted a cardiologist friend for a stress test. His first question was if I was experiencing any symptoms. I answered that I was not. This apparently surprised him. I thought back to my twenties when I had experienced an electrocardiogram. I was diagnosed with an abnormal heartbeat known as Lown-Ganong-Levine Syndrome. In evaluating the results, my doctor attempted to reassure me by telling me that most people who have this symptom do quite well. It is only serious in 10 percent of the people. When I asked how "serious was serious," he told me that the worst result would be "asystole." As a medic, I knew about asystole. Asystole is flatline. Sudden death. No turning back. Gonzo. Only Jesus could bring people back from asystole. But your

name had to be Lazarus. My name is Bill. Not a reassuring thought.

So I studied for my stress test. I would have to wear sweatpants, a T-shirt and running shoes. Things I did not own. The test would last one hour. I was told few people ever had a cardiac arrest while taking the test. However, should I experience a heart attack, the hospital was close and I probably would survive. In passing, my doctor then said that he would be on vacation, but his assistant could handle any problems.

I learned that the test involved establishing a base line, and then running on a treadmill until the patient is on the edge of a heart attack, stroke or both. Gasping for breath, the patient then immediately transfers to a table for an ultrasound and to monitor the electrocardiogram for abnormalities. David, my cardiologist, predicted I would be on the treadmill for about seven and one-half minutes. David also told me some people ran for as long as 30 minutes. I did not realize how accurate David's prediction was. He was only 30 seconds over what I was able to handle.

On the exam date, I showed up early. Following the perfunctory paperwork, I was ushered into a room and to lie on a table. An attractive young lady then came into the room and, reminding me of the movie "40 Year Old Virgin," shaved four patches of hair off of my chest. I looked like a dog with mange. Various leads were attached to the nude portions of my chest. I was then connected to a screen where I could watch my pulsating organ. For approximately 10 minutes, I had fun messing around with my heartbeat, and rate of respiration as I lay there on the Group W bench. But, the fun was soon over when Tom, the physician's assistant and previously an Army commando, entered the room.

Tom said he only had 60 seconds from the time he stopped the treadmill to complete the full ultrasound review of my racing heart. Otherwise, I would have to do the test again. Suitably chastised, I promised to follow the directions rather than risk another test. Tom then asked me if I had any chest pains. I began to get concerned. It was a recurrent question. The answer was still no. With that, the test started. At first, I was out for a casual Sunday stroll. Just when I was becoming proud of my stamina, Tom increased both the treadmill speed and incline. "No problem," I thought. I could handle it.

The inclination next increased to eight degrees and the speed again doubled. To add insult to injury, Tom then started asking annoying questions. By then, I was simply trying to concentrate on breathing and staying up-right. Tom then announced there would be an even greater incline and speed. Clearly, Tom wanted to kill me.

In short order, I was not yet running. But I was certainly walking quite fast. Fortunately, I had a handlebar to hang on to. My blood



"I learned that the test involved establishing a base line, and then running on a treadmill until the patient is on the edge of a heart attack, stroke or both."

pressure had risen. My heartbeat was racing. But I was still alive. Or so I thought. Tom then unexpectedly announced "We're turning off the treadmill now! Does your chest hurt?" Once again, I became concerned. Why would he be asking if my chest hurt? I gasped that I was fine. Perhaps trying to bolster my ego, Tom turned off the unit at seven minutes exactly and I flopped over to the table for my ultrasound. As the ultrasound sensor was placed on my chest, I was ordered to hold my

breath so Tom could see how my heart was pulsating. The command was ridiculous because I didn't have any breath to hold. Fortunately, after a lifetime of 30 seconds, the ultrasound was over. Once again, Tom asked how I felt. I said I was alive. After everything appeared to be okay, I was told I could leave.

I went to the nearby hospital for breakfast. My wife, Brenda, called me and asked how I was doing. I said I was in the hospital, initially neglecting to mention that I was only having breakfast. This caused a certain amount of concern for her. Once I clarified the issue, Brenda was relieved. I was once again back to my old cholesterol-eating self.

Later that day, I received a call from David. David said my stress test was "negative," but that I was

"in terrible shape." I promised I would think about losing weight. And I have. Thought about it, that is.

But the best was yet to come. That afternoon, I was speaking to Al, another close friend of mine. I told Al that David tried to kill me with the test. During the call, I was walking down the street and talking on my cell phone, which is always dangerous and should be illegal. Suddenly, I slipped on a patch of ice and flew up into the air, cell phone in hand and landed hard on my back. The only thing Al heard after a loud thud was a series of incomprehensible grunts, groans and gasps. The phone then went dead. Al, convinced that I had succumbed to a belated heart attack, went into a full panic, calling both my office and Brenda to try to locate me. In each case, the answer was that I had not been seen for an hour. According to Al's wife, Jean, Al was distraught, convinced that he had heard me breathe my last.

I am used to giving stress tests, not taking them. Those stress tests usually occur in court. But, for Al, his own stress test took place with me lying flat on my back on St. Patrick's Day in the middle of Second Avenue in a melted puddle of salty ice water, watching the stars slowly circling my head.

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

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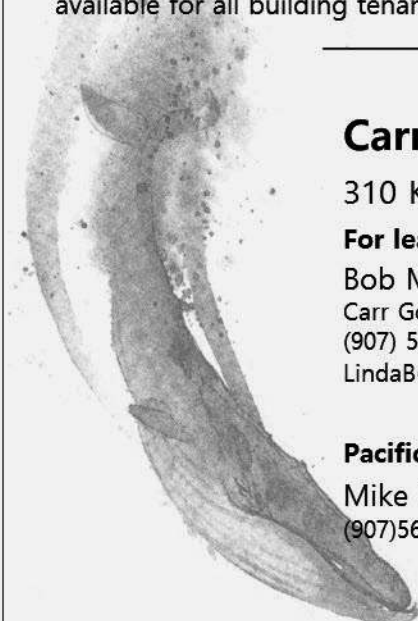
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# Lane Tucker to become Federal Bar group's president

By Darrel J. Gardner

The Alaska Chapter of the Federal Bar Association has experienced a slow autumn as we are working to restructure our leadership ladder. Our president-elect had been Assistant U.S. Attorney Kevin Feldis; however, earlier this summer Kevin accepted an extended overseas detail to work with the U.S. Department of Justice in Indonesia.



Lane Tucker

Anchorage attorney Lane Tucker (of Stoel Rives) has graciously volunteered to assume duties as our new chapter president, and we will soon be in the swing of things, offering lunchtime meetings and other FBA events. Please keep an eye out for FBA news and announcements from the Alaska Chapter.

As well as being president-elect, Kevin Feldis was also a lawyer representative. Following his departure from the state, Chief Judge Timothy Burgess appointed Assistant Federal Defender Jamie McGrady to serve out Kevin's remaining term. Judge Burgess also appointed Assistant U.S. Attorney Andrea Hattan to a new three-year term, following the expiration of Darrel Gardner's term as lawyer representative. Darrel will continue to serve, however, as a board member on the Ninth Circuit's Lawyer Representatives Coordinating Committee.

Lawyer representatives play an important role in the administration of justice in the Ninth Circuit; they work to foster open communication between judges and attorneys, and provide support and advice in the functioning of the courts by serving as liaisons between the federal bench and practicing bar. Lawyer Representatives are chosen to serve three-year terms, representing attorneys practicing in each of the Ninth Circuit's 15 districts in nine western states and two Pacific Island jurisdictions. Currently, there are 168 lawyer representatives. Through the years, attorney support and contributions to the administration of justice in the Ninth

Circuit have been invaluable and have resulted in positive changes that have improved the functioning of the courts.

On a local level, many lawyer representatives work closely with the District, Bankruptcy, and Magistrate judges in their home districts. Lawyer representatives sit on various court committees; help plan and present the local District Conference in association with the Federal Bar Association; meet quarterly with district and circuit judges, the federal public defender, the U.S. attorney, and the chief U.S. Probation officer; and attend the Ninth Circuit Judicial Conference, held annually at various locations throughout the circuit.

On a national level, the Lawyer Representatives Coordinating Committee (LRCC) is composed of a senior delegate elected by lawyer representatives from each of the 15 respective Ninth Circuit districts. The LRCC acts as a liaison for the lawyer representatives to the Ninth Circuit Judicial Council's Conference Executive Committee. As its name implies, the LRCC also coordinates the activities of the lawyer representatives across the circuit. The LRCC presents educational programs during the Conference of Chief District Judges, which in 2017 will take place in San Diego in February. The LRCC also undertakes special projects throughout the year. At the conclusion of the third year of serving as a lawyer representative, LRCC members can run for election to become vice-chair of the LRCC. If elected, the vice-chair serves three additional years on the LRCC, then becomes chair-elect, and finally chair. The LRCC chair assists in many key elements of the Circuit Conference. In 2016 the LRCC chair participated in an onstage conversation with Supreme Court Justice Anthony Kennedy and Alaska Chief Judge Timothy Burgess. Judge Burgess served as program chair in 2016, and is conference chair for 2017. The next Ninth Circuit Judicial Conference will be in San Francisco July 17-20, 2017.

The number of lawyer representatives in a given district is based on the number of district judges in each district. In the District of Alaska,



Darrel J. Gardner

there are four Lawyer Representatives. The terms are staggered, with two lawyers being selected as co-representatives every third year. Alaska's delegate to the LRCC is the senior-most lawyer representative. This year's LRCC delegate is Dick Monkman, and next year's delegate will be Mary Pinkel. The LRCC district delegate is responsible for planning the Alaska District dinner meeting, which takes place at the Ninth Circuit Conference. The delegate also writes the annual District Report for the District of Alaska, which is published on the Ninth Circuit's website ([www.ce9.uscourts.gov](http://www.ce9.uscourts.gov)). The current Alaska lawyer representatives are:

*Darrel J. Gardner (LRCC chair-elect)*

Phone: (907) 646-3406

Email: [Darrel\\_gardner@fd.org](mailto:Darrel_gardner@fd.org)

Term expires: September 30, 2018

*Andrea W. Hattan*

Phone: (907) 271-3376

Email: [andrea.w.hattan@usdoj.gov](mailto:andrea.w.hattan@usdoj.gov)

Term expires: September 30, 2019

*Jamie McGrady*

Phone: (907) 646-3405

Email: [Jamie\\_mcgrady@fd.org](mailto:Jamie_mcgrady@fd.org)

Term expires: September 30, 2017

*Richard D. Monkman (Alaska Delegate, LRCC)*

Phone: (907) 586-5880

Email: [dick@sonoskyjuneau.com](mailto:dick@sonoskyjuneau.com)

Term expires: September 30, 2018

*Mary B. Pinkel*

Phone: (907) 269-6379

Email: [mary.pinkel@alaska.gov](mailto:mary.pinkel@alaska.gov)

Term expires: September 30, 2018

This year marked the conclusion of Anchorage attorney Gregory Fisher's term as an appellate lawyer representative. Although lawyer representatives are selected locally by the chief judge in each Ninth Circuit district, Appellate lawyer representatives are selected directly by the Ninth Circuit Court of Appeals; there is no requirement that there be an appellate lawyer representative from Alaska. There are 18 appellate reps who serve staggered three-year terms. Congratulations to Gregory Fisher for being selected for this prestigious honor, and for volunteering his time and effort to help improve the administration of justice at the circuit level.

For more information on becoming a Lawyer Representative, or if you have any questions, comments, or concerns regarding federal courts or federal practice, please contact any of the Alaska lawyer representatives listed above. Information is

also available on the Ninth Circuit website at [www.ce9.uscourts.gov/lawyer\\_reps](http://www.ce9.uscourts.gov/lawyer_reps).

The federal bar welcomes Rhonda Langford-Taylor as the new chief probation officer for the District of Alaska. Rhonda comes to us from the Western District of Washington, where she currently serves as the



Chief Probation Officer Rhonda Langford-Taylor

deputy chief, a position she has held since April 2011. Rhonda has been with the judiciary since March 2000 and has worked various positions in her career, including U.S. probation/pretrial services officer, program specialist (detailed to Federal Law Enforcement Training Center), probation officer administrator (detailed to Probation and Pretrial Services Office Training and Safety Division), and probation administrator (AO). Rhonda co-developed curriculum for the Federal Judicial Council Train the Trainer Program. She is a leader in the area of safety training and developed national policy at the National Training Academy in this area. Rhonda earned her B.A. in Sociology at Morris College. She earned her M.A. in Liberal Arts from the University of Toledo.

The Third Annual Alaska Federal Bar Conference scheduled for Aug. 12, 2016, at the Dena'ina Center was cancelled, unfortunately, due to the low number of registrants. The Alaska Chapter is hoping to team up with Alaska's federal lawyer representatives to help plan an Alaska District conference for 2017. For the fourth year in a row, the national president of the FBA is planning to attend our district conference in 2017. This year's national president is the Honorable Michael J. Newman, a U.S. magistrate judge in the Southern District of Ohio. Judge Newman was sworn in as president at the FBA's Annual Meeting and Convention, which took place in Cleveland in mid-September. If anyone is interested in helping to plan the 2017 Alaska federal conference, or has suggestions for CLE topics or speakers, please contact FBA-Alaska or a lawyer representative.

*Darrel Gardner is a past president of the Alaska Chapter of the FBA, and president-elect of the Alaska Bar Association.*

For more information, or to join the Federal Bar Association, please contact Lane Tucker ([lane.tucker@stoel.com](mailto:lane.tucker@stoel.com)), or visit the Alaska Chapter website at [www.fedbar.org](http://www.fedbar.org); like us on Facebook at "Federal Bar Association - Alaska Chapter;" and follow "Fed Bar Alaska" on Twitter "@bar\_fed."

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# Permanent Fund's role and PFD in Alaska's fiscal crisis

By John Havelock

In the most recent Bar Rag, (July-September 2016) the distinguished lawyer and public servant, (following in his father's footsteps) and recently public educator, Cliff Groh suggested that a constitutional amendment might be passed distributing a part of the Permanent Fund, in large chunks of money to whoever happens to be living in Alaska at the time of the distribution.<sup>1</sup> In doing so he was paying homage to Hugh Malone, prematurely deceased, a legislator who worked with Cliff in the 80s. But Hugh Malone's remarks were casual and made at a time that the state was still rolling in money, not facing an immediate fiscal crisis. Hugh may also have been tired and his observations may well have come from a state of depression preceding his death. He was a good legislator but not a lawyer.

There is little question that Cliff's proposal is a very bad idea. Though misdirecting on policy, his article is a good beginning for a discussion of the role of the PF and the PFD in the present crisis and in Alaska's long-term future.<sup>2</sup>

An examination of the state's fiscal situation and the adoption of a sound plan to meet the looming crisis is long overdue (shame on legislators of the recent past). So far, plans presented tilt to protect one or more special interest. Almost every Alaska lawyer has, at one time or another, been immersed in a state social and revenue policy or policies that have made them relative experts in both the causes of this crisis and the cures. Over the years, their number in the legislature has unfortunately shrunk. Now is a time of deep crisis when the legal community can again assume leadership roles in hammering a well-crafted plan into shape for acceptance by the people and adoption by the legislature.

It is the governor's role, in the first place, to craft, articulate and sell a plan to the people and the Legislature. Gov. Bill Walker is an experienced lawyer, if burdened by an obsession with a natural gas line (clearly unfeasible after a few minutes reviewing some of the basic numbers), but is otherwise capable of the kind of problem-solving and leadership that is the essence of

lawyers' performance.

The state fiscal plan obviously needs to include consideration of the role of the Permanent Fund and the Permanent Fund Dividend. The plan also needs to consider the role of taxation, particularly, but not exclusively, the compelling and obvious need for an income tax as well as the need to reexamine the subsidized and relatively tax free role given to the oil industry by Alaska's last governor. Gov. Sean Parnell, a lawyer who had previously served as counsel to a major oil company for many years was apparently unable to separate public and private roles. Another distinguished lawyer, Robin Brena has laid out a program for raising income from the oil industry and reducing subsidies that will cover at least half of the state's deficit. (guest editorial, Alaska Dispatch News 10/25/16).<sup>3</sup>

Why is Cliff's proposal so bad? "This [Permanent] Fund created by the past generations, creates a moral conflict with the notion ... of a per capita distribution .... Such a distribution amounts to a breach of trust to generations past who saved and to generations

to come who will have need of the fund and for whose benefit the trust was created .... If the fund is disbursed either in [lump sums] or to prevent the rise of taxes to average American levels, then state policy will [have regressed] to a condition where we admit we do not look out for each other's welfare. In [ PFD capital disbursements], the United States will first take its hefty cut in taxes...."<sup>4</sup>

As is further pointed out in my book,<sup>5</sup> there is no point in dedicating revenues of the Permanent Fund, As Mr. Groh suggests as an alternative purpose, to "... education and other objects of legislative appropriation."

"The legislature will withdraw funds previously committed through appropriation so the dedication turns out to be meaningless .... It makes more sense to give a head start at the beginning of life with a new program."<sup>6</sup>

Although the creation of the fund was originally seen as just a way to stack up revenues from the early dramatic flows and revenues of Alaska oil development without an articulated purpose, the most

prevalent interpretation was that the fund would be available for a "rainy day," meaning an era when the normal range of state revenues would not meet needs. This purpose had built into it the concept that a rainy day does not arrive without the state first returning to normal American levels of taxation. In 2016 we are certainly not there yet.<sup>7</sup> But the idea was established from the beginning that the fund would be used for public purposes.

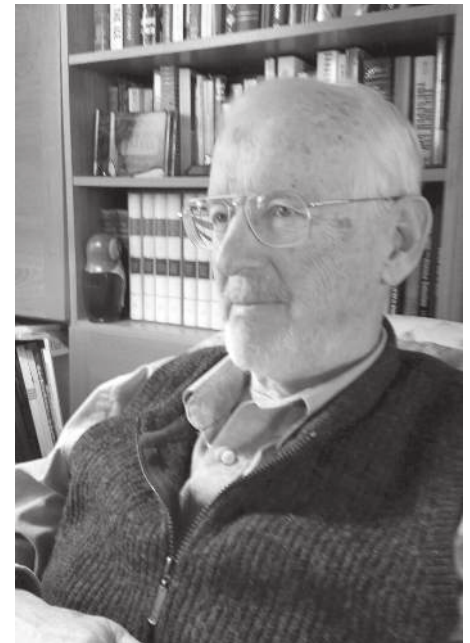
Gov. Jay Hammond had a more clearly articulated purpose for the Permanent Fund Dividend – to stop the greedy among us from raiding the fund for inappropriate purposes, since the people would object to their dividend disappearing. For this purpose, the PFD alarm is certainly set off by Cliff's proposal.

It has only recently been recognized that by serving one purpose, the theft alarm, the PFD has also served two other purposes of central concern to a modern society. The PFD is a minimum income guarantee and, since it goes to anyone born, it is a family or children's allowance. One of the effects of the PFD has been to narrow the divide between the richest and poorest among us, making Alaska, proudly one hopes, the state with the least such separation. Both programs are common in modern industrial society. Leaving half of the fund's income to legislative appropriation is an appropriate compromise.

But what about distributing the PFD to those that don't really need it? The answer is plain enough. Tax it back. Taxing this income back also has the advantage of passing part of the expense on to the federal government.

Alaska has special need for a minimum income in its rural reaches. The PFD is a crucial part of the income of a majority of rural Alaskans, allowing the maintenance of a family subsistence lifestyle. According to ISER economists, PFD dollars roll over in the Alaska economy to a far greater extent than other distributions. There is hell to pay in the immediate future from Go. Walker's \$1,000 cut, creating misery also in the thousands of businesses that support rural Alaska.

Against the profound benefits of the PFD it is puzzling, at least, to find an economist cited in Mr. Groh's column recommending handing the whole fund out, a glory day for the Internal Revenue Service and a triumph of raw greed against public purpose. Cliff seems to say that by feeding the greed impulse with



John Havelock

something less than the total fund, other good purposes can be served with the remainder: defining a purpose for the fund by constitutional amendment and raising taxes. Sorry Cliff, the Permanent Fund already has purposes, the PFD. Yours is a terrible proposal. No gimmicks please. Alaskans, including the legal community, are going to have to face the need for a robust tax regime and fight for it in the political arena.

As Gov. William Egan's Attorney General, John Havelock worked with a special session of the Alaska Legislature in 1973, in forging a tax and regulatory regime governing the development of Prudhoe Bay and the Trans-Alaska Pipeline.

#### Footnotes

1 2016. *Is it time to consider cashing out part of the Permanent Fund?* The Alaska Bar Rag July-September

2 If Mr. Groh's goal is to persuade the public to accept required taxes and other revenue hikes, coupling the proposal with constitutional protection of the PFD would be a sufficient bribe.

3 The author is skeptical, pending further explanation, as to why the state takes a third of gross income, under Mr. Brena's plan, rather than a carefully scrutinized fraction of well-head value or net income.

4 Havelock, John; subtitle: *Why We Need An Alaskan Constitutional Convention.*, p. 169, Alaska Legal Publishing Company 2012. Unfortunately titled "Let's Get It Right," the work was seen as a criticism of the original constitutional authors, a criticism not intended. Free copies of the (overprinted) book are now available from the law offices of Havelock & Duffy.

5 Havelock p.160)

6 This chapter goes on to recommend a consideration of a dedication of part of the fund to Pre-K education, now totally unfunded.

7 As the author, with other members, pointed out in a report of Gov. Hammond's Growth Policy Council, any new industry has a negative effect on the tax-free economy in creating public costs but paying little revenue to meet them.

**Now is a time of deep crisis when the legal community can again assume leadership roles in hammering a well-crafted plan into shape for acceptance by the people and adoption by the legislature.**

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## Kenaitze Tribe, Alaska Court System announce joint-jurisdiction project



Kenaitze Indian Tribe's Executive Council, Executive Director, representatives of the Alaska state court system, and the state's executive branch pose following the ceremony.

By *M. Scott Moon*

The Kenaitze Indian Tribe has entered a historic government-to-government partnership with the Alaska Court System, signing an agreement in October to create a joint-jurisdiction state-tribal therapeutic court that will serve people across the central Kenai Peninsula later this year.

Representatives of the tribe, state court and the Attorney General Office signed the agreement during a ceremony at the Rabinowitz Courthouse in Fairbanks.

The Henu' Community Wellness Court will serve adults who face legal trouble stemming from substance use. The court will target drug and alcohol offenders – including those in families with Children in Need of Aid (CINA) cases – living in the tribe's service area, which spans from Cooper Landing south to Ninilchik. Defendants charged with property crimes may also be considered if the offense stems from substance use. The court's mission is to get to the root of participants' problems and give them the resources to pursue sobriety rather than send them directly to jail.

Two judges – Kenaitze Indian Tribe Chief Judge Kimberley Sweet and Kenai Superior Court Judge Anna Moran – will sit together for hearings at the tribe's courthouse in Old Town Kenai.

"We share the same values, we share the same passion," Sweet said.

Added Moran, "This is a chance for us to join together and bring wellness to our community."

The new court will have the capacity to work with 20 participants at a time, but the plan for now, Sweet said, is to gradually build toward that number.

The tribe, state court judges and the Department of Law have been meeting for the past several months with stakeholders and members of "Project TEAM" – Together Everyone Achieves More – to develop the joint-jurisdiction court. Project TEAM includes law enforcement, legal, health and other professionals from across the community. The Department of Justice, Bureau of Justice Assistance provided a training and technical assistance grant.

Leaders modeled the project on successful joint-jurisdiction efforts in California and Minnesota, where similar courts have reported reduced recidivism, increased public safety and improved relationships across communities.

Gov. Bill Walker, who attended the signing ceremony with Lt. Gov.

Byron Mallott, said Alaska has one of the highest recidivism rates in the United States.

He expressed support for the project, saying it's time to take a different approach when handling substance use cases.

"This is the direction we need to

Participation is voluntary, requiring the consent of the defendant, judge and District Attorney's Office.

Sweet said there are many benefits to participating in the program.

The court will help offenders get reestablished in the community. It will hold them accountable. It also

old and cannot be on parole, among other stipulations. The court will be open to all community members.

The program will consist of four phases – orientation and assessment, education and planning, skill development and feedback, and maintenance and transition. The phases will last a total of at least 18 months.

Those who enter the program will develop an individualized "Life Change Plan." The plan addresses everything from a participant's criminal influences, to their values and beliefs, to their temperament and personality, to family factors, and more.

Participants also are assigned a tribal probation officer and receive a comprehensive and integrated program of drug and alcohol treatment.

"It's all about helping broken people and broken families," Moran said.

The project aligns with the tribe's Dene' Philosophy of Care. The philosophy takes a whole-person approach toward health, focusing on not just one but all areas of a person's well-being, including physical, mental, spiritual and emotional wellness.

As part of the program, participants will receive behavioral health treatment at the Dena'ina Wellness Center, which is across the street from the tribe's courthouse.

"It's a major component of this," Sweet said.

Sweet also thanked members of Project TEAM and the many community partners who helped make the project possible.

*M. Scott Moon is communications manager for Kenaitze Indian Tribe.*



Alaska Attorney General Jahna Lindemuth introduces participants at a historic government-to-government meeting at the Rabinowitz Courthouse in Fairbanks to sign an agreement supporting the creation of a joint state-tribal therapeutic court.

be going," Walker said. "It's much more of a collaborative process, the collaborative relationship is what I'm interested in. So I'm very, very pleased with the work that's taken place for this to happen."

Henu' will be a post-plea, presentencing court, meaning offenders plead guilty to their charges and sentencing is delayed until the participant graduates, opts out or is discharged from the program. There is a more favorable outcome for those who graduate and a less favorable outcome for those who don't.

will be designed to provide peer-to-peer support for those involved. And the program will encourage and help participants to pursue employment and education.

"Instead of punitive, it's restorative," Sweet said.

In addition to the substance use connection, there will be specific eligibility requirements. An individual charged with an unclassified or class A felony will not be eligible, nor will anyone with an outstanding felony warrant from another state. Participants must be at least 18 years



Kenaitze Indian Tribe Chief Judge Kim Sweet and Kenai Superior Court Judge Anna Moran talk about the difference the new court will make in the lives of those it touches.



Kenaitze Executive Director Jaylene Peterson-Nyren shakes Gov. Bill Walker's hand following the ceremony. Lt. Gov. Byron Mallott, center, was also present as representatives of the tribe, state court and the Attorney General Office signed the agreement launching a new joint-jurisdiction wellness court for Kenai at the Rabinowitz Courthouse in Fairbanks.



Five new lawyers were admitted to the Alaska Bar Association at a Swearing-in Ceremony Nov. 9, 2016, in Anchorage. From left are Natelie Schiess, John Periman, Patrick Callahan, Kris Jensen, Maile Tavepholjalern.

## Anchorage attorney Jonathon Katcher receives pro-bono award

By William Conlon

Anchorage attorney and former Alaska Bar Association President Jonathon Katcher received the 2016 Attorney General's Award for Pro Bono Service Oct. 3. Since 1990, Jon has worked on over 20 cases on behalf of domestic violence victims through the Alaska Legal Services Corporation and the Alaska Network on Domestic Violence and Sexual Assault.

### Why do you take on domestic violence cases?

*I've been able to see from my years of practice how bad DV is, especially for children and their physical and emotional development. Representing victims is a way to make a difference in the lives of children and parents, including batterers themselves, who can start to break the cycle of violence.*

*The cases themselves involve easy work and hard work. The law is easy to get your arms around. The custody doctrines are relatively simple, and the parties almost never have substantial or complex property issues. But it's hard work because you are dealing with people in conflict with a former lover over their children.*

### Do you have any especially memorable cases?

*I have been doing this a long time, and so my most memorable case came from being able to see the long-term effects of my legal assistance for a family. I represented a woman whose husband was physically abusive and refusing to return their young child from a visitation. I persuaded the court to award custody of the child to the mother. The child went on to become an exemplary student and athlete, and is now studying aeronautical engineering in college. I ran into the child recently and we continue to maintain contact. That experience profoundly impressed upon me the impact my work could have.*

### What would you say to another attorney thinking about doing domestic violence pro bono work?

*Obviously I find it very fulfilling, but I tell other attorneys that there also is a selfish part to it too. We want the court to pay attention to our other cases. By assisting the court with its DV and what would otherwise be pro se custody cases,*



Alaska Attorney General Jahna Lindemuth joins Jon Katcher as he displays his award.

*we help the court more efficiently deal with a very large part of its case load. This gives the court more time to work on our other often more complex cases, the ones our other clients are paying us to bring to expedient and just resolutions.*

*One of the ways I do this is by working toward having the court appoint an attorney to represent the other side of my pro bono custody cases. Under Alaska law, if one party in a custody matter is represented by an attorney assigned by Alaska Legal Services or the Alaska Network on Domestic Violence and Sexual Assault, and the other party is indigent, the other party has a right to a court-appointed attorney, generally from the Office of Public Advocacy. Having both sides represented streamlines the process for the court and counsel and helps to efficiently get to an outcome of peace in the family.*

Jon has been married 37 years to his wife Kate. He enjoys skiing, biking, kayaking, music and movies, and practices civil litigation at Pope & Katcher in Anchorage.

If you are interested in donating legal help to domestic violence survivors, please contact Christine Pate at the Alaska Network on Domestic Violence and Sexual Assault at 907-747-2673 or email [cpate@andvsa.org](mailto:cpate@andvsa.org) or Laura Goss at the Alaska Legal Services Corporation 907-272-9431, [lgoss@alsc-law.org](mailto:lgoss@alsc-law.org).

William Conlon, is a legal assistant with the Alaska Network on Domestic Violence and Sexual Assault.

## Women lawyers honor newest Supreme Court justice

The Anchorage Association of Women Lawyers met Sept. 22, at a reception in honor of new Supreme Court Justice Susan Carney.



From left are Senior Justice Dana Fabe (ret.), Attorney General Jahna Lindemuth, Justice Susan Carney and Ninth Circuit Court of Appeals Judge Morgan Christen.



AAWL Board members from left are Chelsea Riekkola, Eva Gardner and Andrea Canfield.



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# Is your head in the cloud? Here's how it all works

*Continued from page 1*

You could say the Cloud is not unlike our first relationship with West Publishing back in the early 1980s.

Technology helps you grow and save money and pass the savings on to clients. With this goal in mind, our firm graduated from electric typewriters to our own server, including all the necessary wiring in walls and ceilings. Our server got its own room, and then the server room grew. The unpleasantness of the noise and heat of the room was exceeded only by cost, including downtime. Long story short, our server became too unreliable and expensive relative to the Cloud.

Our first step to the Cloud was with email. We opened an account with Goggle to pay for Gmail and obtain, as one of my children advised, economies of accountability. He observed that when our mail server is not operating, our firm might be the only one complaining. But if and when Gmail is down, many would be complaining.

Next we found Clio, a full-service Cloud platform for lawyers. Clio reportedly has at least 40,000 customers (2016 Legal Trends Report: Powered By Clio, at 11).

Clio has become our firm's technological foundation. In my book, you cannot say enough about Clio. In addition to billing, accounts receivable management, number-crunching, information and document storage and overall making us more efficient, Clio keeps us informed on advances in technology that lawyers ought to know including information about compatible Cloud-service providers. From Clio we have been introduced to Box.com, QuickBooks online, and Amazon Web Services among others.

Clio is convincing that Cloud computing is the future and the future is happening now. The top four in Cloud services are Amazon, Microsoft, IBM, and Google (Cloud Chronicles: How Open-Source Software and Cloud Computing Have Set Up The IT Industry For A Once-In-A-Generation Battle, *The Economist*, August 27, 2016, at 46.) Amazon has about 33% of the Cloud-services market worldwide; Microsoft, about 12%; IBM, about 7%; and

Google, about 5% (*Id.*). Amazon Web Services, the division that handles the Cloud for Amazon, had \$11 billion in sales over the year ending July 31, 2016 (*Id.*)

With economies of accountability, the Internet is reliable in the world as we know it. We use it every day, practically everywhere. The business genius of companies like Amazon, Microsoft, IBM and Google, and dare I say Clio, is based on the Internet. So while the Cloud may at first have the quality of a dream like the Internet itself, the Cloud is real.

Your data may be safer in the Cloud than on your own server or computer. Consider the question: What is your budget and plan to deal with ransomware? And what about theft of your portable device? Consider also that Clio can back up your data on Amazon.

From an early age I prepared my dad's invoices. Presentation is important. Clio does a great job in helping you prepare and email invoices with good presentation.

Clio regularly provides webinars. After signing on with Clio, one of our lawyers attended a Clio webinar and discovered Box.com, which allows us to organize files in the Cloud the same way we have organized physical files since 1977. When working on a document, such as a will or trust, you can open the document with Word and save your changes automatically to Box.com without having to download and upload.

The Cloud is what I call "organic," by which I mean Cloud-service providers update so regularly and naturally that you never seem to face a learning curve. You wake up in the morning and discover that the thing you had wished the Cloud service would do is now available – like saving document changes automatically to Box.com. In other words, the Cloud-service providers are always improving to make your use of their products easy and intuitive.

In the manner of those who love their work, Clio hosts an annual Cloud Conference. I have attended



"Technology helps you grow and save money and pass the savings on to clients."

two of them, both in Chicago; like Clio itself, the purpose of the annual conference is to make your law practice more efficient, and Clio's verve is displayed. You can do your own due diligence on Clio and meet complementary Cloud vendors and other lawyers who have moved to the Cloud.

After the 2014 Clio Cloud Conference, our firm moved to QuickBooks online to integrate with Clio. You find with Clio it is easy to record a client payment, and Clio allows you to transfer that information to QuickBooks online. On a monthly basis, we reconcile our Cloud data with our bank and credit card statements and prepare a report for our Board of Directors.

With an eighth-grade education, my dad taught me you can write a budget on the back of a paper napkin in a saloon. "A budget is you spend less than you make," he said. He emphasized that common sense tells you what you need to know to stay informed, as well as to prepare your tax returns. In our firm we have found the key is, first, to reconcile all Clio and QuickBooks data with current bank and credit card statements in order, second, to prepare monthly reports that, three, are customized by us to make sense to us.

The speakers at the Clio Cloud Conferences are excellent. One observation is they appear to assume away the issue of whether the practice of law is a business. My experience is that the rules on independent judgment and conflicts make the practice of law different from business, although lawyers need to work within a budget in order to be there for clients.

Rules unique to lawyers explain why John D. Rockefeller Sr.'s attorney, Samuel C. T. Dodd, never accepted stock in Standard Oil and why you never hesitate to disengage from a client when called for under the rules of professional conduct. A basic principle is that the loss of revenue to the lawyer from the disengagement is irrelevant to the decision. See my article entitled, "Is

the Practice of Law a Business?" This article may be found at [www.bgolaw.pro](http://www.bgolaw.pro) on the page entitled "Employment" under "About BGO."

The Clio Cloud Conferences are practical. At the 2016 conference, a Clio employee emphasized that email is not necessarily secure. Her words were more or less the following:

Say you want to send a message. If you want the message sent super-securely, you will have an armored truck show up at your office and take the message to the recipient. Think of email as a messenger on a bicycle. The messenger will probably get there no problem, but the messenger would be fairly easy to intercept.

A major topic at the 2016 Clio Cloud Conference was artificial intelligence. At some time in the not-to-distant future we will be logging onto a website to ask a computer a legal question, such as: "How does the Rule Against Perpetuities apply, if at all, in Alaska?" The computer will be able to teach itself and supply legal briefs on questions presented.

A speaker at the conference said artificial intelligence is where cameras in our Smartphones were in 2006. The same speaker mentioned at least one company on the Cloud that currently offers artificial intelligence for lawyers, *rossintelligence.com*, which makes the following claim: "ROSS: Your Brand New Artificially Intelligent Lawyer."

Remember hearing about email years ago and the belief that lawyers would never use it? Before you know it, computers that think may be a regular part of the practice of law.

The handbook that came with my Adler J5 portable typewriter states at page 2: "Confide in [the] 'J5.' The machine will show you everything by itself." You could say the same today about the Cloud.

*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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## NOTICE OF SUSPENSION

By order of the Alaska Supreme Court,  
entered October 28, 2016

### KEVIN G. BRADY

Member No. 9211068 - Anchorage, Alaska

is suspended from the practice  
of law for a period of 6 months,  
effective November 28, 2016 for:

- (1) failure to act with reasonable diligence;
- (2) failure to expedite litigation; and
- (3) Neglect.

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## Smack down calls for channeling fictional captain Hornblower

By Dan Branch

It's noon on Election Day. I'm eating a lunch designed to make my doctor happy and searching the TV guide for something to watch tonight. PBS and the networks only offer election coverage. Unless I spend the evening *Keeping Up With the Kardashians*, I'll have to settle for World Wrestling Entertainment's *SmackDown Woman's Championship*.

Intrigued by *SmackDown*, I check the WWE website. A writer for their homepage promises that during tonight's championship Becky Lynch, AKA Becky Balboa, AKA The Irish Lass Kicker will defend her title against Alexa Bliss. WWE describes Bliss as "sly, sassy and sporting a whole lot of ferocity [who] has been a fierce competitor her entire life. Lynch is said to be a fiery red head from Dublin who "trained for the squared circle at the age of 15." After prolonged exposure to the most divisive presidential race in my lifetime, I opt for a re-watch of *Horatio Hornblower*. I'm sick of posturing and body slams.

I wish we could vote for Captain Hornblower or his clone today. Like

our country, he was born on July 4, 1776. He lacked the inherited wealth or influence normally needed for a successful career in His Majesty's Navy. Starting as a seasick midshipman aboard the HMS *Justinian*, Hornblower overcame shipboard bullying, outwitted the enemy, and earned the respect of his admiral. Always, Hornblower sacrificed his own interest to further those of his country.

Captain Hornblower built shipboard consensus through self-sacrifice and the fair treatment of those he led. Oh Horatio, America could use your skills and temperament today. But, we can't rely on fictional characters, no matter how well rendered, to suture America's social fabric. For that, we need real statesmen.

\*\*\*

It's November 9 — the day after Election Day. Mr. Trump is our president-elect. He'll never channel Horatio Hornblower but I pray that hidden behind his campaign persona is a statesman.



"Oh Horatio, America could use your skills and temperament today."

Our country has been blessed with many statesman-like presidents. Often they show the most class at the end of their terms. Harry Truman confirmed his statesman-like integrity by refusing to cash in on his fame by becoming involved with anything that would commercialize "the prestige and dignity of the office of the presidency." (Truman's words). Jimmy Carter and his wife use their fame to bolster charities like Habitat for Humanities.

Often presidents show class in the way they transfer power. As he was leaving the White House for the last time, President George H.W. Bush wrote a kind and helpful letter to the newly elected President Bill Clinton. Even though Clinton defeated his attempt for a second term and intended to change the course of the country, Bush wrote, "don't let the critics discourage you or push you off course ... you will be our president when you read this note ... your success now is our country's

success. I am rooting hard for you."

Today, the day after Election Day 2016, President Obama continued this genteel tradition by publicly inviting President-elect Trump to the White House "to talk about making sure that there is a successful transition between our presidencies." After acknowledging President George W. Bush's professional and gracious efforts to aid in a smooth transition to his government, Obama promised that he and his team will "work as hard as we can to make sure that this is a successful transition for the president-elect."

Like the first President Bush did for incoming President Clinton, Obama is rooting for Trump's success "in uniting and leading the country." He reminded us "the peaceful transition of power is one of the hallmarks of our democracy." He promised "over the next few months, we are going to show that to the world." Hornblower could not have said it better.

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](mailto:avesta@ak.net)

## Lindemuth leads her first District Attorney Conference

By Clint Campion

The Alaska Department of Law, Criminal Division held its 2016 District Attorney/Victim Witness Paralegal Conference Oct. 26-28, 2016, at the Anchorage Sheraton Hotel. This was the first conference under the new leadership of Attorney General Jahna Lindemuth.

The title of this year's conference was "Prosecuting Domestic Violence in a Post-SB 91 World," and featured presentations from leaders from the Department of Corrections, the Office of Victims' Rights, the Alaska Court System, members of the Criminal Division, and instructors from AEquitas.

AEquitas is an organization that provides training to prosecutors in the areas of violence against women and human trafficking. The funding for the conference was provided by the STOP Violence Against Women grant. Conference attendees included state prosecutors from all across Alaska from Kotzebue to Fairbanks to Ketchikan. Prosecutors from the Anchorage Municipal Prosecutors Office were also in attendance.

Attorney General Jahna Lindemuth kicked off the conference with a presentation. She urged

prosecutors to maintain a high level of professionalism in their dealings with opposing counsel, the court, victims and the communities served.

The conference mainly focused on the changing world of law enforcement following the passage of Senate Bill 91, the legislation seeking to reform Alaska's criminal justice system. Prosecutors were instructed on the purpose of criminal justice reform and its genesis from the evidence-based recommendations provided by the Alaska Criminal Justice Commission. Presenters provided information on how the law was being implemented, including the emphasis on treatment instead of jail time.

The conference also included two ethics presentations: "Ethical Considerations for Prosecutors in Intimate Partner Violence Cases" and "Safeguarding Victim Privacy: A Plan for Action for Prosecutors (Ethics)."

On Thursday night, the annual Criminal Division Awards Banquet took place at the Anchorage Sheraton. Longtime Ketchikan District Attorney Steve West was named the Prosecutor of the Year. Kenai Victim Witness Paralegal Anna LaRoche was named the Paralegal of the Year. Bethel Assistant District Attorney Bailey

Woolfstead was awarded the Making a Difference Award which recognizes professional commitment and dedication to enhancing the communities she serves. Assistant Attorney General Adam Alexander of the Office of Special Prosecution was awarded the Model of Excellence Award which recognizes a prosecutor whose work enhances the public image of the Criminal Division. The support staff at the Office of Criminal Appeals (Mackenzie Milliken, Nancy Anthony, and Sylva Ferry) were awarded the Team Award.

For the first time, the Criminal Division gave awards for the trial of the year and the appellate brief of the year. These awards are designed to highlight the litigation that had the most significant impact on a community. The Fairbanks Four Litigation was recognized as the trial of the year. Assistant Attorneys General Adrienne Bachman, Bob Linton, and Ali Rahoi represented the State of Alaska in the litigation. Assistant Attorney General Diane Wendlandt was recognized for her briefs in the appellate litigation involving the admissibility of polygraph examination testimony.

Clint Campion is the Anchorage District Attorney.



Adam Alexander receives the Model of Excellence Award from Attorney General Jahna Lindemuth and Division Director John Skidmore.



Bailey Woolfstead receives the Making a Difference Award from Attorney General Jahna Lindemuth and Division Director John Skidmore.



John Novak is recognized for 25 years of service to the Alaska Department of Law.

ALASKA BAR ASSOCIATION  
ETHICS OPINION NO. 2016-1

## May a Lawyer Surreptitiously Track Emails and Other Documents Sent to Opposing Counsel?

**Issue Presented:** Is it ethically permissible for a lawyer to use a “web bug” or other tracking device to track the location and use of emails and documents sent to opposing counsel?

**Conclusion:** No. The use of a tracking device that provides information about the use of documents – aside from their receipt and having been “read” by opposing counsel – is a violation of Rule 8.4 and also potentially impermissibly infringes on the lawyer’s ability to preserve a client’s confidences as required by Rule 1.6.

**Background:** A member of the Alaska Bar recently received an email with a “web bug” from opposing counsel. A web bug is a technology tool that tracks certain information about the document to which it is attached. A common method of “web bugging” – used in e-mail newsletters to help track readers, for example – involves placing an image with a unique website address on an Internet server. The document at issue contains a link to this image. The image may be invisible or may be disguised as a part of the document (e.g., part of a footer). When the recipient opens the document, the recipient’s computer looks up the image and thereby sends certain information to the sending party.

One commercial provider of this web bug service advertises that users may track emails “invisibly” (i.e., without the recipient’s knowledge) and may also track, among other details:

- when the email was opened;
- how long the email was reviewed (including whether it was in the foreground or background while the user worked on other activities);
- how many times the email was opened;
- whether the recipient opened attachments to the email;
- how long the attachment (or a page of the attachment) was reviewed;
- whether and when the subject email or attachment was forwarded; and
- the rough geographical location of the recipient.<sup>1</sup>

This provider and similar services give the sender options to alert the recipient that the email contains a web bug and is being tracked, but the sender also has the ability not to disclose this information – which

indeed seems to be the main point of the product. If the sender elects not to notify the recipient that the email or document contains a web bug, some email systems or software programs (e.g., Adobe) may either reject the web bug or affirmatively notify the recipient of its existence. Not all email systems or software programs, however, will identify a tracking device and notify the recipient. And, given the speed at which this technology is developing, it cannot be said with any assurance that detection programs will be consistently effective in discovering and reporting web bugs or other tracking devices.

**Analysis:** Rule 8.4(c) provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” In earlier opinions, the Committee has offered some guidance as to the type of conduct that would run afoul of this rule. For example, a lawyer instructing a court reporter not to inform opposing counsel that the lawyer had requested transcription of a deposition would be unethical if the lawyer knew that opposing counsel expected to receive notice.<sup>2</sup>

A closer analog to the current situation arose in Opinion 2003-1, which withdrew earlier ethics opinions prohibiting the undisclosed recording of telephone conversations by a lawyer. In Opinion 2003-1, the Committee noted that in the 1970s there was a general assumption that anyone speaking with a lawyer would justifiably believe that the conversation was not being recorded.<sup>3</sup> Given that assumption, a lawyer who recorded a conversation without giving appropriate notice or obtaining consent had engaged in misrepresentation or deceit.<sup>4</sup> In Opinion 2003-1 the Committee noted that with the increasing prevalence of telephone recording devices this assumption no longer held true. Accordingly, there was no implied representation that lawyers would not record conversations with other participants and no basis for a *per se* finding of dishonesty, fraud, deceit, or misrepresentation if a recording was made without disclosure.<sup>5</sup>

The use of “web bugs” and other tracking devices is fundamentally different from the permissible recording of conversations by a lawyer. Unlike the telephone recording situation, the Committee believes that it is entirely reasonable for a lawyer to assume that emails, documents and other electronic communications received from an opposing lawyer will not be “bugged.” And, consistent with Opinion 88-4, the Committee likewise believes that it is unethical to use tracking devices on electronic communications.

Most importantly, a core difference from the recording of conversations is that discussions with opposing counsel are not privileged or confidential. Whether or not the conversation is recorded, the communication has been knowingly shared with opposing counsel. This is not true with a tracked electronic communication, especially when the tracking device is undisclosed. If the tracking device is performing as designed, a lawyer will have no idea that the sending lawyer is tracking the lawyer’s handling of the communication. The tracking device could enable the sending lawyer to learn how much time the receiving lawyer

spent reviewing the communication – including even specific pages of documents – or how frequently the communication was viewed (a proxy for how important the receiving lawyer deemed it to be), whether and when it was forwarded either to the client or co-counsel or otherwise, the location of the recipients, and the details of the recipients’ review of the document.

As just one example, assume that a client informs her lawyer that she has moved to another state but does not want her whereabouts disclosed to anyone else for any number of reasons. Opposing counsel sends a bugged email to the client’s lawyer that includes an attached document for the client’s signature. When that email is forwarded to the client, the tracking device could improperly obtain and deliver to the sending lawyer confidential information about the client’s general location.<sup>6</sup> Or, assume that the parties are in settlement negotiations and one lawyer sends a bugged email with a draft settlement agreement. Based on the report from the tracking device, the sending lawyer learns that the lawyer focused most of her time on the third page; the lawyer then forwarded the document to a city where the client lives; this recipient focused on the sixth page and then sent the document back to the lawyer; and the lawyer subsequently focused solely on the sixth page of the draft. This gives the sending lawyer access to attorney-client protected information and extraordinary insight as to which sections of a document the lawyer and her client found most important.

While the surreptitious use of tracking devices is especially troubling, even the disclosed use of a tracking device when communicating with opposing counsel is not permissible. Insofar as the tracking device allows the sending lawyer to intrude upon the attorney’s work product by tracking the attorney’s use of that document, it constitutes an unwarranted intrusion into the attorney-client relationship.<sup>7</sup> Seeking to invade that relationship through the use of tracking devices (whether disclosed or not) is dishonest and unethical. And, it is entirely possible that a busy receiving lawyer may not notice the disclosure, may not fully appreciate what it means, or consider whether client consent is necessary before agreeing (expressly or implicitly) to opposing counsel putting an electronic tracking device on documents.

The Committee notes that Rule 1.6(c) requires a lawyer to take “reasonable precautions” transmitting a communication that includes a client confidence or secret so as to avoid allowing the information to come into the possession of unintended recipients, including information in electronic form.<sup>8</sup> The Committee does not interpret this duty as requiring the lawyer to presume that opposing lawyer will seek to “bug” communications and requiring the lawyer to take active steps to detect and prevent such tracking devices. As a practical matter, with rapidly changing technology and software that may be impractical or even impossible for the receiving lawyer to accomplish. The Committee believes that the only reasonable means of protecting attorney-client communications and work product in this situation is to bar the lawyer send-

ing the communication from using these types of tracking devices.

The Committee therefore concludes that tracking electronic communications with opposing counsel through “web bugs” impermissibly and unethically interferes with the lawyer-client relationship and the preservation of confidences and secrets.<sup>9</sup> Doing so reflects, at a minimum, the lack of straightforwardness that is a hallmark of dishonest conduct.<sup>10</sup> Sending “bugged” emails or documents or other communications with embedded tracking devices constitutes an impermissible infringement on the lawyer’s ability to preserve a client’s confidences or secrets as required by Rule 1.6<sup>11</sup> and violates Rule 8.4(a) and (c).

Approved by the Alaska Bar Association Ethics Committee on September 1, 2016.

Adopted by the Board of Governors on October 26, 2016.

## Footnotes

1 See Live Sample Receipt of ReadNotify Email Tracking History, <http://www.readnotify.com/readnotify/show.asp/0015c797da9a070e0a72c9dd2769d956.html> (last visited August 29, 2016).

2 See Opinion 88-4 (applying DR1-102(A)(4), the precursor to Rule 8.4(c)).

3 See Opinion 2003-1, at 2 (discussing withdrawn opinion 78-1 and ABA Formal Opinion 337).

4 See *id.*

5 See *id.* at 3. (“In the absence any rule or statute specifically prohibiting lawyers from recording conversations without notice, we are confronted with the issue of whether a lawyer violates any Rule of Professional Conduct by reliably preserving information through recording, without notice to other parties to the conversation. The act of recording a conversation, standing alone, is not harmful to a party who has not been advised of or consented to the recording. An undisclosed recording might, however, be used in a manner that would be harmful to an individual. Examples include recording or preserving only portions of the conversation to distort its content, using a recording to embarrass the other party to the conversation or a third party, or improper disclosure of a client confidence contained in a recording. But any such misuse of a recorded statement can be addressed by application of the Rules without straining to interpret the Rules as creating a *per se* prohibition against undisclosed recording.”)

6 Cf. Idaho Bar. Op. 96 (1977) (concluding that disclosing a client’s location would be a violation of the lawyer’s duty to preserve the client’s confidences). The use of “delivery receipts” and “read receipts” through Outlook and similar email services does not intrude upon the attorney’s work product or track the use of a document, and therefore is not at issue here. Those types of receipts are functionally comparable to the receipt one may receive from the use of certified mail.

7 See Rule 4.4 Comment (“It is impractical to catalogue all such rights [of third persons], but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.” (emphasis added)). Arguably, the tracking device creates unauthorized “communications” between the client and opposing counsel in violation of Rule 4.2.

8 See Opinion No. 1998-02 (“Communication by Electronic Mail”) and Opinion 2014-03 (“Cloud Computing”).

9 See N.Y.S.B.A. Opinion 749 (2001) (finding that the surreptitious tracing of email and other electronic documents “would violate the letter and spirit” of the disciplinary rules, including rules prohibiting dishonest and deceptive conduct and rules relating to the protection of client secrets).

10 See, e.g., *Matter of Shorter*, 570 A.2d 760, 767-68 (D.C. Cir. 1990) (describing “dishonesty” as encompassing conduct evincing “a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness” (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967))).

11 Rule 1.6(a) (“A lawyer shall not reveal a client’s confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. . . .”).



Have a Safe and Happy

Holiday  
Season!





NEWS FROM THE BAR

## Board of Governors action items for Sept. and Oct. 2016

### September 30, 2016

- Appointed Bob Groseclose to the Board of Governors vacancy created by Gene Gustafson's resignation from the board.

### October 25 & 26, 2016

- Approved the results of the February 2016 bar exam and recommended 24 people for admission; recommended the admission of six reciprocity applicants and two applicants by UBE score transfer.
- Adopted a new health insurance plan for the Bar staff following the cancellation of the Bar group plan, saving up to \$100,000 in 2017 on the new plan.
- Amended the Standing Policies of the Board by making the mandatory biannual statewide CLE requirement for Sections optional.
- Renewed the contract with Duke Law School to publish the *Alaska*

*Law Review* for another three years.

- Adopted the 2017 budget as amended.
- Adopted a stipulation for a public censure in a discipline matter.
- Approved the Lawyers' Fund for Client Protection panel recommendation for reimbursement of \$11,850 in 2016L003.
- Adopted the ethics opinion entitled "May a Lawyer Surreptitiously Track Emails and Other Documents Sent to Opposing Counsel?"
- Discussed a proposed ethics opinion "Attorney's Ability to contact government official who is a represented party to discuss settlement or other policy related to the litigation" and asked that the committee edit it and bring it back in January.
- Reviewed the results of the Alaska Commission on Judicial Conduct advisory poll and voted to send the names of Marc June and Don McClintock to the governor for consideration for appointment.
- Heard about the Virtual Law Clinic launched by the Bar in October along with 36 other states.
- Appointed Senior Judge Ralph Beistline as *Bar Rag* editor.
- Appointed Molly Brown to the vacant Board secretary position.
- Approved the September 8 and September 30 board meeting minutes.
- Appointed a subcommittee to review the Bylaws: Brown, Wilkinson and Groseclose.
- Requested a draft of a proposed rule change to Bar Rule 28 regarding public censures.

## My Five

Asking people to name their top five favorite songs presents a uniquely difficult challenge. It also provides insight (if you consider yourself an amateur psychologist) into the personalities of the various members of the legal community in Alaska. In this installment three lawyers new to Anchorage share their My Fives:

### Patrick Callahan, associate at Davis Wright Tremaine

- "Glamorous Indie Rock and Roll" – The Killers/Hot Fuss Ltd. ed. version
- "Chances Are" – Garrett Henlund/Country Strong Soundtrack
- "Nine in the Afternoon" – Panic at the Disco/Pretty Odd
- "Fire and Rain" – James Taylor/Sweet Baby James
- "Over the Rainbow/What a Wonderful World+ – (Israel Kamakawiwo'ole/Ka 'Ano'i)

### Maile Tavepholjalern, associate at Sonosky Chambers et al

- "Somewhere over the Rainbow" – Israel Kamakawiwo'ole
- "Blowin' in the Wind" – Bob Dylan
- "Walking on Broken Glass" – Annie Lennox
- "Hakuna Matata" – Jimmy Cliff
- "Eye of the Tiger" – Survivor

### Kris Jensen, associate at Dan Allen and Associates

- "In the Hall of the Mountain King" – Edvard Grieg
- "Save the Whales" – Doc Schultz and the Last Frontier Band
- "Mary, Mary+" – Chumbawamba
- "Jimmy Iovine" – Macklemore & Ryan Lewis
- "It'll be a long time" – The Offspring

# 2017 Alaska Bar Association Budget

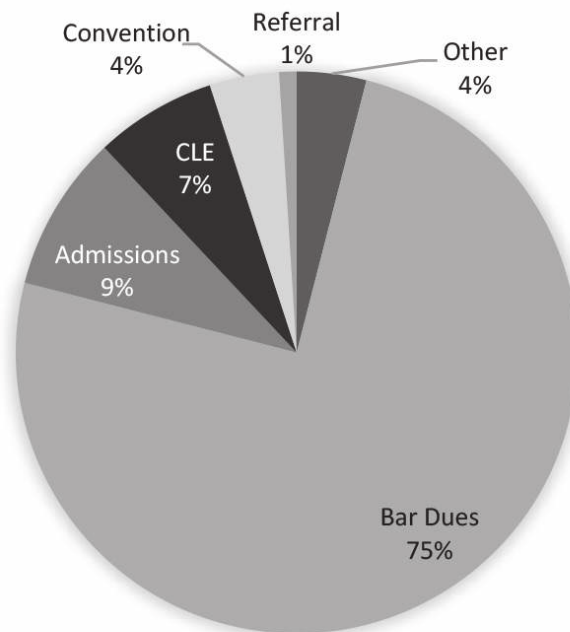
### REVENUE

AdmissionFees-Bar Exams .....	98,800
AdmissionFees-MotionAdmit .....	45,000
AdmissionFees-Exam Soft .....	8,700
AdmissionFees-UBE .....	14,400
AdmissionFees-Rule 81s .....	84,500
CLE Seminars .....	197,590
Accreditation Fees.....	4,600
Lawyer Referral Fees.....	30,460
Alaska Bar Rag - Ads,Subs .....	13,590
Annual Convention.....	128,350
Substantive Law Sections .....	27,805
AccountingSvc Foundation .....	10,718
Membership Dues .....	2,142,600
Dues Installment Fees .....	9,800
Penalties on Late Dues .....	16,165
Disc Fee & Cost Awards .....	0
Labels & Copying.....	1,087
Investment Interest .....	45,522
Miscellaneous Income .....	200
<b>SUBTOTAL REVENUE.....</b>	<b>\$2,879,887</b>

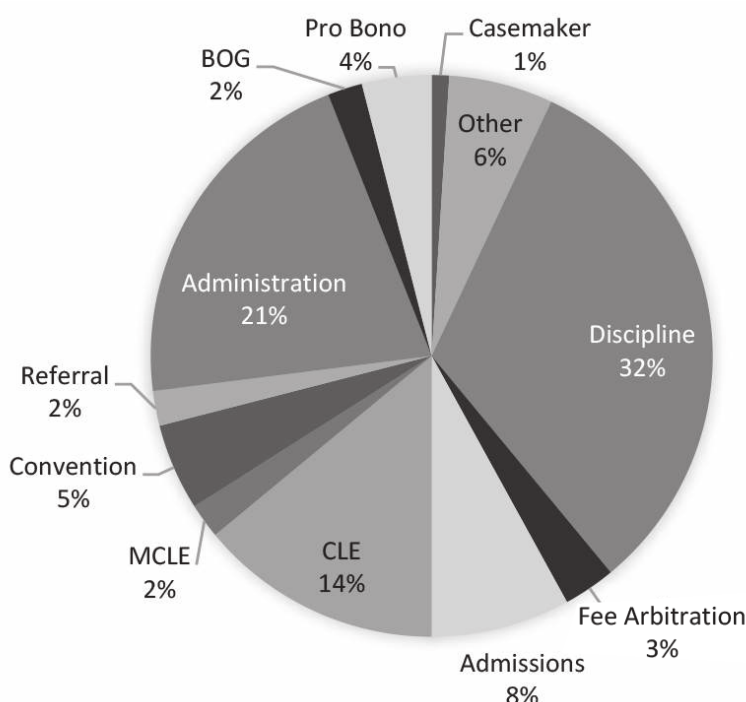
### EXPENSE

BOG Travel.....	55,095
Committee Travel.....	1,000
Staff Travel .....	56,240
New Lawyer Travel .....	3,000
CLE Seminars .....	174,199
Free Ethics Course.....	4,640
Alaska Bar Rag .....	32,826
Bar Exam .....	53,732
Other Direct Expenses.....	82,142
Annual Convention.....	129,323
Substantive Law Sections .....	6,102
AccountingSvc Foundation .....	10,718
MLK Day .....	5,000
Casemaker .....	24,349
Committees.....	8,399
Internet/Web Page.....	13,308
Credit Card Fees.....	66,642
Miscellaneous .....	9,460
Staff Salaries.....	1,085,891
Staff Payroll Taxes.....	89,430
Staff 401k Plan .....	54,294
Staff Insurance .....	469,933
Postage/Freight.....	16,781
Supplies.....	11,197
Telephone .....	880
Copying .....	6,440
Office Rent .....	168,146
Depreciation/Amortization.....	75,028
Leased Equipment .....	34,902
Equipment Maintenance.....	56,284
Property/GLA/WC Insurance .....	32,840
Programming/Database Maint.....	35,611
Temp Support Staff/Recruitment.....	11,022
<b>SUBTOTAL EXPENSE .....</b>	<b>\$2,884,854</b>
<b>NET GAIN/LOSS .....</b>	<b>\$(4,967)</b>

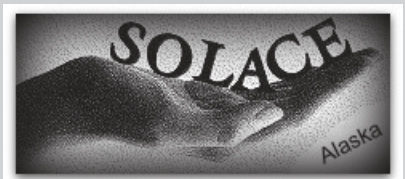
### Revenue



### Expense



## DO YOU KNOW SOMEONE WHO NEEDS HELP?



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

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

Fairbanks: Aimee Oravec,  
aimee@akwater.com

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

Anchorage: Mike Walsh  
mike@wheelslaw.com

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

# Understanding AS 9.10.240: play of parties, complex facts

By Peter J. Aschenbrenner

Senator Whitekeys stands aghast.

"I am aghast," he repeats himself.

"Congratulations on your elevation to the Senate," The Governor and I tender our respects.

"What am I supposed to do with a problem that is 'inherently fact-specific'?" he asks.

"Are you struggling with 'myriad and complex factual allegations,'" The Sarah asks.

Dolley Madison and her husband join the assembly.

"The Supreme Court's been cleaning up after the Legislature?" Dolley asks. "And what's with this Dolly Parton? I could sic my solicitors on her at any time."

"Perhaps 'should' is the proper modal," I apply a modest corrective.

"I said 'sic,'" Dolley Madison counter-corrects me.

"Another vast novelization from the Alaska Supreme Court," Jimmy finishes speed-reading. "[2016] Supreme Court No. 7115, dated 5 August, if I may render my citation after the style of the Mother-Land."

"The Supreme Court never gets it wrong," I sigh. "Before our assembly lies some bleak and barren territory."

"It's the *Jackson* case," Dolley tries her hand. "If I may clear matters up, a suit followed by a motion for stay would have resolved the issue. *Statim*, as they say."

"That's quite true," Bertrand Russell appears with his new 'girl Friday', Roz Russell. He makes the introductions.

"Technically, Dolley's reasoning is impeccable. Let's say that you feel aggrieved – think me and Cary Grant, right –?" Roz interrupts herself, "and are eager to go to court."

"So what?" Bertrand shrugs. "These days a lawsuit is just a few words mumbled over you by a judge."

"What Jackson should have done was this. Sue everyone and then move the Superior Court to stay proceedings. That is, when the defendants whined about getting sued too soon."

"Or even better, we'd like to see defendants be required to tell the court," the Chief Justice addresses the assembly, "when Jackson's suit *would* be timely filed."

"Better too soon than too late," Dolley agrees. "That's Bladensburg humor," she adds, "for Bertrand Russell's benefit."

"This sort of functionalism goes on all the time," Jefferson and Hemmings hove to and drop anchor.

"Mootness, justiciability, ripeness, political questions," Sally studies her nails. "It's all about the timing."

"Please go on," Russell asks Hemmings. "I'm enthralled."

"Imagine that someone came to court," Roz continues, "and wanted to have a conversation with the court about timing. Is that permissible?"

"Does the court have jurisdiction," Bert considers this point, "to consider its own jurisdiction?"

"It seems obvious that Jackson should have gotten a hearing on his motion for stay," Madison consults Jefferson's *Manual of Parliamentary Practice*. "If the court ruled Jackson filed suit too early, then he could have moved – within the canonical year – to set aside that order, if in that (follow-on) year, events transpired that would justify further Rule 60(b) proceedings."

"And in the second follow-on year, another motion could be filed," the Chief Justice continues this 'train of reasoning', "until the defendants gave up and let Jackson have his day in court. Timely filed, that is, *ab initio*."

"Jackson could have insisted that courts do what they are good at doing: deciding when it's right to have a case about having a case."

The Roz, The Sarah and The Dolley consult the algorithms appurtenant. "Yep, that about covers it."

"Or," I intervene, "he could have sued, gotten dismissed and then refiled in the one-year interval permitted him under AS 09.10.240."

"I hate to say this," The Governor carefully considers the relevant combinations and permutations, "but Aschenbrenner may be right. He's been scribbling away in the Bar Rag for 16 years, so it had to happen sooner or later."

Senator Whitekeys calms the galleries. "The code-law in question is titled 'Commencement of action after dismissal or reversal' and provides in pertinent part that: 'If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff ... may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal.'"

"Adding Civil Rule 4(j) into the mix, a suit filed on 1 January 2011, could be refiled mid-2013 and still be timely. File suit, wait to serve, serve, litigate the timing issues in Superior Court, wait out the one year, refile, wait to serve and see what 2.5 years has brought about in the way of 'myriad and complex' facts."

"Didn't Walter Bagehot say that?" Roz Russell speaks up. "I refer to, 'the play of the parties, the unforeseen formation of a guiding opinion, are complex facts, difficult to know, and easy to mistake.'"

"And he sent *The English Constitution* to press in 1867," Governor Egan joins in. "A year sacred to all Alaskans."

"Jackson could always appeal the first dismissal," Dolley adds. "That would put another couple of years back on the clock."

"I think there's a due process violation in here," Bertrand Russell argues. "After all, the statute preserves defenses but sets different hurdles for claims. 'All defenses available against the action, if brought within the time limited, are available against the action when brought under this provision.'"

"This is true," the only former Pharmacist-Governor in the assembly declares. "The plaintiff should be able to preserve the status quo, just like the defendants. He can do so by motion, under the Aschenbrenner-Madison conjecture. If the defendants have the right to litigate

timing and preserve their substantive defenses, under the relevant code-law, so should the plaintiff be able to litigate whether he is obliged to litigate at that time. Or wait to do so."

"Sauce for the goose," Roz and Bertrand agree. "Sauce for the gander."

"The legislature nodded?" I ask. "Oh wait, this is territorial law and long-past its sell-by date. Or 'different possible dates', as per n. 12 of the Slip Opinion."

"Courts indulge themselves in the 'case within a case' by engaging in sidebars," our Chief Justice joins in. "Is the case too ripe, not ripe enough? Too early? Too late? Is there too much to decide? Not enough?"

Jefferson nods his agreement. "Wasn't the plaintiff's name 'Jackson'?" Jefferson asks. "Do you think he's related –?"

"To a President?" I gasp.

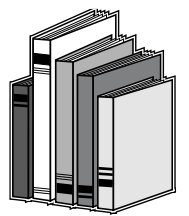
Sally signals me to remain calm. "We're all just one big happy family."

*Peter J. Aschenbrenner has practiced law in Alaska since 1972, with offices in Fairbanks (until 2011) and Anchorage. From 1974-1991 he served as federal magistrate judge in Fairbanks. He also served eight years as a member of the Alaska Judicial Conduct Commission. He has self-published 16 books on Alaska law. Since 2000 the Bar Rag has published 48 of his articles.*

## Law Library News

### Law library coming together after remodeling

By Susan Falk



Have you visited the Anchorage Law Library since our remodel was completed last year? Well, what are you waiting for? Our new space is beautiful, and recent changes have only improved the function and aesthetics of the library.

While construction in the library concluded in 2015, the last element of the remodel is of more recent vintage. We are thrilled to participate in Alaska's One Percent for Art in Public Places program, which designates 1% of the capital costs of construction in public buildings for the acquisition and installation of permanent art displays. The library is proud to showcase Susan Joy Share's Celestial Series, five handmade ceramic tile mosaics now hanging above the reference desk. The individual pieces are titled Vortex, Orb, Eye, Spin and Mandala. A sixth piece of Ms. Share's art, Far Away, hangs in our new mezzanine-level reading balcony.

While our beautiful new art brightens up the library's space, the other recent change is more substantive. Anchorage library staff has made great progress in unpacking and rehousing the thousands of boxes of books we placed in storage at the beginning of the remodel project. Much of this work is happening behind the scenes, and most of the volumes are being shelved in the basement, out of public view. But we are also beginning to fill the shelving on the main floor.

Some of you will be happy to hear that selected reporter volumes have been unpacked and shelved in the public stacks. You may now read cases in hard copy volumes of the Pacific Reporter, the Federal Reporter, the Federal Supplement, and the Supreme Court Reporter. Only more recent volumes are available in the public stacks; older volumes will be shelved in the basement, and many of these remain in boxes pending decisions regarding space allocation. American Maritime Cases are also shelved on the main floor.

In addition to reporters, some titles in the Government Documents collection have been placed in the public stacks. Decisions of the Interior Department are available now, including Interior Board of Indian Appeals and Interior Board of Land Appeals. Commerce decisions are next on the list. The official version of the United States Code has also been reshelved, though these volumes are housed downstairs.

While we still have empty shelves and full boxes, the Anchorage library staff has made tremendous progress in rehousing our collection. If you are in the Anchorage area, come visit us, enjoy our art displays and peruse our newly filled shelves.

*Susan Falk is the state law librarian.*



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### Correction



In the last edition we incorrectly identified one member of the territorial lawyers in the group photo. No. 8 should have been identified as Virgil Vochoska, '60.

Virgil Vochoska, '60

# Alaska law school growing

By Christian Halliburton and Holly Johanknecht

Fifteen years ago, Seattle University School of Law began its Alaska Summer Program as a way to connect law students to the legal issues and professional practice needs that drive this great state. Over the years, and in the course of training more than 150 law student participants, the Law School has had the opportunity to partner and collaborate with dozens of local legal organizations. Building on those long-standing relationships, Seattle University recently deepened its commitment to legal education in Alaska with the 2015 launch of our ABA-approved Alaska Satellite Campus (“ASC”) housed at Alaska Pacific University’s Grant Hall. In addition to the Alaska Summer Program, the ASC also now operates a full-time Alaska 3L Program, which allows rising 3L students from any ABA-accredited law school to complete their JD degree while living, working and studying in Alaska. After a strong start in the fall of 2015, the Alaska 3L Program is now midway through its second academic year and has experienced modest but meaningful growth as planned. Our students are a mix of long-time Alaskans who are coming home to get a jump on their professional careers, and students from other regions who have developed a strong connection to the state and hope to make Alaska their new home. The diversity of our student body coupled with the intentionally small class size creates a dynamic classroom environment in which all of the many varied perspectives present in the room can be heard. This year’s fantastic student cohort hail from law schools all across the country, including those in Maine, Oregon, Colorado and Washington.

A hallmark of both the Alaska Summer and 3L Programs is an emphasis on experiential learning. All ASC students are placed in either an internship or an externship position that allows them to apply their law school training and to explore practice areas that may appeal to them as they begin their transition into the profession. This component of the program has a broader impact beyond providing our students real-world legal work experience. Because the absence of a law school in the state has left Alaska agencies and firms without a reliable source of year-round student associates,

Seattle University has worked hard to ensure that students are placed in professional positions where they will have an opportunity to use their talents to serve our most pressing needs, and we recognize that connecting our students to the Alaska legal community is critical to the ASC’s success.

The intentionally small program size and elective curriculum model also allows the ASC to tailor its course offerings to focus on Alaska’s unique legal issues and history, and to offer new classes based on the changing legal climate in the State. This fall we offered courses in Environmental Policy, Alaska Criminal Justice, Government Contracts, including Small Business Association Programs and Alaska Native Corporations and Advising Startup Companies. These classes are taught by local subject matter experts drawn from Alaska’s bench and bar, which both gives students the opportunity to learn about issues that will most impact their lives and practices in Alaska, and also allows some of Alaska’s leading legal experts to share their knowledge and experience in a structured classroom setting. Our goal is to offer an Alaska-specific curriculum that will allow program graduates to begin their careers here uniquely prepared to address Alaska’s most compelling legal and social issues.

In addition to our JD candidates, we were pleased to welcome two non-degree students to study at the ASC. Both experts in their respective fields, these students have provided a new level of professional perspective to our Environmental Policy and Government Contracts class. The ASC is open to community members who have an interest in participating in our academic programs, and all are welcome to contact our offices to find out more. Our class offerings for spring 2017 include Alaska Constitutional Law, Community Lawyering in Alaska and Trial Advocacy for Alaska.

The ASC is now accepting applications for the 2017 Alaska Summer Program and for the 2017-18 Alaska 3L Program, and we welcome any and all questions, comments, suggestions and referrals – please feel free to email Faculty Director Christian Halliburton at [cmhall@seattleu.edu](mailto:cmhall@seattleu.edu) or Assistant Director Holly Johanknecht at [johanknh@seattleu.edu](mailto:johanknh@seattleu.edu) or visit [www.law.seattleu.edu/Alaska](http://www.law.seattleu.edu/Alaska) for more information.

# Bar People

## Corporate commercial litigator joins Davis Wright Tremaine

**John Parsi**, a corporate commercial litigator with experience in a variety of industries, including oil and gas, construction, and insurance, has joined the litigation practice group at **Davis Wright Tremaine LLP** and will practice in the firm’s Anchorage office.

Prior to joining the firm, Parsi was with K&L Gates’ Anchorage office where he represented a variety of clients in both state and federal courts. His career also includes serving as special assistant to the attorney general, Alaska Department of Law; as a judicial clerk to Justice Morgan Christen, Alaska Supreme Court; and as a law clerk for the federal public defender for the District of Alaska.

Parsi is actively involved in a number of community service efforts, including serving as a volunteer attorney for both the Alaska Network for Domestic Violence and Sexual Assault and the Alaska Institute of Justice – Alaska Immigration Justice Project. He is also on the board of directors of Alaska Common Ground, and is an artist member of the Anchorage Concert Association Innovation Team.

Parsi earned his B.S., M.A. and Ph.D. from Arizona State University and his J.D., cum laude, from the University of Michigan Law School.



John Parsi

## Caulfield and Strickland join firm

Jermain, Dunnagan & Owens, P.C. is pleased to announce that **Michael D. Caulfield** has joined the firm’s school law practice. A lifelong Alaskan, Caulfield joined the firm after clerking with the Honorable William B. Caey of the Alaska Superior Court in Ketchikan.

**Allison G. Strickland** has joined the firm expanding the firm’s civil litigation practice. Strickland has a background in personal injury, aviation law, transportation litigation, products liability, real property disputes, and professional malpractice.



Michael Caulfield



Allison Strickland

## UAA office announces award

The University of Alaska Anchorage Office of Alumni Relations and the UAA Alumni Association are excited to announce the recipients of the 2016 UAA Alumni of Distinction awards. Michael Rose — Alumni Emerging Leader Award, B.A. Political Science ’09, Law Office of Ralph Ertz.

Following his graduation from UAA, Rose attended Seattle University where he earned his law degree. A former member of the Seawolf Debate team and a 2005 U.S. Universities Debating National Champion, Rose has leveraged his oratory skills in the courtroom. In 2014, he was a key member of a litigation team responsible for winning a \$51.3 million verdict in a high-stakes corporate civil action.



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## 2017 NINTH CIRCUIT CIVICS CONTEST



An essay and video contest open to high school students in the western United States and Pacific Islands. Entries accepted beginning February 1, 2017. Deadline for entries is **April 16, 2017**. Contest rules, entry instructions and more information will be available January 1, 2017, at



<http://www.ca9.uscourts.gov/civicscontest>

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1<sup>st</sup> place: \$2,000 2<sup>nd</sup> place: \$1,000 3<sup>rd</sup> place: \$500

## Ninth Circuit civics contest begins

The 2017 Ninth Circuit Civics Contest has begun. This is an essay and video competition for high school students in the western United States and Pacific Islands. It is sponsored by the federal courts to help educate young people about the Constitution and their rights under the law. Student winners will receive cash prizes, and first place winners in both the essay and video competitions will be invited to attend the 2017 Ninth Circuit Judicial Conference in San Francisco along with a parent or a guardian.

The theme of this year's contest is "Not to be Forgotten: Legal Lessons of the Japanese Internment." Students are asked to consider and describe the relevance of the Japanese internment today as our nation combats terrorism.

For the second year, the U.S. District Court for the District of Alaska will host a local contest. Local winners in each category will receive prizes of \$500 for first place, \$300 for second place, and \$200 for third place, for a total of \$2,000 in available prize money. Local winners will be announced in May 2017 and finalists will move on to compete in the Ninth Circuit contest. Students must reside in Alaska to participate in the local contest.

On behalf of the federal judges and court staff in the District of Alaska, we are asking members of the Bar to share the contest details with teachers, student counselors, librarians and other educators within the state of Alaska. We particularly want to reach those educators teaching civics, social studies, English, American history and the video arts. Contest coordinators hope that by distributing this information before the winter break, teachers will have the opportunity to incorporate the contest into their spring curriculums. Last year, several winning entries came from one class in Juneau where the contest was made a class assignment.

As an added incentive, a District Court Judge may be personally available to visit Alaska schools and speak to students concerning the rule of law and to encourage their participation.

Questions and requests for additional information about the local contest (including flyers and posters) may be directed to Ruth Tronnes at (907) 677-6210 or [ruth\\_tronnes@akd.uscourts.gov](mailto:ruth_tronnes@akd.uscourts.gov).

## What to know about new, revised power-of-attorney rules

By Abigail E. O'Connor  
and Steven T. O'Hara

Alaska has new rules for durable powers of attorney and a new form. On July 28, 2016, the governor signed into law House Bill No. 8, titled "An Act relating to powers of attorney and other substitute decision-making documents; relating to the uniform probate code; relating to notaries public; and providing for effective date" (the "Act", see [goo.gl/4VB7uZ](http://goo.gl/4VB7uZ)). The Act is found at: [goo.gl/FIM9ls](http://goo.gl/FIM9ls). The new rules go into effect on Jan. 1, 2017 (*Section 30 of the Act*).

There are significant substantive changes of which the legal community needs to be aware. This is the first of a multi-part article outlining those changes and analyzing the potential issues, as they apply to powers of attorney. Part 1 will highlight some of the procedural and substantive differences. Part 2 (and possibly a Part 3) will focus on the potential complications and dangers, and provide some examples of various language to consider including in the new forms.

### Procedural, Technical Changes

The new statutory form power of attorney includes some significant technical changes. *Section 5 of the Act*. For starters, the form no longer refers to an "attorney-in-fact," instead, it refers to the "agent." *Id.* In addition, references to "disability" generally now use "incapacity" instead. See *Sections 7, 19, and 23 of the Act*.

The form power of attorney, found at AS 13.26.332, begins with a list of categories of powers. Previously, the principal was to initial next to and draw a line through any category that she did not want to give to the agent. In the new AS 13.26.332, the instructions are just the opposite. The principal will mark all of the categories that she does want to give to the agent. *Id.*

The new AS 13.26.332 includes a list of express authorities that will

require an additional mark. Specifically, the principal will need to mark the powers to create, amend, revoke, or terminate an inter vivos trust; make a gift; create or change a beneficiary designation; revoke a transfer on death deed; create or change rights of survivorship; delegate authority granted under the power of attorney; waive the principal's right to be a beneficiary of a joint and survivor annuity, or exercise fiduciary powers that the principal has authority to delegate. *Id.* There has been discussion in the estate planning community about whether the client must mark each power herself by hand, or whether her lawyer may check the applicable powers electronically as instructed by the client before printing the document for signature. We will get into this issue in more detail in Part 2 (or Part 3, as the case may be); however, the Act appears silent on the issue.

The new form includes new language at the end regarding signatures. Specifically, if a person other than the principal executes the signature for the principal, that person cannot be the appointed agent. *Section 5 of the Act*. In such a case, the person signing for the principal must have her signature notarized, as provided in the new form. *Id.*

### Select substantive changes that warrant attention

There are some revised and some new definitions to the "General Definitions" of Title 13 of the Alaska Statutes. *Sections 1 – 3 of the Act*. The U.S. Virgin Islands is now included in the definition of a "state" under the new AS 13.06.050(46). *Section 2 of the Act*. The Act added definitions for "durable," "electronic," "power of attorney," "principal," "record," and "sign" under AS 13.06.050(57) – (62). *Section 3 of the Act*. Interestingly, the "record" definition references an "electronic or other medium" and the "signature" definition includes "to attach to or logically associate with the

record an electronic sound, symbol, or process." *Id.* Does this mean that someone can digitally sign a power of attorney form? We will examine that question in Part 2 (or Part 3).

There is a new statute for "Agent's acceptance and liability" that will be codified as AS 13.26.326. *Section 4 of the Act*. An agent accepts the appointment by exercising authority, performing duties, or any other assertion or conduct indicating acceptance. *Id.* Much of the newly recited duties are inherent with the notion of fiduciary duties in general, such as the duty to act loyally for the principal's benefit (*Id.*, citing the new AS 13.26.326(b)(1)). One addition, however, merits special attention. There is a new duty to "attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors...." (*Id.*, citing the new AS 13.26.326(b)(6).) This duty has potentially long-reaching consequences, and we will go into detail in Part 2. In the interim, note that this duty can be negated by the power of attorney, because the language in the new AS 13.26.326(b) begins with "[e]xcept as otherwise provided in the power of attorney..." Accordingly, drafting attorneys should be aware of the new duty, and provide an exception if it is not desired.

The new AS 13.26.328 ("Acceptance of power of attorney") provides a list of requests available to third parties, including an agent's certification and an English translation of a power of attorney in a foreign language. Importantly, a third party also may request "an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record a reason for the request." *Section 4 of the Act*, citing the new AS 13.26.328(a)(3). If the agent refuses to provide a letter from counsel, the third party is not required to accept the power of attorney. *Id.*, citing

the new AS 13.26.328(e)(4). A third party may not honor the power of attorney if she believes, in good faith, that the document is invalid or that the agent does not have the given authority to perform, regardless of what the agent has provided. *Id.*, citing the new AS 13.26.328(e)(5).

The provisions defining the authority to conduct business transaction has new language. *Section 12 of the Act*. Specifically, an agent with this general authority now may operate, buy, sell, enlarge, reduce, or terminate an ownership interest; put additional capital into an entity; join in a plan of reorganization, consolidation, conversion, domestication, or merger; sell or liquidate all or part of an entity or business; and establish the value under a buy-out agreement to which the principal is a party. *Id.*, citing the new AS 13.26.344(e)(10)-(14).

The general authority with respect to personal relationships has some new language. *Section 15 of the Act*. Supporting dependents now expressly includes after-born persons, and expands to "individuals whom the principal has customarily supported or indicated the intent to support..." *Id.*, citing the new AS 13.26.344(j)(1). The new language expressly permits child support payments and other family maintenance. *Id.* In addition, a new subsection (15) grants the agent the authority to act as an agent under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to pay for health care. *Id.*, citing the new AS 13.26.344(j)(15).

The Act expands the triggers of a principal's incapacity. *Section 20 of the Act*. AS 13.26.353(a) is repealed and replaced with a new version. The language regarding mental and physical issues remains much the same, although the new language clarifies that the principal would have an inability to communicate "even with the use of technological assistance." *Id.*, citing the new AS

Continued on page 21

# Tale of WWII internment has ramifications in law today

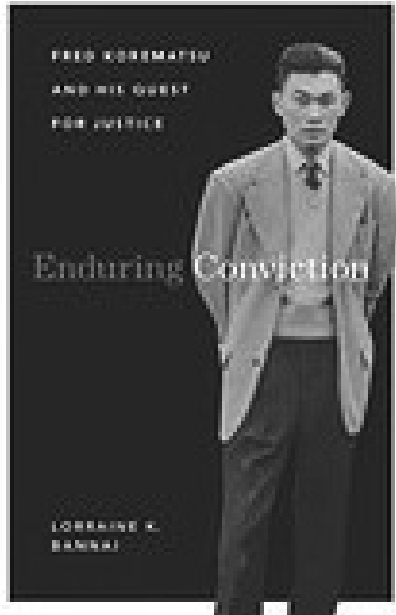
By W. Clinton "Buck" Sterling

*Enduring Conviction: Fred Korematsu and His Quest for Justice.* By Lorraine K. Bannai. Seattle, Washington: University of Washington Press, 2015. 312 pp.

The attack on Pearl Harbor brought our nation to war with Japan and struck fear into the American public and government, a fear that looked for enemies and sought to neutralize them. As a consequence, President Roosevelt issued Executive Order 9066, setting in motion the eventual evacuation of 110,000 Japanese Americans into concentration camps, based not on particularized evaluations of guilt but on racial association.

Fred Korematsu was a young Japanese American who, against great pressure, chose liberty — freedom to be with the one he loved, where he chose exercising the rights of citizenship that all took for granted. Failing to report to an assembly center he was arrested, starting a 40-year legal odyssey that exposed racial prejudice, stigma, and official mendacity but also, eventually, led to justice and catharsis. This book tells Fred's emblematic story, personal and legal.

Korematsu's arrest did not go unnoticed. A representative of the



local ACLU saw an opportunity to test the constitutionality of the evacuation orders. On the other hand, the Japanese American Citizens League, eager to present Nikkei (of Japanese descent) as cooperative patriots, did not support Fred. Neither did his fellow internees. In addition, the military justified its approach by saying that sorting the disloyal Nikkei from the loyal could not be done quickly enough to prevent spying and sabotage. The competing interests eventually met in the Supreme Court.

In *Korematsu vs. United States* the Supreme Court sided with the government, arguing that there was

no basis, on the record, for questioning the military's judgment. The dissents were strong.

After the war Fred continued with his life, marrying and raising a family. While he still felt he was the victim of an injustice he tried to put the issue behind him. Eventually, a new generation of Nikkei sought redress for the internment, proceeding legislatively and judicially.

The legal endgame started in 1982 when documents were uncovered that proved the government had suppressed, altered and destroyed evidence when the Supreme Court heard Korematsu's case in 1944. They also proved that the real reason behind the internment was not practicality but racism. Moreover, the court had relied on the judgment of the army but had not been told that the two agencies officially designated by the president to judge security needs, the FBI and the Office of Naval Intelligence, had specifically disagreed on the record with the army's assessment.

Based on the new evidence Fred's case was reopened and his conviction vacated by a federal court in 1983. It was a major victory and it helped Fred to reconcile with his people — American citizens. He spent the rest of his life trying to educate them about the need for constant vigilance regarding civil liberties.

Alas, the *Korematsu* decision has not been overturned. In his *Korematsu* dissent, Justice Robert Jackson issued the following warning:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution ... the Court for all time has validated the principle of racial discrimination in criminal procedure ... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need ... A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.

We should not understand Korematsu's nor Jackson's concerns to be academic. The heated rhetoric of this year's campaign should remind us that the loaded weapon is still at hand. This book will help the reader understand what that can mean.

*Previously appeared in COLUMBIA: The Magazine of Northwest History, vol. 30, no. 3 (Fall 2016); published by the Washington State Historical Society*

W. Clinton "Buck" Sterling is Public Services Librarian at the Alaska State Court Law Library in Anchorage.

## What to know

Continued from page 20

13.26.353(a)(1)(A). The expansion, however, is that a principal will be deemed incapacitated if he or she is missing, detained (including incarceration), or outside the United States and unable to return. *Id.*, citing the new AS 13.26.353(a)(1)(B).

As noted above, the Act is effective Jan. 1, 2017. Section 30 of the Act. The Act applies to powers of attorney created on or after the effective date. Section 29 of the Act. Accordingly, "old" powers of attorney are grandfathered.

Part 2 (and possibly Part 3) of this article will focus on concerns over the substantive changes to Alaska's power of attorney statute. Chief among these concerns may be whether agents operating under new powers of attorney will have an affirmative duty to minimize, for example, estate taxes or income taxes on the death of the principal. If so, who would want to serve as an agent? We will recommend consideration of custom language that might be included in a power of attorney where a client wants to encourage the named agent to accept the appointment.

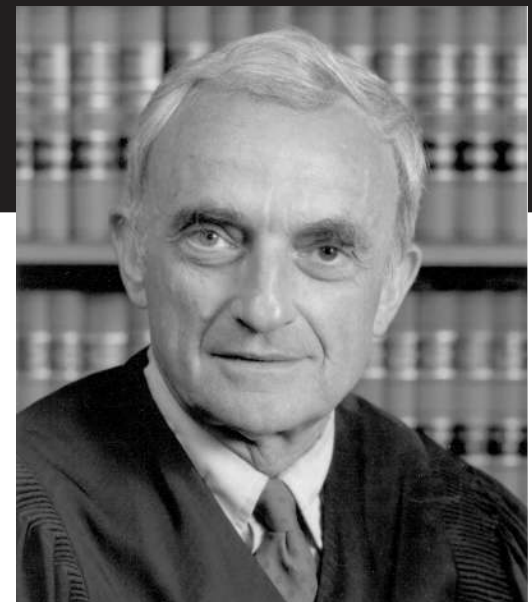
Nothing in this article is legal or tax advice. Non-lawyers must seek the counsel of a licensed attorney in all legal matters, including tax matters. Lawyers must research the law touched upon in this article.

Abigail E. O'Connor is a trusts and estates lawyer with Holland & Knight LLP in Anchorage. Steven T. O'Hara is a lawyer working for Bankston Gronning O'Hara, P.C. in Anchorage.

## Call for nominations for the 2017 Jay Rabinowitz Public Service Award

The Board of Trustees of the Alaska Bar Foundation is accepting nominations for the 2017 Award. A nominee should be an individual whose life work has demonstrated a commitment to public service in the State of Alaska. The Award is funded through generous gifts from family, friends and the public in honor of the late Alaska Supreme Court Justice Jay Rabinowitz.

**ALASKA BAR FOUNDATION**



Jay Rabinowitz

Nominations for the award are presently being solicited. Nominations forms are available from the Alaska Bar Association, 840 K Street, Suite 100, P. O. Box 100279, Anchorage, AK 99510 or at [www.alaskabar.org](http://www.alaskabar.org).

Completed nominations must be returned to the office of the Alaska Bar Association by March 1, 2017. The award will be presented at the 2017 Annual Convention of the Alaska Bar Association.



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The staff and board of Alaska Legal Services Corporation (ALSC) extend our sincere thanks to the individuals, firms, foundations, and corporate sponsors who contributed to the ALSC in the last year including those that donated to the Robert Hickerson Partners in Justice Campaign.

We are especially grateful to our 2014-2015 campaign co-chairs: Anne Carpeneti, Charlie Cole, Saul Friedman, Josie Garton, Jonathon Katcher, Erin Lillie, Peter Michalski, Susan Orlansky, Joe Paskvan, and Jim Torgerson.

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# 3 situations involving ethics in landlord-tenant law

By Daniel B. Lord

There are many unrepresented parties in court cases, especially it seems in landlord-tenant disputes. This article focuses on three ethical situations in that area of law. All involve some issue of representation, whether of the landlord or the tenant.

Alaska Rule of Professional Conduct (RPC) 4.3 addresses dealings with unrepresented persons, and states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

It should be emphasized that the rule mandates disclosure of the lawyer's role, and that the rule "regulates, but does not impose a per se ban on," contact with unrepresented persons. George M. Cohen, *Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients*, 87 Tulane L. Rev. 1197, 2012 ft. 163 (2013).

Many Judges would like to have the parties in landlord-tenant disputes represented by counsel. This is so, even if the representation does not include a full range of services that attorneys normally offer clients. There is the argument, too, that provision of "limited scope representation" by attorneys will increase efficiencies in the legal services market. American Bar Association, Section on Litigation, Handbook of Limited Scope Representation 1, 2-3 (2003).

Limited representation is allowed, pursuant to Alaska RPC 1.2(c), which states:

The lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.

In limited representation, it is understood that an attorney will not do a level of investigation and research in a case that might have been done if the case were entirely the attorney's own. See Comment to Rule 1.2 ("Services Limited to Objectives or Means"). It is similarly understood that an attorney will make it clear not only what he or she is or is not doing for a client, but also what the client will be going up against without the services of the attorney on the remaining issues.

With this background, here are the first two situations:

## Situation One

A landlord files a "Forced Entry and Detainer" (FED) against a tenant. The landlord is seeking an order of eviction and money damages of \$10,000 for back rent, future rent and damage to the property. The court is dividing the case into two separate hearings. A hearing on the right to possession is held no more than 15 days after the case has been filed in court, and the hearing (or trial) on all money claims will be held sometime thereafter. The tenant requests an attorney to represent him at both hearings. The tenant cannot afford to pay the attorneys' full fee for both hearings (or a hearing and a trial), but he can afford to pay the fee for just the first hearing, the possession hearing. The attorney is unsure what to do. He would like

to represent the tenant at just the possession hearing, but he is afraid that if he enters his appearance for him at the first hearing the judge may not allow him to withdraw from the case after that, and then the attorney will be stuck having to represent the tenant at the money damages hearing or trial, and perhaps not get paid.

What are some considerations for resolving this first situation?

Alaska RPC 1.2(a) allows an attorney to provide limited representation to a party – including a *pro se* party – by making a limited appearance for the party at one or more court proceedings, by filing with the court a Notice of Limited Appearance prior to, or simultaneous with, the proceeding. But this is again subject to conditions; adherence to which is critical. These conditions are: (1) a description of the limited representation in a fee agreement, if such agreement is required under Alaska RPC 1.5; (2) the attorney discusses with the client whether the Notice of Limited Appearance should be provided to other interested parties; and (3) the opposing attorney is provided with a written notice that indicates either the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation (in this case on the possession) or the time period during which the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation (in this case for the first hearing).

A resolution, then, turns on whether the three conditions can be fulfilled, permitting the use of RPC 1.2(a), so that the attorney may represent the tenant at just the possession hearing and the attorney may withdraw after that hearing.

## Situation Two

A lawyer volunteers for a free legal clinic, and she agrees to take calls on the help line. She provides free phone consultations to landlords and tenants on a wide variety of issues. A tenant calls the help line to complain to the lawyer that the furnace in the tenant's house is not working, that it is cold, and that the electricity often does not work. The tenant asks the lawyer whether he would owe for future rent on the lease should he move out. The lawyer is concerned about what she should say and how she should answer the question because she does not want to expose herself to any liability at this point.

What are some considerations to help resolve this second situation?

The fourth paragraph of the Scope of the Alaska RPC, states, in part:

... for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so... Whether a client-lawyer relationship exists can depend on the circumstances and may be a question of fact.

In this situation, it could well be that the tenant caller is requesting legal services from the lawyer. A factual basis for non-representation will need to be evident. Should the lawyers not want a client-attorney

relationship to start, she will have to be careful how she responds to questions for legal advice.

If, for example, a caller asks a legal question and the attorney then and there responds by referring the caller to the pertinent provisions of statute, and to an attorney for more, that is one thing. But if the caller asks a legal question and the lawyer says something to the effect that she will research the issue, and get back to the caller, that is another. In the latter, it may well provide the factual basis that she has placed herself in service to the client, thereby triggering the existence of an attorney-client relationship.

## Situation Three

The third situation concerns contacting a person who has hired counsel. Alaska RPC 4.2 covers communications by an attorney with a person represented by another attorney. It clearly states:

In representing a client, a lawyer may not communicate about the subject matter of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

But see Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised No-Contact Rule*, 60 Hastings L. Rev. 797, 798 *et seq.* (2009) (arguing for repeal of Rule 4.2, as it is "overbroad and ambiguous in important respects" and "its work should be done by Rule 4.3").

A landlord asks his attorney to write a notice to a tenant that the tenant is in violation of terms of the

lease and has 14 days to get into compliance. The lease states that this 14-day notice is required to be given (notice is also required for a FED). The attorney knows that the tenant is represented by an attorney in this matter and is not sure whether he should prepare the notice and have it served directly to the tenant, as it might be an impermissible communication with a person represented by an attorney.

What are some considerations for resolving this third situation?

In certain jurisdictions there is an expansion of when it is allowable for a lawyer to communicate with a person represented. They identify more instances of "independent justification" or legal authorization for communicating with the person. Comment to Rule 4.2. To take an instance, Comment 4 to Colorado RPC 4.2 states that with regards to contact, if there is "a contractually-based right or obligation to give notice" an attorney "is permitted to do so."

In such jurisdictions, a lawyer would be permitted to serve the notice to the tenant directly. In Alaska, however, there is no similar expansion of what is allowable under RPC 4.2. There is also no "independent justification", since the attorney can serve the notice of a landlord to a tenant by communicating it to the opposing attorney – (and parties continue to partake of that semblance of peace of mind which is an implied benefit of being represented by counsel).

Daniel B. Lord was Of Counsel with the law firm of Tindall Bennett & Shoup, where he specialized in real property and common interest community law.

Happy holidays from the Lawyers' Assistance Committee

A few holiday tips from the  
Lawyers' Assistance Committee

- Have a strategy for not drinking at parties
- If you do drink, call a cab
- If you're feeling lost or depressed, reach out

We take calls over the holidays; you are not alone!

## Substance Abuse Help

We will

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

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

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# Visualization changes, challenges litigation in the 21st Century

Continued from page 1

In the meantime, here are some classic resources about the use of visual evidence and multimedia trial presentations.

1. *Using Multimedia in Legal Proceedings* by Michael Arkfeld, retrieved on Nov. 3, 2016 at [goo.gl/e6cu18](http://goo.gl/e6cu18)

2. *The Persuasion Edge*, Richard J. Crawford Ph.D. and Charlotte Morris, revised edition of the classic trial psychology book

3. *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, retrieved on Nov. 3, 2016, at [goo.gl/7PykZ0](http://goo.gl/7PykZ0)

4. *Digital Media as Evidence and Evidence as Media*, Sam Guiberson, American Bar Association, retrieved on Nov. 3, 2016 at [goo.gl/NFNNGX](http://goo.gl/NFNNGX)

5. *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentations*, American Bar Association, retrieved on Nov. 3, 2016, at [goo.gl/zGV7BU](http://goo.gl/zGV7BU)

6. *Beautiful Evidence*, by Edward Tufte, Ph.D. A classic treatise about concisely and accurately presenting complicated information in a readily comprehensible form.

*Soldotna attorney Joe Kashi received his BS and MS degrees from MIT in 1973 and his JD from Georgetown law school in 1976. Since 1990, he has written and presented extensively throughout the*

*U.S. and Canada on a variety of topics pertaining to legal technology and served on the steering committees responsible for the ABA's annual TechShow and Canada's Pacific Legal Technology Conference. While at MIT, he "casually" studied photography with famed American fine art photographer Minor White. Since 2007, he has exhibited his photography widely in a variety of statewide juried exhibits and university gallery solo exhibits.*



**ETHICS AT THE 11TH HOUR**  
Live Seminars;  
Video-On-Demand; Webinars

# CLE2016

Alaska Bar Association

## LIVE Seminars

December 14 – Juneau, 1 – 4:15 p.m.

December 16 –

Presented by: *Stuart Teicher, Esq., The CLE Performer*

**What Teenagers Teach us about Communication and Candor**

Hotel Captain Cook – Lower Level Endeavor Room

3.0 Ethics CLE Credits | CLE #2016-015

8:30 – 11:45 a.m.

Registration Fee: \$119 After December 9: \$144



Stuart Teicher



Oftentimes there is a disconnect between what parents say and what their children think they say. In addition, sometimes kids aren't exactly as forthcoming as we'd like them to be. When you think about it, aren't those issues replicated in the lawyer/client relationship? Join internationally recognized speaker Stuart Teicher, Esq. as he shows how our interaction with teenagers teach us valuable lessons about the rules on communication (1.6) and candor (4.1

and 3.3). Stuart will also show how these rules can be used to rehabilitate relationships with your clients — but he makes no promises about improving the relationship with your teenagers!

**Tech Tock, Tech Tock: Social Media and the Countdown to Your Ethical Demise**

Hotel Captain Cook – Lower Level Endeavor Room

3.0 Ethics CLE Credits | CLE #2016-016

1:00 – 4:15 p.m.

Registration Fee: \$119 After December 9: \$144



If the clock is ticking, then social media is changing. And as those platforms change, so too do our ethical concerns. Join "the CLE Performer" Stuart Teicher, Esq., as he explains both the expanding ethical pitfalls and the evolving ethical duties that lawyers face when using social media and other new technologies. Stuart will review ethics opinions from across the country and explain the rules in a substantive, but humorous way. He'll cover developments in the rules on competence (1.1), supervision (5.1 and 5.3), and much more.

## Video-on-Demand

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December 28 –

Presented by: *Michael Kahn, JD, LPC*

Panel Members: *Tonja Woelber and Rex Butler*

**"Don't Let the Jokers Drive You Batty!"- What We Can Learn from Batman about Maintaining our Sanity (and Ethics) in the Practice of Law**

Hotel Captain Cook – Foredeck Ballroom

3.0 Ethics CLE Credits | CLE #2016-027

8:30 – 11:45 a.m.

Registration Fee: \$119 After December 9: \$144



Michael Kahn



Anyone who has been embroiled with a particularly difficult attorney, colleague, client, or judge who "just gets under their skin" knows that such encounters can be absolutely maddening. Unfortunately, when such interactions cannot be avoided, they may also render an attorney more susceptible to compromising his or her own professional or ethical values in the process (often in a noble-minded but misguided attempt to prevent the other side from "getting away

with" something). Using film clips from *Batman Begins* and *The Dark Knight*, this highly interactive seminar explores the impact of these exceptionally challenging professional relationships with such folks, whom we liken to Batman's arch-nemesis, "The Joker."

**Wellness in Reel Life—Practical Guidance on Self-Care from the Movies**

Hotel Captain Cook – Foredeck Ballroom

3.0 Ethics CLE Credits | CLE #2016-028

1:00 – 4:15 p.m.

Registration Fee: \$119 After December 9: \$144



The term "self-care" is becoming more and more of a common topic in our culture. But what exactly does it mean? And if it is such a simple concept, why do so many of us still struggle to practice it? Well, as one character in the film *Grand Canyon* said, "All of life's riddles are answered in the movies." This seminar features scenes from various well-known

films, highlighting the messages (good and bad) and tips they may offer concerning a thoughtful--and most-importantly, workable--understanding of wellness. Participants will leave with greater understanding of the importance of self-care and self-awareness, and practical steps to improve their quality of life, no matter their vocation.

## Webinars

View from the convenience of your home or office. These one-hour high quality programs are presented by national speakers with an entertaining quality. View webinars at [www.AlaskaBar.org](http://www.AlaskaBar.org) at the link under the CLE logo.



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