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Mark Murakami Elected As Hawaii Member of Owners' Counsel of America

Mark also headlined at the national Eminent Domain Conference in Scottsdale

In late January, Damon Key's Mark M. Murakami was elected to a coveted position as the Hawaii member of Owners' Counsel of America (OCA), a professional association of the nation's most experienced eminent domain and property lawyers. Membership in OCA is by invitation only, and is limited to a single lawyer per state. Mark was elected unanimously at OCA's annual meeting in Scottsdale, Arizona.

"We offer membership only to the leading property rights lawyer in each state," said OCA's Executive Director, Leslie Fields. "Not merely those with the experience and knowledge to handle eminent domain and related matters, but those who also have a passion for representing private property owners against all types of incursions on their property rights. Having Mark as OCA's Hawaii member will make our association better."

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Presently, Mark represents many of the families and businesses in the path of Honolulu's rail project, defending their property rights in several multimillion-dollar valuation cases. Eminent domain is the legal process by which the government acquires private property for public uses, most often by forcing the owner to sell it. Damon Key has long been the leading Hawaii eminent domain firm, and in 2009, Mark was a key member of the firm's legal team which represented a Big Island owner whose family's land was being seized by eminent domain. In that case, the Hawaii Supreme Court issued a landmark ruling limiting the power of the government to take property for pretextual reasons.

The OCA Annual Meeting was held in conjunction with the three-day American Law Institute-CLE Conference on Eminent Domain and Land Valuation Litigation, during which Mark was a featured speaker. With over 200 attendees, the Conference is the yearly gathering of property lawyers, judges, law professors, appraisers, relocation agents, and other professionals to discuss the most important topics in this area of the law. Now in its 39th year, this Conference is the oldest and most well-attended national conference of its kind.

Along with his colleague, Wisconsin attorney Smitha Chintamaneni, Mark educated the audience about "Why Jurisdictional Offers Must Include an Assessment of Severance." That may sound like an esoteric topic, but Mark's presentation focused on why it is important in every case where the government is using its eminent domain power to take property against the wishes of its owner for the government to evaluate what are known as "severance" damages.

Often, the government isn't taking the entirety of an owner's property, only some portion of the land, or a limited interest such as an easement. In those cases, the owner's remaining property suffers what are called "severance" damages. In other words, the damages to the use and value of the property **not** taken that result from its severance from the remainder of the property, and the owner being left with a diminished parcel, or less than the full legal interest. For example, someone might cut off only the tip of your necktie or scarf, but it isn't hard to see how taking even a small portion could result in a massive loss of use or value to the part that remains. Mark's and Smitha's presentation covered why it is important that when the government figuratively cuts property owners' neckties, it meets is legal obligations to evaluate the damage that the cutting does.

This wasn't the first time Mark spoke at the Conference – he's a long-time member of the faculty. Serving as a speaker not only educates his national colleagues about eminent domain issues, but is also a real honor because spots on the faculty are highly sought after and very limited. Mark's new role as the Hawaii OCA Member will no doubt cement his standing among his colleagues even further. To find out more about eminent domain and property rights, please call Mark Murakami at (808) 531-8031 or email him at mmm@hawaiilawyer.com.

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Navigating the Probate Process from Overseas – What Clients Need to Know to Open Probate for the Estates of Japanese Decedents

By Madeleine M.V. Young

With the easing of COVID-19 travel restrictions, Hawaii has begun to welcome our foreign national friends and visitors back to the islands, including those from Japan. Our firm serves a considerable number of clients from Japan with various legal matters, including with respect to property ownership in Hawaii. Many Japanese nationals own investment properties and/or maintain bank accounts in Hawaii. If they should pass away without an estate plan providing for the disposition of these assets, as is often the case, their immediate family members may have to navigate the probate process here and administer the decedent's estate even if they are unable to travel freely between Japan and the United States. Our firm is generally able to assist our clients in Japan with probate and estate administration even when travel between the countries may be restricted.

In Hawaii, a decedent's estate can be administered through either informal or formal procedures. Compared with formal proceedings, informal probate is preferable as it does not typically require court hearings, utilizes less court supervision, and can be completed in a few months. In order to be eligible for informal probate procedures, the following requirements must be met: the proposed personal representative must be a person with priority to serve under Hawaii's Uniform Probate Code; all individuals with equal or higher priority to serve as personal representative must agree to the appointment of the proposed personal representative; and, if the decedent died with a will (i.e., testate), an original will must be available to open probate. A probate proceeding may also be opened informally in the more common case for our Japanese clients where the decedent passes away without a will (intestate).

While the probate process is essentially the same whether the decedent is a U.S. citizen or foreign national, there are requirements for estates of foreign decedents with property in Hawaii that merit particular note. Certain documentation and information are necessary to commence probate proceedings in Hawaii for the estates of Japanese decedents. The Hawaii Probate Rules require any foreign official records submitted for this purpose to be authenticated by a two-step procedure. Most importantly, an official copy of the

…there are requirements for estates of foreign decedents with property in Hawaii that merit particular note…

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decedent's death record and/or family register, known as the *koseki tohon*, must be submitted together with an apostille issued by the Japanese Ministry of Foreign Affairs ("MOFA"), as a final authentication as to the genuineness of the signature of the official whose seal appears on the *tohon* (usually the municipal mayor issuing the record). This same requirement applies for a removal certificate reflecting a change in familial status, known as a *jyoseki tohon*. Note that only MOFA can certify the authenticity of the *tohon*, and MOFA will only authenticate an original document within three months of issuance.

Additionally, court filings submitted on behalf of our Japanese clients, such as an informal probate application or formal probate petition, and certain supporting documents, must be signed before a notary in Japan, and authenticated with an apostille from the notary public office (*Koshonin yakuba*) or MOFA or, alternatively, the signature can be certified by the U.S. Consulate in Japan. We also request that deeds conveying property from an estate and to be recorded in the Bureau of Conveyances, as well as certain documents to be signed and submitted to Land Court, be notarized and authenticated by an apostille from the *Koshonin yakuba* or MOFA, or certified by the U.S. Consulate, since after recordation or filing, these documents become public record.

If available, a duplicate original of the Japanese decedent's heirs' agreement regarding the disposition of the decedent's Hawaii assets, known as the "consent to partition of estate" (*bunkatsu kyogisho*), or the decedent's original will, if any, should be submitted for probate. The *bunkatsu kyogisho* should have each heir's signature or *hanko* (unique seal). These documents, the *tohon*, and any other supporting documents in the Japanese language submitted with the probate application or petition must be accompanied by an affidavit of translation for each such document. (Our in-house translator can provide the necessary translation and attestation.) Additionally, we ask clients to provide us with the full name and address of the proposed personal representative of the estate, and the name, age and address of all family members, and anyone else with an interest in the decedent's estate, including known creditors. Of course, we will request all pertinent information regarding the decedent's real property and personal property located in Hawaii, in order to prepare an inventory. If the family in Japan is unsure of the location or existence of the decedent's assets in Hawaii, we can help with researching and investigating this information.

Although the probate process and requirements in Hawaii can seem uniquely challenging for those residing overseas, we stand ready and able to assist in all aspects of probate and estate administration for foreign decedents, including for those with families in Japan.

For more information or questions regarding this article, please call Madeleine at (808) 531-8031, email her at mmvy@hawaiilawyer.com or scan the code with your smartphone.

Clint K. Hamada Brings Dedication & Intensity to Damon Key

If you asked Clint K. Hamada about his greatest strength, he'd tell you that he doesn't know how to give less than 100 percent of himself to his goals. According to Clint, "I'm always pedal to the metal, and perfect is never good enough." Damon Key is pleased to announce that this laser-focused attorney is one of the firm's newest Associates, joining our Business & Commercial, Land Use & Eminent Domain, Litigation & Dispute Resolution, Wills, Trusts & Estates practice groups.

Because Clint's father is an attorney, he's always carried around the idea of possibly becoming an attorney one day. The idea was advanced when he took a condensed course called "Europe and the Modern World," which covered about a thousand years of European history in only eight weeks. "The course put into perspective the development of many of the rights that we find 'fundamental' to our everyday lives, yet often take for granted, such as habeas corpus," said Clint. "It gave the law a new meaning to me." This heavy revelation came to him during the summer before he entered high school.

Born and raised in Hawaii, Clint is a graduate of Iolani School. Fresh out of high school, he became an intern in the office of Hawaii's then U.S. House Representative Mazie K. Hirono, where he created extensive Asia-Pacific Economic Cooperation portfolios containing summaries of international leaders, focal issues, and lectures. He went on to earn his Bachelor of Arts in Philosophy Politics & Law from the University of Southern California, where he was a co-founder of Helping Hands Tutoring U.S.C.

In 2021, Clint earned his law degree, *magna cum laude*, from the William S. Richardson School of Law at the University of Hawaii. His honors included receiving CALI Awards for Excellence for the highest grades in Lawyering Fundamentals I and Legal Research. He was an oralist in the Philip C. Jessup International Law Moot Court, as well as a Teaching Assistant for Lawyering Fundamentals and a Research Assistant for Legal Research.

Clint served as a Judicial Extern to Chief Justice Mark E. Recktenwald of the Supreme Court of Hawaii. While there, he drafted memos analyzing whether to accept or reject applications for writs of certiorari. He also assisted with drafting and editing majority and dissenting opinions. Clint created comprehensive binders used by the chief justice during oral arguments, containing relevant cases, statutes, rules, transcripts, and the record on appeal.

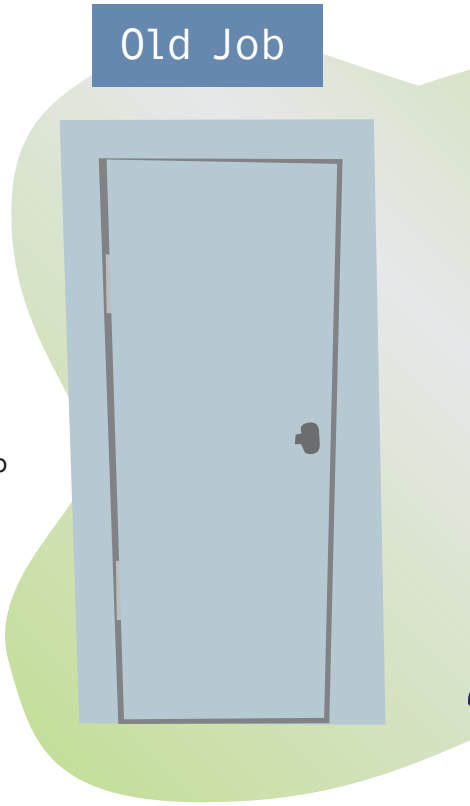
As a Law Clerk and also a volunteer with Legal Aid Society of Hawaii, Clint helped implement the Community Navigators Project to facilitate meaningful public access to civil legal needs through community leaders. He created and presented seminars for identity theft prevention and conducted I-765 Employment Authorization Document clinics. Clint also coordinated "Providing Refuge – A Legal Training" to highlight local housing laws' intersection with domestic violence, disability rights, and language access.

In his spare time, Clint enjoys pushing himself physically as a weightlifting and exercise enthusiast. He also has a passion for football, and was previously employed as a Player Participation Analyst with Pro Football Focus in Los Angeles. Clint loves interacting with clients and developing solutions to their problems that might not have been readily apparent. "I become heavily invested in everything I undertake, and as a result, I become personally invested in my clients. Success for them is success for me."

Non-Compete Agreements Must Be For More Than Preventing Competition

By Joanna C. Zeigler

The Hawaii Supreme Court recently filed an opinion that may impact employers who include non-compete and/or non-solicitation agreements in their employment contracts. The Opinion (written by Justice McKenna) was a 3-2 split between the Justices with Justices McKenna and Wilson and Circuit Court Judge Morikawa (assigned by reason of vacancy) for the Majority and Justice Recktenwald and Nakayama concurring in part and dissenting in part. The case addresses the enforceability of a non-compete agreement that restricted the employee from establishing her own brokerage firm within one year after terminating her employment and from soliciting persons employed with or affiliated with the employer.



Prudential Locations, LLC ("Locations"), a real estate brokerage firm, was the employer in this case and included a section entitled "Agreement Not To Compete" in the employment contract of Lorna Gagnon ("Gagnon"), which included both a non-compete clause and a non-solicitation clause. The clauses provided in pertinent part that Gagnon would not within one year after ceasing employment with Locations engage in similar business that is generally comparable or competitive with Locations, own or operate such a business, or induce or encourage any other persons employed or affiliated with Locations to terminate their relationship with Locations.

Gagnon's employment began as a "sales coach" in 2008 when she moved to Hawaii. She had previously worked as a real estate salesperson in New Hampshire from 1989 and later became a licensed real estate broker in 1999. Gagnon had also previously owned an independent brokerage business, and from 2003 to 2008, she owned and operated a RE/MAX real estate franchise in New Hampshire. In June 2013, Gagnon terminated her employment with Locations, and in August 2013, she opened a new RE/MAX franchise in Hawaii called Prestige Realty Group, LLC ("Prestige"). In addition, a few Locations real estate agents also left Locations to open Prestige.

Locations filed a complaint in circuit court and later a summary judgment motion contending that Gagnon violated the non-compete agreement. Locations claimed the non-compete clause was necessary because Gagnon had access to technologies and techniques tailored to Locations and its website-related technology that provides analysis and reports concerning preferences of its consumers. In opposition to Locations summary judgment motion Gagnon argued, among other things, that the sole purpose of the non-compete clause was to prevent new competition, thereby restricting trade and commerce in violation of Haw. Rev. Stat. § 480-4(a).

Haw Rev. Stat. § 480-4(a) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal." Haw. Rev. Stat. § 480-4(c) also provides examples of when restrictive covenants not to compete may be lawfully entered into. If a restrictive covenant is not listed in section 480(c) its validity is determined based on whether it is

reasonable. In turn, a restrictive covenant is not reasonable if: (i) it is greater than required for the protection of the person for whose benefit it is imposed; (ii) imposes undue hardship on the person restricted; and (iii) has a benefit to the convantee that is outweighed by injury to the public. *Technicolor v. Traeger*, 57 Haw. 113, 122, 551 P.2d 163, 170 (1976). In addition, "training that provides skills beyond those of general nature is a legitimate interest which may be considered in weighing the reasonableness of a non-competition covenant, when combined with other factors weighing in favor of protectable business interest such as trade secrets, confidential information, or special customer relationships." *7's Enterprises, Inc. v. Del Rosario*, 111 Haw. 484, 493, 143 P.3d 23, 32 (2006). Thus, even if a restrictive covenant satisfies the *Traeger* factors it is unenforceable unless it is ancillary to a legitimate purpose not violative of Chapter 480.

The Supreme Court concluded that the information that Locations asserted constituted protectable legitimate purposes was not actually confidential. Other Locations employees and managers with similar or more access to the allegedly confidential information were not restricted by the non-compete agreements. In addition, the non-compete clause only prohibited Gagnon from starting her own firm, but permitted her to work for an existing brokerage firm. But preventing competition is not a legitimate ancillary purpose under Haw. Rev. Stat. § 480-4(a). Therefore, the Supreme Court concluded that summary judgment was proper in favor of Gagnon with regard to the non-compete clause.

With regard to the non-solicitation clause, the Supreme Court stated that solicitation clauses are also contracts in restraint of trade or commerce that require a legitimate ancillary purpose under Haw. Rev. Stat. § 480-4(a). The Supreme Court noted that workforce stability and customer relationships can be a legitimate ancillary interest for an agreement prohibiting the solicitation of employees. The Supreme Court also noted that solicitation requires an active initiation of contact. Here, the court concluded there was a genuine issue of material fact as to whether Gagnon actively initiated contact with one of the employees that left Locations to start Prestige with Gagnon based on conversations Gagnon had with the employee prior to leaving. Therefore, the Supreme Court vacated summary judgment with respect to the one employee and remanded to the circuit court.

The key take-away from this case is if an employer is considering whether to include a non-compete agreement in an employment contract, a non-compete agreement will not be upheld based simply on the desire to prevent competition. There must be a legitimate ancillary purpose and the *Traeger* factors must be satisfied for the non-compete agreement to be valid.

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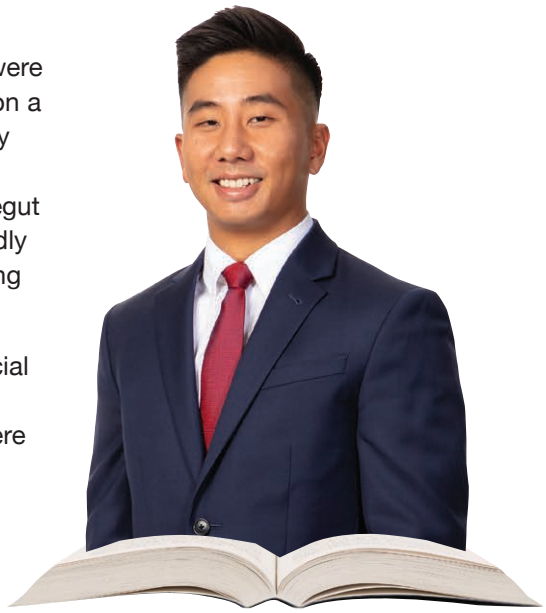
[1] *The case is Prudential Locations, LLC v. Gagnon, 2022 Haw. LEXIS 24 (Haw. Feb. 17, 2022).*

For more information or questions regarding this article, please call Joanna at (808) 531-8031, email her at jcz@hawaiilawyer.com or scan the code with your smartphone.

Love of Reading Propels Toren K. Yamamoto into Law



Toren K. Yamamoto always loved stories. As a kid, those stories were primarily consumed in the form of comics or stories that he saw on a screen. Later, he discovered the wryly satirical novels and short story collections of American author Kurt Vonnegut. Vonnegut's writings captivated Toren and resulted in a newfound love of reading. "Vonnegut helped me realize that books could be funny, engaging, and profoundly meaningful all at the same time," said Toren. It was his love of reading which eventually gravitated Toren towards law school.

Today, Toren is a new Associate in the firm's Business & Commercial Law practice group. He earned his law degree, *cum laude*, from the William S. Richardson School of Law at the University of Hawaii, where he was Staff Writer and Technical Editor for the University of Hawaii Law Review.

In 2020, Toren was a Summer Intern with the U.S. Army JAG Corps at West Point, New York. While there, he drafted motions and memos, and researched and wrote on various legal issues, including military justice and constitutional issues. Additionally, he spent time on complex evidentiary issues and administrative projects. He found the experience to be rewarding and enjoyed working with both the soldiers who came into the office for legal assistance and his coworkers on the job.

While attending law school, Toren served as a Legal Assistant with two Honolulu-based law firms. In this time, he researched and wrote about third-party insurance issues, as well as drafted basic motions, prenuptial agreements, and memos. He also managed client correspondences and transmittals between opposing attorneys.

During the 2016 Hawaii State Legislative Session, Toren served as Committee Clerk for State Representative Kyle Yamashita. While there, he gained valuable insights into the inner workings of the government's legislative branch. He managed the bill tracking system for the Public Safety Committee, reviewed legislation for the representative, and responded to and addressed the concerns of constituents and the public.

"As the firm continues to grow, we are pleased to add new talent to our team," said Damon Key Vice President Michael Yoshida. "Toren's various experiences with military, government and private practice will serve him well as he moves forward here at Damon Key. We are pleased to welcome Toren and all our new associates to the firm."

Born and raised in Honolulu, Toren attended Punahou School. He holds a Bachelor of Science in Business Administration – Finance, from Creighton University. At Creighton, he was honored on the Dean's List several years and was a member of Alpha Phi Omega Service Fraternity.

To prepare for his day, Toren enjoys surfing every morning at dawn. He is also an avid runner, lacing up his running shoes at least five times a week. He has run two marathons in the past.

Toren has an interest in the field of psychology and how it applies to issues relating to the law, a subject that he may explore further in the future. In the meantime, he looks forward to the stability that comes with practicing law, as well as doing meaningful work in his legal practice.

We look forward to seeing Toren's unfolding story, right here at Damon Key.

Faster Might Not Be Better

By Clint K. Hamada

In an effort to accelerate the litigation process, the Hawaii Supreme Court promulgated amendments to the Hawaii Rules of Civil Procedure and to the Rules of the Circuit Courts of the State of Hawaii, creating an "expedited track" to trial for certain civil cases. These amendments went into effect on January 1, 2022. The worst kept secret of our legal system is that litigation is often expensive and protracted — hence the high percentage of cases that settle well before reaching trial. However, for many parties, seeing their litigation through to the end of trial might be their only avenue to obtaining the justice they deserve. As a result, the new expedited track seeks to get litigants to the finish line faster while hopefully saving on costs.

So how do the new amendments "expedite" litigation? The answer to that essentially boils down to three key changes. First, the plaintiff must request a scheduling conference within just fourteen days of serving the complaint onto the defendant. Depending on how swiftly the judge sets the scheduling conference, this triggers a whole set of deadlines that creeps up very quickly. For example, all parties must meet and confer at least twenty-one days before the scheduling conference. During this initial meeting, the parties must discuss the bases of their claims and defenses, explore the possibility of settlement, decide whether to formally assign the case to the expedited track, and determine a discovery plan to propose to the court. Once the initial meeting has taken place, all parties then have fourteen days to disclose likely witnesses, copies or descriptions of all documents and tangible evidence that might be used at trial, and a computation of likely damages. That is a long list of to-do items that could all realistically happen less than two months from the time the initial complaint is served.

Second, and arguably most importantly, the expedited track significantly shortens and limits the discovery process. In particular, each party is restricted to only four oral depositions, with a cumulative limit of 16 hours, and to thirty-five interrogatories, requests for documents, and requests for admissions. A party seeking to conduct additional discovery beyond these parameters will need to convince the court that the additional discovery is necessary and that the burden or expense will not outweigh its likely benefit.

...the expedited track significantly shortens and limits the discovery process...

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Third, cases in the expedited track must have trial set for no later than nine months from the scheduling conference, which can then be extended if good cause exists to do so. In contrast, non-expedited cases can be scheduled for up to eighteen months after the scheduling conference upon request by any party.

As great as an "expedited" trial sounds, not every civil case is eligible for it. Certain categories of lawsuits, such as foreclosure, agency appeals, consumer debt collection, quiet title, and asbestos cases, are restricted from the expedited track. Moreover, even if a case is eligible to be expedited, the expedited track might not be the best choice for every given case. In order to be assigned to the expedited track, all parties involved in the case must agree to said assignment.

As mentioned earlier, the deadlines start quickly, and they do not ease up. There is less time and less flexibility for litigants to discover evidence necessary to reinforce their case. Accordingly, before electing to expedite a case, each party should weigh the strength of their existing evidence, the degree to which more evidence needs to be discovered, the costs associated with both routes, and the urgency by which resolution needs to be obtained.

Having taken effect so recently, the amendments will likely require considerably more time for Hawaii attorneys and judges to thoroughly grasp all of the practical advantages and drawbacks of the expedited track. Nonetheless, the driving intent behind the amendments' promulgation is clear, and any mechanism aimed towards providing parties faster and cheaper redress should be openly welcomed.

For more information or questions regarding this article, please call Clint at (808) 531-8031, email him at ckh@hawaiilawyer.com or scan the code with your smartphone.

Christine A Kubota participated in a charity golf tournament for Hawaii Aloha Life Enrichment Association, which is celebrating their 15th Anniversary this year. Christine serves on the board and is Executive Vice President. Proceeds from the tournament benefited Kuakini Hospital and Rainbow Japanese School. Damon Key was one of the tee sponsors.

Christine was with First Lady Mrs. Ige at the Anne Namba fashion show for the Shufu Society of Hawaii. Christine serves as the Honorary Advisor and guest modeled in the show. The event was held at the Royal Hawaiian Hotel and was Shufu Society of Hawaii's 56th Annual Meeting and Installation Banquet, and included fundraising for Ukraine.

Mark M. Murakami spoke to the University of Hawaii Law School's Law of War class about the role of judge advocates in the military operations.

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Attorneys in the News

Tred R. Eyerly was a panelist at the American Bar Association's Insurance Coverage Litigation Committee's annual seminar in Tucson in March. The topic was "Why Can't We settle? Consequences When Insurer and Insured Disagree on the Value of the Underlying Claim." Tred was also a panelist on a Strafford webinar entitled "Procedural Bad Faith Claims Against Insurers."

Kenneth R. Kupchak appeared in Cornell University's Alumni newsletter *Cornellians*, the issue was titled Big (Red) Love: A Celebration of Cornellian Couples. The *Cornellians* shared a host of 'happily ever after' stories of alumni who found their soulmate in a fellow Cornellian. By Beth Saulnier & Alexandra Bond '12 Cornell

Kenneth Kupchak '64, JD '71 & Patty Geer Kupchak '67

From Kenneth: "When Cornell shut the dorms over Thanksgiving, another freshman on her corridor invited Patty—who was from Hawaii—to her home in Pittsburgh for the holiday. That corridor-mate was my sister, Bonnie Kupchak Winckler '67!

The day after we got engaged, I received my orders to Vietnam. Without telling anyone, we arranged for a New York Supreme Court justice to marry us; five months later, on leave, I arrived in Hawaii for the 'wedding.'

Neither set of parents ever knew about the 'real' wedding. We recently celebrated our 55th anniversary."