STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-SEVENTH STATE LEGISLATURE

Listing Alaska Statutes with
Delayed Repeals or Delayed Amendments
and
Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

DECEMBER 2011

A REPORT TO THE TWENTY-SEVENTH STATE LEGISLATURE

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Examining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes

The report lists Alaska Statutes that will be amended or repealed between February 29, 2012, and March 1, 2013, according to laws enacted before the 2012 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2010, and September 30, 2011,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2010, and September 30, 2011.

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INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

(1) the courts and agencies are properly implementing legislative purposes;
(2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;
(3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;
(4) the courts have modified or revised the common law of the state.

Under AS 24.20.065(b) the Council is to make a comprehensive report of its findings and recommendations to the members of the Legislature at the start of each regular session.

This edition of the review by the attorneys of the Legislative Affairs Agency examines the opinions of the Alaska Supreme Court, the Alaska Court of Appeals, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for the District of Alaska. As in the past, those cases where the court construes or interprets a section of the Alaska Statutes are analyzed. Those cases where no statute is construed or interpreted or where a statute is involved but it is applied without particular examination by the court are not reviewed. In addition, those major cases that have already received legislative scrutiny are not analyzed. However, cases that reject well-established common law principles or reverse previously established case law that might be of special interest to the legislature are analyzed. Because the purpose of the report is to advise members of the legislature on defects in existing law, we have generally not analyzed those cases where the law, though it may have been criticized, has been changed since the decision or opinion was published.

The review also covers formal and informal opinions of the Attorney General. As with court opinions, we have only analyzed those opinions where a provision of the Alaska Statutes is construed or interpreted, or which might otherwise be of special interest to the legislature.

The review of administrative regulations is the responsibility of the Administrative Regulation Review Committee under AS 24.20.460 and is not included in this report.

This report also includes a list of Alaska Statutes that, absent any action by the 2012 Legislature, will be repealed or amended before March 1, 2013, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

Reviews of state court decisions were prepared by Jean Mischel, Don Bullock, and Dan Wayne, Legislative Counsel, and Jerry Luckhaupt, Assistant Revisor of Statutes. Dennis Bailey, Legislative Counsel, reviewed federal court decisions and opinions of the Attorney General. Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 29, 2012 and March 1, 2013 according to laws enacted before the 2012 legislative session

Laws enacted in 2004

Ch. 70, SLA 2004, as amended by ch. 61, SLA 2009, ch. 48, SLA 2010, and ch. 13, 2011 -- Sport Fishing

AS 16.05.340(a)(26)	repealed effective January 1, 2013
AS 16.40.260	repealed effective January 1, 2013
AS 16.40.270	repealed effective January 1, 2013
AS 16.40.280	repealed effective January 1, 2013
AS 16.40.290	repealed effective January 1, 2013
AS 16.40.299	repealed effective January 1, 2013
AS 25.27.244(s)(2)(A)(xviii)	repealed effective January 1, 2013
AS 25.27.244(s)(2)(A)(xix)	repealed effective January 1, 2013
AS 41.21.506(b)	amended (conditionally) effective January 1, 2013 by secs. 22 and 31, ch. 58, SLA 2010 contingent on repeal of AS 16.40.260 and 16.40.270 under ch. 70, 2004

Laws enacted in 2007

Ch. 27, SLA 2007 -- Requiring Electronic Monitoring as a Special Condition of Probation and Parole for Offenders Whose Offense Was Related to a Criminal Street Gang

AS 12.55.100(f)	repealed effective December 31, 2012
AS 33.16.150(g)	repealed effective December 31, 2012

Laws enacted in 2008

Ch. 71, SLA 2008 -- Report to the Legislature on Teacher Preparation, Retention, and Recruitment by the Board of Regents

AS 14.40.190(b)	amended effective July 1, 2012

2008 Legislative Resolve No. 35 -- Amending the Uniform Rules of the Alaska State Legislature Relating to Standing Committees

Uniform Rule 20	removes the Education Committees from the list of standing committees effective on the first day of the first regular session of the Twenty Eighth Legislature, and adds education to the jurisdiction of the Health and Social Services Committees, renaming them the Health, Education, and Social Services Committees

Laws enacted in 2010

Ch. 10 and 71, SLA 2010 -- Municipal Property Tax Exemptions

AS 29.45.030	amended effective November 30, 2012

Ch. 24, SLA 2010 -- Concealed Handgun Permits

AS 18.65.725	enacted effective July 1, 2012

Ch. 93, SLA 2010 -- School Construction and Major Maintenance

AS 14.11.025	enacted effective July 1, 2012
AS 14.11.030	enacted effective July 1, 2012
AS 14.11.035	enacted effective July 1, 2012

Laws enacted in 2011

Ch. 23, SLA 2011 -- Health Care Insurance and Related Matters

AS 21.54.180	repealed effective July 1, 2012

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the list above. Also, the list does not include repeals of uncodified law, including sunsets of advisory boards and task forces and pilot projects of limited duration created in uncodified law.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

FRAUDULENT CONCEALMENT OF EVIDENCE, AS DISTINGUISHED FROM SPOLIATION, IS AVAILABLE CAUSE OF ACTION FOR INTENTIONALLY CONCEALED EVIDENCE.

A construction worker was injured on a homeowner's staircase that had no railing and was icy. The insurer investigated and made photographs available during discovery without the investigator's notes on them about the condition of the staircase, believing the notes to be privileged. The homeowner's testimony about the condition of the staircase contradicted the investigator's notes. The insurer later realized that the notes were not privileged and produced them and offered to pay for a new deposition of the homeowner. The court sanctioned the insurer. The construction worker then filed a separate lawsuit alleging spoliation of evidence by the insurer. The Alaska Supreme Court for the first time defined the tort of spoliation as a destruction of evidence. In cases where evidence is not actually destroyed the court recognized the alternative common law tort of fraudulent concealment as a separate cause of action in Alaska.

Allstate Insurance Co. v. Dooley, 243 P.3d 197 (Alaska 2010).

Legislative review is not recommended unless the legislature disagrees with the court's definitions of the torts.

IT IS FOR TRIAL JUDGES TO DECIDE CORPUS DELICTI AND CRIMINAL DEFENDANTS ARE ONLY ENTITLED TO A NEW TRIAL FOR A VIOLATION OF THE CORPUS DELICTI RULE.

Police officers were called to Jerry Langevin's apartment to investigate a domestic dispute. Langevin was visibly intoxicated and told officers he was "three sheets to the wind." Langevin stated he had been drinking at a Fairbanks bar and had either driven all the way home or part of the way home. Langevin was arrested and subsequently convicted of drunk driving based solely upon his statements to the police. On appeal, Langevin argued his conviction violated the *corpus*

delicti rule and he was therefore entitled to an acquittal. The *corpus delicti* rule provides that a criminal conviction can not be based solely on a defendant's uncorroborated confession. The Alaska Court of Appeals found that Alaska follows the evidentiary foundation approach to *corpus delicti*, thereby requiring the trial judge to determine if the state has introduced independent evidence that substantially corroborates the confession. The court found that the state had not, reversed Langevin's conviction, and determined that, under *corpus delicti*, the proper remedy is a new trial.

Langevin v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10510, decided June 3, 2011. 2011 Alas. App. LEXIS 49.

Legislative review is not recommended.

Art. I, sec. 24, Constitution of the State of Alaska
AS 12.61.010 - AS 12.61.900

WHEN A CRIMINAL DEFENDANT CHALLENGES A CONVICTION AND DIES WHILE THE CHALLENGE IS PENDING THE CONVICTION MAY STAND.

The Alaska Supreme Court consolidated two otherwise unrelated criminal cases to resolve the question: under Alaska law, what is the effect of the death of a criminal defendant while an appeal is pending in that defendant's case? The court held that when a criminal defendant dies after filing an appeal, or a petition for hearing which has been granted, the defendant's conviction will stand unless the defendant's personal representative elects to continue the appeal. In doing so the court expressly overruled its own prior holding, *Hartwell v. State*, 423 P.2d 282 (Alaska 1967), that the death of a criminal defendant while a conviction is on appeal permanently abates all proceedings in the defendant's case and nullifies the conviction. The court explained that overruling *Hartwell* was necessary because many other state courts have since reconsidered the propriety of abatement and because abatement is inconsistent with the various victims' rights provisions that have been enacted in the last 30 years in Alaska.

Carlin v. State, 249 P.3d 752 (Alaska 2011).

Legislative review is not recommended unless the legislature wishes to examine the issue and adopt a different result. The court noted that no statute or court rule divests the appellate courts of jurisdiction upon the death of a party.

Art. VII, sec. 10, Constitution of the State of Alaska
AS 38.05.035(f)

PREFERENCE FOR PURCHASE OF STATE LAND REQUIRES LESSOR TO ENTER LAND TO QUALIFY.

The Alaska Constitution, art. VIII, sec. 10, provides for the selection, management, and disposal of state lands. In 1984, the legislature provided for a preference right without competitive bid to purchase or lease state land to an individual who has erected a building on the land and used it for a bona fide purpose before and after selection by the state from federal lands. A regulation, 11 AAC 67.053(a)(1) and (2), required written proof of entering the land, and of erecting and using a building there while under federal ownership. In 1989, the plaintiff leased state land and built a sport hunting lodge and business there. In 2005, the state conveyed that land to the borough. The plaintiff challenged the requirement that he had to have entered the land while it was under federal ownership as contrary to the plain meaning of the statutory preference right. The Alaska Supreme Court disagreed and held that the plain meaning of AS 38.05.035(f) required the entry while under federal ownership. The court explained that all land available for selection by the state was under federal ownership, so that the use by the legislature of the phrase "after selection by the state" could only apply to pre-selection use of federal land.

Gillis v. Aleutians East Borough and State of Alaska, ___ P.3d ___ (Alaska 2011).

Legislative review is not recommended since it appears that the court's interpretation is consistent with the statutory construction of the purchase preference.

AS 08.08.210(d)

STATUTE AUTHORIZING RECENT LAW SCHOOL GRADUATES TO PRACTICE LAW FOR A LIMITED PERIOD OF TIME DOES NOT CONFLICT WITH RULES GOVERNING THE PRACTICE OF LAW.

AS 08.08.210(d) authorizes recently graduated law students to be employed by and practice law for the Alaska Public Defender Agency for up to 10 months before they are licensed in Alaska as lawyers. Grove was represented in court by an employee of the Alaska Public Defender Agency, as permitted under AS 08.08.210(d), when he was convicted of assault and eluding a police officer. Grove filed a petition for post-

conviction relief arguing that he had been provided ineffective assistance of counsel because his counsel, like others representing clients under AS 08.08.210(d), was subject to a requirement under Alaska Bar Rule 44 that employees be supervised in-person by a licensed attorney when appearing in a courtroom on a client's behalf. Grove further argued that the Alaska Supreme Court has sole constitutional authority to regulate the practice of law in Alaska, the Alaska Supreme Court adopted Rule 44 for that purpose, and AS 08.08.210(d) is unconstitutional because it conflicts with Rule 44. The Alaska Court of Appeals found that AS 08.08.210(d) does not conflict with Rule 44 but merely creates an alternative method for law school graduates to practice law temporarily before becoming licensed. The court found it significant that the Alaska Bar Association considers AS 08.08.210(d) and Rule 44 alternatives to each other, and that Rule 44 has been subsequently amended to specifically exempt employees practicing law under AS 08.08.210(d).

Grove v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10622, decided May 27, 2011. 2011 Alas. App. LEXIS 36

Legislative review is not recommended.

AS 09.60.010
Alaska R. App. P. 508

THE EPA DECISION TO ALLOW ALASKA TO ADMINISTER PORTIONS OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM UNDER THE CLEAN WATER ACT WAS NOT ARBITRARY OR CAPRICIOUS.

Petitioners challenged the Environmental Protection Agency's (EPA) approval of the state's assumption of responsibility for administering parts of the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act (CWA), arguing that the EPA did not ensure that (1) state law will provide the same opportunities for judicial review of permitting decisions, (2) the state has the necessary enforcement tools to abate permit violations, and (3) the subsistence resources will be protected as mandated by the Alaska National Interest Lands Conservation Act (ANILCA). NPDES allows the EPA to approve state administration of portions of NPDES (subject to EPA oversight) pursuant to CWA if certain criteria are met. The Ninth Circuit Court of Appeals found that the EPA's approval was not arbitrary or capricious and denied the petition for review based on the following:

(1) CWA mandates that the EPA encourage public participation in the development, revision, and enforcement of regulations; NPDES regulations require that states that administer the program shall provide for judicial review of permit approval or denial that is the same as that available to obtain judicial review in federal court; the petitioner questioned whether Alaska law on the award of attorney's fees, including the abrogation of the public interest exception enacted in 2003, interfered with appropriate judicial review; the court compared the effect of the federal "dual standard" for the award of attorney's fees with Alaska law on the award of attorney's fees; the court recognized some uncertainty about the possibility of future attorney's fees awards, but decided that the EPA decision to allow administration of NPDES was not arbitrary or capricious even in light of the attorney's fees issue and concluded that the state provides an opportunity for judicial review of the approval or denial of permits that is sufficient to assist with public participation in the permitting process;

(2) the court also reviewed the state's authority to abate violations of the permit or permit program and other means of enforcement in the context of the EPA's approval of state administration of the program; the EPA has administrative enforcement options while the state must initiate a legal proceeding to impose a civil penalty; the court concluded that the state has adequate enforcement remedies;

(3) finally, the court concluded that the EPA's transfer of the NPDES program to the state did not trigger the requirement of a subsistence evaluation under sec. 810 of ANILCA; the court concluded that a subsistence evaluation is not required because (a) doing so would amend CWA by implication, by adding additional criteria, (b) the more specific provisions of CWA control the general application of ANILCA, and (c) the EPA was not required to conduct subsistence evaluations before it transferred its authority to the state because the EPA does not directly manage public lands and is not a federal land management agency.

Akiak Native Cmty. v. United States EPA, 625 F.3d 1162 (9th Cir. 2011).

Legislative review is not recommended.

AS 10.06.430
AS 10.06.450(d)

DISCLOSURE OF CORPORATE RECORDS TO A SHAREHOLDER DOES NOT REQUIRE DELIVERY TO THE SHAREHOLDER.

Former directors of a corporation who sought re-election sued the corporation for excluding their names on corporate proxy materials for holding a board election and for failure to provide shareholder e-mail information as requested. The board had rejected the former directors' applications for re-election as board-approved candidates. The board informed them of the decision before the election and that they could provide their own proxy materials and run independently. In response, the former directors requested the corporation electronically send them the shareholder list containing the numbers of shares held by each, the shareholders' e-mail addresses, telephone numbers, and addresses in order to mail election materials separately to the shareholders in a subsequent election. The corporation provided all information electronically except e-mail and telephone information. The former directors did not seek to inspect the records as provided for under AS 10.06.430 and 10.06.450 but sued for failure to provide the records electronically. In a case of first impression, the court held that the statute unambiguously provided a right to inspect, not a right to delivery of, corporate records.

Heinrichs v. Chugach Alaska Corp., ___ P.3d ___ (Alaska 2011).

Legislative review is not recommended unless the legislature would like to provide a right to electronic delivery of specified corporate records such as e-mail contact information of shareholders.

AS 11.56.310

PRISONER DOES NOT COMMIT ESCAPE IN THE SECOND DEGREE IF THE PRISONER MERELY LEAVES AN UNSECURED CORRECTIONAL FACILITY.

Bridge, charged with a misdemeanor and unable to make bail, was confined at the Fairbanks Correctional Center and after classification was transferred to a halfway house to await trial. Bridge left the facility without permission and was eventually caught 15 months later and charged with a violation of AS 11.56.310(a)(1)(A), escape in the second degree. Escape in the second degree is committed when a person removes oneself from a correctional facility while under official

detention. Bridge argued that the halfway house was not a correctional facility. The Alaska Court of Appeals found that while Bridge was at the halfway house and in the custody of the commissioner of corrections awaiting trial, Bridge was not *confined* at the halfway house because the halfway house did not have staff whose duty is to prevent prisoners from leaving the facility. The court concluded that, under AS 11.56.310(a)(1)(A), a person may only be convicted of escape from a correctional facility if the correctional facility has guards or other staff who have a duty to prevent prisoners from leaving the correctional facility.

Bridge v. State, __ P.3d __ (Alaska App. 2011).

Legislative review is recommended. The decision appears to disregard that the legislature has defined "official detention" to include "actual or constructive restraint" and seems to always require that a prisoner be actually restrained at a correctional facility to be convicted under AS 11.56.310(a)(1)(A).

AS 11.61.128

AMENDMENTS TO CRIMINAL STATUTE PROSCRIBING DISTRIBUTION OF INDECENT MATERIAL TO MINOR UNCONSTITUTIONAL UNDER FIRST AMENDMENT.

Plaintiffs challenged the constitutionality of AS 11.61.128 as modified in SB 222, secs. 9 - 12, enacted by the 26th Alaska State Legislature. SB 222 amended the elements of the crime of distribution of indecent material to minors by adding "material harmful to a minor" to the existing "censorship law" and defining "harmful to minors."

The court analyzed the amended statute using the strict scrutiny standard applicable to free speech issues, which requires that the statute must (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve that interest, and (3) be the least restrictive means of advancing that interest. The court acknowledged the compelling governmental interest in protecting minor children but questioned the compliance with the additional tests under the strict scrutiny standard. The court said that if the legislature intends the statute to only criminalize the grooming of children for sexual abuse, as argued by the state, the legislature could do so without violating the constitutional rights of the average citizen. The court noted that AS 11.61.125 applies the "harmful to minors" test approved by the U.S. Supreme Court.

But the court also stated that the language of the statute in other areas, particularly in regard to Internet communications, lacked the precision the First Amendment requires when a statute regulates the content of speech. The court concluded that the statute violates the First Amendment to the United States Constitution because it is not narrowly tailored to achieve the state's compelling interest.

American Booksellers Found. For Free Expression v. Sullivan, Civil Action No 3:10-cv-0193-RRB, 2011 U.S. Dist. Lexis 70414 (D.C. Alaska 2011).

Legislative review is recommended because the court suggested that alternatives might be available depending on the intent of the legislature.

AS 11.71.020(a)

MULTIPLE FELONY COUNTS OF POSSESSION OF INGREDIENTS INTENDED FOR THE MANUFACTURE OF METHAMPHETAMINE IN A SINGLE CONTINUING EFFORT CONSTITUTE A SINGLE CRIME FOR SENTENCING.

Wiglesworth was convicted of six separate counts of misconduct involving a controlled substance in the second degree (MICS2) (AS 11.71.020(a)(2) - (6)). Wiglesworth's convictions related to his possession of various listed chemicals important to the manufacture of methamphetamine and immediate precursors of methamphetamine, with the intent to manufacture methamphetamine. Wiglesworth argued that his six counts of misconduct involving a controlled substance actually was a continuing attempt to manufacture methamphetamine and his separate counts should merge for sentencing as a single count. After examining the various forms of MICS2, the Alaska Court of Appeals agreed, and found that a defendant that violates two or more provisions of AS 11.71.020(a)(2) - (6) during the course of a single, continuing effort to manufacture methamphetamine is guilty of only one act of MICS2 for purposes of conviction and punishment. The court noted that the legislature: "did not perceive a separate societal interest in the defendant's possession of each separate chemical, or in the defendant's accomplishment of each separate state in the manufacturing process. Rather, the societal interest at stake is to prevent the illicit manufacturing of methamphetamine."

The court noted that separate convictions and punishments

would be proper when there are separate discrete attempts to manufacture methamphetamine and when the requisite facts have been expressly pleaded by the state and found by the jury.

Wiglesworth v. State, 249 P.3d 321 (Alaska App. 2011).

The decision seems reasonable. Legislative review is not recommended unless the legislature perceives that there is a different societal interest involved in the different forms of misconduct involving a controlled substance in the second degree discussed here and wants to ensure separate punishments for these different forms.

AS 12.55.090

COURT NOT LIMITED TO SENTENCE AGREED TO IN PLEA BARGAIN AFTER SUBSEQUENT PROBATION VIOLATION.

In separate prosecutions, two defendants entered into plea bargains with the state for resolution of criminal charges against them. Each defendant served a period of incarceration and a subsequent period of probation for a suspended term of imprisonment. Each violated probation and at a revocation hearing each asked to be sentenced to a term of imprisonment (that is, neither wanted to be put back on probation). In each case the judge sentenced the defendant to a term of imprisonment less than the period of suspended imprisonment agreed to in the plea bargain. The state appealed, arguing that the plea bargain was a contract and that the new lesser sentences were a violation of that contract (the plea bargain). The Alaska Court of Appeals disagreed and found the new sentences proper and within the sentencing court's discretion. The court noted the plea bargains did not contain provisions "requiring the defendants to relinquish their right under Alaska law to reject further probation. Nor do the plea agreements contain any express provision requiring the defendants to relinquish their accompanying right . . . to have the superior court assess their sentences of imprisonment . . . rather than automatically imposing the full amount of the defendants' remaining suspended jail time."

State v. Henry, 240 P.3d 846 (Alaska App. 2010).

It appears that the issue presented by this case could be resolved by the Department of Law by including, when warranted, some additional express terms in the department's

plea agreements. Legislative review is still recommended to determine if the department has amended their agreements and whether the issue has been resolved.

AS 15.15.360

ABBREVIATIONS, MISSPELLINGS, AND OTHER MINOR VARIATIONS IN THE NAME ON A BALLOT CAST FOR A WRITE-IN CANDIDATE MUST BE COUNTED IF VOTER INTENT CAN BE DISCERNED.

Lisa Murkowski ran for the United States Senate on a write-in campaign. Joe Miller, one of her opponents, challenged the decision of the state elections division to count ballots cast for Murkowski that contained misspellings or other minor errors. The Alaska Supreme Court interpreted AS 15.15.360's requirement that the write-in ballot include the "name, as it appears on the write-in declaration of candidacy . . . or the last name of the candidate," as allowing minor misspellings and pseudonyms. The court held that voter intent is paramount and that the legislative purpose was not to require perfection but to ensure that ballots are counted and not excluded.

Miller v. Treadwell, 245 P.3d 867 (Alaska 2010).

Legislative review is recommended to determine whether the court correctly interpreted legislative intent.

AS 16.43.150(e)

LIMITED ENTRY PERMIT IS NOT A PROPERTY RIGHT FOR PURPOSES OF COMPENSATION FOR GOVERNMENTAL TAKING.

After the state adopted regulations shortening the fishing year and limiting the number of salmon that commercial fishers could harvest, plaintiffs sued, asking the United States district court to declare those regulations an unconstitutional taking of property without just compensation and as a violation of due process rights. The court held that an entry permit to fish commercially for salmon is not "property" for the purpose of requiring compensation when its value decreases due to state regulation. The court also held that the state's decision to enact a system of licenses or use privileges is not unreasonable, arbitrary, or capricious, and AS 16.43.150(e) bears a substantial and reasonable relationship to Alaska's goals of salmon conservation and maintenance of a sustainable fishery.

Therefore, AS 16.43.150(e) does not violate permit holders' substantive due process rights.

Vandevere v. Lloyd, 644 F.3d 957 (9th Cir. 2011).

Legislative review is not recommended.

AS 18.65.240

PUBLIC POLICY EXCEPTION APPLIES TO ENFORCEMENT OF ARBITRATION AWARDS.

A police officer was terminated for lying about performing a burnout during motorcycle training and an arbitrator reinstated the officer. The state argued that the reinstatement decision was unenforceable as a violation of state policy of not employing dishonest peace officers. The Alaska Supreme Court recognized that a public policy exception applies to arbitration decisions but held that, because there was no explicit, well-defined, and dominant public policy in Alaska against the reinstatement of a law enforcement officer who had engaged in relatively minor dishonesty, the arbitrator's award was not unenforceable as a violation of public policy. None of the sources of law the state cited clearly set out a public policy pertaining to the minimal consequences that had to follow when law enforcement officers committed minor acts of dishonesty that were not directly related to their duties to the public, that were not directed toward superiors in their chain of command, and that did not arise in the context of a formal investigation. The court further held that the arbitrator did not commit gross error in determining that the state lacked just cause to terminate the trooper because: (1) the trooper was not convicted of a crime; (2) a more experienced trooper who was also found to be deceptive, misleading, or evasive received only a reprimand; and (3) the state did not make it clear how the decision constituted an obvious mistake.

State v. Public Safety Employees' Association, ___ P.3d ___ (Alaska 2011).

Legislative review is recommended to determine whether the court correctly recognized a public policy exception to enforcing an arbitration decision, whether the court correctly failed to apply that exception in the present case involving dishonesty by a law enforcement officer, and whether the policy is or should be explicit.

AS 18.66.990
Alaska Rule of Evidence 404(b)(4)

THE TERM "CRIME INVOLVING DOMESTIC VIOLENCE" AS DEFINED BY AS 18.66.990 AND INCORPORATED BY ALASKA RULE OF EVIDENCE 404(b)(4) IS NOT UNCONSTITUTIONALLY VAGUE.

Bates was convicted of attempted murder for an attack upon his former girlfriend. At his trial, evidence was presented of Bates' prior assault on his former girlfriend and on another former girlfriend. The evidence was admitted under Alaska Rule of Evidence 404(b)(4), which allows, in a domestic violence case, the introduction of a defendant's other crimes of domestic violence. Rule 404(b)(4) incorporates the definition of "household member" contained in AS 18.66.990(3) to determine what is a crime of domestic violence. Bates asserted that the definition of "household member" is unconstitutionally vague as it includes persons who are "dating" or in a "sexual relationship" without defining those terms. The Alaska Court of Appeals found "sexual relationship" to be sufficiently descriptive. The court had a harder time determining what the legislature meant by "dating" and finally determined that it should be interpreted to mean: "a relationship that either is marked by emotional intimacy or whose purpose is to allow two people to evaluate each other's suitability as a partner in an intimate relationship or in marriage." When interpreted in this manner, the court concluded that Rule 404(b)(4) was constitutional.

Bates v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10350, decided June 3, 2011. Alas. App. LEXIS 48

Legislative review is not recommended unless the legislature determines that the court determined meaning of "dating," as used in the definition of the term "household member" found in AS 18.66.990(3), is incorrect or insufficient.

AS 21.36.475

STATUTORY LIMITATIONS APPLICABLE TO AN OWNER CONTROLLED INSURANCE PROGRAM FOR A CONSTRUCTION PROJECT DO NOT APPLY TO WORKERS' COMPENSATION AND GENERAL LIABILITY COVERAGES FOR WORK CHARACTERIZED AS MAINTENANCE.

The division of insurance issued a cease and desist order to Liberty Mutual Group (Liberty) because the owner controlled insurance program (OCIP) written by Liberty was designed to cover ongoing maintenance and was not restricted to a large

construction project. The division contended that an OCIP for anything other than a large construction project was prohibited by AS 21.36.475 (originally enacted as AS 21.36.065 and renumbered in 2010). The Alaska Supreme Court rejected the division's position that the OCIP for ongoing maintenance was prohibited by the definition of "an owner controlled insurance program" in AS 21.36.475. The court stated that AS 21.36.475(c)(4) defines "owner controlled insurance program," in relevant part, as "an insurance program where one or more insurance policies are procured on behalf of a project owner," and "project owner" is defined in AS 21.36.475(c)(5) as "a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project." The court declined to look beyond the plain meaning of the statute and held that an OCIP written for ongoing maintenance, such as the one written by Liberty, is not prohibited by AS 21.36.475 and is therefore unregulated.

State v. Alyeska Pipeline Service Co., __ P.3d __ (Alaska 2011).

Legislative review is recommended to consider whether AS 21.36.475 was intended to, or otherwise should, apply to an owner controlled insurance program (OCIP) for maintenance or another activity other than "working on a construction project" or whether an OCIP for non-construction purposes should be regulated in another manner.

AS 23.20.379
AS 23.20.385

SUITABILITY OF WORK AND GOOD CAUSE FOR QUITTING INTERPRETED FOR PURPOSES OF UNEMPLOYMENT BENEFITS.

An employee quit her job voluntarily and applied for unemployment benefits claiming reasons for quitting that included transportation difficulties and personality conflicts with coworkers. She also expressed concern about workplace safety and described one incident of unsafe practices. When the hearing officer asked the claimant what efforts she had made to keep her job, the claimant replied that she had tried to use public transportation but that her work schedule had been too unpredictable. The claimant acknowledged that she had not discussed the personality conflicts or her transportation difficulties with management and had not asked for an adjustment to her work schedule that would have enabled her to use the transit system and continue working. The court held

that the claimant failed to show good cause for quitting under AS 23.20.379(a). That section disqualifies an employee from receiving unemployment benefits if the employee leaves "suitable work voluntarily without good cause." As a separate inquiry, the court found that the employee did not show that the work was unsuitable under AS 23.20.385 because the workplace hostility and safety concerns she described did not provide evidence of significant health and safety risks. Because she did not exhaust all reasonable alternatives with regard to her transportation problems and workplace hostility, she did not show good cause for leaving work. The court relied heavily on the Department of Labor and Workforce Development's benefit policy manual for interpretations of the concepts of suitability and good cause, including a finding that reductions in work hours and pay did not constitute good cause for quitting.

Calvert v. State, 251 P.3d 990 (Alaska 2011).

Legislative review is recommended to determine whether the department's benefit policy manual correctly interprets legislative concepts of suitability and good cause.

AS 23.30.008(d)

"SUCCESSFUL CLAIMANT" INTERPRETED FOR PURPOSES OF AWARDING ATTORNEY'S FEES IN WORKERS' COMPENSATION APPEAL.

A successful workers' compensation claimant requested attorney's fees. The Alaska Workers' Compensation Board reduced the claimant's attorney's fees request by 30 percent. The claimant disagreed with this reduction and appealed to the Workers' Compensation Appeals Commission. The commission reversed the board's decision and ordered the board to reconsider the award of attorney's fees to the claimant. The claimant then sought attorney's fees for the successful appeal from the commission but the commission refused, finding that the claimant was not a "successful" party under AS 23.30.008. The Alaska Supreme Court reversed, interpreting the statutory concept of "successful claimant" in workers' compensation appeals for the first time. The court found that the legislature intended for attorney's fees awards under AS 23.30.008 to follow the same rules as appellate court attorney's fees awards. See Rule 508, Alaska Rules of Appellate Procedure. Therefore, the claimant was entitled to an award of attorney's fees as the claimant prevailed on a significant issue in the appeal.

Lewis-Wlaunga, et. al. v. Municipality of Anchorage, 249 P.3d 1063 (Alaska 2011).

The decision appears reasonable. Legislative review is recommended if the legislature wishes to reexamine the standard for awarding attorney's fees in workers' compensation appeals.

AS 23.30.007
AS 23.30.125(b)
AS 23.30.128(b)

WORKERS' COMPENSATION APPEALS COMMISSION HAS AUTHORITY TO REVIEW NON-FINAL ORDERS OF THE WORKERS' COMPENSATION BOARD.

An employer asked the Workers' Compensation Appeals Commission to review and to stay the Workers' Compensation Board's non-final order denying a change of venue from Fairbanks. The commission issued an order preventing the hearing from being held in Fairbanks and later reversed the board's denial of a change of venue. The employee challenged the commission's authority to review a non-final decision. The Alaska Supreme Court interpreted the various statutes that established the commission's jurisdiction to hear board appeals "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." Although nothing in the statutes explicitly gave the commission jurisdiction over discretionary review of non-final board decisions, the court held that such authority was implied based on its quasi-judicial function and the effect of delay of some decisions until a final order is issued. The court relied upon the legislative purpose in establishing the commission to increase efficiency and flexibility and to reduce costs.

Monzulla v. Voorhees, 254 P.3d 341 (Alaska 2011).

Legislative review is recommended to determine whether the court properly interpreted legislative intent to include that the Workers' Compensation Appeals Commission has the authority to review non-final decisions of the board.

AS 25.24.150(h)

PRESUMPTION AGAINST CUSTODY FOR DOMESTIC VIOLENCE APPLIES TO MODIFICATIONS OF CUSTODY.

Parents of a child entered a negotiated agreement to share physical and legal custody of their child despite a 2007 arrest and other alleged incidents involving domestic violence perpetrated by a father. The agreement was included in a 2009 divorce decree. Two weeks after the divorce decree was entered, the father pleaded guilty to third-degree assault from the 2007 charge of domestic violence and agreed to attend a domestic violence intervention program and to have no contact with his former wife. Four months after the guilty plea, the ex-wife filed a motion to modify the custody agreement based on two changed circumstances: (1) the domestic violence offense made the father ineligible for joint custody based on the statutory presumption against awarding custody to a person with a history of perpetrating domestic violence and the no contact order made co-parenting impossible; and (2) the ex-wife intended to move out of state to remarry. The Alaska Supreme Court held that the rebuttable presumption for domestic violence applied in modification proceedings after reviewing the legislative history for the presumption. The court also found that applying the statutory presumption in a modification proceeding was appropriate where the presumption was not addressed in the initial custody determination.

Williams v. Barbee, 243 P.3d 995 (Alaska 2010).

Legislative review is recommended to clarify that the applicability of the rebuttable presumption against the award of child custody in domestic violence circumstances applies in custody modification proceedings.

AS 25.24.170(a)

18-YEAR-OLD MUST BE SUPPORTED THROUGH HIGH SCHOOL EVEN IF IN THE CUSTODY OF A GUARDIAN.

A father refused to pay child support to a legal guardian for the benefit of his 18-year-old son, who was in high school, on the basis that the legal custody under the guardianship order had expired at the age of majority. In a case of first impression, the court held that child support is not linked to the legal custody of the child and that the support obligation continued through high school.

Brotherton v. Warner, 240 P.3d 1225 (Alaska 2010).

Legislative review is not recommended since the court's interpretation of the statute appears to be consistent with the statutory purpose of providing for support through high school.

AS 29.45.110(d)

PROPERTY ASSESSMENT ON FULL AND TRUE VALUE MAY INCLUDE EFFECT OF LOW INCOME RENTAL RESTRICTION WITHOUT CONSIDERATION OF FEDERAL TAX CREDITS.

The federal low income housing tax credit (LIHTC) program provides a 10-year amortized tax credit for a commitment to restrict rental rates for not less than 30 years. AS 29.45.110(a) provides that property shall be assessed at its "full and true value," defined as "the estimated price that the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer both conversant with the property and with prevailing general price levels." Subsection (d)(1) of the statute provides for consideration of actual income derived from the property and excludes consideration of federal tax credits for the property before 2001. After January 1, 2001, subsection (d)(2) directs local governments to choose whether to apply (d)(1)'s mandatory income approach or to provide for a parcel-by-parcel appraisal method. Kenai Peninsula Borough chose the parcel-by-parcel option. The owner of a 30-unit apartment complex that qualified in 2003 for LIHTC requested the application of the mandatory income approach and was denied, resulting in a much higher tax assessment than for an appraisal based on mandatory income. The owner appealed the assessment and the local board reduced the assessment by 40 percent because the original approach resulted in an assessment that was "overvalued and was grossly disproportionate as compared to similar projects." States are split on the question of whether and how the LIHTC commitment is accounted for in tax assessments on the property affected by a rental restriction. The Alaska Supreme Court held that state law and the local assembly decision do not prohibit a taxing authority from considering restricted rental rates, without the commensurate tax credit, in another valuation method if it is reasonable to do so.

Horan v. Kenai Peninsula Borough, 247 P.3d 990 (Alaska 2011).

Legislative review is recommended to clarify the statutory choice available to a taxing authority when considering rental restrictions and tax credits.

AS 33.20.010
AS 33.20.030
AS 33.20.040

PRISONERS ON MANDATORY PAROLE ARE ENTITLED TO GOOD TIME REDUCTIONS OF THEIR SENTENCES WHEN RELEASED TO CORRECTIONAL RESTITUTION CENTERS OR HALFWAY HOUSES AND WHEN CONFINED PENDING REVOCATION OF THEIR PAROLE.

The legislature has authorized the Department of Corrections to award a prisoner a good time reduction of the prisoner's sentence when confined in a correctional facility. The Alaska Court of Appeals has noted that "the legislative purpose of this statute is 'to reward prisoners for good behavior during their terms of confinement . . . [and to] give [correctional officials] a means of enforcing discipline within correctional facilities.'" *Valencia v. State*, 91 P.3d 983, 984 (Alaska App. 2004). The amount of good time earned is deducted from the prisoner's sentence and the prisoner is released on mandatory parole for the period of the good time deduction. In this case, the Alaska Court of Appeals determined that a prisoner who has been released on mandatory parole is entitled to an additional good time deduction when the prisoner (1) is serving some or all of that period of mandatory parole in a correctional restitution center or a halfway house, and (2) has been arrested for violation of terms of mandatory parole and is incarcerated in a correctional restitution center or halfway house pending revocation of parole.

State v. Shetters, 246 P.3d 332 (Alaska App. 2010), *on rehearing at, reaffirmed* 246 P.3d 338 (Alaska App. 2010).

Legislative review is recommended to determine if the awarding of good time mandated by the court in these two situations is consistent with the overall legislative intent for the awarding of good time in AS 33.20.010.

AS 33.30.028

PRISONER'S LIABILITY FOR COSTS OF MEDICAL CARE.

AS 33.30.028 provides that "liability for payment of the costs of medical, psychological, and psychiatric care provided or

made available to a prisoner . . . is the responsibility of the prisoner and" certain other persons. A superior court judge ruled that this statute only imposed liability for payment on a prisoner while the prisoner was incarcerated and that the liability for payment and the state's ability to seek reimbursement ends when the prisoner is released. The Alaska Supreme Court reversed, finding that the statute imposed liability for payment on a prisoner who has had health care provided or made available to the prisoner regardless of whether the prisoner is still incarcerated when reimbursement is sought. The plaintiff (the prisoner's estate) also argued that the state can only seek reimbursement from a prisoner under AS 33.30.028 for health care that has been "provided to them by the department." The plaintiff argued that "provided to them by the department" means only in-house prison medical care and that the state cannot seek payment for medical care that was made available to the prisoner through outside providers (regardless of whether the state paid the outside providers for the care). The court found that AS 33.30.028 "may be ambiguous" as it pertains to outside providers and remanded the case to the superior court.

State v. Hendricks-Pearce, 254 P.3d 1088 (Alaska 2011).

Legislative review is recommended. The Alaska Supreme Court's decision that liability for the costs of health care provided to a prisoner continue after the prisoner's release is correct. The confusion regarding reimbursement seems misplaced. In AS 33.30.028(a), it appears that the legislature was making a clear statement that a prisoner (and certain other people and entities) is responsible for the costs of health care provided to the prisoner (that is, paid for by the department) or made available to the prisoner (that is, facilitated by the department but not provided at department expense). In AS 33.30.028(b), the legislature required the commissioner of corrections to require a prisoner who is provided health care by the department (that is, paid for by the department) to pay for the costs of that health care, if the department did not pay for the health care then there is no need for the prisoner to reimburse the department. The legislature could add language that clarifies that the prisoner is liable and must pay the costs incurred by the department in providing or making available health care to the prisoner.

AS 38.05.180(aa)

AGREEMENT TO ACCEPT A CONTRACT PRICE AS THE VALUE OF THE STATE'S ROYALTY SHARE OF GAS PRODUCTION MAY NOT BE APPLIED RETROACTIVELY.

Gas lessees must pay a royalty to the state. AS 38.05.180 sets the value of the gas at the highest of four possible prices but allows lessees to request of the Department of Natural Resources (DNR) to instead use or accept the price for gas established in a contract with a gas or electric utility as the basis for determining the value of the state's royalty share of gas production. Marathon requested contract pricing and further requested that DNR apply the contract pricing retroactively as well as prospectively. DNR entered into the agreement to accept contract pricing under AS 38.05.180(aa), but denied its retroactive application based on DNR's longstanding interpretation that retroactive application was prohibited because of the use of the word "prospective" in the statute and the Alaska Land Act's purpose of maximizing revenue. Although the Alaska Supreme Court found the statute to be ambiguous, the court upheld DNR's interpretation on the basis that DNR's determination was longstanding, was within the department's area of jurisdiction, and had a reasonable basis in the statute. The court also decided that DNR was not required to promulgate its interpretation as a regulation.

Marathon Oil Co. v. State, 254 P.3d 1078 (Alaska 2011).

Legislative review is recommended to determine whether the court's interpretation of the statute disallowing retroactive application is consistent with the intent of the legislature.

AS 39.52.170

PUBLIC EMPLOYEE NOT REQUIRED TO REPORT UNION RELATED SERVICES AS CONFLICTING OUTSIDE EMPLOYMENT UNDER ETHICS ACT.

The Alaska Executive Branch Ethics Act, AS 39.52.170(a), prohibits a public employee from rendering services or accepting employment outside of the employee's agency if the outside employment is incompatible or in conflict with the proper discharge of the employee's official duties. AS 39.52.170(b) requires an employee to report outside employment annually for review and approval. The attorney general opined that union activities (1) are associated with and are a right of state employment, (2) are not outside services or

employment under AS 39.52.170(a), and (3) need not be reported under AS 39.52.170(b).

2011 Op. Alaska Att'y Gen. (July 26, 2011).

Legislative review is not recommended.

AS 42.30.020

THE FEDERAL MARITIME COMMISSION HAS PRIMARY JURISDICTION OF THE REGULATION OF WHARFAGE AND DOCKING FEES IN THE SHIPPING INDUSTRY UNDER THE SHIPPING ACT.

Minto, a British Columbia mining company that ships ore concentrate through Skagway, Alaska, sued Pacific and Arctic Railway and Navigation Company (PARN), the owner of a shipping dock where ore is loaded on ships, claiming that the wharfage and docking fees being charged to Minto by PARN were higher and different than those charged other shippers and were discriminatory under AS 42.30.020 and under the federal Shipping Act, 46 U.S.C. 41106. The federal district court held that, as the parties were engaged in shipping, the discrimination claim is governed by the Shipping Act. The court determined that Minto must first bring its claim of discrimination to the Federal Maritime Commission and that AS 42.30.020 does not apply.

Minto Explorations Ltd. v. Pac. & Arctic Ry. & Navigation Co., 3:11-cv-00031, August 12, 2011.

Legislative review is not recommended.

AS 45.50.471

UNFAIR TRADE PRACTICES ACT DOES NOT APPLY TO RESIDENTIAL LEASES.

A tenant challenged late fees due under her residential lease agreement as a violation of the Unfair Trade Practices and Consumer Protection Act (UTPA). The court held that the UTPA was not intended to apply to residential leases for two reasons: (1) the legislature has not extended the Act to include real estate transactions, including residential leases; and (2) another Act, the Uniform Residential Landlord and Tenant Act, AS 34.03.010 - 34.03.380, regulates residential leases.

Roberson v. Southwood Manor Associates, 249 P.3d 1059 (Alaska 2011).

Legislative review is not recommended unless the legislature desires to extend the application of the UTPA to real estate transactions.

AS 47.17.050

ABSOLUTE QUASI-JUDICIAL IMMUNITY EXTENDED TO COURT-APPOINTED INVESTIGATORS ACTING WITHIN THE SCOPE OF APPOINTMENT.

A child custody investigator appointed by a court failed to report to the child's parents or the Office of Children's Services an allegation of sexual misconduct by the child contained in a police report reviewed as part of the investigation. The investigator included the allegation in her report to the court but in the meantime, the child had assaulted a half-sibling with whom the child had been placed. The parents asserted that the investigator had a duty to warn them regarding the allegation of sexual misconduct. The Alaska Supreme Court held that court-appointed child custody investigators are entitled to absolute quasi-judicial immunity from suits arising from the performance of their duties and further that the immunity extended to the state as the employer.

Christoffersen v. State of Alaska, 242 P.3d 1032 (Alaska 2010).

Legislative review is recommended to determine whether immunity may be extended vicariously to the state or other employer.

AS 47.30.735

EVIDENCE OF MENTAL ILLNESS RELEVANT IF SYMPTOMS EXIST AT THE TIME OF AN INVOLUNTARY COMMITMENT HEARING, NOT ON ADMISSION, AND COURT MAY CONSIDER RECENT SYMPTOMS.

A woman was admitted involuntarily to a psychiatric facility based, in part, on her symptoms on the day of and prior to admission to the facility. At the commitment hearing the woman argued that her symptoms were diminished, that she was compliant with her treatment plan, and that a court could only consider symptoms that existed on the day of the commitment hearing, not when she was admitted to the hospital. The Alaska Supreme Court disagreed. The Court found that while AS 47.30.735 provides a court may grant an

involuntary commitment petition only if the court finds the person mentally ill and likely to harm herself or others or is gravely disabled at the time of the commitment hearing, in making this determination a court may consider recent behavior and conditions, as well as the patient's symptoms on the day of the hearing.

In the Matter of Tracy C., 249 P.3d 1085 (Alaska 2011).

The court's interpretation of the statute appears correct, therefore legislative review is not recommended.

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