

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

February 19, 2020

1:31 p.m.

MEMBERS PRESENT

Senator John Coghill, Chair
Senator Peter Micciche, Vice Chair
Senator Shelley Hughes
Senator Lora Reinbold
Senator Jesse Kiehl

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

PRESENTATION: LEGISLATIVE AFFAIRS AGENCY ~ 2019 LEGAL SERVICES
OVERSIGHT REPORT

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

MEGHAN WALLACE, Director
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Participated a PowerPoint and answered questions during the 2019 Legal Services Oversight Report.

LINDA BRUCE, Assistant Revisor
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Participated in a PowerPoint and answered questions during the 2019 Legal Services Oversight Report.

SANDON FISHER, Legislative Legal Counsel

Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Participated in a PowerPoint and answered questions on the 2019 Legal Services Oversight Report.

MEERA CAOUETTE, Legislative Legal Counsel
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Participated a PowerPoint and answered questions on the 2019 Legal Services Oversight Report.

ACTION NARRATIVE

[1:31:11 PM](#)

CHAIR JOHN COGHILL called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Present at call to order were Senators Reinbold, Kiehl, Hughes and Chair Coghill. Senator Micciche joined the meeting as it was in progress.

Presentation: Legislative Affairs Agency, 2019 Legal Services Oversight Report

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CHAIR COGHILL announced a presentation by the Legislative Affairs Agency on the 2019 Legal Services Oversight Report.

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MEGHAN WALLACE, Director, Legal Services, Division of Legal Services, Legislative Affairs Agency, said she cannot take any credit for the report since the agency's attorneys worked on reviewing, summarizing, and providing the recommendations on the report.

[1:34:01 PM](#)

MS. WALLACE reviewed slide 2, Why Do We Prepare the Oversight Report?

- 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.

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CHAIR COGHILL commented that the legislature asked for this report.

MS. WALLACE agreed. The LAA, Legislative Legal Services no longer reviews the regulations. In 2018, the legislature repealed the regulation commission's authority.

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MS. WALLACE reviewed slide 3, What is in the Oversight Report?

- Review of 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 that rely on Alaska Statutes or interpret the Alaska Constitution
- Review of formal and informal opinions of the Attorney General that construe or interpret Alaska Statutes or the Alaska Constitution or that might be of special interest to the legislature
- A list of Alaska Statutes that, absent any action by the 2020 Legislature, will be repealed or amended before March 1, 2021, because of repealers or amendments enacted by previous legislatures with delayed effective dates
- Recommendations for legislative review

She said this year the legislature was already aware of the attorney general's opinions, so they did not have to highlight them in the report. She provided a brief summary of how the agency conducts these reviews. The Alaska Supreme Court issues its decisions on Fridays, she assigns the decisions to attorneys, and the attorneys review the decisions throughout the year. In the Interim, the attorneys will pull out cases and prepare summaries. It takes several months to prepare these reports.

MS. WALLACE directed members to the report. After the case summary, the attorney makes a notation that legislative review is not recommended, which means the division included the case since it analyzed or interpreted a constitutional provision or an Alaska statute, or alternatively, a recommendation for legislative review or a qualifier that that legislative review is not recommended unless there is something the legislature may specifically wish to review with respect to the decision.

She said the plan today is to go through the 2019 oversight report and highlight three cases the legislature may wish to review, and about 15 other cases that may interest the legislature. She explained that the attorneys read the cases but are not the subject matter expert of the statute or subject under discussion. She asked members to keep that in mind before diving too deeply into a subject area.

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CHAIR COGHILL suggested that members make individual notes on issues that may need additional briefing.

[1:39:54 PM](#)

LINDA BRUCE, Assistant Revisor, Legislative Legal Services, Legislative Affairs Agency, Juneau, Alaska, said she would discuss the first 8 of the 18 cases for today's hearing.

She referred to a case on slide 4, 2019 Recommendations for Legislative Review:

- *State v. Planned Parenthood of the Greater Northwest*, 436 P.3d 984 (Alaska 2019) - AS 47.07.068
- **AS 47.07.068 AND 7 AAC 160.900(D)(30), WHICH REDEFINE WHICH ABORTIONS QUALIFY AS "MEDICALLY NECESSARY" FOR THE PURPOSES OF MEDICAID FUNDING, VIOLATE THE ALASKA CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION.**

- Pages 4 - 5

She said in 2014, the legislature enacted AS 47.07.068, which redefined which abortions qualify as "medically necessary" for the purpose of Medicaid funding, similar to the 2013 regulation. Specifically, AS 47.07.068(a) prohibits Medicaid payment for abortions "unless the abortion services are for a "medically necessary" abortion or the pregnancy was the result of rape or incest." Subsection (b) (3) defines a "medically necessary" abortion as one that, "in a physician's objective and reasonable professional judgment after considering medically relevant factors ... must be performed to avoid a threat of serious risk to the life or physical health of a woman from continuation of the woman's pregnancy." Subsection (b)(4) then explains "serious risk to the life or physical health."

MS. WALLACE said the Alaska Supreme Court determined that the statute and the regulation imposed different requirements for Medicaid funding eligibility upon women who choose to have an abortion to terminate their pregnancy versus women who continue with their pregnancy. Therefore, the Court held that the statute violated the Constitution of the State of Alaska guarantee of equal protection.

She said as provided in the report, "Legislative review is recommended to consider amending AS 47.07.068 in light of this decision."

CHAIR COGHILL said he recalls the debate.

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SENATOR REINBOLD said she cosponsored the bill and she finds this very challenging. She asked for the definition of equal protection.

CHAIR COGHILL said it is a question the committee will need to answer in terms of the statute in question. He said her question relates to the issues the Alaska Supreme Court had with the language and not the Legislative Legal Services attorney's interpretation.

SENATOR REINBOLD said she was interested in the definition of equal protection.

CHAIR COGHILL explained that he does not wish to have Legislative Legal review the entire court case. He said the goal is to flag the issues for the committee.

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SENATOR MICCICHE joined the hearing.

SENATOR HUGHES said it is appropriate to flag this issue. She stated that the constitutional amendment in SJR 13 would address this issue.

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MS. BRUCE turned to the next case on slide 4:

- *Doe v. State, Dep't of Pub. Safety*, 444 P.3d 116 (Alaska 2019) - AS 12.63.010 - 12.63.100; AS 18.65.087

THE ALASKA SEX OFFENDER REGISTRATION ACT'S REGISTRATION REQUIREMENTS CAN CONSTITUTIONALLY BE APPLIED TO OUT-OF-STATE OFFENDERS; THE ACT VIOLATES DUE PROCESS, BUT THIS DEFECT MAY BE CURED BY PROVIDING A PROCEDURE FOR OFFENDERS TO ESTABLISH THEIR NON-DANGEROUSNESS.

- Pages 6 - 7

The Alaska Supreme Court considered whether the Alaska sex offender act violated due process by requiring all sex offenders to register without providing a procedure for them to establish their non-dangerousness. Under the act, all sex offenders must register every year for 15 years. However, repeat offenders or offenders guilty of an aggravated offense must register quarterly for life. First, the Alaska Supreme Court concluded that Alaska is not barred by lack of jurisdiction from requiring out-of-state offenders who are present in the state to register under the Alaska Sex Offender Registration Act (ASORA). Therefore, the Court found that Doe must register under ASORA. Next, the Court concluded that the Act violated due process. A sex offender may hold a legitimate and objectively reasonable privacy expectation that his conviction and personal information will not be disseminated as it is under ASORA. The Court agreed with the state that there was a compelling state interest in protecting the public from sex offenders. However, the Court determined the Act did not provide the least restrictive means for achieving this goal. The Court concluded that the defect in ASORA may be cured by providing a procedure for offenders to establish their non-dangerousness. The Court specifically said

it was not invalidating the Act because it serves very obvious, legitimate purposes.

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CHAIR COGHILL interjected that the legislature has a bill in the Senate State Affairs Standing Committee on this subject.

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SENATOR KIEHL asked if the decision talks about timeframes or the number of hearings.

MS. BRUCE answered the decision did not discuss timeframes or multiple hearings. It appears from the decision that just one hearing is needed but it seems to be left to the legislature.

CHAIR COGHILL said the committee will have a chance to consider the court's actions and the governor's solution.

[1:47:39 PM](#)

SENATOR REINBOLD said it would be helpful to know the bill number and year that it passed. She specifically asked if it pertained to HB 49 or if it was a different bill.

MS. BRUCE answered that it did not relate to HB 49. She said she thought that the sex offender registry passed the legislature in 1984, but the legislature has subsequently amended it multiple times.

CHAIR COGHILL said it would be helpful to review the specific statute for the footnotes that identify the court decisions.

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SENATOR REINBOLD asked why the court is reviewing the decision after 20 years.

CHAIR COGHILL answered that someone out of state complained. He reiterated his intent for the committee to flag issues on these cases to deal with later.

SENATOR REINBOLD said she understood. She added that the legislature dealt with the sex offender registry last year as a public safety issue.

CHAIR COGHILL said he anticipated responding to this issue in committee.

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SENATOR KIEHL said he found his notes on this pertaining to an applicant filing a new complaint to get off the sex offender registry. He said it would be helpful for Legislative Legal to discuss the notion of rehearing.

[1:50:24 PM](#)

SENATOR MICCICHE related his understanding that Legislative Legal Services was giving a status report on the cases.

CHAIR COGHILL agreed. He said the goal is to flag the cases for further committee review.

[1:51:19 PM](#)

SENATOR MICCICHE said it is difficult not to get passionate about the cases.

CHAIR COGHILL acknowledged that each of these cases brings legal and emotional debate.

[1:51:48 PM](#)

MS. BRUCE returned to Doe v. State. She said legislative review is recommended to consider whether to amend the Alaska Sex Offender Registry Act in light of this decision. As Chair Coghill pointed out, the governor has introduced HB 228 and SB 168 to address sex offender registration.

[1:52:25 PM](#)

MS. BRUCE reviewed slide 5, 2019 Recommendations for Legislative Review:

- *Hamburg v. State*, 434 P.3d 1165 (Alaska App. 2018) - AS 12.30.011(d)(2)
- **THE PRE-2018 VERSION OF AS 12.30.011(d)(2), WHICH ALLOWS THE COURT TO PRESUME THAT DEFENDANTS CHARGED WITH CERTAIN CLASSES OF FELONIES MAY NOT BE RELEASED ON BAIL, VIOLATES THE CONSTITUTIONAL PROVISION ENTITLING DEFENDANTS TO BAIL BEFORE CONVICTION.**
- Page 9

She said this case has to do with HB 49. The Court considered the pre-2018 version of AS 12.30.011(d)(2), which provided that when a defendant is charged with certain types of offenses there is a rebuttable presumption that no conditions of bail will guarantee the defendant's appearance at future court proceedings and the safety of the victim and the public. The Court held that

the statute was unconstitutional under Article I, Section 11, of the Constitution of the State of Alaska.

MS. BRUCE said legislative review is recommended because the legislature used language similar to the pre-2018 version of the statute when it repealed and reenacted AS 12.30.011(d)(2) in HB 49. That language is now back in statute, she said.

CHAIR COGHILL related his understanding that it is challengeable.

MS. BRUCE answered yes.

CHAIR COGHILL said it is something the committee should review.

[1:53:46 PM](#)

MS. BRUCE reviewed slide 6, Other Cases of Interest That May Require Review:

- *State v. Thompson*, 435 P.3d 947 (Alaska 2019)
- Legislative review is not recommended unless the legislature does not want to allow separate convictions for each distinct act of non-consensual sexual penetration when either the penetrating object or body part or the penetrated orifice has changed.
- Page 8

She said in this case a defendant was convicted of multiple counts of first and second degree sexual abuse of a minor. The disagreement was whether separate convictions could be imposed for sexual penetration with different objects or body parts regardless of the time period of the assault. The defendant argued that these separate convictions should be merged into one conviction. The Alaska Supreme Court first determined that the same rules for merger apply to both sexual abuse of a minor and sexual assault convictions. The Court next considered the state and federal constitutional protections against double jeopardy and the legislative intent of the sexual abuse of a minor and sexual assault statutes and concluded that a separate act of penetration occurs each time the penetrated orifice or the penetrating object or body part changes. Therefore, each of these can support separate convictions.

MS. BRUCE said legislative review is not recommended unless the legislature does not want to allow separate convictions for each

distinct act of non-consensual sexual penetration when either the penetrating object or body part or the penetrated orifice has changed. She stated that legislative review is not recommended because generally it seems as if the Court followed legislative intent and the plain language of the statute. Nevertheless, Legal Services flagged it for the legislature's consideration.

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SENATOR MICCICHE related his understanding that the Court ultimately found that not merging the charges was appropriate.

MS. BRUCE answered that is correct.

CHAIR COGHILL recalled that was the legislature's intent.

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MS. BRUCE continued with the next case on slide 6:

Nelson v. State, 440 P.3d 240 (Alaska 2019).

- Legislative review is not recommended unless the legislature wants a public defender's conflict to only be imputed to others in the same office on a case-by-case basis.

- Page 17

She said this case relates to rules of professional conduct. A defendant alleged ineffective assistance of counsel from his public defender. At the defendant's sentencing hearing, the defendant was represented by a different attorney from the same Public Defender Agency office. The defendant argued that he should not have a public defender from the same office due to a conflict of interest. The superior court agreed on the conflict of interest but appointed new counsel only for any potential appellate and post-conviction relief proceedings. On appeal, the Alaska Supreme Court adopted a per se rule, under which a "mere allegation of ineffective assistance is sufficient to create a conflict of interest disqualifying the public defender." The Court held that a public defender has a conflict of interest that disqualifies that public defender from representing a defendant when the defendant raises a claim of ineffective assistance of counsel against another public defender in the same office. The Court further held that a defendant is entitled to conflict counsel immediately after raising an ineffective assistance of counsel claim in the context of an attempt to withdraw a plea.

MS. BRUCE said legislative review is not recommended unless the legislature wants a public defender's conflict to only be imputed to others in the same office on a case-by-case basis. Some states do operate in this manner.

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SENATOR REINBOLD asked how these cases correlate.

MS. WALLACE explained that since there are multiple drafters of this report, she organized the synopses based on the cases each attorney reviewed. She pointed out that she designated on each slide the page number on the report. For example, *Nelson v. State*, just discussed, is found on page 17 of the report.

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MS. BRUCE referred to the next case on slide 6:

- *Weston v. AKHappytime, LLC*, 445 P.3d 1015 (Alaska 2019) - AS 09.17.070
- Legislative review is not recommended unless the legislature wants to limit evidence introduced at trial to the amount actually paid to the medical provider.
- Page 18

She said in this case a woman was seriously injured when she slipped and fell on ice in a hotel parking lot. When the woman later sued the hotel for negligence, the hotel sought to bar her from introducing her original medical bills as evidence of her damages, arguing that only the amount Medicare actually paid was relevant and admissible. On appeal, the Alaska Supreme Court allowed the injured party to introduce the full, undiscounted medical bills at trial as evidence of the medical services' reasonable value. However, the Court also found that evidence of the amounts actually paid to providers for medical services should be excluded from the jury's consideration at trial but is subject to post-trial proceedings under AS 09.17.070 for possible reduction of the damages award.

MS. BRUCE said legislative review is not recommended unless the legislature wants to limit evidence introduced at trial to the amount actually paid to the medical provider.

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MS. BRUCE reviewed the final case on slide 6:

- *Keeton III v. State, Dep't of Transp. and Pub. Facilities*, 441 P.3d 933 (Alaska 2019) - AS 09.55.440(a)
- Legislative review is not recommended unless the legislature wants to include attorney's fees and costs in "the amount finally awarded" for purposes of awards of prejudgment interest under AS 09.55.440(a).
- Pages 18 - 19

She explained that when the Department of Transportation and Public Facilities (DOTPF) files a declaration of taking, allowing it to take title to the property immediately, it must deposit with the court the estimated compensation for the taking. The landowner can appeal arguing that the amount of the taking is greater. If the landowner succeeds in that effort, AS 09.55.440(a) allows any difference between the amount awarded and the amount that DOT&PF placed with the court to be charged interest at the rate of 10.5 percent annually.

MS. BRUCE said the landowner argued that the amount finally awarded should include legal fees and costs. The Alaska Supreme Court disagreed and held that "for purposes of awards of prejudgment interest under AS 09.55.440(a), 'the amount finally awarded' does not include attorney's fees and costs." It pertains only to the fair value of the land.

She explained that the landowner still receives attorney's fees and costs, but the interest rate is 4.5 percent.

MS. BRUCE said legislative review is not recommended unless the legislature wants to include attorney's fees and costs in the amount finally awarded for purposes of awards of prejudgment interest under AS 09.55.440(a).

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MS. BRUCE reviewed slide 7, Other Cases of Interest That May Require Review:

- *R.C. v. State*, 435 P.3d 1022 (Alaska App. 2018) - AS 47.12.120(b)(4)(A)
- Legislative review is not recommended unless the legislature does not want a court to consider a

minor's ability to pay restitution in juvenile delinquency cases.

- Pages 24 - 25

Under this case the Court considered two different statutes. One is AS 12.55.045(g), which prohibits trial courts from considering a criminal defendant's ability to pay when determining the amount of restitution in a criminal case. In this case a juvenile argued that the trial court erred in failing to consider the juvenile's ability to pay when it ordered the restitution amount. On appeal, the Alaska Court of Appeals stated that there is no provision equivalent to AS 12.55.045(g) in AS 47.12, which governs juvenile delinquency proceedings. However, the court noted that AS 47.12.120(b)(4) provides that a court shall order a minor and the minor's parents to make suitable restitution following the adjudication of a minor as delinquent. The court noted the legislative history. It has come before the legislature multiple times and the legislature has chosen not to amend the juvenile statutory language similar to the criminal provision. It ultimately held that trial courts are not prohibited from considering a juvenile's ability to pay when setting restitution amounts in juvenile delinquency cases.

MS. BRUCE said legislative review is not recommended unless the legislature does not want a court to consider a minor's ability to pay restitution in juvenile delinquency cases. She said essentially it says that the legislature could choose to adopt similar language to the criminal provision for juveniles.

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CHAIR COGHILL remarked that this review provides a chance to see what the courts have done and to even consider how to handle the effective dates.

[2:05:16 PM](#)

SANDON FISHER, Legislative Counsel, Legal Services, Legislative Affairs Agency (LAA), Juneau, Alaska, reviewed the second case on slide 7:

- *Thompson v. Hebdon*, 909 F.3d 1027 (Ninth Cir. 2018) - AS 15.13.072
- Legislative review is recommended if the legislature wishes to amend the amount or manner of permissible nonresident political contributions.

▪ Pages 13 - 14

He explained that this case challenged Alaska's campaign contribution statutory limits on the grounds that they violate the First Amendment of the U.S. Constitution. Specifically: (1) the \$500 annual contribution limit on an individual contribution to a political candidate; (2) the \$500 limit on an individual contribution to a non-political party group; (3) the annual limits on what a political party can contribute to a candidate; and (4) the annual aggregate limit on contributions a candidate may accept from nonresidents of Alaska. The Ninth Circuit Court of Appeals upheld the first three contribution limits because they furthered an important state interest and the limits were closely drawn.

MR. FISHER said the Ninth Circuit struck down the aggregate limit on nonresident contributions. Generally, a state can impose contribution limits in order to further an important state interest. The Alaska Supreme Court case law has said the important state interest is preventing quid pro quo corruption or its appearance. The Alaska Supreme Court said the contribution limit would be upheld if the limit is closely drawn to furthering that important state interest. In this case, the Ninth Circuit pointed out that the state failed to show why an out-of-state individual's early contribution was not corrupting but a later contribution above the limit somehow became corrupting. For that reason, the Ninth Circuit held that the nonresident aggregate contribution limit violated the First Amendment of the U.S. Constitution and did not further an important state interest.

CHAIR COGHILL said he recommended review of this case.

MR. FISHER said because the Ninth Circuit found that this fourth campaign contribution limit is unconstitutional, the Legislative Legal Services recommends legislative review if the legislature wishes to amend the amount or manner of permissible nonresident political contributions. Basically, the Ninth Circuit said the statute is unconstitutional and unenforceable.

CHAIR COGHILL said this is a good case to flag but he has not seen a statutory provision brought forth yet.

MR. FISHER pointed out that the contribution limits are primarily found in AS 15.13.070 and 15.13.072.

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SENATOR KIEHL said he thinks there is a bill in the other body.

[2:07:51 PM](#)

MR. FISHER turned to the next case on slide 7:

- *State v. Tofelogo*, 444 P.3d 151 (Alaska 2019) - AS 12.55.255(c)(18)(A)
- Legislative review is recommended if the legislature does not intend for the sentencing aggravator to apply to roommates.
- Pages 26 - 27

He summarized that a man killed his roommate with a large knife while demonstrating martial arts moves. He pled guilty to criminally negligent homicide and stipulated to the applicability of the statutory aggravator set out in AS 12.55.155(c)(18)(A) that allows sentencing above the upper range when a crime is "committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant."

MR. FISHER said on appeal the defendant argued that the aggravators should not apply to his case because the legislature intended to apply to domestic violence situations. The Court of Appeals agreed with the defendant. However, on appeal, the Alaska Supreme Court reversed the Court of Appeals, concluding that the plain language of the statute applied to roommates. Legislative review is recommended if the Alaska Supreme Court's interpretation of the aggravator is not consistent with the legislature's intent. Basically, the question is whether the legislature intend for the sentencing aggravator to only apply to domestic violence situations, he said.

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MR. FISHER turned to the last case on slide 7.

- *Michael W. v. Brown*, 433 P.3d 1105 (Alaska 2018) - AS 13.26.132
- Legislative review of AS 13.26.132 is recommended if the legislature wants to change the standard for appointment of a non-parent as a guardian for a minor child.

- Pages 28 - 29

He said this case involves a child, Kevin, whose parents separated in the Lower 48. The father, Michael W., moved to New York, and the mother, Mindy B., moved to Alaska. In 2016, Mindy moved to Arizona to enter a rehabilitation program. From that point forward, Kevin stayed in Alaska with his maternal grandparents, the Browns. In 2017, the Browns filed a petition to be appointed as the child's legal guardian and Michael W. opposed the petition. Under AS 13.26.132, the court may appoint a guardian for a minor if all the parental rights have been "terminated or suspended by circumstances" or a prior court order. The Alaska Supreme Court held that when a parent opposes a non-parent's petition for guardianship of a minor, a court should first apply the biological parent preferences. This is a presumption that the parent should have custody of the child. He reiterated that preference can only be overcome if the parental rights have been "terminated or suspended by circumstances" or by a prior court order.

In this guardianship situation, the Alaska Supreme Court said that "suspended by circumstances" means "some set of circumstances which deprives a parent of the ability to accept the rights and responsibilities of parenthood." If the court cannot overcome this first hurdle, it does not proceed any further and the parent is entitled to his/her biological preference.

If there is a set of circumstances which deprives a parent of the ability to accept the rights and responsibilities of parenthood, then the court considers the best interest of the child in determining who to appoint as the guardians. Here, the best interest of the child is not the first order of the Court's inquiry in a guardianship dispute between a nonparent and a parent. Legislative review of AS 13.26.132 is recommended if the legislature wants to clarify or change the standard for appointment of a non-parent as a guardian for a minor child.

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MR. FISHER reviewed slide 8, Other Cases of Interest That May Require Review:

- *Schacht v. Kunimune*, 440 P.3d 149 (Alaska 2019) - AS 13.33.211
- Legislative review is not recommended unless the legislature does not intend for AS 13.33.211 to apply

to all controversies between beneficial account owners and creditors.

- Pages 29 - 30

He said this case involves the relationship between a creditor and the owners of a joint checking account.

A son opened joint checking and savings accounts with his father. A creditor of the father later levied the joint account and obtained approximately \$90,000 (essentially all of it traceable to the son) in partial satisfaction of the creditor's judgment against the father. The son intervened in the collection action, arguing that the money should be returned to him because he was the equitable owner of the funds in the accounts.

MR. FISHER said at issue in this case is AS 13.33.211(a), which provides that "during the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent." After reviewing this statute, the Alaska Supreme Court held that "courts considering a challenge by a joint account owner to a creditor's levying of funds from a joint account presumptively must apply AS 13.33.211 and calculate the net contributions of each account owner to determine the amount of funds subject to levy. A creditor can, in turn, rebut the presumption that joint owners own the account in accordance with their net contributions by providing clear and convincing evidence of a different intent."

He said legislative review is not recommended unless the legislature does not intend for AS 13.33.211 to apply to all controversies between beneficial account owners and creditors. He pointed out that it is important to note that this statute applies only to disputes between creditors and joint account owners. It wouldn't necessarily apply to a dispute between the owners of a joint account over the ownership of the funds.

CHAIR COGHILL said it appeared to have worked the way it was supposed to work.

[2:13:18 PM](#)

MR. FISHER turned to the next case on slide 8.

- *Morrison v. Alaska Interstate Constr. Inc.*, 440 P.3d 224 (Alaska 2019) - AS 23.30.010(a)

- Legislative review is not recommended unless the legislature wishes to modify the last injurious exposure rule.
- Pages 31 - 32

He said in this case a worker had surgery on his right knee in 2004 after injuring it while working for an employer, [SKW Eskimos, Inc.]. The employer paid all workers' compensation claims related to the 2004 knee injury. The worker returned to work for a different employer. In 2014, the worker again injured the knee. The new employer disputed liability for continued medical care, and the worker filed a written claim against Interstate [the new employer]. The question at issue is if the old or new employer should be held liable for the workers' compensation claim.

MR. FISHER said this case involves the last injurious exposure rule, which applies when successive injuries with different employers each contribute to a worker's needs for medical care. Prior to 2005, the rule imposed full liability on the employer at the time of the most recent injury that bore a causal relationship to the disability. However, in 2005, the legislature amended AS 23.30.010. The change now requires the Workers' Compensation Board to look at the different causes of need for medical treatment and determine which of those causes is the most substantial. The Court held that this statute changed the last injurious exposure rule. Instead of looking to the person who was the employer at the time of the last injury related to the disability, now the board determines which injury was the substantial cause of this disability. The board can then impose liability on the current employer or an earlier employer, rather than just going back to the most recent injury.

CHAIR COGHILL related his understanding that the board would decide the proportional cause.

MR. FISHER answered not necessarily. The Court noted that the board must pick between one or the other. The employer who is most responsible pays in full. It specifically noted that the statute does not apply for apportionment.

Legislative review is not recommended unless the legislature wishes to modify the last injurious exposure rule.

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MR. FISHER reviewed the next case on slide 8:

In re Paige M., 433 P.3d 1182 (Alaska 2018) - AS 47.30.700

- Legislative review is not recommended unless the legislature wants to clarify when a screening investigation should be conducted.
- Pages 41 - 42

A psychologist petitioned to have a patient involuntarily hospitalized. The superior court held a hearing on the petition at which only the psychologist testified, and the court granted the petition. The court relied on testimony by the psychologist about the patient's condition before the filing of the petition and did not conduct a screening investigation. The patient was hospitalized under AS 47.30.700, which allows for involuntary hospitalization upon the petition of any adult. He pointed out that AS 47.30.705 would allow a peace officer or licensed doctor or psychologist to swear an affidavit and have someone taken in immediately. AS 47.37.700 allows for hospitalization after a judge issues an order to that affect. Under AS 47.30.700, the judge must immediately conduct a screening investigation of the person alleged to be mentally ill or direct a local health professional to do so.

The Alaska Supreme Court clarified that before issuing the hospitalization order, the screening must include post-petition interviews with the person(s) making the allegations, other significant witnesses, and if possible, the respondent, the person alleged to have mental illness requiring involuntary hospitalization.

Legislative review is not recommended unless the legislature wants to clarify when a screening investigation should be conducted.

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CHAIR COGHILL said it sounds like the Court found an artful solution.

[2:17:49 PM](#)

MEERA CAOUILLE, Legislative Counsel, Legal Services, Legislative Affairs Agency, Juneau, Alaska, reviewed the final case on page 8.

Anderson v. State, 436 P.3d 1071 (Alaska App. 2018) - AS 18.66.990

- Legislative review is recommended if the legislature wishes to clarify application of the term "household member" with respect to a minor victim of sexual abuse or wishes to amend the exceptions to the marital privilege rules.

- Pages 15 - 16

She said the Court of Appeals had to interpret an exception to the marital privileges in Rule 505(a)(2)(D) and Rule 505(b)(2)(A), the spousal immunity privilege. That rule provides that a married person has a privilege not to be called as a witness when their spouse is charged with a crime. However, there are several exceptions to this privilege where the spouse can be compelled to testify.

MS. CAOUILLE said the issue in this case was the exception for cases where the spouse is charged with a crime of domestic violence as defined in AS 18.66.990. Under AS 18.66.990(3), a crime of domestic violence includes any crime against a person under AS 11.41--which includes sexual abuse of a minor--if one household member commits the crime against another household member. Under AS 18.66.990(5), "household member" includes both "adults or minors who are dating or who have dated" and "adults or minors who are engaged in or who have engaged in a sexual relationship."

She reviewed the facts of this case. A high school music teacher was charged with multiple counts of sexual abuse of a minor based on allegations of repeated sexual encounters with a 15-year-old student. The teacher's wife asserted her spousal immunity privilege to not testify against her husband. The Court of Appeals concluded that the student was a "household member" under AS 18.66.990(5) because the teacher and student dated and were engaged in a sexual relationship. The court made this finding based on the student's grand jury testimony. Although the student was not legally able to consent to sexual activity with an adult, she believed they were dating and viewed their sexual relationship as consensual according to grand jury testimony. The Court of Appeals ruled that the crime of domestic exception to the spousal immunity applied and the defendant's wife could be compelled to testify.

She said legislative review is recommended if the legislature wishes to clarify application of the term "household member" with respect to a minor victim of sexual abuse if the court's interpretation is inconsistent with the legislature's intent or to consider adding a specific exception to the marital privilege rules for a crime against any child regardless of the child's relation to either spouse. The court noted that other jurisdictions have adopted this type of exception to the marital privileges rules, but no such exception exists under Alaska law.

[2:20:40 PM](#)

CHAIR COGHILL said the Court of Appeals is giving the legislature a hint on how to remedy the issue.

MS. CAOUETTE responded that the Court noted it was trying to honor the legislature's intent to broaden who may be considered as a victim of domestic violence, but it noted that this case might be easier to resolve in another jurisdiction with a specific exception for a crime against any child.

CHAIR COGHILL said the legislature will be dealing with sexual assault issues so perhaps a bill related to Title 18 will be coming through. He suggested the committee keep this in mind.

[2:21:15 PM](#)

SENATOR REINBOLD requested that, during a future hearing, the committee also discuss marital privilege. She said she finds it astonishing that a teacher's wife would not want to testify.

CHAIR COGHILL responded that many court cases have astonishing facts. Some of it is how people act and some is how the rule of law intersects with that action. That's why the legislature continually reviews and rethinks some of these things. He concurred that it was difficult to imagine that kind of reaction and flagged the case for committee review.

[2:22:16 PM](#)

MS. CAOUETTE reviewed the first case on slide 9, Other Cases of Interest That May Require Review:

- *Alaska Spine Ctr., LLC v. Mat-Su Valley Med. Ctr. LLC*, 440 P.3d 176 (Alaska 2019) - AS 18.07.031
- Legislative review is not recommended unless the legislature wishes to clarify the meaning of "same community" within the context of the AS 18.07.031(c) exemption to AS 18.07.031(a).
- Pages 30 - 31

She said in this case the Alaska Supreme Court interpreted the meaning of "same community" within the context of AS 18.07.031. That statute requires a healthcare facility to obtain a certificate of need (CON) from the Department of Health and Social Services (DHSS) before beginning construction that will exceed a cost of \$1,000,000. Under AS 18.07.031(c), DHSS may grant an exemption from the CON requirement to an existing ambulatory surgery facility that plans to relocate within the same community as long as the facility does not increase the services it offers. The statute does not define the term "same community," which is why the Court was asked to interpret it. DHSS granted an exemption to Alaska Spine Center (Alaska Spine), an Anchorage facility that sought to relocate to Wasilla, after determining that Wasilla and Anchorage are within the same service area and therefore considered the same community.

The Alaska Supreme Court concluded that neither the plain language of the statute nor the legislature history support DHSS's determination that Anchorage and Wasilla are in the same community. In reaching this determination, the Court noted that Anchorage and Wasilla are each part of distinct local governments, are located 44 miles apart, have separate school districts, police forces, and elected officials, have independent hospitals, and have no tax overlap. The Court further reasoned that the term "service area," defined in DHSS regulations as the "the geographic area to be served by the proposed activity, including the community where the proposed activity will be located," is clearly broader than the term "community." The Court therefore determined that the terms could not be considered synonymous.

She said in this case legislative may wish to review this case to consider defining the term "same community."

CHAIR COGHILL offered his view that the Court got pretty close to where the legislature would have gotten.

MS. CAOUETTE said one thing to note is that the Court did make the decision but did not actually define the term. She suggested that there could be future litigation.

[2:24:38 PM](#)

MS. CAOUETTE reviewed the next case on slide 9:

Warnke-Green v. Pro-West Contractors, LLC, 440 P.3d
283 (Alaska 2019) - AS 23.30.128

- Legislative review is not recommended, unless the legislature wishes to limit the reconsideration authority of the Alaska Workers' Compensation Appeals Commission to its final decisions on the merits.
- Pages 32 - 33

She said in this case the Alaska Supreme Court considered whether under AS 23.30.128, the Alaska Workers' Compensation Appeals Commission can only reconsider its final decisions. That statute describes the appeal proceedings of the Workers' Compensation Appeals Commission.

MS. CAOUETTE explained that in this case, a party [Warnke-Green] asked the Commission to reconsider its attorney's fees decision and the Commission denied the request, stating that it was only authorized to reconsider its final decision on the merits of the appeal. The Alaska Supreme Court noted that while AS 23.30.128(f) addresses reconsideration of Commission decisions, the statute "is silent about reconsideration of any decisions other than the final decisions on appeal described in subsection (e)." The Court considered AS 23.30.128(d), which authorizes the Commission to "affirm, reverse, or modify a decision or order upon review and issue other orders as appropriate." The Court reasoned that the authority in subsection (d) gives the Commission broad authority to reconsider its non-final decisions and that doing so is a "necessary part of adjudication" and advances the legislative intent to give individuals seeking review of board decisions the same procedural rights that they would otherwise receive in superior court. The Court therefore held that the Commission has authority to reconsider its non-final decisions because such authority is "necessarily incident" to its authority to issue other orders as appropriate under AS 23.30.128(d).

CHAIR COGHILL related that there is a bill before the legislature on whether to keep the Commission or allow the superior court to handle workers' compensation appeals.

SENATOR REINBOLD said she is skeptical of that bill and when she sees this type of case, she wonders why the legislature would consider abolishing the Commission.

[2:26:48 PM](#)

CHAIR COGHILL reiterated that the Commission can currently adjudicate cases, but there is a question on whether to continue with that process.

[2:26:56 PM](#)

MS. CAOUETTE said in this case the legislature may wish to review this case if it did not intend for the Commission to have the authority to reconsider its non-final decisions.

[2:27:08 PM](#)

MS. CAOUETTE reviewed the next case displayed on slide 9:

Black v. Whitestone Estates Condo. Homeowners' Ass'n,
446 P.3d 786 (Alaska 2019) - AS 34.08.470(h)

- Legislative review is not recommended unless the legislature wishes to relieve unit owners that have actual knowledge of an assessment of the obligation to pay that assessment if it is omitted from a statement provided under AS 34.08.470(h).

- Pages 36 - 37

MS. CAOUETTE said in this case the Alaska Supreme Court considered AS 34.08.470(h), which provides that a condominium association "shall furnish to a unit owner a statement setting out the amount of unpaid assessments against the unit" upon request and the statement "is binding on the association, the executive board, and each unit owner." The Court considered whether the statute relieves the unit owner of the obligation to pay an assessment that is omitted from the statement when the owner has actual knowledge of the assessment. In this case a condominium owner couple requested a statement of unpaid assessments and then argued that they were not obligated to pay a special assessment because it was omitted from the statement. On appeal, the Alaska Supreme Court noted that the legislative history of AS 34.08.470(h) showed an intent to protect unit owners by ensuring they could readily obtain information about their liability and preventing the association from collecting assessments of which the owners have no knowledge. The Court reasoned that when an owner has actual knowledge of an assessment, the protection provided by AS 34.08.470(h) is unnecessary. The Court concluded that "[i]t would be contrary to the purpose of AS 34.08.470 to allow a unit owner who already knows about an assessment to use its omission from a statement provided by the association as a means to relieve himself or herself of the obligation to pay it." She said the legislature

may want to review this case if it intends for the statute to relieve a unit owner of the obligation to pay that assessment if it is omitted from a statement even if the owner has actual knowledge of the statement.

[2:28:47 PM](#)

CHAIR COGHILL said this reminds members of the importance of the details when they review lengthy bills.

[2:29:02 PM](#)

SENATOR REINBOLD relayed that a condo association in her district suffered significant damage from the earthquake and many owner are losing their condominiums. She asked whether she would be the staff attorney to talk to about this issue.

MS. CAOUETTE answered no.

[2:29:36 PM](#)

MS. WALLACE suggested she speak to Terry Bannister in Legislative Legal Services.

[2:29:56 PM](#)

MS. CAOUETTE reviewed the last case listed on slide 9:

Adkins v. Collens, 444 P.3d 187 (Alaska 2019) - AS 45.50.537(a)

- Legislative review is not recommended unless the legislature intended to allow "full reasonable attorney fees" to be calculated based on a contingency fee agreement.

- Page 39

MS. CAOUETTE said in this case the Alaska Supreme Court considered how "full reasonable attorney fees" should be calculated under Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) and whether the calculation may be based on a contingency fee agreement. The UTPA is codified in AS 45.50, and under AS 45.50.537(a) a prevailing plaintiff is entitled to full reasonable attorney fees, which is not defined in the statute. In determining the amount of attorney fees, the superior court concluded that "full reasonable attorney fees" under AS 45.50.537(a) could be defined by the contingency agreement executed by the plaintiff and his counsel. The Alaska Supreme Court held that Alaska courts should instead employ the "modified lodestar" method in calculating "full reasonable

attorney fees" under AS 45.50.573(a). Under the modified lodestar method, a court should first determine the baseline lodestar amount by multiplying the reasonable number of hours worked by a reasonable hourly rate and then the court may consider a variety of factors to determine whether to adjust the calculated amount. The Court therefore concluded that the superior court's calculation of attorney fees based on the contingency fee agreement did not constitute "full reasonable attorney fees" under AS 45.50.537(a). The legislature may want to review this case if the court's method of calculating attorney fees is inconsistent with the legislature's intent.

CHAIR COGHILL said it sounds like the Court got it right, but someone may wish to review it.

[2:31:49 PM](#)

SENATOR REINBOLD asked if any authority reviews and regulates attorney fees because she did not consider any of the attorney fees she has encountered as reasonable.

MS. CAOUETTE answered yes. She said Rules of Professional Conduct would have a rule considering reasonable attorney fees. The issue is that the term was used in the statute with no explanation of what that term means or how to define it. The [Alaska Supreme Court] was forced to look to other jurisdictions to see how that was handled under similar Consumer Protection Acts.

CHAIR COGHILL said it was good to flag, but it sounds like the Court found a methodology that was reasonable.

[2:32:41 PM](#)

SENATOR KIEHL said he was curious how the term lodestar was used to determine the baseline amount of attorney fees.

MS. CAOUETTE responded she researched the term but was not able to find an explanation.

[2:33:22 PM](#)

MS. BRUCE reviewed slide 10, Delayed, Repeals, Enactments or Amendments:

Laws enacted in 2008

- Ch. 15, SLA 2008, sec. 2 -- Capstone Avionics Revolving Loan Fund - certain provisions repealed
July 1, 2020

Laws enacted in 2013

- Ch. 10, SLA 2013, sec. 34 -- Oil and Gas Competitiveness Review Board - certain provisions repealed February 28, 2021

Laws enacted in 2014

- Ch. 61, SLA 2014, secs. 16, 22, and 23 -- Tax Credits and Indirect Expenditures - certain provisions repealed or amended December 31, 2020
- SB 130 (relating to AS 43.75.075 and 43.75.130(f) only)

Laws enacted in 2015

- Ch. 3, SLA 2015, sec. 6 -- School Bond Debt Reimbursement - certain provisions repealed July 1, 2020
- HB 106

MS. BRUCE directed attention to page 1 in the 2019 Oversight Report. She said she complied the delayed amendments and repeals that take affect between February 29, 2020 and March 1, 2021. The first repeal was enacted in 2008 for the Capstone Avionics Revolving Loan Fund. This fund and program will be repealed on July 1, 2020. The program allows the Department of Commerce, Community and Economic Development (DCCED), to make loans for the purchase and installation of capstone avionics equipment to the owner of an aircraft that logs a substantial percentage of flight hours in the state. The Capstone Avionics program is designed to improve tracking and safety on planes. It allows pilots to have a moving map video display screen with additional information. It also allows air traffic control to know the precise location of a downed aircraft. She noted that the governor's proposed budget includes an appropriation of the balance of that fund on June 30 to go to DCCED for the Alaska Development Team (AKDT). She said the balance is a little less than \$3 million. If the fund is not appropriated this year and the fund is repealed on July 1 as provided in 2008, that money will lapse into the general fund.

CHAIR COGHILL recalled the discussion about the Capstone Avionics program. Alaska had so many aircraft incidents that the state took measures to improve tracking and flight integrity. He said he is unsure if those issues are resolved, but this will be a question for the legislature.

[2:35:58 PM](#)

MS. CAOUETTE reviewed the next item on slide 10, laws enacted in 2013, related to the Oil and Gas Competitiveness Review Board, [listed on page 1 of the report]. These statutes will be repealed on February 28, 2021. This board collects, and reviews

information related to oil and gas in the state and makes recommendations to the legislature. The board's final written findings and recommendations to the legislature are due on January 31, 2021.

MS. CAOUETTE reviewed the next item on slide 10, laws enacted in 2014, related to Tax Credits and Indirect Expenditures that are scheduled to be repealed. She reviewed the statutes, including AS 43.75.035 and AS 43.75.130 (f) relating to the salmon and herring product development tax that will be repealed on December 31, 2020. She noted that SB 130, currently before the Senate Resources Standing Committee extends these provisions and repeals them on January 1, 2026.

MS. CAOUETTE referred to AS 43.77.040, which allows a taxpayer who harvests a fishery resource under the provisions of a Community Development Quota to claim a credit for certain approved contributions to a nonprofit corporation. This statute will be repealed on December 31, 2020. She stated that AS 43.77.050(b) will be amended on December 31, 2020 to remove a reference to the previous statute.

[2:38:18 PM](#)

MS. BRUCE reviewed the next item on slide 10, laws enacted in 2015. Some provisions related to school bond debt reimbursement restrict bond debt reimbursement for school bonds by a municipality between January 1, 2015 and July 1, 2020. These are currently scheduled to be repealed on July 1, 2020. HB 106 is currently in the Senate Finance Committee that would extend these provisions to July 1, 2025.

[2:38:54 PM](#)

SENATOR REINBOLD asked if the laws enacted in 2013 related to the Oil and Gas Competitiveness Review Board correlated to SB 21.

MS. CAOUETTE answered yes.

[2:39:40 PM](#)

MS. CAOUETTE reviewed slide 11, Delayed, Repeals, Enactments or Amendments:

Laws enacted in 2016

- Ch. 54, SLA 2016, sec. 23 -- School Accountability - certain provisions repealed July 1, 2020

Laws enacted in 2018

- Ch. 101, SLA 2018, secs. 3, 8, 13, 18, 23, 28, 32, and 34 -- Education Tax Credits - certain provisions amended December 31, 2020 and January 1, 2021

Laws enacted in 2019

- Ch. 18, SLA 2019, secs. 1 - 4 -- Prescription Drugs - certain provisions amended March 1, 2020
- Ch. 4, FSSLA 2019, secs. 123 - 129 and 131 -- Crimes and Criminal Procedure - certain provisions enacted or amended January 1, 2020, July 1, 2020, and September 1, 2020

[2:40:05 PM](#)

MS. CAOUETTE reviewed the laws enacted in 2016. She said AS 14.07.175 is scheduled to be repealed on July 1, 2020, which relates to the development of a statewide assessment plan and review of education laws and regulations.

She reviewed laws enacted in 2018. She said various statutes relating to education tax credits were scheduled to be amended on January 1, 2021. This would change the amount of the credits to 50 percent of contributions of cash and equipment accepted for certain educational purposes. She explained that the educational tax credit computations for contributions will be changed to 50 percent on and after January 1, 2021.

MS. CAOUETTE reviewed laws enacted in 2019. She said two session laws (SLA) are scheduled to be amended. The first one, Senate Bill 44, related to prescription drugs. Several provisions will be amended on March 1, 2020 to allow physician assistants to diagnose a patient and prescribe medication to a patient without conducting a physical examination under certain circumstances. She said this authority was passed several years ago for physicians and last year physician assistants were added.

[2:41:33 PM](#)

MS. CAOUETTE said HB 49, related to crimes and criminal procedure, would amend and enact certain statutes on January 1, 2020 relating to sexual assault examination kits. It would amend and enact statutes on July 1, 2020 relating to tracking and reporting data on felony sex offenses. It would amend a statute on September 1, 2020 relating to a person's duty to report harm to a child if the harm appears to be the result of a sex offense.

CHAIR COGHILL recalled that regulations needed to be implemented.

[2:42:34 PM](#)

MS. WALLACE reviewed slide 10, Historical Oversight Reports are available on the Internet at <https://intranet.akleg.gov/legal-services/index.php?oul=Legal%20Services&&bid=legal>.

She related that after each legislative session, the agency prepares a summary of legislation that passed the legislature and that report is also available on the intranet.

[2:43:34 PM](#)

SENATOR HUGHES asked if Legislative Legal ever updates the previous oversight reports to reflect any subsequent changes the legislature may have made to clarify legislative intent and show that the legislature followed up on Legislative Legal recommendations.

MS. WALLACE replied the agency does not currently track that but the legislature could add it to the agency's responsibilities. She said that information is easily ascertained and any members who had questions could contact the agency to find out if a specific statute was further amended.

[2:45:28 PM](#)

CHAIR COGHILL highlighted that reviewing the Legislative Legal Services oversight reports provides an opportunity to hear how the court has interpreted bills that the legislature has passed and to ask questions. He added that he was reluctant to add any additional responsibilities to the agency.

[2:49:10 PM](#)

There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at 2:49 p.m.