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State of the Judiciary Address

by

The Honorable Joel H. Bolger

Chief Justice

Alaska Supreme Court

Before the Senate

of the

First Session of the

Thirty-Second Alaska State Legislature

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President Micciche, Speaker Stutes, Honorable Members of the 32nd Alaska Legislature, and others who are joining us to hear the condition of Alaska’s judicial system, good morning. I thank you for this opportunity to address the joint session of the Senate and the House of Representatives today, and I am grateful for your past and ongoing support of the judicial branch of Alaska’s government.

The judiciary has one over-arching mission – to resolve all cases that come before it justly and in accordance with the rule of law. We strive every day to provide a fair and impartial forum for people to resolve their disputes, whether the dispute involves parties within a family unit, children who may be at risk, Alaskans who are accused of criminal activity, or governmental entities who seek resolution for challenging issues where compromise cannot be found. Handling all of our cases and following our mission of ensuring justice for all requires judges to apply the constitution and laws of the State of Alaska and the United States to the facts of each case, and I am proud to say that our judges do exactly that every single day, faithfully and with integrity and fairness, to the great benefit of all Alaskans.

Over this past year, as you might imagine, the judiciary has faced exceptional and unique challenges in making sure that we follow that core mission of providing justice for all while simultaneously responding to the unpredictable and ever-changing impacts of the novel coronavirus disease.

Let me assure you of two very important principles that have guided every operational decision the courts have made in responding to this pandemic: First the Alaska Court System has been, and continues to be, absolutely determined to stay open for business to the fullest extent possible to deliver justice without interruption throughout this entire period. Second and simultaneously, we have been fully committed to not putting the general public at risk and to protecting the health and safety of our staff and every single person who enters a courthouse.

Finding the best balance between these two tenets has been a tremendously time-consuming process for us, and at times difficult or even confusing for others as we respond to new and changing information, but I can report to you today that we have in fact remained open for almost all court business and procedures, and I am confident that we have been making the proper decisions about our ongoing operations at the proper moments.

I am confident because our approach has been methodical and well-informed: top court administrators, presiding judges, and I have met and continue to confer with the state's Chief Medical Officer and officials in the Department of Health and Human Services to learn the most current information about how the virus behaves and spreads, case counts and projections, the latest advice for implementing best practices to limit exposure, and even to seek specific advice on whether and how to hold court hearings and trials. Administrators and judges have stayed abreast of how other state courts are reacting through nationally-organized pandemic-related webinars, as well as through less structured video- or teleconferences with colleagues in other areas of the country. Our staff has participated in weekly videoconferences with DHSS and others from the executive branch to ensure we have the most current and best virus-related information to inform our decisions. And high-level court staff and judges have participated in weekly videoconference "pandemic planning" meetings since last February to ensure that our internal communication is sound and well understood.

With this underpinning, I am here to say that the court system has reacted thoughtfully, relying on all of the most up-to-date, evidence-based health and safety information available, and appropriately, weighing the often competing rights and concerns of parties and the public, to the unique challenges we have faced since last March. And now let me get more specific about the steps we've taken and the operational adjustments we've made, and explain the reasons for and impacts of some of those changes.

The earliest changes the court system made were effective in mid-March of last year, soon after Governor Dunleavy's emergency declaration. The court suspended or relaxed certain rules, allowed some non-priority hearings to be postponed, and authorized video and

telephone appearances for others, allowed filings to be emailed to the court, and allowed limits on the number of people that could be present in a courtroom. A series of statewide orders followed, which were modified as needed as time passed and new information about the virus became better known. Generally, we gradually were able to expand the kinds of court proceedings that could take place as long as safety protocols were in place, and I'm pleased to say that we are almost back to full action. I say "almost" because, as you are likely aware, the courts suspended nearly all jury trials beginning last spring, reluctantly, because we could see that bringing all those Alaskans into a courtroom was, and continues to be, just too risky to the public's health. I will certainly address some of the particular problems concerning juries, but first let me tell you what has been happening in the court system, first in the background administratively, and then in the actual courtrooms.

Administratively, we've made all the changes to our practices that you'd probably expect. We require masks be worn by the public and staff, we adhere to social distancing guidelines, and we take visitors' temperatures when they enter, and keep visitor logs for contact tracing. We also installed Plexiglas barriers where needed, supplied courthouses with hand sanitizer and soap and gloves, and replaced air filters and water fountains. We've mapped out socially distanced locations for our courtrooms and customer service areas. We hired day cleaners in our largest courts to clean high touch areas in public and employee areas, and brought in special cleaners for situations when specific areas need special cleanings.

The court system has over 40 locations statewide -- some of these we own, some are part of the state's building fund and are run and maintained by an executive branch agency, and some we lease from private landlords. The task of ordering and delivering supplies, installing barriers, and making other physical changes, or getting the changes made through an agency or a landlord, and enhancing cleaning services and protocols, all within as short a time as possible in courthouses all across the state, was truly a massive one. But as of today, we know of no member of the public who has become ill with COVID-19, or who has caused another person to be infected, as a consequence of visiting a court facility to do court business. Our precautions have worked so far.

Those are the general behind the scenes efforts that the court staff has been very busy planning and deploying. Now let's talk about the actual daily work of the trial court judges and the court activity that directly affects the court system's caseload.

First I must emphasize that from the very beginning of the pandemic emergency back in March, the courts have consistently continued to hold "priority hearings" – that is, a list of emergency and extremely important hearings identified by the Supreme Court in its first Order. So every day, the judges have in fact been holding critical criminal hearings, domestic violence hearings, certain child in need of aid hearings, mental health commitment hearings, and a list of other high priority hearings. None of these very important events were suspended by the court system whatsoever, because the court determined that the balance tilted in favor of consistently handling these crucial proceedings even in light of the public health emergency. It is surely a testament to our dedicated employees and to the many professionals in the affected agencies – the district attorneys, the public defenders, the OCS workers, and the like – that the court has never stopped holding these priority hearings, even during the earliest and most confusing days of the declared emergency.

For a short time at the outset of the pandemic, the courts held only these essential hearings. Other hearings, especially in civil cases, were rescheduled to later dates. This had to be done to allow all the parties and attorneys and court personnel a chance to deal with changed childcare responsibilities, or unexpected quarantine restrictions, or illnesses, or other practical disruptions to peoples' schedules of that nature. In very short order, however, we returned to nearly full operations, and most cases now are being routinely dealt with within the same general timeframes and with the same general case activity as in pre-pandemic days.

As you would expect, hearings and case processing do look quite different from pre-pandemic times. The most obvious way things are different now is that for almost every hearing, all of the participants (other than the judge and a court clerk) appear in court by phone or video connection – attorneys, parties, relatives, victims, defendants, and everybody else, and I'll talk a bit more about the challenges that

can bring in a moment. And case complaints, petitions, motions, requests, briefs – nearly all case documents – are now emailed to the court and served by email on other parties. Allowing emailed filings cuts down on people needing to come to a courthouse and is safer because papers are not touched by as many people, but it also means that a court clerk needs to monitor a specified email address, open all the emails sent by parties and others, review the documents for cybersecurity concerns and ensure they are safe, then open and print the attached filings for the court’s official case records and for the judges to use.

And so with these safeguards in place to allow the courts to operate yet slow the transmission of the virus, let me give you some data on what the courts have been doing. From March through December of 2020,

- courts disposed of nearly 24,000 petitions in CINA, domestic relations, probate, and domestic violence cases alone;
- judges held more than 225,000 court hearings in criminal and civil cases statewide;
- we had over 4,300 trials held before a judge, sitting without a jury, mostly in civil cases; we have moved ahead with these trials where witnesses testify, evidence is presented, and parties make their arguments to the judge for resolution, and these are very common in civil cases; and finally,
- judges issued about 78,000 rulings and orders to resolve disputed issues, which might be evidentiary questions or motions to change the amount of child support a parent has to pay, or to finally close civil and criminal cases.

These numbers are not very far off what courts did during the same time period for prior years - - with variations that reflect changes in the number of case filings and motions of course - - and they certainly show that Alaskans are getting their protective orders, custody issues, divorces, CINA matters, small claims, criminal cases, and other legal matters resolved by the courts, even during these very challenging times.

In addition, we have been working with the justice agencies over the past months and have developed a novel way to hold grand jury proceedings as well, so that felony indictments wouldn't be as severely backlogged during the pandemic. Some grand juries have met through Zoom videoconference, an innovation that was piloted in Northwest Alaska last summer after much planning, training, and cooperation. Since November, during the hardest parts of the pandemic, these remote videoconference grand juries have been allowed across the state, and prosecutors have been conducting these proceedings to the extent they deem reasonable and necessary.

Now let me turn to the court proceedings that have proven most challenging to resume safely, and that is criminal jury trials. Again, the struggle is finding the right balance. Criminal defendants have a constitutional right to face their accusers, and jurors and other participants generally must see the defendants and witnesses in person to render a reliable verdict. This makes a criminal jury trial via Zoom videoconference or other remote means simply unavailable in most cases. For most criminal jury trials, the jurors and other participants must be physically present.

The main barrier to resuming jury trials in person is the size of our courtrooms. They are simply too small to accommodate the number of people who need to attend a jury trial, while simultaneously adhering to the six-foot social distancing protocols. Even a misdemeanor trial, which requires just six jurors, calls for 14 or 15 people to be present, not counting the media or general public, once you add in the attorneys, investigators, witnesses, a judge, a court clerk, possibly a victim, a security officer, and sometimes others. A felony trial increases the minimum number of participants to about 20 - - and felony jury trials typically have multiple witnesses who very often would need to travel to the trial, sometimes long distances, which is obviously difficult if not impossible during the pandemic. We have been very cautious about continuing these court processes that increase the risk of transmission of the virus and that at the very least would cause the jurors and everyone else in the courtroom a lot of worry and distraction.

In-person jury trials present a host of other complexities too. What if a criminal defendant transported to the courtroom for his or her trial is COVID-positive? What if a juror or any other participant tests positive during a trial? How do the participants pass around and examine documents and other physical exhibits or microphones when the best advice is not to touch items immediately after someone else has done so? What should happen if potential jurors are reluctant to respond to the summons, or feel uncomfortable or resentful about serving? How can a crime victim, the media, and the general public observe meaningfully?

We have certainly wrestled with each of these problems, and many others. As I mentioned, our staff, judges, and myself have looked nationwide at other courts for new ideas and options and answers. We have considered renting alternative sites, we have considered putting some participants in a separate room, and we have considered a whole host of possible ideas that have not, in the end, been workable. But we have seen some success with jury trial logistics – in Kenai, a felony trial took place last fall with jurors scattered throughout the courtroom, including the gallery area where the public usually sits, and the entire trial was broadcast on YouTube by computer cameras placed to capture the key angles in the courtroom. In a Juneau delinquency case, juror selection was conducted by Zoom videoconference, and then the jury panel sat scattered throughout a larger courtroom with some participants on video. And we've held several presumptive death jury trials via Zoom, with jurors going into a secure "breakout" room to deliberate. I'm pleased to announce that beginning March 15, we have decided to allow the presiding judges in each district to allow jury trials upon request considering the requests of the parties, the age of the case, the seriousness of the charges, and other relevant factors.

A final word on jury trials – I want to assure you that the supreme court and every judge I know wants nothing more than to resume 100% of our regular operations. We are as frustrated as others may be at the difficulties this pandemic has caused Alaskans. After all, our mission is to move forward, to conduct proceedings efficiently and thoroughly, and to provide a fully-accessible forum for resolving legal problems. One fact that may help put this into perspective in terms of overall criminal justice is that, in any given regular year, only about

3% of all criminal cases filed are ever brought to a jury. About 97% of criminal cases are resolved through a plea bargain or are dismissed. Not having criminal jury trials, though troubling, should not be a roadblock for moving the vast majority of criminal cases towards resolution.

Before I move away from describing how the court system has responded to the COVID-19 emergency, I would like to highlight some examples of the technological and practical challenges that the pandemic has brought, and how we've used technology to continue our operations. The entire supreme court and I have been consistently impressed with how rapidly and effectively the court system staff was able to adopt and implement some of these changes.

For example, I mentioned that some grand jury proceedings were taking place remotely via Zoom videoconference, and some limited jury selection and presumptive death trials were similarly occurring via Zoom. But jurors often do not have the appropriate computer equipment or programs in their homes to allow them to be on a computer video for many hours or days. Many jurors cannot afford to use up their home internet bandwidth to stream the video for a court proceeding. So in order to conduct Zoom grand jury or jury selection, we purchased dozens of computer tablets (using CARES Act funding), loaded them with the correct programs and internet connectivity (we purchased cell phone data plans for this specific purpose), eliminated access to any other programs or purposes, and then distributed these customized tablets to courts around the state for the clerks to distribute, often by in-person home delivery, to the jurors for use in court proceedings. Using these portable computer tablets has been a tremendous practical solution to ensure that those Alaskans who are participating in court proceedings are doing so with the proper tools and with minimized burdens.

Court staff and judges also faced practical, smaller obstacles when court hearings were ordered to take place remotely in nearly all cases. Before that, most of the court system's desktop computers did not even have internal webcams or any attached camera at all, so having the judge appear on a screen for a hearing wasn't possible. And apparently the courts weren't the only ones to leverage this

technology; even though our staff started looking immediately, webcams were backordered for up to four months at certain points last spring and summer, even though we searched far and wide.

Further, a subset of court proceedings or hearings, particularly in child-in-need-of-aid cases, mental health commitments, and other probate matters, are confidential or involve discussion of highly sensitive personal matters, perhaps involving a child's welfare or behavioral issues or medical matters. The judge can't simply initiate a regular Zoom meeting for these types of hearings – our staff had to procure a number of special software licenses for an encrypted Zoom product that could ensure confidentiality and privacy and not have the courts breach the protections that the law requires and Alaskans expect for these protected case types.

Another one of the advances that I'm most excited about is a new online dispute resolution system that the court's administrative office is planning to make available to Alaskans who have certain types of legal disputes. This system gives people with certain cases an extremely useful alternative to litigating a lawsuit in court, and dealing with the costs and time that are necessarily involved in a court case. Alaskans will be able to log onto a portal through the court's website, enter an explanation of their problem, and either attempt to negotiate with the other party through the platform, or work with an online mediator to reach a resolution that is fair, fast, and inexpensive to all parties - - all without ever going to court or even leaving their computer desk for that matter. We're thrilled to be getting this new system underway – it's an improved means of delivering justice, and I know many, many Alaskans will benefit from having this streamlined process available to them.

I hope I've given you a better overview of how the court system has been responding to the coronavirus pandemic over the past year, and more meaningful information about what the judges have been doing each and every day to fulfill our mission. We have been operating in an environment where litigants, attorneys, court staff, and many Alaskans are more anxious and more uneasy generally – some have increased childcare obligations, some are facing financial issues, and some have heightened health problems. Particularly in this environment, I will assure that the court system is committed to

continuing to balance our obligation to provide timely resolution of criminal cases and all other court proceedings, and our responsibility as a branch of the state government to avoid endangering the public's health and safety.

We have been able to make all the changes I've described with existing resources and with the crucial help of CARES Act funding, fortunately, but I also need to explain that the judiciary does have requests for increments in our FY 22 operating budget that you'll be considering this session. A few of the items appear to be large – but I want to explain that they are actually funding transfers that correspond to equivalent cuts from the executive branch's budget. This is because the executive branch has requested that the court system take over work or expenses that were previously funded by the state, but that were handled and paid for by the executive branch. So even though you'll see two substantial increments in our budget request this year, the funding we are seeking is actually a transfer of funds from the executive branch to accompany the tasks that are being moved into the court system.

The court system does have a few other relatively modest increments for FY 2022, including a request for funding a 1% pay raise for court staff who are not judges, which executive branch employees are already scheduled to receive next year. Let me stress, though, that the supreme court decides to request a budget increment only after thorough deliberation and only if we are convinced that the dollars are absolutely necessary for the continued fair, safe, and efficient operations of the court system. Many of you have recognized and probably recall that the court system has been a very careful steward of the state funding you have provided in past years, and that we were proactive and aggressive in implementing our own budget cuts beginning in FY 2015. Now we truly have no leeway left, and no alternatives for continuing effective court operations without the increments that we are seeking. Of course, you'll be hearing much more on this and all other aspects of our budget from our representatives here in Juneau, Doug Wooliver and Nancy Meade, who will be here throughout the session and are always willing to answer questions, explain processes, and help with court-related issues in any way.

In closing, I want to add three expressions of special gratitude. First I want to thank the hundreds of employees and judges on the court staff who have worked diligently through the past year to provide timely justice services in spite of the global pandemic. Most of our staff have been required to work from their offices, so they have endured all of the safety precautions that went along with that effort: indoor masking and social distancing at work, careful hand cleaning every day, special sanitizing after exposures, and quarantines and other lost work time based on illness, contact with others, and care for their children and families at home. They implemented the technologies I mentioned and brainstormed for hours over safe and expeditious ways to deliver our services in a dangerous time. I will never forget this effort.

Second, I want to thank the governor for making available Dr. Anne Zink, Dr. Joe McLaughlin, Commissioner Adam Crum, and their staffs. They have shared their expertise and guidance to help the court system navigate the pandemic to address specific situations and to develop policies to minimize the spread of COVID-19 in the courthouses and protect our staff and visitors.

Finally, I want to thank you, the members of the legislature, for your help and support over the last three years. I have decided to retire in June at the end of my term, so I may not see you again. The court system has appreciated the funding you have provided and the leadership and concern you have expressed on issues related to the justice system. Thank you for your hospitality here this morning, and best wishes for a healthy and productive legislative session.

Please report corrections to the Senate Secretary's office.