STATE OF ALASKA

Legislative Affairs Agency

A REPORT TO THE TWENTY-SECOND STATE LEGISLATURE

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

Prepared by
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Construing Alaska Statutes

The report examines published cases construing Alaska Statutes
that were decided by the state courts between
October 1, 2000, and September 30, 2001,
and by the federal courts and reported in
212 F.3d 1384 to 249 F.3d 941 and in 98 F.Supp.2d 1386 to 141 F. Supp.2d 1083

and

Opinions of the Attorney General
that were made available through Internet distribution between
October 1, 2000, and September 30, 2001

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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;

(3) the opinions 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 formal and informal opinions of the Attorney General are also reviewed. 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 within this review.

The review of court decisions was prepared by Terry Cramer and Mike Ford, Legislative Counsel. The review of the Opinions of the Attorney General was prepared by Terri Lauterbach, Legislative Counsel. Both reviews were undertaken under the general direction of Tamara Brandt Cook, Director of the Division of Legal and Research Services, Legislative Affairs Agency.

The Agency welcomes comments from members of the Legislature on ways in which this review may become of more assistance to members.

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TABLE OF CONTENTS

Art. II sec. 13
Art. II sec. 15 1
GOVERNOR'S ITEM VETO POWER OVER APPROPRIATIONS.

AS 09.17.060 2
COMPARATIVE NEGLIGENCE IN PRODUCTS LIABILITY ACTIONS INCLUDES ORDINARY NEGLIGENCE.

AS 09.19.010 2
PRISONERS ARE REQUIRED TO PAY A FILING FEE WHEN COMMENCING A LITIGATION AGAINST THE STATE.

AS 09.30.070(b) 3
COURT CONSTRUES PREJUDGMENT INTEREST STATUTE.

AS 09.50.250 3
FIREFIGHTING DECISIONS BY STATE PERSONNEL NOT NECESSARILY IMMUNE FROM CIVIL LIABILITY.

AS 09.65.070(d) 4
MUNICIPAL DISASTER PLAN DOES NOT PROVIDE IMMUNITY FOR CIVIL LIABILITY.

AS 11.41.120(a)(2)
Art. I, sec. 1
Art. I, sec. 22 5
NO CONSTITUTIONALLY-BASED RIGHT TO PHYSICIAN ASSISTED SUICIDE FOR MENTALLY-COMPETENT TERMINALLY ILL PATIENTS.

AS 11.41.410(a) 5
VICTIM MAY WITHDRAW CONSENT AFTER PENETRATION IN FIRST-DEGREE SEXUAL ASSAULT.

AS 11.41.420 6
COURT UPHOLDS SEXUAL ASSAULT LAW AGAINST CONSTITUTIONAL CHALLENGES.

AS 11.41.438 7
COURT CONSTRUES LAW REGARDING THIRD DEGREE SEXUAL ABUSE OF A MINOR.

AS 11.41.470(6) 7
HEALTH CARE WORKER MAY BE CONVICTED OF SECOND-DEGREE SEXUAL ASSAULT EVEN THOUGH PATIENT WAS UNAWARE THAT CONTACT WAS OF A SEXUAL NATURE.

AS 11.46.100
AS 11.46.190(a) 8
THEFT BY RECEIVING IS NOT A CONTINUING OFFENSE.

AS 11.46.980(c) 8
AGGREGATION OF CRIMES REQUIRES PROOF OF SINGLE COURSE OF CONDUCT.

AS 11.56.740(a) 9
CONVICTION FOR CRIME OF VIOLATING A PROTECTIVE ORDER REQUIRES PROOF THAT THE DEFENDANT KNEW CONDUCT VIOLATED THE ORDER.

AS 11.56.770(a)(1) 10
HINDERING PROSECUTION STATUTE DOES NOT REQUIRE PROOF OF CONVICTION OF A FELONY.

AS 11.61.110(a)(6) 10
DISORDERLY CONDUCT MISDEMEANOR.

AS 11.71.040(a) 11
MARIJUANA CONVICTION REQUIRES POSSESSION OF LIVE PLANTS.

AS 12.20.010 11
COURT CONSTRUES BAR TO SUCCESSIVE PROSECUTIONS.

AS 12.30.040(b)(2) 12
POSTCONVICTION BAIL STATUTE HELD UNCONSTITUTIONAL AS APPLIED TO CERTAIN OFFENDERS.

AS 12.55.015(a)(5)
AS 12.55.045(a) 12
REQUIRING REIMBURSEMENT FOR DRUG BUY MONEY PERMITTED AS PART OF SENTENCING.

AS 12.55.125(c) 13
COURT CONSTRUES PRESUMPTIVE SENTENCE FOR FIRST DEGREE WEAPONS MISCONDUCT.

AS 12.55.155(f) 13
REMEDY FOR NEGLIGENT LATE FILING OF NOTICE OF AGGRAVATING FACTOR IS CONTINUANCE.

AS 12.72.020(a)(6)
AS 18.85.100(c)(1) 14
LIMITED EXCEPTION TO THE BAN ON SUCCESSIVE PETITIONS TO POST-CONVICTION RELIEF; RIGHT TO COUNSEL IN SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF.

AS 13.16.435 15
NOMINATED PERSONAL REPRESENTATIVE SEEKING EXPENSES FOR PROCEEDING ENTITLED TO REIMBURSEMENT WHETHER OR NOT THE REPRESENTATIVE PREVAILED IN THE ACTION.

AS 15.45.130 15
STATUTE REQUIRING NAME OF CIRCULATOR ON INITIATIVE PETITION IS "CLEARLY UNCONSTITUTIONAL" AND SHOULD NOT BE ENFORCED.

AS 16.05.255(a)(3)
AS 16.05.255(a) (10) 16
BOARD OF GAME DESIGNATION OF TWO AREAS AS CONTROLLED USE AREAS.

AS 18.66.100
AS 18.66.110 17
GRANDMOTHER NOT ENTITLED TO SEEK CUSTODY OF GRAND-CHILDREN AS PART OF DOMESTIC VIOLENCE PETITION.

AS 18.85.120(c) 18
DEFENDANT WHO PREVAILS ON APPEAL BUT REMAINS CONVICTED MUST PAY ATTORNEY FEES.

AS 21.89.020 18
AUTOMOBILE LIABILITY INSURANCE CONSTRUED AS INCLUDING UMBRELLA POLICY.

AS 21.89.020 19
PRIVATE CAUSE OF ACTION MAY BE BROUGHT TO ENFORCE INSURANCE LAW.

AS 23.10.110 19
PRO SE PLAINTIFF DOES NOT HAVE STATUTORY RIGHT TO REPRESENT CLASS IN WAGE AND HOUR DISPUTE.

AS 23.20.240 20
BANKRUPTCY PROCEEDINGS ABSOLVED CHIEF FINANCIAL OFFICER OF PERSONAL LIABILITY FOR EMPLOYER SHARE OF EMPLOYMENT SECURITY TAXES.

AS 23.30.045(a) 20
FAILURE TO PROVIDE WORKERS' COMPENSATION DOES NOT CREATE ACTION FOR BREACH OF CONTRACT.

AS 23.30.235(2) 21
PROVISION THAT BARS WORKERS' COMPENSATION CONSTRUED BY THE COURT.

AS 25.20.060(c) 21
JOINT PHYSICAL CUSTODY SCHEDULE WITHIN DISCRETION OF THE COURT.

AS 25.23.180(c)(3) 22
TERMINATION OF PARENTAL RIGHTS BECAUSE CONCEPTION OCCURRED AS RESULT OF SEXUAL ASSAULT DOES NOT REQUIRE PROOF OF A PRIOR CONVICTION FOR SEXUAL ASSAULT.

AS 28.15.166 22
DRIVER'S LICENSE REVOCATION MAY TRIGGER RIGHT TO IN-PERSON HEARING.

AS 28.15.201(a) 23
COURT HAS INHERENT POWER TO GRANT LIMITED DRIVER'S LICENSE.

AS 28.20.440(b)
AS 28.22.101(d) 23
COURT CONSTRUES MOTOR VEHICLE LIABILITY INSURANCE LAW.

AS 28.20.445(e)(1) 24
SETTLEMENT OF CLAIMS AND UNDERINSURED MOTORIST POLICIES.

AS 28.35.030(a) 25
FOR PURPOSES OF THE CRIME OF DRIVING WHILE INTOXICATED, A DEFENDANT IS IN "ACTUAL PHYSICAL CONTROL" OF A VEHICLE WITHOUT MAKING ATTEMPTS TO OPERATE THE VEHICLE.

AS 28.35.032(p)(5) 25
DISCRETION TO IMPOSE CONSECUTIVE SENTENCES FOR BREATH TEST REFUSAL.

AS 29.45.080(c)
AS 29.45.100 26
APPORTIONMENT OF TAXES ON OIL AND GAS PROPERTIES BETWEEN MUNICIPALITIES AND THE STATE.

AS 33.16.210
AS 33.20.010 26
GOOD TIME CREDIT SHOULD BE COMPUTED ON COMPOSITE SENTENCE.

AS 33.20.040 27
MANDATORY PAROLE AND AUTHORITY TO SET CONDITIONS OF RELEASE UPHELD.

AS 33.30.031(a)
AS 47.17.010
AS 44.17.040 27
TRANSFER OF PRISONER TO PRIVATE OUT-OF-STATE FACILITY DID NOT WAIVE STATE'S JURISDICTION OVER INMATE.

AS 34.35.430 28
ATTORNEY LIEN PROVISION CONSTRUED BY THE COURT.

AS 38.05.035 29
PHASED REVIEW OF PROPOSED OIL AND GAS LEASE SALE.

AS 38.05.265 29
PARTIAL PAYMENT OF MINING CLAIM RENTAL FEE ENTITLES CLAIMANT TO OPPORTUNITY TO CURE DEFICIENCY.

AS 39.25.110(28) 30
EXEMPT STATUS OF ALASKA MILITARY YOUTH ACADEMY EMPLOYEES.

AS 39.35.410(a) 31
ENTITLEMENT TO OCCUPATIONAL DISABILITY BENEFITS UNDER PERS REQUIRES SHOWING THAT EMPLOYEE WAS TERMINATED BECAUSE OF DISABILITY.

AS 39.50.200(a)(9) 31
DISCLOSURE OF CLIENTS BY PUBLIC OFFICIALS AND LEGISLATORS.

AS 43.05.260
AS 43.05.275
AS 43.20.021
AS 43.20.200(b) 32
IRS AGREEMENT TO WAIVE FEDERAL STATUTE OF LIMITATIONS IS EFFECTIVE FOR STATE TAX PURPOSES.

AS 43.23.005(a)(5)(B) 33
PFD ELIGIBILITY REQUIREMENT FOR LEGAL ALIENS.

AS 46.03.822 33
POLLUTION LIABILITY LAW CONSTRUED BY THE COURT.

AS 47.07.010 34
DENIAL OF MEDICAID BENEFITS FOUND TO BE UNCONSTITUTIONAL.

AS 47.27.010(1)
7 AAC 45.225(b)
7 AAC 45.225(d) 35
PUBLIC ASSISTANCE REGULATIONS FOR DETERMINING ATAP ELIGIBILITY WHERE TWO PARENTS SHARE CUSTODY OF CHILDREN ARE VALID.

DESCRIPTIVE WORD INDEX 37

INDEX BY ALASKA STATUTE REFERENCE 38

INDEX OF CASES ANALYZED 39

INDEX OF OPINIONS OF THE ATTORNEY GENERAL ANALYZED 43

Art. II sec. 13
Art. II, sec. 15

GOVERNOR'S ITEM VETO POWER OVER APPROPRIATIONS.

A majority of the Alaska Supreme Court ruled that the Governor had invalidly exercised the item veto power in deleting language from five appropriations in the 1997 operating and capital budgets. The full court held that, in three appropriations to the Alaska Seafood Marketing Institute (ASMI), the language violated the constitutional requirement that appropriation bills be confined to appropriations and therefore the language was unconstitutional. In dissent, two justices would have found that language in the appropriation for a therapeutic treatment community program in Valdez was a violation of the confinement clause and one of the justices also would have invalidated language in an appropriation to the Department of Corrections for new community residential centers as a violation of the confinement clause.

All of the justices agreed to the statement of a five part test for determining whether qualifying language satisfied the definition of what was an "item" and therefore subject to the item veto power; the decision describes the test as "non-exclusive." The five prongs of the test state that the qualifying language:

1. must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent;
2. may not administer the program of expenditures;
3. may not enact law or amend existing law;
4. may not extend beyond the life of the appropriation;
5. must be germane (that is appropriate) to an appropriations bill.

The majority then applied the test to the appropriations before it, finding that language in the three ASMI appropriations violated at least four of the prongs of the test (all but the fourth stated above) and was therefore invalid; that the CRC qualifying language satisfied the test and was therefore valid; and that the Valdez corrections qualifying language could be interpreted as merely descriptive of the program for which the appropriation as made and therefore was valid. The dissenting justices argued that the Valdez corrections language was wholly superfluous and therefore violated the first prong of the test – it was not the minimum necessary to explain the legislature's intent. And one justice would have found the CRC language, which required using an appropriation for only

one of two statutorily-permissible kinds of facilities, was an amendment to substantive law and therefore violated the confinement clause.

Alaska Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001).

Legislative review is not recommended.

AS 09.17.060

COMPARATIVE NEGLIGENCE IN PRODUCTS LIABILITY ACTIONS INCLUDES ORDINARY NEGLIGENCE.

The Supreme Court of Alaska held that the definition of comparative negligence, enacted by the Alaska Legislature in 1986, requires that ordinary negligence be included as a type of conduct that triggers a proportional reduction in damages in product liability actions. The court found that the definition of comparative fault under AS 09.17.060 is broader than existed prior to 1986 and that this reflected a general trend occurring across the nation. Most courts now apply comparative negligence principles in strict product liability cases and allow a person's ordinary negligence to constitute comparative fault. Prior to 1986, in product liability cases comparative fault was limited to instances of product misuse or some type of unreasonable assumption of risk.

Smith v. Ingersoll-Rand Company, 14 P.3d 990 (Alaska 2000)

Legislative review is not recommended.

AS 09.19.010

PRISONERS ARE REQUIRED TO PAY A FILING FEE WHEN COMMENCING A LITIGATION AGAINST THE STATE.

The Alaska Supreme Court ruled that the prisoner filing fee statute, which requires payment of a filing fee before a prisoner may bring a civil action against the state, did not violate prisoners' equal protection rights. The prisoner argued that the statute violated equal protection because non-prisoner indigent plaintiffs can petition the court to waive the entire filing fee. The court held that indigent prisoners are not similarly situated to indigent non-prisoners, since board and lodging are provided

by the state to prisoners, so the economic decision about whether to pay a filing fee does not require the same kind of weighing of expenditures to prisoners that it does to non-prisoners. The court also noted that statute actually allows an exemption from paying any fee to prisoners whose correctional facility account is small enough.

Brandon v. Corrections Corp. of America, 28 P.3d 269 (Alaska 2001)

Legislative review is not recommended.

AS 09.30.070(b)

COURT CONSTRUES PREJUDGMENT INTEREST STATUTE.

The Supreme Court of Alaska held that prejudgment interest awarded under AS 09.30.070(b) applies only to actions for personal injury, death, or damage to property and does not apply to claims for purely economic loss. The court recognized that the general rule for the award of prejudgment interest is that it starts from the date the cause of action accrues, but that AS 09.30.070(b) modifies this general rule by providing that prejudgment interest accrues from the date on which the defendant receives written notice that a claim may be brought or the date on which process is served, whichever is earlier. The court determined that this construction was consistent with prior case law in which the calculation of prejudgment interest was considered.

Beaux v. Jacob, 30 P.3d 90 (Alaska 2001)

Legislative review is not recommended.

AS 09.50.250

FIREFIGHTING DECISIONS BY STATE PERSONNEL NOT NECESSARILY IMMUNE FROM CIVIL LIABILITY.

The Alaska Supreme Court ruled that firefighting decisions made by the state Forestry personnel are not specifically immunized under AS 09.50.250. In that firefighting is not an activity that is specifically listed in AS 09.50.250 as explicitly immune by law, the court concluded that the legislature did not intend to immunize the entire class of firefighting activities.

The court held that state firefighting decisions may be planning decisions that are subject to immunity under the discretionary function immunity provisions of AS 09.50.250 or may be operational firefighting decisions that are not immune and would subject the state to liability if performed negligently. Each allegation of negligence would have to be examined to determine if the act constitutes a planning or operational decision.

Angnabooguk v. State, 26 P.3d 1074 (Alaska 2001)

Unless the legislature desires to provide immunity for all state firefighting decisions, legislative review is not recommended.

AS 09.65.070(d)

MUNICIPAL DISASTER PLAN DOES NOT PROVIDE IMMUNITY FOR CIVIL LIABILITY.

The Supreme Court of Alaska held that a municipality's disaster plan does not provide the municipality with immunity against civil damage resulting from the municipality's response to a local disaster. The municipality claimed immunity under AS 09.65.070(d)(5), which provides that a municipality is immune if the civil action is based on exercise of a duty under the terms of a contract with the state to meet emergency public safety requirements. The court examined the legislative history of the immunity provision and held that state review of the municipality's plan for compliance with AS 26.23.060(b) did not transform it from a statutory duty into an agreement or contract to perform the state's duties. The court also rejected an argument that the municipality was immune under the discretionary function provisions of AS 09.65.070(d)(2). The damages claimed were the result of operational negligence and therefore are not immune.

City of Seward v. Afognak Logging, 31 P.3d 780 (Alaska 2001)

Legislative review is not recommended.

AS 11.41.120(a)(2)
Art. I, sec. 1
Art. I, sec. 22

NO CONSTITUTIONALLY-BASED RIGHT TO PHYSICIAN ASSISTED SUICIDE FOR MENTALLY-COMPETENT TERMINALLY-ILL PATIENTS.

The Alaska Supreme Court ruled that the state's constitution does not guarantee mentally-competent patients who are terminally ill the right to the assistance of a physician so that they can end their own lives. Accordingly, the court ruled that no exception for physicians who assist such a patient to commit suicide should be read into the state's manslaughter statute. The statute includes intentionally aiding another person to commit suicide within the crime of manslaughter. The plaintiffs argued that the constitutional guarantees of privacy and liberty protected their right to control the timing and manner of their deaths. The court found that the strong interest of the state in protecting vulnerable Alaskans from undue influence and protecting the integrity of the medical profession was sufficient to overcome the patients' general privacy and liberty interest. The court also declined to find a denial of the plaintiffs' equal protection rights; they had argued that the statute was infirm because the prohibition against assisted suicide prevents physicians from assisting mentally competent, terminally ill patients who wish to end their lives while not prohibiting physicians from honoring a dying patient's wish by removing essential life support systems. In reaching this decision, the court focused on the difference between action and forbearance, noting that the withdrawal of life support does not end life, but rather permits the patient's underlying condition to run its course. In its decision, the court also noted that because the controversy surrounding physician-assisted suicide is so firmly rooted in questions of social policy, it is a quintessentially legislative matter.

Sampson v. State, 31 P.3d 88 (Alaska 2001)

Legislative review is not recommended.

AS 11.41.410(a)

VICTIM MAY WITHDRAW CONSENT AFTER PENETRATION IN FIRST-DEGREE SEXUAL ASSAULT.

The Alaska Court of Appeals ruled that even if there was consent initially, it was likely that a victim could withdraw consent and the defendant's actions thereafter in continuing the sexual contact could constitute the crime of sexual assault in

the first degree. Therefore, the trial court's instruction to the jury was not plain error. Noting that Alaska statutes do not limit "sexual penetration" to the moment of initial penetration, the court declined to accept the defendant's argument that a conviction for rape cannot be sustained if the victim initially consented to the sexual penetration. The court found that case law from other jurisdictions supporting the defendant's interpretation was based on archaic and outmoded social conventions and was not persuasive.

McGill v. State, 18 P.3d 77 (Alaska App. 2001)

Legislative review is not recommended.

AS 11.41.420

COURT UPHOLDS SEXUAL ASSAULT LAW AGAINST CONSTITUTIONAL CHALLENGES.

The Court of Appeals of Alaska ruled that the 1997 amendment of AS 11.41.470(2), the definition of "incapacitated" for purposes of second-degree sexual assault, did not violate the single subject clause of the Alaska Constitution. The court concluded that the amendment as contained in chapter 63, SLA 1997 satisfied the constitutional requirement that the bill containing the amendment be confined to one subject. The court also rejected an argument that second-degree sexual assault as described in AS 11.41.420(a)(3) was unconstitutionally vague. For purposes of a second-degree sexual assault prosecution the court construed the requirement that the victim be "incapacitated" as equivalent to a requirement that the victim be temporarily incapable of understanding the act in question. Finally the court also rejected a due process challenge to second-degree sexual assault under AS 11.41.420(a)(3), finding that the crime requires the state to prove that the defendant knew the victim was incapacitated or the defendant was aware of a substantial probability that the victim was incapacitated and the defendant did not actually believe otherwise.

Ragsdale v. State, 23 P.3d 653 (Alaska App. 2001)

Legislative review is not recommended.

AS 11.41.438

COURT CONSTRUES LAW REGARDING THIRD DEGREE SEXUAL ABUSE OF A MINOR.

The Court of Appeals of Alaska ruled that whether a live-in boyfriend was in a position of authority over a minor for purposes of a conviction for third degree sexual abuse of a minor is a question for the jury. The court reviewed the language and legislative history of the sexual abuse statutes regarding whether a live-in boyfriend could be included as a person in a "position of authority" for purposes of third degree sexual abuse of a minor (AS 11.41.438(a)(2)). The court upheld the conviction and rejected an argument that the term "position of authority" for purposes of sexual abuse statutes means more than merely acting like a father. In a sharp dissent, Judge Mannheimer pointed out that the opinion of the majority results in the definition of "position of authority" in AS 11.41.470 being rewritten by the court. Further the dissent points out that the legal standard adopted by the court is vague and invites unequal application.

Wurthmann v. State, 27 P.3d 762 (Alaska App. 2001)

Legislative review is recommended to consider the definition of "position of authority" adopted by the court.

AS 11.41.470(6)

HEALTH CARE WORKER MAY BE CONVICTED OF SECOND-DEGREE SEXUAL ASSAULT EVEN THOUGH PATIENT WAS UNAWARE THAT CONTACT WAS OF A SEXUAL NATURE.

The Alaska Court of Appeals ruled that a health care worker may be convicted of second-degree sexual assault when the patient knew that a physical touching occurred but did not realize that the contact was of a sexual nature. The defendant, a massage therapist, had argued that only those patients who had no physical perception of being touched could be deemed to be unaware that a sexual act was being committed. The court held that the statute included sexual contact with patients who are aware of the touching but who are unaware that the touching exceeds the legitimate bounds of treatment. The court noted that there is an exception to the criminal conduct for touching performed for legitimate treatment and that the statute

requires that the health care worker know that the patient is unaware that sexual contact is occurring.

Ritter v. State, 16 P.3d 191 (Alaska App. 2001).

Legislative review is not recommended.

AS 11.46.100
AS 11.46.190(a)

THEFT BY RECEIVING IS NOT A CONTINUING OFFENSE.

The Supreme Court of Alaska affirmed the decision of the Alaska Court of Appeals that theft by receiving is not a continuing offense. The defendant had purchased a rifle in 1988 for $35 which he later learned was a valuable antique. He was charged and indicted in 1997 and argued that the statute of limitations had run in 1993, barring his conviction. The state responded that the crime of theft by receiving was a continuing offense and since he had retained the rifle, the statute of limitations did not apply. The supreme court noted that under AS 12.10.030, an offense is continuing only if the legislature plainly intended it to be so. That intent was not established for theft by receiving. The court considered the language and structure of the theft by receiving statute, the legislative history, and public policy considerations in reaching its conclusion that the statute was ambiguous as to whether the crime was intended to be a continuing offense.

State v. Saathoff, 29 P.3d 236 (Alaska 2001)

Given the court's finding that the legislative intent is ambiguous, legislative review is recommended.

AS 11.46.980(c)

AGGREGATION OF CRIMES REQUIRES PROOF OF SINGLE COURSE OF CONDUCT.

The Court of Appeals of Alaska held that in order to aggregate the value of property stolen or injured to support a felony charge, proof of a single course of conduct is required. Under AS 11.46.980(c), the degree or classification of a crime can change from a misdemeanor to a felony by aggregating the amounts involved in the criminal acts. In order to aggregate the amounts however, the jury must find that the defendant engaged in a single course of conduct, consisting of separate

criminal acts. The court also held that the superior court erred when it found that an aggravating factor had been proven, that factor being the defendant knew the offenses involved more than one victim. (AS 12.55.155(c)(9)) In this case the aggravating factor was also an element of the offense charged, therefore the factor may not be used to aggravate the presumptive term.

Buckwalter v. State, 23 P.2d 81 (Alaska App. 2001)

Legislative review is not recommended.

AS 11.56.740(a)

CONVICTION FOR CRIME OF VIOLATING A PROTECTIVE ORDER REQUIRES PROOF THAT THE DEFENDANT KNEW CONDUCT VIOLATED THE ORDER.

The Alaska Court of Appeals ruled that the state must prove that a defendant knew that his or her conduct violated a protective order to support a conviction of violating the order. The state argued that the defendant's ignorance or misunderstanding of the provisions of a protective order should not excuse the defendant's violation of that order. The court found the language of the statute and the legislative history ambiguous as to whether the legislature intended to require that the state prove that the defendant acted "knowingly" or "recklessly" that the actions the defendant committed constituted a violation of the order. Because the statutory language was ambiguous and because of the principle that statutes imposing criminal liability should be construed narrowly, and ambiguities resolved against the government, the court found that the state must prove that the defendant knew or was aware of a substantial probability that his conduct violated the order.

Strane v. State, 16 P.3d 745 (Alaska App. 2001)

Because the court notes that the statute is ambiguous, legislative review is recommended.

The Department of Law has advised that the state supreme court has accepted this case for review.

AS 11.56.770(a)(1)

HINDERING PROSECUTION STATUTE DOES NOT REQUIRE PROOF OF CONVICTION OF A FELONY.

The Alaska Court of Appeals ruled that a defendant may be convicted of hindering prosecution if the defendant's conduct assisted another person whose actions constituted a felony, even if the other person was not convicted of a felony. In the case before it, the other person was initially charged with a felony assault but ultimately convicted (after entering a plea agreement with the state) of a misdemeanor assault. The court relied on both the language of the statute and the legislative commentary in reaching its decision.

Greinier v. State, 23 P.3d 1192 (Alaska App. 2001)

Legislative review is not recommended.

AS 11.61.110(a)(6)

DISORDERLY CONDUCT MISDEMEANOR.

The Alaska Court of Appeals ruled that the defendant was properly convicted of the crime of disorderly conduct because he "recklessly created a hazardous condition for others by an act which has no legal justification or excuse" and that the statute was not unconstitutionally overbroad. The defendant argued that the state was required to prove that the "hazardous condition" element of the statute required the state to prove that there was not just a risk of injury, but that there was a substantial and imminent risk of injury and that the risk of harm could only be satisfied by proof of a risk to people, not to property. The court noted that the defendant offered no legal authority for this argument, aside from reference to a definition of "hazardous substance" in statutes on the prevention and abatement of environmental hazards which is not part of the state's criminal code. The court also found that from the legislative commentary to the statute, it appears that the legislature was only contemplating potential injury to persons when it enacted this paragraph and noted that the legislature's intent was explicit in the statute, which speaks of creating "a hazardous condition *for others*." The appellate court held that the trial court's instructions on "recklessly" encompassed the defendant's argument that "hazardous condition" is confined to substantial risks, and therefore even if the defendant's argument was correct, there was no error in the case before it.

Wolfe v. State, 24 P.3d 81 (Alaska App. 2001)

Legislative review is not recommended.

AS 11.71.040(a)

MARIJUANA CONVICTION REQUIRES POSSESSION OF LIVE PLANTS.

The Court of Appeals of Alaska ruled that to convict a person for violating AS 11.71.040(a)(3)(G), prohibiting possession of 25 or more marijuana plants, the state must prove that the defendant possessed living marijuana plants. The court reviewed the legislative history of the statute and concluded that in this context "plant" means live plants, not dead ones. The purpose for the law was to avoid requiring the police to harvest and dry living plants in order to show possession of more than a pound of marijuana. Therefore the legislature picked 25 living plants as the equivalent of a pound of harvested marijuana. With this intent behind the law, it would be inconsistent to include plants that are not living.

Pease v. State, 27 P.3d 788 (Alaska App. 2001)

Legislative review is not recommended.

AS 12.20.010

COURT CONSTRUES BAR TO SUCCESSIVE PROSECUTIONS.

The Court of Appeals of Alaska held that AS 12.20.010 does not forbid successive criminal prosecutions for offenses arising from the same transaction or episode. The statute in question provides that if a defendant has been convicted or acquitted in another jurisdiction for a criminal act, Alaska is barred from prosecuting the defendant for the same act. The court reviewed the prior case law interpreting the statute, as well as other similar statutes in other states, and concluded that criminal "act" was intended to mean something narrower than "transaction" or episode." Therefore AS 12.20.010 forbids successive prosecutions for an offense when the elements that must be proved to establish the crime in the subsequent prose-

cution are the same, but does not forbid successive prosecutions for offenses arising from the same transaction or episode.

State v. Bonham, 28 P.3d 303 (Alaska App. 2001)

Legislative review is not recommended.

AS 12.30.040(b)(2)

POSTCONVICTION BAIL STATUTE HELD UNCONSTITUTIONAL AS APPLIED TO CERTAIN OFFENDERS.

The Court of Appeals of Alaska ruled that AS 12.30.040(b)(2), prohibiting a defendant with a prior felony sexual conviction from being eligible for postconviction bail, is unconstitutional as a violation of the Alaska equal protection clause. The rationale for the statute is to protect the public from perceived dangerous offenders, by prohibiting postconviction bail if a defendant has a prior conviction for a felony sexual offense. However, a defendant who has a current conviction for a felony sexual offense is not denied postconviction bail. The court concluded that this unequal treatment of two similar types of defendants violates the equal protection clause of the Alaska Constitution. A majority of the court also held that under AS 12.30.040(b)(2), a prior conviction for attempted sexual assault would preclude postconviction bail following a conviction for a felony offense.

Bourdon v. State, 28 P.3d 319 (Alaska App. 2001)

Legislative review is recommended.

AS 12.55.015(a)(5)
AS 12.55.045(a)

REQUIRING REIMBURSEMENT FOR DRUG BUY MONEY PERMITTED AS PART OF SENTENCING.

The Alaska Court of Appeals ruled that a court's power to order restitution includes the power to order a convicted defendant to reimburse the state for the money used to buy the drugs for which he was convicted as part of the defendant's sentence. The defendant argued that the state was not a victim or other person who was injured by his offense and therefore the court lacked the power to include reimbursement in sentencing him. The court noted that it had earlier decided that

a trial court could order restitution for money used to buy drugs as a condition of probation and found that the defendant's argument would result in an anomalous situation – a court could require restitution for drug buy money as a condition of probation but not as part of a sentence.

Haynes v. State, 15 P.3d 1088 (Alaska App. 2001)

Legislative review is not recommended.

AS 12.55.125(c)

COURT CONSTRUES PRESUMPTIVE SENTENCE FOR FIRST DEGREE WEAPONS MISCONDUCT.

The Court of Appeals of Alaska ruled that a first felony offender convicted of first degree weapons misconduct, a class A felony under AS 11.61.190(a)(2), is subject to a 5-year presumptive term. Under AS 12.55.125(c) a first felony offender convicted of a class A felony is subject to either a 7-year or a 5-year presumptive term. The court pointed out that a 7-year presumptive term for this offense would lead to incongruous results. A person commits the offense of first degree weapons misconduct by discharging a firearm under circumstances that create a substantial and unjustifiable risk of injury. However, a person convicted of manslaughter by accidentally killing someone would only be subject to a 5-year presumptive term under AS 12.55.125(c). The court concluded that the legislature could not have intended to impose a 7-year presumptive term when a drive-by shooting endangers a person, but a lesser 5-year presumptive term if the shooting results in death.

Smith v. State, 28 P.3d 323 (Alaska App. 2001)

Unless the legislature intends to reexamine the presumptive sentencing structure for class A felonies, legislative review is not recommended.

AS 12.55.155(f)

REMEDY FOR NEGLIGENT LATE FILING OF NOTICE OF AGGRAVATING FACTOR IS CONTINUANCE.

The Alaska Court of Appeals ruled that even when the prosecutor apparently negligently failed to file a timely notice

of intent to prove an aggravating factor during the defendant's sentencing hearing, the proper remedy was to offer the defendant a continuance of the sentencing hearing so that the defendant could prepare a defense to the proposed aggravator. The defendant had argued that when the prosecutor offered no reason for the late filing, the remedy should be to strike the proposed aggravator. The judge declined to follow that argument, reasoning that the legislative intent was clear that the presumptive sentencing provisions of the revised criminal code were intended to be mandatory and were not intended to be applied at the discretion of the court or the prosecution.

Brown v. State, 12 P.3d 201 (Alaska App. 2000)

Legislative review is not recommended.

AS 12.72.020(a)(6)
AS 18.85.100(c)(1)

LIMITED EXCEPTION TO THE BAN ON SUCCESSIVE PETITIONS TO POST-CONVICTION RELIEF; RIGHT TO COUNSEL IN SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF.

The Alaska Court of Appeals ruled that the statute limiting a criminal defendant to one petition for post-conviction relief must be read under the state constitution to include a limited exception where the defendant alleges that he or she obtained ineffective assistance of counsel in the defendant's first petition for post-conviction relief. The court emphasized that this is a limited exception to the ban on successive petitions, noting that the defendant must prove not only that he or she was denied a fair and meaningful opportunity to litigate claims but also that those claims would have been successful if properly raised. The court also suggested that the ban on successive petitions for post-conviction relief would not withstand a due process challenge under the state constitution in instances where a defendant who has already brought one petition for post-conviction relief now has newly-discovered evidence that proves his or her innocence. (The opinion refers to several examples of DNA testing proving the innocence of individuals who had been convicted many years before the scientific techniques were available.)

The court also considered whether a defendant is entitled to the assistance of counsel when litigating a successive petition for post-conviction relief and held that there is no constitutional

right under the state or federal constitution to the assistance of counsel but that the trial court had discretion to appoint counsel if the complexity of the issues raised required it.

Grinols v. State, 10 P.3d 600 (Alaska App. 2000)

Legislative review is not recommended.

The Department of Law has advised that the state supreme court has accepted this case for review.

AS 13.16.435

NOMINATED PERSONAL REPRESENTATIVE SEEKING EXPENSES FOR PROCEEDING ENTITLED TO REIMBURSEMENT WHETHER OR NOT THE REPRESENTATIVE PREVAILED IN THE ACTION.

The Alaska Supreme Court ruled that a person nominated as a personal representative in a will that had been superseded by a later will was entitled to recover reasonable and necessary expenses for challenging the probate of the subsequent will if the claimant met the other requirement of the statute: that the challenge be brought in good faith. However, the court found that, in the matter before it, the challenge was not brought in good faith because the concept of good faith in the statute incorporates the statutory requirement that the action be brought in the interest of the estate, and here the challenger did not claim that she was acting as a personal representative for the estate. The court noted that a personal representative is entitled to reimbursement for administrative expenses even if a proceeding does not financially benefit the estate so long as it is consistent with the representative's fiduciary responsibility to the estate.

Enders v. Parker, 28 P.3d 280 (Alaska 2001).

Legislative review is not recommended.

AS 15.45.130

STATUTE REQUIRING NAME OF CIRCULATOR ON INITIATIVE PETITION IS "CLEARLY UNCONSTITUTIONAL" AND SHOULD NOT BE ENFORCED.

In response to an inquiry from the Lieutenant Governor, the Attorney General advised that the portion of AS 15.45.130 that

requires a circulator's name to appear on each page of an initiative petition is unconstitutional and should not be enforced. The office based its opinion on the United States Supreme Court decision in Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999). The Buckley decision invalidated a Colorado statute that required each initiative petition circulator to wear an identification badge displaying the circulator's name. The Court found that this requirement was excessively restrictive of political speech and, thus, violated the First Amendment to the United States Constitution. The Attorney General advised that the same reasoning would be applicable to the identification requirement in AS 15.45.130, so the Lieutenant Governor should not enforce that requirement, it being "clearly unconstitutional." (2000 Op. Att'y Gen., No. 3, September 22, 2000.)

Legislative review is recommended.

AS 16.05.255(a)(3)
AS 16.05.255(a) (10)

BOARD OF GAME DESIGNATION OF TWO AREAS AS CONTROLLED USE AREAS.

The Alaska Supreme Court ruled that the Board of Game's designation of two areas as controlled use areas was within the authority of the board and neither arbitrary nor unreasonable. The CUA's closed the areas to the use of aircraft, in the case of the Noatak CUA, and airboats, in the case of the Nenana CUA. The court found that the Board of Game's statutory authority to adopt regulations "establishing the means and methods employed in the pursuit, capture, taking and transport of game" (AS 16.05.255(a)(3)) and for regulating hunting "for conservation, development, and utilization of game" (AS 16.05.255(a)(10)) authorized the board to adopt the regulations limiting access to the two areas. The court relied on an earlier case, discussing the definition of "conservation and development" in the context of the means and methods of fisheries regulation. Here, there was evidence before the board of shortages and of habitat alteration which satisfied the "conservation" part of paragraph (10), and the regulations fell within the "development" criterion because they addressed making game resources available for use in a certain way. The court also held that the mandate to regulate for development entitled the Board to consider the quality of hunters' outdoor experiences in regulating hunting.

In answer to constitutional challenges that the CUA's created and protected local, monopolistic interests by enabling local hunters to use their preferred methods of hunting transportation and putting other hunters at a disadvantage by denying them their preferred transportation methods, the board ruled that distinctions based on the type of equipment used in the harvest of a resource are not prohibited under the state constitution. The board noted that the CUA's are open to any resident and that the equipment limitations apply equally to all users.

Interior Alaska Airboat Ass'n. v. State, Board of Game, 18 P.3d 686 (Alaska 2001)

Legislative review is not recommended.

AS 18.66.100
AS 18.66.110

GRANDMOTHER NOT ENTITLED TO SEEK CUSTODY OF GRANDCHILDREN AS PART OF DOMESTIC VIOLENCE PETITION.

The Alaska Supreme Court ruled that a grandmother of two young children could not use the domestic violence petition statutes to seek custody of her grandchildren. The court noted that the statute does not address directly whether only parents who are seeking domestic violence protective orders may use a domestic violence proceeding to secure custody orders. The court found that the domestic violence statute provides for quick and efficient proceedings which are not well suited for the resolution of the complex child custody issues of non-parents or legal guardians and held that trial courts have discretion to decline to permit litigation of those custody claims. The court also declined to grant the grandmother visitation as part of the protective order, but noted that there are established procedures which a grandparent may use to obtain visitation rights.

J.M.R. v. S.T.R., 15 P.3d 253 (Alaska 2001)

Legislative review is not recommended.

AS 18.85.120(c)

DEFENDANT WHO PREVAILS ON APPEAL BUT REMAINS CONVICTED MUST PAY ATTORNEY FEES.

The Court of Appeals of Alaska ruled that a defendant who appeals his conviction and prevails, but who remains convicted of the underlying offense is required to partially repay the cost of counsel received at public expense. The defendant argued that because he prevailed on appeal attorney's fees should not be imposed. The court held that under Criminal Rule 39 and Appellate Rule 209, unless the conviction is reversed the defendant is required to partially repay the cost of legal counsel received at public expense. The court pointed to the policy behind the rules as being that indigent litigants should shoulder at least some portion of the legal expenses that society incurs on behalf of the defendant.

Malutin v. State, 27 P.3d 792 (Alaska App. 2001)

Legislative review is not recommended.

AS 21.89.020

AUTOMOBILE LIABILITY INSURANCE CONSTRUED AS INCLUDING UMBRELLA POLICY.

The Alaska Supreme Court ruled that AS 21.89.020, which requires automobile liability insurance to provide equal liability and underinsured motorist coverage in the absence of a waiver, applies to umbrella policies. In construing the provisions of AS 21.89.020 the court found that the umbrella policy in question qualified as an automobile liability policy. The court rejected an argument that including umbrella coverage conflicted with the provisions of AS 28.22.121(b). The court determined that the provisions of AS 21.89.020 are requirements applicable to insurance companies whereas the provisions of AS 28.22 apply to liability and underinsured motorist coverage that drivers must obtain. The court found that the exclusion of umbrella coverage under AS 28.22.121(b) was limited to the application of the provisions of the mandatory insurance law contained in AS 28.22.

Holderness v. State Farm Fire and Casualty Company, 24 P.3d 1253 (Alaska 2001)

Legislative review is not recommended.

AS 21.89.020

PRIVATE CAUSE OF ACTION MAY BE BROUGHT TO ENFORCE INSURANCE LAW.

The Supreme Court of Alaska ruled that two provisions of law relating to uninsured and underinsured motorist insurance coverage, AS 21.89.020(c) and (e), can be enforced in a private civil action. The court acknowledged that AS 21.89.020 is silent on the question of enforcement of its provisions by private civil action. However, the court found that the factors listed under section 874A of the Restatement (Second) of Torts support an implied private cause of action to provide a remedy for violations of the insurance law. The court also ruled that AS 21.89.020(c) and (e) do not give rise to a private civil action against insurance agents, in the same manner as may be brought against insurance companies.

Peter v. Schumacher Enterprises, Inc., 22 P.3d 481 (Alaska 2001)

Legislative review is not recommended.

AS 23.10.110

PRO SE PLAINTIFF DOES NOT HAVE STATUTORY RIGHT TO REPRESENT CLASS IN WAGE AND HOUR DISPUTE.

The Supreme Court of Alaska held that a pro se claimant does not have a statutory right to represent a class of employees who were allegedly owed overtime wages. In reaching its decision, the court noted that while the statute on which the appellant relied could be read as the appellant asserted, it was at least equally plausible to read the statute in a manner that did not address the issue of whether a pro se applicant could represent a class, and that it was improbable that the legislature intended to permit a pro se litigant to act as representative for a class of other employees, given the possibility that inadequate representation would prejudice the rights of the entire class.

Hallam v. Holland America Line, Inc., 27 P.3d 751 (Alaska 2001)

Legislative review is not recommended.

AS 23.20.240

BANKRUPTCY PROCEEDINGS ABSOLVED CHIEF FINANCIAL OFFICER OF PERSONAL LIABILITY FOR EMPLOYER SHARE OF EMPLOYMENT SECURITY TAXES.

A majority of the Alaska Supreme Court ruled that the chief financial officer (CFO) of a corporation that filed for bankruptcy before the final due date for payment of employment security taxes was not personally liable for payment of the employer share of those taxes. The majority found the record insufficient to decide whether the CFO should be held liable for payment of the employee contributions, which by statute are held in trust by the employer and remain assets of the employees, and remanded the case. In dissent, two justices argued that the CFO should have been held personally liable for payment of both the employer share and the employee share of the taxes. The dissent noted that the payments first became due before the filing of the bankruptcy petition, and that during that period the CFO had the ability to ensure the payment. The fact that there was a 30-day period for payment, and that the final deadline occurred after the filing of the petition, did not persuade the dissenting justices that the CFO should be relieved of liability. The dissent considered both the statutory intent and purpose of the Alaska Employment Security Act and the Act's legislative history in reaching its conclusion.

Hartung v. State, Dep't of Labor, 22 P.3d 1 (Alaska 2001).

Given the dissent's argument, legislative review is recommended.

AS 23.30.045(a)

FAILURE TO PROVIDE WORKERS' COMPENSATION DOES NOT CREATE ACTION FOR BREACH OF CONTRACT.

The Supreme Court of Alaska ruled that an injured employee cannot bring claims for breach of contract or breach of good faith and fair dealing against an employer who fails to provide workers' compensation insurance. The court held that under AS 23.30.055, an employee has two statutory remedies when an employer fails to provide workers' compensation benefits and that these remedies supersede any common law remedies outside of the statutory scheme. An employee can pursue a

claim before the Alaska Workers' Compensation Board or can file a lawsuit against the employer for the worker's personal injuries. If the employee files a lawsuit, the lawsuit must be a tort action for the underlying injury.

Nickels v. Napolilli, 29 P.3d 242 (Alaska 2001)

Legislative review is not recommended.

AS 23.30.235(2)

PROVISION THAT BARS WORKERS' COMPENSATION CONSTRUED BY THE COURT.

The Supreme Court of Alaska ruled that in a case where a claimed injury is a drug addiction, that the bar to compensation under AS 23.30.235(2) for an injury caused by the claimant being under the influence of drugs does not apply. In this case the court adopted a narrow view of the bar to compensation, holding that in order for the bar to apply, the employee's mental or physical faculties must be impaired by the use of drugs, and the employee's impaired condition must proximately cause the injury. When the only physical impairment at issue is the drug addiction itself, the bar to workers' compensation for drug use established under AS 23.30.235(2) does not apply. In order for the injury to be compensable however, the employee must still show by a preponderance of the evidence that the addiction was work-related.

Parris-Eastlake v. State, 26 P.3d 1099 (Alaska 2001)

Legislative review is not recommended.

AS 25.20.060(c)

JOINT PHYSICAL CUSTODY SCHEDULE WITHIN DISCRETION OF THE COURT.

The Supreme Court of Alaska ruled that under AS 25.20.060(c) the trial court has the authority to award joint physical custody to both parents. While the court acknowledged that the legislature only established a statutory preference for joint legal custody, the court determined that the trial court has the authority to award joint physical custody when the trial court determines it is in the best interests of the child. Only when there is an abuse of discretion by the trial court in awarding joint physical custody would the apellate court reverse the trial

court's decision. The court refused to decide whether primary physical custody by one parent is generally better than joint physical custody by both parents and indicated that this question is a general policy decision within the power of the legislature.

Elliott v. Settje, 27 P.3d 317 (Alaska 2001)

Unless the legislature desires to review the issue of joint physical custody, legislative review is not recommended.

AS 25.23.180(c)(3)

TERMINATION OF PARENTAL RIGHTS BECAUSE CONCEPTION OCCURRED AS RESULT OF SEXUAL ASSAULT DOES NOT REQUIRE PROOF OF A PRIOR CONVICTION FOR SEXUAL ASSAULT.

The Alaska Supreme Court ruled that the statute permitting termination of parental rights in an adoption proceeding because the biological parent committed an act constituting sexual assault does not require that the parent whose rights are terminated have been convicted of the sexual assault. The court relied on the plain meaning of the statute and on legislative history in reaching its conclusion. The court also found that the statute did not violate the due process or equal protection clauses of the state and federal constitutions, noting that adoption hearings are not proceedings brought by the state to punish offenders, that adoption proceedings are sealed, protecting the biological father from the infamy that accompanies a conviction, and that the possible result – loss of parental rights – is not punitive; rather the proceeding is intended to protect the best interests of the child.

In Re Adoption of A.F.M., 15 P.3d 258 (Alaska 2001)

Legislative review is not recommended.

AS 28.15.166

DRIVER'S LICENSE REVOCATION MAY TRIGGER RIGHT TO IN-PERSON HEARING.

The Alaska Supreme Court ruled that administrative proceedings to revoke a driver's license may trigger the right to an in-person hearing. The court ruled that when a driver's credibility is a material issue, due process requires that an in-

person hearing be held as opposed to a telephonic hearing. The court determined that a driver's license is an important property right and that in-person testimony is a valuable tool for evaluating the credibility of witnesses. Also, the government's interest in cost saving and public safety is not greatly prejudiced by holding in-person hearings. Justice Carpeneti dissented, arguing that the existing statute adequately protected the due process rights of drivers faced with administrative license revocation, by giving the hearing officer the power to require an in-person hearing if necessary to protect the rights of the driver.

Whitesides v. State, 20 P.3d 1130 (Alaska 2001)

Legislative review is not recommended.

AS 28.15.201(a)

COURT HAS INHERENT POWER TO GRANT LIMITED DRIVER'S LICENSE.

The Court of Appeals of Alaska ruled that a court revoking a defendant's driver's license has inherent authority under the original sentence to grant a post-sentencing request for a limited license under AS 28.15.201(a). The defendant's request for a limited license was rejected by a three-judge sentencing panel because the panel concluded that the request amounted to a late-filed motion for modification or reduction of sentence. The Court of Appeals held that granting a limited license would not require modification of the defendant's sentence. Under AS 28.15.201, when a sentencing court revokes a driver's license under AS 28.15.181(b), the court retains continuing supervision over the license and has the power to grant a limited driver's license.

Hill v. State, 32 P.3d 10 (Alaska App. 2001)

Legislative review is not recommended.

AS 28.20.440(b)
AS 28.22.101(d)

COURT CONSTRUES MOTOR VEHICLE LIABILITY INSURANCE LAW.

The Alaska Supreme Court ruled that an insurer is not required to pay prejudgment interest in addition to the policy limit when the policy limit exceeds the statutory minimum. The court held

that prior case law requiring an insurer to pay prejudgment interest on minimum policy limits established under AS 28.22.101(d) did not require payment of prejudgment interest when the policy limit exceeds the statutory minimum coverage. It is only when the policy limit is the statutory minimum that the insurer must pay prejudgment interest in addition to the policy limit. Further the court also rejected an argument that under AS 28.20.440(b) and AS 28.22.101(d) an insurer must pay prejudgment interest on the statutory minimum amount when the policy limits exceed the statutory minimum coverage required. No additional amount is required to be paid if the victim's total award or settlement already covers this amount.

Farquhar v. Alaska National Insurance Co., 20 P.3d 568 (Alaska 2001)

Legislative review is not recommended.

AS 28.20.445(e)(1)

SETTLEMENT OF CLAIMS AND UNDERINSURED MOTORIST POLICIES.

The Alaska Supreme Court ruled that under the state's underinsured motorist (UIM) statute, an insured may not offer the UIM insurance carrier a credit against the underlying liability policy limits in order to place a claim based on UIM coverage. The case involved claims arising from two different motor vehicle accidents. In one case, the insured declined to bring a claim against the driver or the driver's liability insurer but did file claims under both the driver's and her own UIM policies, offering to offset her recovery under the UIM policy by the amount of the liability insurance policy. In the other case, the insured settled the claim against the UIM policy for less than the liability policy limits, and offered to offset the difference between the settlement amount and the liability policy limit. The court ruled that an offset is not a payment, judgment or settlement and so does not satisfy the statutory requirement that liability policy limits be exhausted by payments, judgments, or settlements before UIM coverage is triggered.

Curran v. Progressive Northwestern Ins. Co., 29 P.3d 829 (Alaska 2001)

Legislative review is not recommended.

AS 28.35.030(a)

FOR PURPOSES OF THE CRIME OF DRIVING WHILE INTOXICATED, A DEFENDANT IS IN "ACTUAL PHYSICAL CONTROL" OF A VEHICLE WITHOUT MAKING ATTEMPTS TO OPERATE THE VEHICLE.

The Court of Appeals of Alaska ruled that, for purposes of the crime of driving while intoxicated, a defendant who is sitting behind the steering wheel in an automobile and who had the keys to the vehicle in his pocket could be held to be "in actual physical control" of the vehicle even though the engine was not running and the defendant did not attempt to start the engine. The defendant had argued that the state had failed to prove that he operated or drove the vehicle, as required by the statute.

Kingsley v. State, 11 P.3d 1001 (Alaska App. 2000)

Legislative review is recommended.

AS 28.35.032(p)(5)

DISCRETION TO IMPOSE CONSECUTIVE SENTENCES FOR BREATH TEST REFUSAL.

The Alaska Court of Appeals ruled that only the mandatory minimum sentences specified in statute for breath test refusal must be imposed to run consecutively with any other sentence imposed on the defendant, and that the court has discretion to decide whether any additional time imposed for a conviction of breath test refusal should run consecutively or concurrently. The trial court had interpreted the statute to require that the defendant's entire sentence for breath test refusal must run consecutively to any other sentence. The appellate court considered the legislative intent by looking at the history of changes to the statute in reaching its decision.

Baker v. State, 30 P.3d 118 (Alaska App. 2001)

Legislative review is recommended.

AS 29.45.080(c)
AS 29.45.100

APPORTIONMENT OF TAXES ON OIL AND GAS PROPERTIES BETWEEN MUNICIPALITIES AND THE STATE.

A majority of the Alaska Supreme Court ruled that both oil and gas property in a municipality and other locally assessed property should be reduced when determining the application of the valuation cap on local taxation and that the 225% tax base limitation does not apply to limit municipal taxes for repaying bonded indebtedness. The appellant had argued that in cases where a municipality's total tax base exceeds the limit imposed by statute, the municipality should tax 100 percent of locally assessed property and only tax the portion of oil and gas property sufficient to reach the tax cap. The dissent agreed with the appellant's reading of the statute. The majority found the language of the statute ambiguous and relied, in part, on the state's long-standing interpretation.

The appellant also argued that the tax base limitation extended to the imposition of taxes for debt service. The court ruled that the language of the statute, the legislative history, and an opinion of the Attorney General make clear that the legislature did not intend to impose the 225 percent valuation cap on a municipality's authority to tax for debt financing.

Bullock v. State, Dep't of Comm. and Reg'l Affairs, 19 P.3d 1209 (Alaska 2001)

Legislative review is recommended.

AS 33.16.210
AS 33.20.010

GOOD TIME CREDIT SHOULD BE COMPUTED ON COMPOSITE SENTENCE.

The Alaska Court of Appeals ruled that for inmates who are serving composite sentences, some of which run concurrently with others, good time credit (credit for following the rules while in prison) should be computed based on the total time to serve, not on each separate sentence. The defendant had argued that he was entitled to separate good time credit based on each concurrently-running sentence, which would have resulted in his receiving an earlier release date. The court looked at the mandatory parole statutes for guidance in reaching its decision. The defendant also argued that the

Parole Board's authority to discharge a mandatory parolee before completion of two years of parole was mandatory because the statute did not provide standards for the board in exercising its discretion. The court ruled that the statute clearly sets out two alternatives and that regulations direct the board to consider specific factors in making its decision.

Jackson v. State, 31 P.3d 105 (Alaska App. 2001)

Legislative review is not recommended.

AS 33.20.040

MANDATORY PAROLE AND AUTHORITY TO SET CONDITIONS OF RELEASE UPHELD.

The Court of Appeals of Alaska ruled that when a person receives a composite term of imprisonment that exceeds two years, good time credit under AS 33.20.010 operates to convert days in jail to days on parole when the prisoner is released on mandatory parole. The good time credit becomes a type of suspended sentence that can be reimposed in whole or in part by the Parole Board under AS 33.16.220(i). The Court also rejected an argument that revocation of a parolee's good time credit constitutes an illegal increase in the parolee's sentence and that the Parole Board has no authority to place conditions on a prisoner's mandatory parole.

Hill v. State, 22 P.3d 24 (Alaska App. 2001)

Legislative review is not recommended.

AS 33.30.031(a)
AS 47.17.010
AS 44.17.040

TRANSFER OF PRISONER TO PRIVATE OUT-OF-STATE FACILITY DID NOT WAIVE STATE'S JURISDICTION OVER INMATE.

The Alaska Court of Appeals ruled that the transfer of an inmate to a private out-of-state prison facility did not waive the jurisdiction of the Department of Corrections over the inmate and was not contrary to the state's authority to delegate governmental functions to an independent contractor. The inmate argued that the repeal in 1985 of a statute that specifically provided that the state retained jurisdiction of inmates who were transferred to another state meant that the state did not retain jurisdiction. The court found that the

legislature's intent to retain jurisdiction over inmates serving Alaska sentences out-of-state was clear. The court also ruled that the specific statutory authority given to the Department of Corrections to contract with private prisons out of state is a later-enacted, more specific statute that supersedes the general statutory authorization to the executive officer of each Alaska department to assign functions to subordinate officers and employees; furthermore, the statutes cited by the inmate were intended to address the exercise of authority by department heads over their subordinates and the oversight of the operations and finances of the private out-of-state prison by the Department of Corrections was more than sufficient to meet that standard.

Hertz v. State, 22 P.3d 895 (Alaska App. 2001)

Legislative review is not recommended.

AS 34.35.430

ATTORNEY LIEN PROVISION CONSTRUED BY THE COURT.

The Supreme Court of Alaska ruled that an attorney's lien under AS 34.35.430 has priority over a claim for court awarded attorney fees and costs by another defendant in a multiparty case. The court took a narrow view of a provision, AS 34.35.430(b), that subordinates the attorney's lien to "the rights existing between the parties to the action" and held that it refers to each plaintiff's rights as to each defendant's rights. Each judgment should be considered its own action for purposes of AS 34.35.430. In this case the priority claimed against the attorney's lien was asserted by a defendant who was seeking to recover against a judgment awarded against another defendant. The court held that the defendant asserting the priority was not a party to the judgment at issue and was not entitled to a priority against the attorney's lien under AS 34.35.430.

Falconer v. Adams, 20 P.3d 583 (Alaska 2001)

Legislative review is not recommended.

AS 38.05.035

PHASED REVIEW OF PROPOSED OIL AND GAS LEASE SALE.

The Alaska Supreme Court ruled that the Department of Natural Resources was permitted to phase its best interest finding when conducting its review of a proposed oil and gas lease sale concerning state lands in Cook Inlet. The court noted that the statute had been amended to permit phased best interest findings but that the previous decisions of the supreme court had not been specifically overruled in that legislation. The court held that the statute did overrule the previously-articulated holding that phasing is disfavored. The court also ruled that the second principle, that phasing is prohibited if it can result in disregard of the cumulative potential environmental impacts of a project, had been incorporated in the legislative findings and the substance of the statute. The court ruled that the third principle, that phasing through the use of conditions is prohibited where it is feasible to obtain the information necessary, had been severely limited if not nullified by the amendment. The court then applied the statutory provisions and found that the department's review met the standards.

Kachemak Bay Conservation Society v. State, 6 P.3d 270 (Alaska 2000)

Legislative review is not recommended. Ch. 101, SLA 2001 amends this provision.

AS 38.05.265

PARTIAL PAYMENT OF MINING CLAIM RENTAL FEE ENTITLES CLAIMANT TO OPPORTUNITY TO CURE DEFICIENCY.

The Alaska Supreme Court ruled that a partial payment of $400 on annual mining rental fees was sufficient to entitle the claimant to an opportunity to cure the deficiency in rental payments. Under the rental payment statute, miners who stake claims must pay a first year's rent within 90 days, which establishes the claim through the following September 1. Rent for the following year is due between September 1 and December 1. For claims staked in June, July, or August, the deadlines for first year's rent and the second year's rent overlap. The claimant here was in that situation with respect to 224 of the 244 claims for which he paid rent to the state. In November, he paid one year's rent on all 244 claims. In fact,

he owed two year's rent on the 224 claims staked before September 1 (rent for year one – for the time from staking through August 31- and for year two – for the next year, beginning on September 1) and one year's rent (beginning on September 1) on the 20 claims that were staked after the end of "year one". Initially the department determined that his mining claims had been abandoned. The claimant appealed, but in the meantime other miners staked claims on the same territory. The department determined that the initial claimant was entitled to an opportunity to cure the deficiency. The other miners appealed to the superior court, which reversed the department's determination. On appeal, the supreme court ruled that because he paid rent owed in "year two" for 20 claims, he had made a timely, though deficient, payment and was entitled to the statutory notice and opportunity to cure the deficiency.

Newmont Alaska Ltd. v. McDowell, 22 P.3d 881 (Alaska 2001).

Legislative review is not recommended.

AS 39.25.110(28)

EXEMPT STATUS OF ALASKA MILITARY YOUTH ACADEMY EMPLOYEES.

In response to an inquiry from the Department of Military and Veterans' Affairs concerning whether AS 39.25.110(28) places the employees of the Alaska Military Youth Academy in the exempt service, the Attorney General's office concluded that AS 39.25.110(28) applies only to participants in the academy, not to the academy's employees. Therefore, the office advised the department that, unless another law applies to the academy's employees, they are properly considered part of the classified service of the state. The office agreed that the Alaska Military Youth Academy is an employment or pre-employment training program covered by AS 39.25.110(28), but advised, based on letters to and from legislators when the program was established in 1989, that the phrase "engaged in" was meant to refer only to the trainees in the program, not to the staff running the program. The placement of program participants in the exempt service is consistent with the placement of students and interns in other programs in the exempt service. (See, for instance, AS 39.25.110(22) and 39.25.110(24).) (Inf. Op. Att'y Gen., October 13, 2000)

Legislative review is not recommended.

AS 39.35.410(a)

ENTITLEMENT TO OCCUPATIONAL DISABILITY BENEFITS UNDER PERS REQUIRES SHOWING THAT EMPLOYEE WAS TERMINATED BECAUSE OF DISABILITY.

The Alaska Supreme Court ruled that to be eligible for occupational disability benefits under the Public Employees' Retirement System (PERS) an employee must show that she was terminated because of a disability. The employee had argued that she should be entitled to benefits under the statute because she was unable to work because of a disability prior to the time that the state terminated her employment. The termination happened because her position was eliminated due to a reorganization of the office she worked in. The court relied on the language of the statute and the definition of "terminated" in reaching its decision, noting that although the employee had stopped working some months before her termination, she still retained ties to her employer until the reorganization. The court declined to accept the employee's argument that the statute was intended to provide benefits for those who suffer disability that leads to termination of employment, regardless of the reason for the actual termination.

Rhines v. State, Public Employees' Retirement Bd., 30 P.3d 621 (Alaska 2001)

Legislative review is not recommended.

AS 39.50.200(a)(9)

DISCLOSURE OF CLIENTS BY PUBLIC OFFICIALS AND LEGISLATORS.

In response to an inquiry from the Alaska Public Offices Commission, the Attorney General's office reviewed the definition of "source of income" in AS 39.50.200(a)(9) and concluded, based on grammar and logic, that application of the definition requires the disclosure of clients of a partnership or professional corporation when a public official, legislator, or family member is a member of the partnership or professional corporation, even if the official, legislator, or family member does not have a controlling interest in the partnership or professional corporation. Disclosure must be made under AS 24.60.200 for legislators and under AS 39.50.020 for other

public officials. The Attorney General's office advised that the phrase "in which the person . . . hold[s] a controlling interest" in AS 39.50.200(a)(9) refers only to interests held in corporations other than professional corporations. (Inf. Op. Att'y Gen., September 21, 2000). This opinion affirms advice given in 1985 Inf. Op. Att'y Gen. at 1, n.1 (Feb. 15, 366-298-85).

Legislative review is not recommended.

AS 43.05.260
AS 43.05.275
AS 43.20.021
AS 43.20.200(b)

IRS AGREEMENT TO WAIVE FEDERAL STATUTE OF LIMITATIONS IS EFFECTIVE FOR STATE TAX PURPOSES.

The Alaska Supreme Court ruled that an agreement between a taxpayer and the federal Internal Revenue Service to waive the statute of limitations for federal income tax purposes also is effective for state tax purposes, but only within the scope of the federal waiver. The taxpayer had filed and paid state income taxes but then, more than four years later for all but one of the tax years in question, filed a claim for refund. In accordance with departmental policy, the Department of Revenue promptly paid the refund and then evaluated the merits of the taxpayer's claim. The department determined that the taxpayer had failed to comply with the state statute of limitations in filing its request for a refund and requested return of the refund. The taxpayer refused, arguing that the waiver it had obtained from the IRS operated under state statutes that incorporated provisions of the Internal Revenue Code into the state tax code to toll the state statute of limitations. The state supreme court agreed, despite the state's argument that provisions in the state statutes permitting the department and a taxpayer to consent to extend the state statute of limitations required a separate agreement between the state and the taxpayer before those deadlines could be held to have been waived. The court noted that the federal waiver granted the taxpayer was restricted for three tax years to waiving determination of taxes pertaining to a specific issue; the court held that the restricted federal waiver limits the scope of a taxpayer's claim for a refund to state adjustments that are reasonably related to the issues covered by the restricted federal waiver.

Louisiana-Pacific Corp. v. Dep't of Revenue, 21 P.3d 1274 (Alaska 2001)

Legislative review is recommended.

AS 43.23.005(a)(5)(B)

PFD ELIGIBILITY REQUIREMENT FOR LEGAL ALIENS.

The Alaska Supreme Court ruled that the Permanent Fund Dividend (PFD) eligibility requirement that legal aliens be lawfully admitted for permanent residence in the United States was, as interpreted by emergency regulations, constitutional and not preempted by the federal supremacy clause. In reaching its decision the court declined to hold that the phrase "lawfully admitted for permanent residence in the United States" as used in the state statute must have the same meaning as that phrase has when used in federal immigration law. The more-expansive definition given the phrase by the state would include those aliens who can legally form the intent to remain in Alaska indefinitely. Since some aliens can, under federal immigration law, legally form the intent to remain in the United States indefinitely, they cannot be denied PFD's on the basis of their alienage. The court considered the legislative history of the statute in reaching its decision, noting that the legislature's concern appeared to preclude illegal aliens from PFD eligibility and that the legislative history was silent with regard to the intended effect on legally-admitted aliens.

State, Dept of Rev. v. Andrade, 23 P.3d 58 (Alaska 2001)

Legislative review is not recommended.

AS 46.03.822

POLLUTION LIABILITY LAW CONSTRUED BY THE COURT.

The Supreme Court of Alaska ruled that a private cause of action for strict joint and several liability exists against polluters who release hazardous substances in violation of AS 46.03.822. The court examined the legislative history behind the effort to impose strict liability for certain kinds of pollution under AS 46.03.822, as well as those factors identified in a prior case that are used to determine whether a statute implies a private cause of action. The court also ruled

that Alaska's statute of limitations applies to civil actions brought under AS 46.03.822. The court rejected an argument that the language of AS 46.03.822 precluded all defenses to a civil action brought under that statute except those listed in AS 46.03.822(b). The court concluded that such an interpretation strained common sense, was contextually implausible and was at odds with legislative history. Finally, the court ruled that a cause of action for contribution under AS 46.03.822(j) may be brought during the pendency of a direct action under AS 46.03.822(a), but does not accrue for purposes of the statute of limitations until the direct action concludes.

Federal Deposit Insurance Corp. v. Laidlaw Transit, Inc., 21 P.3d 344 (Alaska 2001)

Legislative review is not recommended.

AS 47.07.010

DENIAL OF MEDICAID BENEFITS FOUND TO BE UNCONSTITUTIONAL.

The Supreme Court of Alaska held that denial of Medicaid benefits, funding for medically necessary abortions, violates the equal protection clause of the Alaska Constitution. The court determined that the State in establishing a health care program for the poor cannot selectively deny necessary care to eligible women merely because the threat to their health arises from pregnancy. Under 7 AAC 43.140, Medicaid assistance is denied for medically necessary abortions unless there is a risk of death or the pregnancy resulted from rape or incest. The court reviewed prior case law on this issue and concluded that the regulation violated the state constitutional guarantee to equal protection under the law. The court rejected the argument that holding the Medicaid program to constitutional standards resulted in appropriation of funds in violation of the separation of powers doctrine.

State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001)

Legislative review is not recommended.

AS 47.27.010(1)
7 AAC 45.225(b)
7 AAC 45.225(d)

PUBLIC ASSISTANCE REGULATIONS FOR DETERMINING ATAP ELIGIBILITY WHERE TWO PARENTS SHARE CUSTODY OF CHILDREN ARE VALID.

The Alaska Supreme Court ruled that regulations of the Division of Public Assistance implementing eligibility standards for the Alaska Temporary Assistance Program (ATAP) concerning how to determine which parent had physical custody of children were valid. A mother of two young children was denied ATAP benefits because she failed to show that she had physical custody of the children. She and the children's father shared custody under a temporary custody order under which she had the children during the day six days out of seven, providing breakfast, lunch, snacks, putting them down for naps, and taking care of them until their father picked them up around 6 p.m. and provided them dinner, baths, and put them to bed. The regulations adopted by the division to interpret whether a caretaker was entitled to ATAP benefits interpreted the statutory requirement of having "physical custody" as requiring that the caretaker have physical custody for more than 50 percent of the time; the division's calculations showed that the mother had physical custody 40 percent of the time but provided 60 percent of the "guidance, discipline, and physical and financial needs" of the children. The mother argued that the standard for determining physical custody under ATAP relied on the same standard previously used under the federal Aid to Families with Dependent Children (AFDC) program, which Congress repealed. The court found that the division was given broad latitude to adopt regulations to implement the ATAP program, that using the AFDC standards was not arbitrary, and that there was no reason to assume that by using the phrase "physical custody" in ATAP that the state legislature intended to prohibit the division from re-adopting the AFDC eligibility standards. The court also found that the ATAP regulation was consistent with the statutory standard, even though it has the effect of making a needy parent who shares physical custody of children with a non-needy parent on an equal or slightly less than equal basis ineligible for ATAP benefits.

Lauth v. State, 12 P.3d 181 (Alaska 2000)

Legislative review is recommended.

DESCRIPTIVE WORD INDEX

abortion 34
alcohol 25
aliens 33
appropriations 1
attorneys 18, 28
civil action 2, 3, 4, 19, 28, 33
conflict of interest 31
corporations 20
corrections 27
courts 2
crime/criminal procedure 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 22, 23, 25, 26, 27
custody 17, 21, 22, 35
disability 31
disaster 4
drugs 11, 12
elections 15
estates 15
ethics 31
families 22
fire protection 3
fish/game, game 16
game 16
governor 1
initiatives 15
insurance 18, 19, 23, 24
item veto 1
legislators 31
legislature 1
liability 2, 3, 23, 33
licensing 22, 23
liens 28
medical care 34
military 30
mines/minerals 29
motor vehicles 22, 23, 24, 25
municipalities 26
oil/gas 26, 29
permanent fund dividends 33
prisoners 2
privacy 5
probate 15
public assistance 35
public employees 30, 31
public lands 29
public officers 31
residency 33
rights 5
sentencing 12, 13, 25, 26, 27
statute of limitations 32
taxes 26, 32
unemployment 20
wages 19
weapons 13
workers' compensation 20, 21

INDEX BY ALASKA STATUTE REFERENCE

7 AAC 45.225(b) 35
7 AAC 45.225(d) 35
Art. I, sec. 1 5
Art. I, sec. 22 5
Art. II, sec. 13 1
Art. II, sec. 15 1
AS 09.17.060 2
AS 09.19.010 2
AS 09.30.070(b) 3
AS 09.50.250 3
AS 09.65.070(d) 4
AS 11.41.120(a)(2) 5
AS 11.41.410(a) 5
AS 11.41.420 6
AS 11.41.438 7
AS 11.41.470(6) 7
AS 11.46.100 8
AS 11.46.190(a) 8
AS 11.46.980(c) 8
AS 11.56.740(a) 9
AS 11.56.770(a)(1) 10
AS 11.61.110(a)(6) 10
AS 11.71.040(a) 11
AS 12.30.040(b)(2) 12
AS 12.55.015(a)(5) 12
AS 12.55.045(a) 12
AS 12.55.125(c) 13
AS 12.55.155(f) 13
AS 12.72.020(a)(6) 14
AS 13.16.435 15
AS 15.45.130 15
AS 16.05.255(a)(3) 16
AS 16.05.255(a)(10) 16
AS 18.66.100 17
AS 18.66.110 17
AS 18.85.100(c)(1) 14
AS 18.85.120(c) 18
AS 21.89.020 . . . . 18, 19
AS 23.10.110 19
AS 23.20.240 20
AS 23.30.045(a) 20
AS 23.30.235(2) 21
AS 25.20.060(c) 21
AS 25.23.180(c)(3) 22
AS 28.15.166 22
AS 28.15.201(a) 23
AS 28.20.440(b) 23
AS 28.20.445(e)(1) 24
AS 28.22.101(d) 23
AS 28.35.030(a) 25
AS 28.35.032(p)(5) 25
AS 29.45.080(c) 26
AS 29.45.100 26
AS 33.16.210 26
AS 33.20.010 26
AS 33.20.040 27
AS 33.30.031(a) 27
AS 34.35.430 28
AS 38.05.035 29
AS 38.05.265 29
AS 39.25.110(28) 30
AS 39.35.410(a) 31
AS 39.50.200(a)(9) 31
AS 43.05.260 32
AS 43.05.275 32
AS 43.20.021 32
AS 43.20.200(b) 32
AS 43.23.005(a)(5)(B) 33
AS 44.17.040 27
AS 46.03.822 33
AS 47.07.010 34
AS 47.17.010 27
AS 47.27.010(1) 35

INDEX OF CASES ANALYZED

Alaska Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001). 1, 2

Angnabooguk v. State, 26 P.3d 1074 (Alaska 2001) 3, 4

Baker v. State, 30 P.3d 118 (Alaska App. 2001) 25

Beaux v. Jacob, 30 P.3d 90 (Alaska 2001) 3

Bourdon v. State, 28 P.3d 319 (Alaska App. 2001) 12

Brandon v. Corrections Corp. of America, 28 P.3d 269 (Alaska 2001) 2, 3

Brown v. State, 12 P.3d 201 (Alaska App. 2000) 13, 14

Buckwalter v. State, 23 P.2d 81 (Alaska App. 2001) 8, 9

Bullock v. State, Dep't of Comm. and Reg'l Affairs, 19 P.3d 1209 (Alaska 2001) 26

City of Seward v. Afognak Logging, 31 P.3d 780 (Alaska 2001) 4

Curran v. Progressive Northwestern Ins. Co., 29 P.3d 829 (Alaska 2001) 24, 25

Elliott v. Settje, 27 P.3d 317 (Alaska 2001) 21, 22

Enders v. Parker, 28 P.3d 280 (Alaska 2001). 15

Falconer v. Adams, 20 P.3d 583 (Alaska 2001) 28

Farquhar v. Alaska National Insurance Co., 20 P.3d 568 (Alaska 2001) 23, 24

Federal Deposit Insurance Corp. v. Laidlaw Transit, Inc., 21 P.3d 344 (Alaska 2001) 33, 34

Greinier v. State, 23 P.3d 1192 (Alaska App. 2001) 10

Grinols v. State, 10 P.3d 600 (Alaska App. 2000) 14, 15

Hallam v. Holland America Line, Inc., 27 P.3d 751 (Alaska 2001) 19

Hartung v. State, Dep't of Labor, 22 P.3d 1 (Alaska 2001). 20

Haynes v. State, 15 P.3d 1088 (Alaska App. 2001) 12, 13

Hertz v. State, 22 P.3d 895 (Alaska App. 2001) 27, 28

Hill v. State, 22 P.3d 24 (Alaska App. 2001) 27

Hill v. State, 32 P.3d 10 (Alaska App. 2001) 23

Holderness v. State Farm Fire and Casualty Company, 24 P.3d 1253 (Alaska 2001) 18

In Re Adoption of A.F.M., 15 P.3d 258 (Alaska 2001) 22

Interior Alaska Airboat Ass'n. v. State, Board of Game, 18 P.3d 686 (Alaska 2001) 16, 17

J.M.R. v. S.T.R., 15 P.3d 253 (Alaska 2001) 17

Jackson v. State, 31 P.3d 105 (Alaska App. 2001) 26, 27

Kachemak Bay Conservation Society v. State, 6 P.3d 270 (Alaska 2000) 29

Kingsley v. State, 11 P.3d 1001 (Alaska App. 2000) 25

Lauth v. State, 12 P.3d 181 (Alaska 2000) 35

Louisiana-Pacific Corp. v. Dep't of Revenue, 21 P.3d 1274 (Alaska 2001) 32, 33

Malutin v. State, 27 P.3d 792 (Alaska App. 2001) 18

McGill v. State, 18 P.3d 77 (Alaska App. 2001) 5, 6

Newmont Alaska Ltd. v. McDowell, 22 P.3d 881 (Alaska 2001). 29, 30

Nickels v. Napolilli, 29 P.3d 242 (Alaska 2001) 20, 21

Parris-Eastlake v. State, 26 P.3d 1099 (Alaska 2001) 21

Pease v. State, 27 P.3d 788 (Alaska App. 2001) 11

Peter v. Schumacher Enterprises, Inc., 22 P.3d 481 (Alaska 2001) 19

Ragsdale v. State, 23 P.3d 653 (Alaska App. 2001) 6

Rhines v. State, Public Employees' Retirement Bd., 30 P.3d 621 (Alaska 2001) 31

Ritter v. State, 16 P.3d 191 (Alaska App. 2001). 7, 8

Sampson v. State, 31 P.3d 88 (Alaska 2001) 5

Smith v. Ingersoll-Rand Company, 14 P.3d 990 (Alaska 2000) 2

Smith v. State, 28 P.3d 323 (Alaska App. 2001) 13

State v. Bonham, 28 P.3d 303 (Alaska App. 2001) 11, 12

State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001) 34

State v. Saathoff, 29 P.3d 236 (Alaska 2001) 8

State, Dept of Rev. v. Andrade, 23 P.3d 58 (Alaska 2001) 33

Strane v. State, 16 P.3d 745 (Alaska App. 2001) 9

Whitesides v. State, 20 P.3d 1130 (Alaska 2001) 22, 23

Wolfe v. State, 24 P.3d 81 (Alaska App. 2001) 10, 11

Wurthmann v. State, 27 P.3d 762 (Alaska App. 2001) 7

INDEX OF OPINIONS OF THE ATTORNEY GENERAL ANALYZED

2000 Op. Att'y Gen., No. 3, September 22, 2000 . . . . 15, 16

Inf. Op. Att'y Gen., September 21, 2000. . . . . 31, 32

Inf. Op. Att'y Gen., October 13, 2000 30