STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-THIRD STATE LEGISLATURE

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

Prepared by
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Juneau, Alaska 99801-1182

DECEMBER 2002

A REPORT TO THE TWENTY-THIRD STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals or Delayed Amendments

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

The report lists Alaska Statutes that will be amended or repealed between February 1, 2003, and March 1, 2004, according to laws enacted before the 2003 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the state courts between October 1, 2001, and September 30, 2002, and by the federal courts and reported in 249 F.3d 941 to 290 F.3d 326 and in 141 F. Supp.2d 1083 to 198 F.Supp.2d 1182

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2001, and October 30, 2002

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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.

For the first time this year, this report also includes a list of Alaska Statutes that, absent any action by the 2003 Legislature, will be repealed or amended before March 1, 2004, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

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

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DELAYED REPEALS OR AMENDMENTS
taking effect between February 1, 2003, and March 1, 2004

AS 12.55.036(f). Court system report on day fines. (Repealed, effective 2/2/2004.)

AS 16.43.901. Vessel permits for the Bering Sea Korean hair crab fishery. (Repealed, effective 7/1/2003.)

AS 18.60.880(f). Exemption from "sharps" regulations for use of certain FDA-approved drugs or biologics. (Repealed, effective 12/31/2003.)

AS 41.37. Citizens' Advisory Commission on Federal Areas in Alaska. (Repealed, effective 6/30/2003.)

AS 43.80.050 - 43.80.100. Reporting of wholesale salmon prices. (Repealed, effective 7/1/2003.)

AS 44.33.431. Alaska Minerals Commission. (Repealed, effective 2/1/2004.)

AS 44.33.895. Alaska regional economic assistance program. (Repealed, effective 7/1/2003.)

AS 44.62.710 - 44.62.800. Negotiated regulation making process. (Related statutes are AS 09.65.235, AS 36.30.850(b)(39) and AS 39.25.110(33).) (Repealed, effective 7/1/2003.)

Use of social security numbers for licenses and legal documents. The following statutes will be repealed or amended to eliminate the requirement to submit a social security number in order to obtain certain licenses or in relation to certain legal documents for potential use in child support enforcement: AS 06.20.020(b); AS 06.40.050(a) and (e); AS 08.01.060(b), 08.01.089, and 08.01.100(e); AS 08.08.137; AS 09.55.050; AS 14.20.027; AS 16.05.450(a) and (d) and 16.05.480(b) and (d); AS 18.50.230(f) and 18.50.280(a) and (c); AS 18.60.395(a) and (d); AS 18.65.410(a) and (b); AS 18.72.030; AS 21.06.255; AS 25.05.091(b); AS 25.20.050(n); AS 25.24.210(f); AS 25.27.020(a)(2)(D); and AS 28.15.061(g). (Repealed or amended, effective 7/1/2003.)

Tax credits. The following statutes will be repealed in order to eliminate a one-year window of opportunity that was established in 2002 during which certain taxpayers could have a tax credit for their contributions to the Alaska veterans' memorial endowment fund: AS 21.89.071, AS 43.20.018, AS 43.55.021, AS 43.56.019, AS 43.65.019, AS 43.75.019, and AS 43.77.046. (Repealed, effective 7/1/2003.)

PLEASE NOTE: Additional delayed "sunset" of boards and commissions occurs under AS 08.03.010 and AS 44.66.010. Those "sunsets" are not reflected in the list above. Also not listed above are repeals that have been delayed to allow for an orderly transition to new law, such as when a new version of a uniform act is enacted and the repeal of the old version is delayed a year or two.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

Art. I, sec. 7, Constitution of the State of Alaska

INDIGENT CIVIL LITIGANT NOT ENTITLED TO APPOINTED COUNSEL.

Midgett filed a tort action against the State of Alaska and moved for appointment of counsel, arguing that appointed counsel was "the only way for him to obtain his right to due process." The court refused to appoint counsel and the Alaska Supreme Court agreed noting that "an indigent person does not have a right to appointed counsel in most civil cases" and that Midgett's claim does not fit any recognized exception to that rule.

Midgett v. Cook Inlet Pretrial Facility, 53 P.3d 1105 (Alaska 2002).

Legislative review is not recommended.

AS 04.11.491
AS 04.16.200(e)

ENFORCEMENT OF MUNICIPAL BAN ON ALCOHOLIC BEVERAGES ON STATE LAND WITHIN MUNICIPALITY.

The municipality of St. Mary's has banned the possession of alcoholic beverages under AS 04.11.491. Prince possessed alcoholic beverages on state land within the boundaries of the municipality and was charged with violating a state law, AS 04.16.200(e), which makes it a felony to possess alcoholic beverages within a municipality that has banned their possession. Prince argued that, because his possession occurred on state land, the ban did not apply to him. The Alaska Court of Appeals noted that Alaska law does contain provisions that limit the reach of municipal authority over state land but that these provisions did not have any application to the prosecution of a person for violation of a state statute prohibiting the possession of alcohol within a municipality that has banned that possession in accordance with state law.

State v. Prince, 53 P.3d 157 (Alaska App. 2002).

Legislative review is not recommended.

AS 05.15.188

QUESTIONS RELATING TO PULL-TAB SPACE IN LIQUOR ESTABLISHMENTS.

In response to an inquiry from the Department of Revenue, the Attorney General's office gave advice about two questions relating to pull-tab operations. (1) The office advised that a person who holds a charitable gaming operator's license and owns a bar or liquor store may not use the bar's or liquor store's employees and space to sell pull-tab games in that establishment without obtaining a vendor registration. (2) The office advised that an operator might avoid the need for a vendor registration by renting pull-tab sales space in the liquor establishment and staffing the space with the operator's employees as long as the cost of rent is the only expense connected with the liquor establishment that is passed on to the charitable gaming permittees by the operator. (Inf. Opin. Att'y Gen., August 23, 2002)

The advice given on the first question seems to be consistent with clear legislative intent. However, legislative review of the statutory language related to the second question is recommended because it is far less clear what the legislature intended on the subject of renting space within a liquor establishment for pull-tab operations.

AS 09.10.055
AS 09.10.140
AS 09.17.010
AS 09.17.020
AS 09.17.080
AS 09.30.065
AS 09.65.096

TORT REFORM LEGISLATION UPHELD BY THE COURT.

An equally divided Alaska Supreme Court ruled that 1997 tort reform legislation enacted by the Alaska Legislature is facially constitutional. The plurality opinion held that caps on noneconomic and punitive damages under AS 09.17.010 and 09.17.020, that requiring half of any punitive damages award be paid to the state under AS 09.17.020(j), that the comparative apportionment of damages requirement under AS 09.17.080, that the offer of judgment procedure under AS 09.30.065, the statute of limitations tolling procedure for minors under AS 09.10.140, the provision granting partial tort immunity to hospitals under AS 09.65.096, and the statute of repose under AS 09.10.055, are facially constitutional. The opinion also

rejected an argument that the enactment violated the single-subject rule of Article II, section 13 of the Alaska Constitution. Two justices dissented and believed that the cap on noneconomic damages and the provision regarding punitive damages is unconstitutional. One justice believes that the statute of limitations tolling procedure for minors is also unconstitutional.

Evans v. State, 56 P.3d 1046 (Alaska 2002).

Unless the legislature wishes to re-examine the issues of tort reform, legislative review is not recommended.

AS 09.10.210

LATE PAYMENT UNDER DEED OF TRUST REVIVES STATUTE OF LIMITATIONS.

The Alaska Supreme Court ruled that a late monthly installment payment resulted in revival of the right to recover the previously time-barred installment payments under the deed of trust. Under AS 09.10.050(1), a six-year statute of limitations ordinarily applies to an action to recover payments due under a promissory note or a deed of trust. However, under AS 09.10.210, when a past due payment of principal or interest is made on an evidence of indebtedness, the running of time within which an action may be commenced starts from the time the last payment was made. The court rejected an argument that the revival only applied to the underlying debt and did not extend the time for foreclosure under the deed of trust. The court concluded that the late payment revived the mortgagee's right to recover the previously time-barred payments under the deed of trust to the same extent as it revived the right to recover on the underlying promissory note.

Madden v. Alaska Mortgage Group, 54 P.3d 265 (Alaska 2002).

Legislative review is not recommended.

AS 09.25.010(a)(6)

COURT REFUSES TO EXPAND EXCEPTIONS TO STATUTE OF FRAUDS.

The Alaska Supreme Court ruled that promissory estoppel cannot be used to enforce an oral contract involving a real estate lease when the key terms are ambiguous. The court

noted that the statute of frauds, AS 09.25.010(a), precludes enforcement of certain agreements unless the agreement is in writing. The agreement in question, a lease interest in real property for a period of longer than one year, is subject to the statute of frauds. The RESTATEMENT (SECOND) OF CONTRACTS provides that promissory estoppel can bind a promisor notwithstanding the statute of frauds. This principle has been endorsed by the Alaska Supreme Court as to employment contracts. After discussing the purposes of the statute of frauds, the court declined to expand the promissory estoppel exception to cases involving the sale or lease of real estate when the agreement is ambiguous as to key terms.

Valdez Fisheries Dev. Assoc., Inc. v. Alyeska Pipeline Serv. Co., 45 P.3d 651 (Alaska 2002).

Legislative review is not recommended.

AS 09.55.275

COURT CONSTRUES MEANING OF BOUNDARY CHANGE IN EMINENT DOMAIN ACQUISITION.

The Alaska Supreme Court ruled that when a municipality by eminent domain takes an easement that is not coextensive with existing property lines and functionally interferes with the landowner's use, a boundary change results. Under AS 09.55.275, a municipality is required to obtain a preliminary approval of a replat before acquiring land by eminent domain if the acquisition results in a boundary change. The court noted that the term "boundary change" was not defined in Alaska Statutes. After considering the legislative history of the statute, the court concluded that the legislature intended the statute to be read broadly to achieve coordination between the state and local governments, and therefore easements should be included as a type of boundary change governed by AS 09.55.275.

Municipality of Anchorage v. Suzuki, 41 P.3d 147 (Alaska 2002).

Legislative review is not recommended.

AS 10.35.040
AS 45.50.471

VALID REGISTRATION OF A BUSINESS NAME REQUIRES PRIOR USE.

The Alaska Supreme Court ruled that in order to validly register a business name under AS 10.35.040, the person must have used the name prior to registration. Under AS 10.35.040, a person conducting a business can register its name. The court interpreted the phrase "conducting a business" to mean that the registration was for an existing business, not for registering a name for a new business. The court also noted that AS 10.35.040 grants a right to exclusive use of a business name and provides remedies, including injunction and damages. Finally, the court pointed to a potential conflict between AS 10.35.040, which allows registration of a business name, and AS 45.50.471, which provides protection for a trade name against unfair competition.

Alderman v. Iditarod Properties, Inc., 32 P.3d 373 (Alaska 2001).

Unless the legislature intends to examine the relationship between business name registration under AS 10.35.040 and trade name infringement under AS 45.50.471, legislative review is not recommended.

AS 11.41.510(a)(1)
AS 11.81.900(b)(26)

USE OF FORCE IN A ROBBERY.

Butts attempted to snatch a purse from a woman in a Safeway parking lot. The woman resisted and fell to the ground as Butts continued to pull on the purse. She eventually let go of the purse as she feared Butts might attack her with a weapon. Butts was convicted of robbery in the second degree. Butts challenged his indictment arguing that he did not exert "force" on the victim as that term is defined in AS 11.81.900(b)(26) as he never directly touched the victim. The Alaska Court of Appeals found that Butts' indirect application of bodily impact on the victim through the purse constituted force. The court found that this conclusion was in concert with established rules of criminal law and that there was no evidence suggesting that the legislature intended something different when it adopted the robbery statute and the definition of force.

Butts v. State, 53 P.3d 609 (Alaska App. 2002).

Legislative review is not recommended.

AS 11.61.195(a)(1)

POSSESSION OF FIREARM DURING COMMISSION OF DRUG OFFENSE.

Murray was convicted of misconduct involving weapons in the second degree, AS 11.61.195(a)(1), possession of a firearm during the commission of a drug offense. Murray challenged his conviction, contending that the state had failed to prove a sufficient nexus between his possession of a .44 magnum handgun in his home and his commission of several drug offenses in his home. The Alaska Court of Appeals noted that they had previously held that AS 11.61.195(a)(1) "requires proof of a nexus between a defendant's possession of the firearm and the defendant's commission of the felony drug offense." The state contended that this nexus is satisfied whenever someone possesses drugs and a firearm in close proximity. The court rejected the state's contention stating that they did "not believe this was the intent of the legislature." The court stated that the nexus requires a finding that the defendant's possession of the firearm aided, advanced, or furthered the commission of the drug offense.

Murray v. State, 54 P.3d 821 (Alaska App. 2002).

Legislative review is recommended.

AS 12.55.015(a)

COURT USE OF SENTENCE REDUCTION TO TEMPORARILY RELEASE PRISONER.

In three consolidated appeals, the state challenged the authority of trial courts to temporarily release prisoners who had already commenced service of their sentences. The state contended that the courts had arrogated to themselves the power to grant furloughs to prisoners, a power that is granted to the Department of Corrections. The courts justified their actions in two cases as sentence reductions under Alaska Criminal Rule 35(b) and in one case "in the interest of fairness." The Alaska Court of Appeals agreed with the state and found the actions of courts to be improper and may intrude on the authority of the Department of Corrections to manage its prison population.

State v. Felix, et al., 50 P.3d 807 (Alaska App. 2002).

Legislative review is not recommended.

AS 12.55.025
AS 28.35.030

DRIVING WHILE INTOXICATED - CREDIT FOR TIME SERVED IN TREATMENT.

Judson pleaded guilty to driving while intoxicated (DWI) in violation of AS 28.35.030. This was Judson's second DWI offense and he therefore was subject to a mandatory minimum jail sentence of twenty days and mandatory alcohol screening, evaluation, referral, and treatment. As a condition of his release, Judson asked the trial court to order him to enroll in a residential alcohol treatment program in Washington state. The court agreed with Judson's request and subsequently granted Judson confinement credit for the time spent in the treatment program, credit which satisfied the minimum jail time requirements of the DWI law. The state appealed arguing that Judson was not entitled to confinement credit as the court merely acquiesced in Judson's request to enroll in the program and that the program cannot satisfy the minimum jail sentence required for DWI offenders. The Alaska Court of Appeals rejected these arguments finding that (1) Judson was subjected to jail-like conditions during the treatment program so credit for time served was appropriate, and (2) although the mandatory jail sentence and alcohol treatment provisions of the DWI law are distinct requirements, a court has sufficient latitude to allow a residential alcohol treatment program to satisfy both requirements.

State v. Judson, 45 P.3d 329 (Alaska App. 2002).

It is not clear that the legislature intended that enrollment in a residential alcohol treatment program could satisfy the mandatory minimum jail time requirements of the DWI law, therefore legislative review is recommended.

AS 12.55.045
AS 12.55.100(a)

RESTITUTION TO VICTIMS OF CRIME.

Demers was convicted of embezzling funds from a non-profit organization. As part of his sentence, the Superior Court ordered him to pay restitution to the organization. The order of restitution included $5,000 for 200 hours of volunteer labor performed by board members of the organization who audited and reconstructed the organization business records. The Alaska Court of Appeals determined that AS 12.55.045 places certain requirements on a court when considering a restitution order and that AS 12.55.100(a) allows restitution orders for

actual damages or loss caused by a crime as a condition of probation. The court concluded that the non-profit organization did not sustain actual damages or loss with regard to the $5,000 "because the injury was cured by volunteer efforts" and vacated that portion of the restitution award.

Demers v. State, 42 P.3d 1 (Alaska App. 2002).

To the extent that the court's decision appears to require a crime victim to always hire third persons to undo injury caused by criminal acts and precludes awards for self-help or volunteer mitigation efforts where the value of those efforts can be established, legislative review is recommended.

AS 12.55.088(a)

MODIFICATION OR REDUCTION OF SENTENCE.

AS 12.55.088(a) used to provide that a court could modify or reduce a sentence "at any time" if the court "finds that conditions or circumstances have changed." In 1995, the Alaska Legislature amended this provision to provide that motions for sentence modification or reduction must be made within 180 days of the original sentencing. Stoneking claimed that because he was sentenced in 1988, the original language of AS 12.55.088(a) should apply and that he should be permitted to file his motion. The Superior Court dismissed his application as untimely and the Alaska Court of Appeals affirmed finding that (1) the Alaska Legislature made the amendments to AS 12.55.088(a) retroactive, and (2) the *ex post facto* clauses of the United States and Alaska Constitutions did not bar the application of the amendments to Stoneking as the amendments were procedural in nature.

Stoneking v. Alaska, 39 P.3d 522 (Alaska App. 2002).

Legislative review is not recommended.

AS 12.55.090(b)

MODIFICATION OF CONDITIONS OF PROBATION DURING THE TERM OF PROBATION.

AS 12.55.090(b) provides that a court "may revoke or modify any condition of probation, or may change the period of probation." Does this provision allow a court to modify the conditions of probation, to the detriment of the defendant, in the absence of a proven violation of the pre-existing conditions of probation? The Alaska Court of Appeals answered in the affirmative. The court first noted that "a court has no inherent

power to suspend sentence and impose probation; any such power must be granted by legislative enactment." Noting a lack of legislative history on whether detrimental modifications of probation conditions are permitted, the court employed its "common-law power to declare the law in the absence of a statutory directive." The court held that a court may modify conditions of probation to the detriment of a defendant when the state proves a "'significant change of circumstances' -- which we define to mean post-sentencing conduct that establishes a substantial reason to conclude that the current conditions of probation are not adequately ensuring the defendant's rehabilitation or adequately protecting the public."

Edwards v. State, 34 P.3d 962 (Alaska App. 2001).

The court's decision appears reasonable and correct. As the power of the courts in this area depends entirely on legislative enactment, legislative review is recommended so that the legislature may expressly declare the law in this area.

AS 12.55.115
AS 12.55.155
AS 12.55.185

PRESUMPTIVE SENTENCING - ENHANCEMENT OF TERM AND RESTRICTION OF PAROLE ELIGIBILITY.

Fitzgerald was convicted of first degree sexual abuse of a minor. He had at least five previous felony convictions and was a third felony offender for presumptive sentencing purposes under AS 12.55.185. The trial court found that various aggravating factors existed under AS 12.55.155, enhanced the presumptive sentence, and imposed the maximum sentence for the offense and restricted Fitzgerald's eligibility for discretionary parole under AS 12.55.115. Fitzgerald contended that this sentence was excessive. The Alaska Court of Appeals affirmed, finding that the trial court had properly applied the sentencing statutes.

Fitzgerald v. State, 42 P.3d 1143 (Alaska App. 2002).

Legislative review is not recommended.

AS 12.55.120(a)
AS 22.07.020(b)

APPEAL OF PROVISION OF CRIMINAL SENTENCE - REVOCATION OF DRIVER'S LICENSE.

Richardson was convicted of murder in the second degree and assault when, after being warned not to drive, he drove while

intoxicated and struck another vehicle killing two people and seriously injuring two others. Richardson did not appeal his sentence of imprisonment but did appeal the trial court's revocation of his driver's license for a twenty-year period. The Alaska Court of Appeals affirmed. The state contended that Richardson did not have the right to appeal the revocation of his driver's license under AS 12.55.120(a) and AS 22.07.020(b). The state argued these statutes only allow a criminal defendant to appeal the defendant's sentence of imprisonment and then only if the sentence exceeds two years of unsuspended incarceration for a felony offense. The Court of Appeals rejected the state's argument and held that a criminal defendant who receives a sentence of unsuspended incarceration of two years or more may appeal any aspect of the sentence, even those aspects unrelated to the incarceration. In making this decision, the court noted that "[t]he legislative history of AS 12.55.120 is silent regarding this history of sentence appeal litigation involving matters other than terms of imprisonment," and "the legislature did not express a desire to limit sentence appeals to the single issue of whether the defendant's unsuspended term of imprisonment was excessive."

Richardson v. State, 47 P.3d 660 (Alaska App. 2002).

Considering the court's finding that there are no express statements of legislative intent regarding the language chosen by the legislature, legislative review is recommended.

AS 12.55.125(a)(3) **MANDATORY 99-YEAR SENTENCE FOR CERTAIN FIRST DEGREE MURDERS.**

Malloy was convicted of first degree murder among other charges. The trial court imposed a mandatory 99-year sentence of imprisonment without possibility of parole after finding by clear and convincing evidence that Malloy had subjected the victim to substantial physical torture. Malloy appealed to the Alaska Court of Appeals and that court found that AS 12.55.125(a) was unconstitutional insofar as it attempted to restrict Malloy's parole eligibility. The state petitioned the Alaska Supreme Court on this ground and the court reversed the Court of Appeals and reinstated Malloy's sentence of imprisonment without parole. The nexus of Malloy's complaint was that AS 12.55.125(a)(3) creates a new class of

first degree murder by imposing a harsher maximum sentence than that normally authorized for murder and impermissibly allows a court, instead of a jury, to find the existence of an element of that crime, that being that Malloy had subjected her victim to substantial physical torture. The Alaska Supreme Court rejected this reasoning finding that the sentence imposed on Malloy is within the range authorized by the legislature for murder in the first degree and that AS 12.55.125(a)(3) merely restricts a court's sentencing discretion when the aggravating factors listed have been found by the sentencing court.

Malloy v. State, 46 P.3d 949 (Alaska 2002).

Legislative review is not recommended.

AS 12.55.155
AS 33.16.090

MITIGATED PRESUMPTIVE SENTENCE NOT ELIGIBLE FOR DISCRETIONARY PAROLE.

The Alaska Court of Appeals held that a defendant sentenced to a mitigated presumptive term under AS 12.55.155 is not eligible for discretionary parole under AS 33.16.090. Although the court held that AS 33.16.090 did not explicitly so provide and was ambiguous in this regard, the court determined that regulations adopted by the Board of Parole resolved the ambiguity.

State v. Cofey, 39 P.3d 733 (Alaska App. 2001).

Legislative review is not recommended.

AS 13.06.085

COURT FINDS NO RIGHT TO JURY TRIAL IN PROBATE CASE.

The Alaska Supreme Court ruled that because probate matters are generally equitable in nature, no right to jury trial ordinarily exists unless expressly authorized by statute. The court rejected an argument that AS 13.06.085 creates a right to a trial by jury in this particular case, a contest over a will. The court found that AS 13.06.085(a) only entitles a party in a probate case to a jury trial when the party has a constitutional right to trial by jury. However, in civil cases the Alaska Constitution only guarantees the right to trial by jury to the extent the right existed at common law. Will contests are unknown at common law and exist only as permitted by statute, therefore the Alaska

Constitution does not guarantee trial by jury in a probate matter involving the contest of a will. The court noted that the right to trial by jury does exist in some probate matters, including creditor claims that raise contract issues.

Riddell v. Edwards, 32 P.3d 4 (Alaska 2001).

Legislative review is not recommended.

AS 13.16.295

COURT ARTICULATES STANDARD FOR REMOVAL OF A PERSONAL REPRESENTATIVE.

The Alaska Supreme Court established a standard for removal of a personal representative in a probate action due to an alleged conflict of interest. Under AS 13.16.295, a personal representative can be removed for certain specified circumstances. In the absence of the statutorily specified circumstances, the court stated that removal of a personal representative requires that the evidence establish a "real issue" as to whether there is a substantial conflict of interest. The court pointed out that the mere allegation of a conflict of interest is not sufficient to require removal. Removal is required if the evidence indicates that the personal representative is potentially liable to the estate because of the existence of some cause of action against the personal representative.

Helgason v. Merriman, 36 P.3d 703 (Alaska 2001).

Legislative review is not recommended.

AS 13.26.145
AS 13.26.210

PROCESS FOR REMOVAL OF GUARDIAN OR CONSERVATOR CONSTRUED.

The Alaska Supreme Court construed the procedure for removal of a guardian or conservator. The court first noted that existing law does not provide the exclusive grounds for removal or the procedure to be followed. Then the court described a two-part procedure to be followed by the trial court when considering a petition seeking removal. First, the petitioner must show a material change in circumstances since

the appointment. Second, the court must decide whether the existing appointment is in the ward's best interests. The court also noted that this best interests determination gives weight to the substantive values that apparently underlie the statutory priorities under AS 13.26.145 and AS 13.26.210 for appointing guardians and conservators.

H.C.S. v. Community Advocacy Project of Alaska, Inc., 42 P.3d 1093 (Alaska 2002).

Legislative review is not recommended.

AS 13.26.305

COURT CONSTRUES CONSERVATOR STATUTE.

The Alaska Supreme Court ruled that conservators are precluded by statute from claiming absolute immunity from a civil action for damages brought by a ward. The court pointed to AS 13.26.305(b), under which conservators are explicitly made liable for torts committed in the course of administration for which they are personally at fault. The court rejected the interpretation of the trial court that AS 13.26.305(b) only allows claims by a third party and not by a protected person against a conservator. In reaching its decision the court also pointed to other sections of conservatorship law requiring a conservator to act as a fiduciary, to observe standards of care applicable to a trustee, and to post a bond that is available to satisfy claims brought by any interested party.

Trapp v. State, 53 P.3d 1128 (Alaska 2002).

Legislative review is not recommended.

AS 14.08.151(b)

CONFLICTING LAWS FOR TRANSFER OF AIRPORT PROPERTY TO REGIONAL SCHOOL BOARDS.

In response to an inquiry from the Department of Transportation and Public Facilities, the Attorney General's office advised that the department should not implement AS 14.08.151(b) in a way that conflicts with federal grant agreements that are authorized under AS 02.15.020(c). AS 14.08.151(b) requires the department to transfer state-owned land occupied by a regional school board (RSB) to the RSB on request of the RSB. Federal agreements relating to the

airport land, however, usually require the state to maintain state ownership of the land and keep it primarily for aviation purposes. AS 02.15.020(c) requires the department to accept federal terms and conditions for receiving federal money for airports. The Attorney General's office concluded that the legislature could not have meant to impliedly repeal the older statute (AS 02.15.020(c)) when it enacted AS 14.08.151(b), so the office advised the department to deny RSB requests to transfer state-owned land if the land was confined to aviation purposes through a federal agreement under AS 02.15.020(c). (Inf. Op. Att'y Gen., December 11, 2001)

Legislative review is recommended so that the conflict between the two statutes can be removed legislatively.

AS 14.14.060(c)
AS 29.20.270(c)(1)

COURT UPHOLDS VETO POWER BY THE MAYOR OF A HOME RULE MUNICIPALITY OVER SCHOOL DISTRICT BUDGET.

The Alaska Supreme Court ruled that veto power over a school district budget granted to a home rule municipality's mayor is not prohibited by state law. The court rejected an argument that AS 14.14.060(c), giving assemblies power to determine and appropriate school district budgets, precludes granting veto powers to the mayor of a home rule municipality. The court pointed to AS 29.20.270(c)(1), under which mayoral veto power over school district budgets is prohibited in all municipalities except for home rule municipalities. The existence of AS 29.20.270(c)(1) implies that the legislature did not consider AS 14.14.060(c) to preclude mayoral veto power over school district budgets in a home rule municipality.

Municipality of Anchorage v. Repasky, 34 P.3d 302 (Alaska 2001).

Legislative review is not recommended.

AS 15.25.110

WHAT IS THE PROPER PROCEDURE TO FOLLOW WHEN A CANDIDATE FOR GOVERNOR WINS A PRIMARY BUT LACKS A RUNNING MATE?

In response to an inquiry from the Division of Elections, Office of the Lieutenant Governor, the Attorney General's office

advised the division to adopt an emergency regulation to govern a situation where a party primary has yielded a nominee for governor but no candidate ran for the lieutenant governor position in that party's primary. The constitution contemplates that the governor and lieutenant governor nominated at a primary will run in the general election as a team. The statutes have a process for filling a slot when a party nominee dies, withdraws, resigns, or becomes disqualified (AS 15.25.110). However, the statutes do not provide a process for filling the lieutenant governor's slot on the general election ballot when there simply was no candidate for the lieutenant governor's slot in the primary. Rather than deny ballot access to the gubernatorial nominee who has no running mate, the division was advised to adopt an emergency regulation to handle this situation in a manner analogous to situations covered by AS 15.25.110. (Inf. Opin. Att'y Gen., September 13, 2002)

Since this situation is capable of repetition and there is a statutory "gap," legislative review is recommended.

AS 16.20
AS 29.65.040
AS 38.05.810

WHAT IS THE OWNERSHIP STATUS OF STATE LAND THAT HAS BEEN APPROVED FOR CONVEYANCE TO ANOTHER PARTY BUT FOR WHICH A PATENT HAS NOT BEEN ISSUED?

In response to a joint inquiry from the Commissioner of Natural Resources, Commissioner of Fish and Game, and Commissioner of Transportation and Public Facilities, the Attorney General's office gave advice regarding land title issues related to the Municipality of Anchorage and the Anchorage Coastal Wildlife Refuge. The office's advice included the following: (1) certain Point Campbell land was never part of the refuge so that a later conveyance of the land to the municipality was valid; (2) the municipality holds equitable title to the land at the mouth of Campbell Creek and that land is not part of the refuge even though the land was not patented before the legislature, arguably, added it to the refuge; (3) a third party who meets the jurisdictional requirements could have standing to bring a suit to invalidate these conveyances to the municipality, but the suit would probably be unsuccessful; (4) private and municipal land within the exterior boundaries of the refuge are not inholdings and are not part of the refuge; (5) reservation of the mineral estate in private land does not give ADF&G broad regulatory authority

over the land estate; (6) a right-of-way acquired by DOT&PF does not automatically become part of the refuge; and (7) the office is unaware of any state law that extends ADF&G's authority to regulate refuge land so that adjacent land can also be regulated. (2002 Op. Att'y Gen. No. 1, September 23, 2002)

Legislative review relating to issue (2) is recommended. The legislature may wish to clarify, not only in relation to refuges but for other purposes as well, whether "state land" includes state land that has been selected by another party, approved for conveyance by DNR, and/or surveyed following that approval, but for which a patent has not yet been issued. In other words, does the state still own the land, and can the legislature dispose of it for another purpose, until the patent is issued?

AS 18.65.080
AS 18.65.090

POLICE DO NOT HAVE A STATUTORY DUTY TO EXECUTE AN ARREST WARRANT.

The Alaska Supreme Court ruled that the state troopers do not have a statutory duty to execute an arrest warrant. The court cited AS 18.65.080 that specifically covers police duties and that provides that state troopers "may . . . execute any lawful warrant or order of arrest." The word "may" gives the police permissive authority, not an obligatory duty. The court also rejected an argument that AS 18.65.090 imposes a duty on the police to execute an arrest warrant. While AS 18.65.090 imposes a duty on the police to assist other governmental departments, it does not create a general duty to protect the public.

Wongittilin v. State, 36 P.3d 678 (Alaska 2001).

Legislative review is not recommended.

AS 18.66.990(3)
AS 18.66.990(5)

DEFINITION OF "DOMESTIC VIOLENCE."

In a prosecution for sexual abuse of a minor, certain evidence was not admitted under Alaska Rule of Evidence 404(b)(1) and (2). On appeal, the state argued the evidence was admissible under Rule 404(b)(4), which allows the admission of evidence of other crimes involving domestic violence in a prosecution for a crime involving domestic violence. "Domestic violence" is defined in AS 18.66.990(3) and includes a broad range of

conduct committed by one household member against another. "Household member" is defined in AS 18.66.990(5). The state argued that sexual abuse of a minor (see AS 11.41.434 - 11.41.440), a crime involving sexual conduct between an adult or older minor with a younger minor that does not require proof of force or violence, is a crime involving domestic violence. The Alaska Court of Appeals determined that the definition of "domestic violence" "is not clear" and leads to "counter-intuitive results."

Carpentino v. State, 42 P.3d 1137 (Alaska App. 2002).

Legislative review is recommended.

AS 18.80.220

GRIEVANCE PROCEDURE IN COLLECTIVE BARGAINING AGREEMENT PRECLUDES STATUTORY REMEDY.

An evenly divided Alaska Supreme Court affirmed a lower court ruling that a claim subject to arbitration under a collective bargaining agreement precludes use of an independent statutory remedy for the same claim. The plurality opinion noted that the question was a close one, but held that a claim subject to an agreement to arbitrate for which an independent statutory judicial remedy is also available must be arbitrated, unless the history and structure of the statute indicate that the legislature intended to preclude waiver of the judicial remedy. In this case, the plurality opinion pointed to the fact that the legislature has mandated that all collective bargaining agreements subject to the Public Employment Relations Act contain grievance procedures and that these procedures must have binding arbitration as a final step. In a strong dissent, two members of the court argued that federal case law and precedent in Alaska indicate that the plaintiff has a cause of action that is not extinguished by the collective bargaining agreement at issue.

Barnica v. Kenai Peninsula Borough School Dist., 46 P.3d 974 (Alaska 2002).

Given the division of the court over this issue, legislative review is recommended.

AS 23.10.085
8 AAC 15.160

EMPLOYEE WAGE DEDUCTION FOR COSTS OF BOARD OR LODGING CONSTRUED BY THE COURT.

The Alaska Supreme Court ruled that employers may deduct the cost of employer supplied board and lodging even if no alternative board and lodging is available, provided that with the reduction the employee's pay does not fall below the minimum wage. In a plurality opinion, two justices held that under 8 AAC 15.160(a) and (d), an employer may deduct the cost of board and lodging provided to an employee, even when there is no alternate board and lodging available if the deduction does not reduce an employee's wage rate to below the minimum wage. Two justices dissented from the plurality's interpretation of the regulation, pointing to the Alaska Department of Labor and Workforce Development's longstanding and consistent interpretation that would prohibit this type of employer wage deduction. The dissent also argued that this interpretation conflicts with the federal Fair Labor Standards Act and has no support in case law from any other federal or state jurisdiction.

Diaz v. Silver Bay Logging, Inc., 55 P.3d 722 (Alaska 2002).

Given the division of the court over this issue, legislative review is recommended.

AS 23.30.015

COURT CONSTRUES WORKERS' COMPENSATION PROVISION.

The Alaska Supreme Court ruled that the workers' compensation benefit forfeiture provisions of AS 23.30.015(h) apply even when a third party compromise is approved by a court. Under AS 23.30.015(h), when an employee or employee's representative settles for an amount that is less than the employee is entitled to in workers' compensation benefits, the employee forfeits further workers' compensation benefits unless the settlement is approved by the employer. The Alaska Supreme Court ruled that trial court approval of a settlement still constitutes a compromise with a third person as described under AS 23.30.015(h). Therefore, when an employee settles a claim under compromise with a third party and the settlement is for a sum less than due the employee in future workers' compensation benefits, the employee forfeits further workers'

compensation benefits unless the settlement is approved by the employer in writing.

State v. Kacyon, 31 P.3d 1276 (Alaska 2001).

Legislative review is not recommended.

AS 23.30.155(e)

INJURED WORKER NOT ENTITLED TO PENALTIES FOR INCOMPLETE MEDICAL REPORT.

The Alaska Supreme Court ruled that employers are not subject to penalties for a delay in paying a medical bill when the delay is due to an incomplete report from a medical provider. Under AS 23.30.155(e), employers are subject to a penalty for failing to pay medical bills within 21 days after receiving the bill and a completed report. The court rejected an argument that an employer should also be penalized when the employer fails to notify the employee that a medical report was not received from the medical provider. The Alaska Supreme Court agreed with the trial court and the Alaska Workers' Compensation Board that an employer does not have to take action on a medical bill until a completed report is received. An employer is required by regulation to notify an employee of the reason for nonpayment of a medical bill.

Williams v. Abood, 53 P.3d 134 (Alaska 2002).

Legislative review is not recommended.

AS 23.30.155(m)

STATUTE IS AMBIGUOUS AS TO PENALTY FOR ANNUAL WORKERS' COMPENSATION REPORTS THAT ARE INCOMPLETE.

In response to an inquiry from the Department of Labor and Workforce Development, the Attorney General's office advised that there are two reasonable interpretations of how the department should assess civil penalties under AS 23.30.155(m) when an adjuster files an incomplete annual report of worker's compensation claims and the report covers more than one insurer. The penalty under the statute is $1,000 for an incomplete report. If the report covers 20 insurers and is "incomplete" as to 11 of them, it can be reasonably argued that the penalty could be either $1,000 or $11,000. The office

advised the department to request amendment of the statute by the legislature and adopt a regulation stating how the department would apply the statute until the legislature clarifies legislative intent. As of the date of this oversight report, such a regulation has not been adopted. (Inf. Op. Att'y Gen., August 20, 2001)

Since it is common practice for an adjuster to report worker's compensation claims on behalf of multiple insurers, legislative clarification of this penalty statute is recommended.

AS 23.40.210

ADMINISTRATIVE AGENCY MAY DETERMINE IF ISSUE IS ARBITRABLE.

The Alaska Supreme Court determined that the legislature has granted the Alaska Labor Relations Agency the authority to determine if an issue under a collective bargaining agreement is arbitrable.

Fairbanks Fire Fighters Association, Local 1324 v. City of Fairbanks, 48 P.3d 1165 (Alaska 2002).

Legislative review is not recommended.

AS 25.24.140(a)

COURT CONSTRUES STATUTE PROVIDING FOR AWARD OF ATTORNEY FEES.

The Alaska Supreme Court ruled that the Superior Court had authority under AS 25.24.140(a) to award attorney fees in a divorce action where the client agreed to pay the attorneys whatever fees the court might award the client. The court rejected an argument that the fee arrangement was a contingent fee agreement and hence prohibited by Alaska Bar Rule 35(d)(1). The court found that the arrangement was not contingent, as the payment was not dependent on securing a divorce, alimony, or a property settlement. It found that the fee agreement was a form of pro bono arrangement by which counsel agreed to represent the plaintiff in the hope that the court would award attorney fees at the end of the litigation.

Hodge v. Sorba, 31 P.3d 1273 (Alaska 2001).

Legislative review is not recommended.

AS 25.24.150(c)

CONDUCT OF PARENT CAN BE CONSIDERED IN DETERMINING CUSTODY OF CHILDREN.

The Alaska Supreme Court ruled that the conduct of a parent in leaving a marriage can be considered in determining custody of minor children. The court rejected an argument that because the concept of fault has been eliminated from divorce, the trial court is precluded from considering the conduct of a parent who chooses to leave the marriage in making custody determinations. The court noted that a distinction must be made between the fault for a divorce, which may not be considered, and the conduct of a parent as it affects the children. Under AS 25.24.150(c), the trial court has an obligation to base its custody decision on the best interests of the children. When the conduct of a parent in leaving the marriage also affects the emotional well-being of the children, the trial court can consider these facts in determining custody.

Velasquez v. Velasquez, 38 P.3d 1143 (Alaska 2002).

Legislative review is not recommended.

AS 25.24.160(a)

HEALTH INSURANCE CONSTITUTES MARITAL ASSET.

The Alaska Supreme Court ruled that health insurance should be treated as a marital asset. The court rejected an argument that health insurance was not "property" and therefore not subject to court protection against depletion of marital assets. If a spouse unilaterally removes the other spouse from a health insurance policy, the court concluded that this constitutes dissipation of a marital asset. In the event that one spouse does improperly remove the other spouse's health insurance coverage, the trial court can consider this when dividing the marital property and make adjustments to compensate for the depletion in marital assets.

Kinnard v. Kinnard, 43 P.3d 150 (Alaska 2002).

Legislative review is not recommended.

AS 28.35.030

DRIVING WHILE INTOXICATED - BLOOD ALCOHOL LEVEL.

Conrad was charged with driving while intoxicated. Conrad relied on a "big gulp" defense in that he contended that he had quickly consumed two beers immediately before driving and therefore did not have the requisite blood alcohol at the time of driving even though, when his blood was finally tested sometime later, he did have the requisite blood alcohol level as determined by a chemical test. The trial court rejected this defense. It determined that a finding of guilt under AS 28.35.030 merely required a finding that Conrad had that requisite blood alcohol as determined by a test conducted within four hours of driving and that Conrad's actual blood alcohol level at the time of the offense was not relevant. The Alaska Court of Appeals found that while the legislature could have defined the offense in this manner, there is no clear indication of legislative intent that this is what the legislature intended. The court then reversed the conviction, finding that AS 28.35.030 requires the state to prove that the defendant had the requisite blood alcohol level at the time of driving.

Conrad v. State, 53 P.3d 313 (Alaska App. 2002).

Legislative review is recommended.

AS 28.35.030(n)
AS 28.35.030(o)(4)

DRIVING WHILE INTOXICATED; SIMILAR PRIOR CONVICTIONS FROM OTHER JURISDICTIONS.

Simpson was indicted for felony driving while intoxicated because he had two prior convictions for driving under the influence in Montana. Simpson contended that his convictions in Montana could not be used to aggravate his current charge of driving while intoxicated in Alaska as those offenses are not similar. AS 28.35.030(o)(4) allows prior convictions from other jurisdictions to serve as predicates to aggravate an Alaska offense if the other jurisdiction's law requires proof of elements that are similar to those in AS 28.35.030. The Alaska Court of Appeals examined the elements of the Montana statutes and

found that they were similar even though the Montana and Alaska statutes did "not completely overlap in their coverage."

State of Alaska v. Simpson, 53 P.3d 165 (Alaska App. 2002).

Legislative review is not recommended.

AS 34.20.150(a)

UNRECORDED NOTE HELD NOT EFFECTIVE TO OVERRIDE STATUTORY MATURITY DATE FOR DEED OF TRUST.

The Alaska Supreme Court ruled that the statutory 10-year maturity date for an instrument creating a lien on real property cannot be overridden by a different maturity date contained in an unrecorded note. Under AS 34.20.150(a), the default maturity date for certain real property instruments is 10 years unless the instrument contains a different maturity date or some other recorded document extends the lien. The court found the purpose of AS 34.20.150(a) was to provide subsequent purchasers with record knowledge and reasonable certainty regarding the vitality of liens recorded against real property. Therefore, the statutory 10-year default maturity date cannot be overridden by a deed of trust provision incorporating the terms of a contemporaneously executed note unless the note is also recorded.

Holta v. Certified Financial Services, Inc., 49 P.3d 1104 (Alaska 2002).

Legislative review is not recommended.

AS 34.35.140
AS 34.35.145

DUMP LIENS ON MINES AND WELLS.

AS 34.45.140 governs liens on a dump or mass of minerals. The statute allows a person who, at the instance of another who has the right of possession of a mine or well, has performed work on the mine or well, or any other work producing, piling up, or storing of a dump or mass of mineral, "a lien on the dump or mass, and the gold, gold dust, or other minerals contained in or extracted from it, to secure the amount due the laborer." A corporation filed a lien on a dump for work performed by the laborers of the corporation and its equipment related costs, including materials. The trial court initially held

that a dump lien could be filed by a corporation as the term "person" in AS 34.35.140 was not defined. The trial court then determined that the lien could cover only the value of the labor and not equipment related costs, including materials. The Alaska Supreme Court considered the legislative history of AS 34.35.140 and found that it "provides us with little guidance." After a review of the decisions of other states, the court reversed the trial court, finding that a dump lien may secure the costs of equipment including the value of labor performed. The court also concluded that the costs of materials may not be included in a dump lien. The court also limited the labor costs to those performed directly at the mine and excluded indirect labor costs performed off the mine site.

Blattner & Sons, Inc. v. N.M. Rothschild & Sons, Ltd., 55 P.3d 37 (Alaska 2002).

Legislative review is recommended.

AS 39.35.410(i)

ARE BENEFITS UNDER AS 39.35.410(i) RETIREMENT BENEFITS OR DISABILITY BENEFITS?

In response to an inquiry from the Division of Retirement and Benefits, Department of Administration, the Attorney General's office advised that benefits under AS 39.35.410(i) are retirement benefits, not occupational disability benefits. The distinction is important because the two types of benefits may be taxed differently under federal tax law. While there is language in AS 39.35.410(j) that appears to treat the benefits under AS 39.35.410(i) as occupational disability payments by exempting the benefits from other statutes relating to disability payments, the office opined that the exemption language probably arose "out of an abundance of caution" (to ensure that certain disability provisions do not apply to these retirement benefits) and not because the exemptions were really needed. (Inf. Opin. Att'y Gen., September 19, 2002)

Legislative review is not recommended. While there, arguably, may be surplusage in AS 39.35.410(j), AS 39.35.410(i) itself is clear that the benefits paid under (i) are retirement benefits, not occupational disability benefits.

AS 39.35.490

VALIDITY OF QUALIFIED DOMESTIC RELATIONS ORDER AS TO SURVIVOR BENEFITS.

In response to an inquiry from the Division of Retirement and Benefits, Department of Administration, the Attorney General's office advised that the division should accept a qualified domestic relations order (QDRO) that names a PERS member's ex-wife as the member's survivor, whether the member (who is still an active member) should die before or after retirement. While the member might re-marry, and there are other statutes that seem to require that the new spouse must have survivor rights, AS 39.35.490 clearly provides that the terms of a QDRO supersede those statutes. The legislature could choose not to authorize QDRO's for the PERS system, but, having authorized them, the PERS system must comply with federal laws that govern the validity of QDRO's. Since this QDRO complies with those federal laws, the office advised the division to accept the QDRO as valid. (Inf. Opin. Att'y Gen., October 2, 2002)

Legislative review is not recommended.

AS 41.17.900(e)
AS 46.40

DO STANDARDS OF THE ALASKA COASTAL MANAGEMENT PROGRAM APPLY TO AERIAL USE OF HERBICIDES FOR REFORESTATION PURPOSES?

In response to an inquiry from the Division of Governmental Coordination, the Attorney General's office advised that "reforestation" is probably not a "timber harvest activity" within the meaning of the second sentence of AS 41.17.900(e). The office also advised that the first sentence of AS 41.17.900(e) probably means that the forest management standards of AS 41.17 may not be supplemented by regulations adopted under AS 46.40 (Alaska Coastal Management Program) because legislative amendments made in 1990 probably should be construed to have changed a prior "long-settled interpretation" of the office. The interpretation of AS 41.17.900(e) by the Attorney General's office that existed before 1990 was that ACMP habitat and water quality standards were not preempted by the forest practice standards adopted under AS 41.17, but were supplementary to them.

"Timber harvest activity" is not defined in the Alaska Statutes, and the Attorney General's office found it to be "a very close

question" as to whether application of a herbicide to kill red alder in order to allow the regrowth of more commercially valuable species of trees was a "harvesting" activity. The office also found it to be "a close question" as to whether legislative changes in 1990 to AS 41.17.900(e) were meant to change the prior applicability of the ACMP habitat and water quality standards to forest management practices. The office relied, in part, on the use of the word "establish" in AS 41.17.900(e), which replaced the phrase "shall be the basis for," which appeared in AS 41.17.101(6) in the 1989 statutes. (Inf. Op. Att'y Gen., June 17, 2002)

Because two "close" questions were involved in the Attorney General's informal opinion, legislative review is recommended.

AS 41.35.020(a)

ALASKA HISTORIC PRESERVATION ACT APPLIES TO ABANDONED ANTIQUITIES ON LAND OWNED OR CONTROLLED BY THE STATE.

To settle a civil action between them, one party agreed to transport certain items of property of the other party if transporting the items did not violate state law. A question arose as to whether some of the items to be transported were actually historic, prehistoric, or archaeological resources taken illegally from state land. The Alaska Historic Preservation Act gives the state "title to all historic, prehistoric, and archaeological resources situated on land owned or controlled by the state." The Alaska Supreme Court interpreted this provision to apply only to abandoned historic, prehistoric, or archaeological resources and not to any resource that might happen to become present on state owned or controlled land even if that presence is only temporary.

Brooks Range Exploration Company v. Gordon, et al., 46 P.3d 942 (Alaska 2002).

Legislative review is not recommended.

AS 42.05

UTILITY FUEL SURCHARGE IS A RATE THAT MAY NOT BE DETERMINED RETROACTIVELY.

Chugach Electric Association generates electricity and sells that electricity to Matanuska Electric Association. Chugach's rates have two components: a base rate, consisting of the fixed costs of providing electrical service, and a fuel surcharge, which is a fluctuating charge for the costs of purchasing and

generating power. The fuel surcharge includes an estimate of the electricity that is lost through its generation and transmission. The fuel surcharge is recalculated each quarter and over or under collections, when compared to the actual costs and energy losses, are taken into account when calculating the new surcharge for the next quarter. The Regulatory Commission of Alaska found that Chugach had overestimated the fuel surcharge, specifically the amount of electricity lost through generation and transmission, and thereby had overcharged Matanuska and ordered Chugach to refund the overcharge to Matanuska. Chugach objected, arguing that the fuel surcharge was a rate, that rates may not be set retroactively, and that the commission could only adjust the next surcharge and could not order a refund. The Alaska Supreme Court agreed with Chugach finding that the fuel surcharge is a rate and that retroactive ratemaking is impermissible under Alaska law.

Matanuska Electric Association v. Chugach Electric Association, 53 P.3d 578 (Alaska 2002).

Legislative review is recommended.

AS 42.05.221

PROVISION OF ELECTRIC SERVICE OUTSIDE ASSIGNED AREA REQUIRES REGULATORY APPROVAL.

The Alaska Supreme Court ruled that an electric utility that wants to sell power outside its assigned geographic area must first obtain approval from the Regulatory Commission of Alaska. The court examined the requirements imposed under AS 42.05.221 and found that it requires an additional certificate of public convenience before any utility provides an additional type of service. The court rejected the argument that this interpretation is a violation of federal law and created a conflict between AS 42.05.221(a) and AS 42.05.221(d). The commission's and the trial court's interpretation of AS 42.05.221 is also consistent with the well-established view that public utilities must obtain approval before offering a competitive service in a particular market.

Chugach Electric Assoc., Inc. v. Regulatory Comm. of Alaska, 49 P.3d 246 (Alaska 2002).

Legislative review is not recommended.

AS 44.19.145(a)(11)
AS 46.40

A GENERAL FEDERAL TOXIC DISCHARGE PERMIT DOES NOT EXEMPT THAT ACTIVITY FROM PROJECT SPECIFIC REVIEW UNDER THE ALASKA COASTAL MANAGEMENT ACT.

The Environmental Protection Agency issued a general wastewater permit for oil and gas drilling operations in upper Cook Inlet. The Division of Governmental Coordination then excluded the wastewater discharge activities of a proposed oil and gas exploration project from review under the Alaska Coastal Management Act, as the EPA permit covered those activities, and issued a consistency determination for the overall project. The Alaska Supreme Court reversed the consistency determination for the project. The court found that the Alaska Coastal Management Act applies independently of, and in addition to, any permitting requirements for a discrete activity and that the consistency review required under the Alaska Coastal Management Act must examine the entire project.

Cook Inlet Keeper v. State, et al., 46 P.3d 957 (Alaska 2002).

Legislative review is recommended.

AS 45.50.562
AS 45.50.588

PRICE FIXING IN COMMERCIAL SOCKEYE SALMON FISHERY.

A class of Bristol Bay commercial sockeye salmon fishers brought an antitrust action against salmon processors and importers whom the fishers claimed conspired to depress the prices for raw salmon paid to fishers. The trial court granted summary judgment to the processors and importers and the Alaska Supreme Court reversed, reinstating the lawsuit. AS 45.50.562 outlaws "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." The court found that the plaintiffs' circumstantial evidence was sufficient to establish that there was a material issue of fact for trial. The processors and importers also alleged that AS 45.50.588 limits the time period for which damages may be recovered to the four year period preceding the filing of the action. AS 45.50.588 establishes a four year limitations period for the filing of antitrust suits after the claim accrues and contains language allowing claims for continuing violations to accrue at any time during the period of violation.

The trial court found that this statute allowed recovery of damages for the entire period of a continuing violation even for damages arising more than four years prior to the commencement of the suit. The court agreed with the defendants, finding that AS 45.50.588 was ambiguous with regard to whether damages could be recovered for violations occurring more than four years prior to the commencement of suit. The court held that, while an action for a continuing violation may be filed at any time during the period which the violation is ongoing, recovery is limited to the period prior to the filing of suit prescribed by the applicable statute of limitations, in this case four years.

Alakayak v. British Columbia Packers. Ltd., 48 P.3d 432 (Alaska 2002).

Legislative review is recommended regarding the decision to limit the recovery of damages for continuing violations to the limitations period.

AS 45.50.592

CIVIL INVESTIGATIVE DEMAND BY STATE IN PRICE-FIXING INVESTIGATION PROPER AND NOT OVERBROAD.

Tesoro objected to a civil investigative demand (CID) issued under AS 45.50.592 by the Alaska Attorney General as being overly broad and oppressive, and to the sharing by the state of the information obtained under the CID with outside counsel as improper under the statute. The Alaska Supreme Court initially reviewed the legislative history of the statute and found that the outside counsel retained by the Attorney General was properly permitted access to the information obtained under the CID. The court then found that the scope of the CID "was not unreasonable, improper, or oppressive."

Tesoro Petroleum Company v. State, 42 P.3d 531 (Alaska 2002)

Legislative review is not recommended.

AS 46.04.030
18 AAC 75.445(k)

OIL SPILL REGULATIONS RELATING TO "BEST TECHNOLOGY AVAILABLE" STRUCK DOWN.

The Alaska Supreme Court ruled that regulations adopted to implement new oil spill response standards are in conflict with the authorizing statute and are therefore invalid. Under AS 46.40.030, persons engaged in oil-related activities are required to file and obtain approval of oil spill prevention and contingency plans. Under AS 46.40.030(e), oil spill contingency plans must provide for the use by the applicant of "the best technology available" at the time the plans are submitted. The court found that two paragraphs of the regulation implementing the "best technology available" requirement, 18 AAC 75.445(k)(1) and (2), were inconsistent with and therefore failed to reflect statutory requirements. The regulation resulted in a definition of "best technology available" in terms of statutory minimums, which is inconsistent with the legislative intent of requiring plan holders to provide for the use of the best available technology.

Lakosh v. Alaska Dept. of Environmental Conservation, 49 P.3d 1111 (Alaska 2002)

Legislative review is not recommended. Ch. 9, SLA 2002 addresses the provision in question.

AS 47.12.300(d)

PRE-SENTENCE INVESTIGATION - ACCESS TO AND USE OF JUVENILE RECORDS.

McCoy was convicted of third-degree assault and a pre-sentence investigation was conducted. The pre-sentence investigation included a discussion of McCoy's contacts with the juvenile justice system. McCoy contended that the inclusion of this discussion violated AS 47.12.300(d) which seals juvenile records except when access to those records is ordered by a court. The Alaska Court of Appeals found that the discussion was properly included in the pre-sentence investigation. The court determined that Delinquency Rule 27(a)(1) allows a pre-sentence investigator automatic access to juvenile records when preparing an adult pre-sentence investigation. The court found that the difference between AS 47.12.300(d) and Rule 27(a)(1) was merely procedural and that a procedural court rule takes precedence over the procedure provided in the statute in instances like this.

McCoy v. State, --P.3d--, Slip Opin. No. 1822, rehearing granted, --P.3d-- (Alaska App., 2002).

Legislative review is not recommended.

SUBJECT INDEX FOR COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

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